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REPORTS OF CASES
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SUPREME COURT OF APPEALS
AND THE
MILITARY COURT OF APPEALS
OF VIRGINIA.

BY PEACHY R. GRATTAN.

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FROM OCTOBER 1, 1868, TO JULY 1, 1870.

JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

R. C. L. MONCURE, PRESIDENT.

WILLIAM T. JOYNES,

ALEXANDER RIVES.

Attorney General: THOMAS RUSSELL BOWDEN.

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TABLE OF CASES REPORTED.

Alex. & Wash. R. R. Co. <i>and</i> Wash., Alex. & Georget. R. R. Co.....	592	Knox &c., <i>and</i> Exchange Bank of Va., for Camp, trustee	739
Alley & als. <i>v.</i> Rogers.....	366	Lancaster & als. <i>v.</i> Corbin & als.....	438
Anderson & Co. <i>and</i> Farmers Bank of Va., for Goddin, trustee.....	739	Lee & als. <i>v.</i> Cabell's ex'or & als.....	758
Ballard & als. <i>v.</i> Thomas & Ammon....	14	Lohman <i>v.</i> Crouch & als.....	331
Billgerry <i>v.</i> Branch & Sons.....	393	Mayo's ex'or & als. <i>v.</i> Carrington's ex'or & als.....	74
Branch & Sons <i>and</i> Billgerry.....	393	Mills' ex'or & als. <i>and</i> Corbin & als.....	438
Cabell's ex'or & als. <i>and</i> Lee & als.....	758	Mills' ex'or & als. <i>and</i> Robinson's adm'r & als.....	438
Cabell's ex'or & als. <i>and</i> Skipwith & als.	758	Moon & wife <i>v.</i> Stone's ex'or & als.....	130
Carrington's ex'or & als. <i>and</i> Mayo's ex'or & als.....	74	Myers & al. <i>and</i> Zetelle.....	62
Commonwealth <i>and</i> Cousins.....	807	Nutt <i>and</i> Downey.....	59
“ <i>and</i> Jackson.....	656	Pierce <i>and</i> Graham & als... ..	28
“ <i>and</i> Jones.....	478	Philips' Case... ..	485
“ <i>and</i> Philips.....	485	Read, for &c., <i>and</i> Steptoe.....	1
“ <i>and</i> Shelly	653	Rich., Fred. & Pot. R. R. Co. <i>v.</i> Snead & Smith.....	354
“ <i>and</i> Sledd.....	813	Richmond Mayoralty Case... ..	673
“ <i>and</i> Whitehead.....	640	Robinson's adm'r & als. <i>v.</i> Mills' ex'or & als.....	438
“ <i>and</i> Wright.. ..	626	Rogers <i>and</i> Alley & als.....	366
Corbin & als. <i>and</i> Lancaster & als.....	438	Shelly's Case.....	653
Corbin & als. <i>v.</i> Mills' ex'ors & als	438	Skipwith & als. <i>v.</i> Cabell's ex'or & als..	758
Cousins' Case... ..	807	Sledd's Case.....	813
Crouch & als. <i>and</i> Lohman.....	331	Smith, A. C., <i>v.</i> Smith, R. P.....	545
Cunningham <i>and</i> Griffin's ex'or.....	571	Snead & Smith <i>and</i> Rich., Fred. & Pot. R. R. Co.....	354
Devaughn <i>v.</i> Devaughn.....	556	Steptoe <i>v.</i> Read, for &c.....	1
Downey <i>v.</i> Nutt.....	59	Stone's ex'or & als. <i>and</i> Moon & wife... ..	130
Exchange Bank of Va., for Camp, trustee, <i>v.</i> Knox &c.....	739	Tatum <i>and</i> Jones.....	720
Farmers Bank of Va., for Goddin, trustee, <i>v.</i> Anderson & Co.....	739	Thomas & Ammon <i>and</i> Ballard & als....	14
Graham & als. <i>v.</i> Pierce	28	Wash., Alex. & Georget. R. R. Co. <i>v.</i> Alex. & Wash. R. R. Co.....	592
Griffin's ex'or <i>v.</i> Cunningham.....	571	Whitehead's Case.....	640
Honaker <i>v.</i> Howe.....	50	Wright's Case.....	626
Howe <i>and</i> Honaker.....	50	Zetelle <i>v.</i> Myers & al.....	62
Jackson's Case.....	656		
Jones' Case.....	478		
Jones <i>v.</i> Tatum.....	720		

TABLE OF CASES CITED.

Abbott <i>and</i> Hanger, 6 Wall. 534.. 401, 408, 430	Baker <i>and</i> Shanley, 4 Ves. 732..... 305
Ackers <i>and</i> Phipps, 9 Cl. & Fin. 598..... 301	Baker <i>and</i> Tucker, 11 Ir. Eq. 104, 3 H. L. C. 106, 2 Eng. L. & E. 1..... 205
Adams <i>and</i> Jefferson, 4 Harring 321.... 56	Baldwin <i>and</i> Garth, 2 Ves. sr. 65.... 243
Adams <i>and</i> Jordan, 6 Conn. Bench N. S. 748, 9 Id. 483..... 204, 246	Ball <i>and</i> Hudson, 14 Sim. 558..... 267
Adams <i>v.</i> Otterback, 15 How. 539.. 375	Ball <i>v.</i> Payne, 6 Rand. 73..... 160, 220
Addison <i>and</i> Robinson, 2 Beav. 515..... 790	Ball <i>and</i> Pell, 1 Speer Eq. 48..... 792
Akerman's adm'rs <i>v.</i> Vreeland's ex'or, 1 McCart. 23..... 301	Bamfield <i>v.</i> Popham, 1 P. Wms. 57..... 231
Albany City Bank <i>v.</i> Montgomery County Bank, 3 Seld. 459.. 373	Bamford <i>v.</i> Chadwick, 14 Com. Bench 708, 26 Eng. L. & E. 302..... 318
Albree <i>v.</i> Ward, 8 Mass. 86..... 492	Bank of England <i>and</i> Partridge, 58 Eng. C. L. 396, 425..... 375, 378, 381
Alexander's Cotton, 2 Wall. 404..... 406	Bank of Georgia <i>and</i> United States Bank, 10 Wheat. 333 373
Allen <i>and</i> Picket, 10 Conn. 140..... 692	Bank of U. S. <i>v.</i> Jackson's adm'x, 221... 398
Allison <i>and</i> Ratcliffe, 3 Rand. 537..... 780	Bank of United States <i>and</i> Mills, 11 Wheat. 431..... 373
Alstadt <i>and</i> Henkle, 4 Gratt. 284... 377, 389	Bank of United States <i>and</i> Vorhees, 10 Pet. 449..... 560, 611
Ambler <i>v.</i> Norton, 4 Hen. & Mun. 23.... 778	Bank of Washington <i>v.</i> Triplett, 1 Pet. 25..... 373, 375
Andersons <i>and</i> Thomason, 4 Leigh 48... 156, 162, 167, 190, 220, 240, 265	Barbour <i>and</i> Hollingsworth, 4 Pet. 466... 611
Andree <i>v.</i> Ward, 1 Russ. 260. 325	Barhite <i>and</i> Staley, 2 Caines 221..... 496
Andrews <i>v.</i> Avery, 14 Gratt. 229..... 21	Barker <i>v.</i> Barker's adm'r, 2 Gratt. 344.... 8
Andrews <i>v.</i> Partington, 3 Bro. Ch. C. 401 781	Barker <i>and</i> Eaton, 2 Coly 124..... 319
Andrews <i>v.</i> The State, 2 Sneed 550..... 665	Barker & al. <i>and</i> Floyd, 1 Paige 480.... 788
Andrews <i>and</i> Wallen, 2 Bingh. 106, 9 Eng. C. L. 342..... 149, 175, 220	Barker <i>v.</i> Greenwood, 2 Young & Col. 414..... 376, 381
Anonymous, 2 Hayw. 161..... 121	Barlow <i>v.</i> Salter, 17 Ves. 479.. 160, 219, 268, 317
Anonymous, 2 Freem. 287..... 322	Barnardiston <i>and</i> Carter, 1 P. Wms. 510, 3 Bro. P. C. 64..... 237, 249
Anthony <i>v.</i> Smith, 1 Busb. Eq. 188.. 780, 798	Barnes & als. <i>and</i> Skey, 3 Meriv. 335.... 473
Applin <i>and</i> Doe, 4 T. R. 82. 164, 219, 256	Baron <i>and</i> Wood, 1 East. 258..... 152, 217
Archer <i>and</i> Lamb, Carth. 266, Comb. 208, 1 Salk. 225..... 313	Barrett <i>v.</i> Beckford, 1 Ves. sr. 521..... 202
Archibald <i>v.</i> Thomas, 3 Cow. 290..... 274	Barrett <i>v.</i> State, 1 Wisc. 181 535
Armstrong <i>v.</i> Armstrong, 14 B. Mon. 333. 301	Barrow <i>and</i> Crompe, 4 Ves. 681..... 284, 285, 286, 308
Ashburner <i>v.</i> McGuire, Lead. Cas. Eq. 201..... 780, 794	Barter <i>and</i> Seale, 2 Bos. & Pul. 485.... 143, 144, 146, 209, 237, 239
Ashburnham <i>v.</i> Bradshaw, 2 Atk. 36.... 779	Barton <i>v.</i> Cooke, 5 Ves. 461..... 779
Ashby <i>v.</i> Kiger, 3 Rand. 165..... 732	Barton <i>and</i> Florentine, 2 Wall. 328..... 611
Ashley <i>v.</i> Ashley, 6 Sim. 358..... 215, 246	Bassett <i>and</i> Fisher, 9 Leigh 119..... 559, 566
Ashlock <i>v.</i> Commonwealth, 7 B. Mon. 44 506	Bass <i>v.</i> Scott, 2 Leigh 356..... 733
Askew <i>and</i> Dingwell, 1 Cox Eq. 427..... 795	Bates <i>v.</i> Holman, 3 Hen. & Mun. 502.... 778
Aspinwall <i>and</i> Joy, 23 Eng. L. & E. 453, 18 Jur. 284..... 283	Baury <i>and</i> Wright, 7 Cush. 105..... 205
Astor's lessee <i>and</i> Grignon, 319..... 565	Bean <i>v.</i> Halley, 8 T. R. 5..... 256
Athol <i>and</i> Earl of Derby, 1 Ves. sr. 202.. 493	Beard <i>v.</i> Westcott, 5 Taunt. 500..... 286, 293, 294, 295, 296, 301, 302, 303, 307, 308
Atkinson <i>v.</i> Hutchinson, 3 P. Wms. 260 274, 314	Beasley <i>and</i> Williams, 1 Winst. 102.... 205
Atkinson <i>and</i> White, 2 Wash. 94.... 342, 345, 352, 353	Beasley <i>and</i> Boggs, 1 Bro. Ch. 188.. 175, 317
Atkyns <i>v.</i> Clare, 1 Vent. 399..... 211, 225	Beauclerk <i>v.</i> Dormer, 2 Atk. 314..... 316
Attorney General <i>v.</i> Grote, 3 Meriv. 316, 2 Russ. & Myl. 699 792	Beckford <i>and</i> Barrett, 1 Ves. sr. 521.... 202
Attorney General <i>and</i> Lloyd, 3 Atk. 551 779, 785	Beckham & als. <i>and</i> Gibson, 16 Gratt. 321. 22
Attorney General <i>v.</i> Ward, 3 Ves. 327... 779	Beck <i>and</i> Taylor, 3 Rand. 316..... 9, 13
Audley <i>and</i> Jee, 1 Cox 326..... 268	Beebee <i>v.</i> O'Brien, 10 Wisc. 481..... 516
Avery <i>and</i> Andrews, 14 Gratt. 229..... 21	Beevans <i>v.</i> Rees, 5 Mees. & Welsb. 306.. 345
Ayres <i>v.</i> Falkland, 1 Ld. Ray. 235, 1 Salk. 231..... 321	Beirne <i>and</i> McClung, 10 Leigh 394..... 389
Baber <i>v.</i> Cook & al., 11 Leigh 606..... 9	Bella Guidita, 1 C. Rob. 207..... 408, 413
Backus <i>and</i> People, 5 Calif. 275..... 497	Bells <i>v.</i> Gillespie, 5 Rand. 273..... 157, 158, 159, 160, 176, 220
Bagnell <i>v.</i> Dry, 1 P. Wms. 700..... 781	Bengough <i>v.</i> Edridge, 2 Cond. Eng. Ch. 112, 4 Barn. & Ald. 801..... 291, 292, 293
Bainbridge <i>v.</i> Gardiner, O. Bridg. 402... 211	Bennett <i>v.</i> Hunter, 18 Gratt. 100..... 61
Baird <i>and</i> McNeil, 6 Munf. 316..... 337	

Bensley and Bigg, 1 Bro. Ch. 188.....	317	Burford v. Lee, 2 Freem. 210.....	322
Bernard and Hipkins, 6 Call 101.....	265	Burgh and Pond, 10 Paige 155.....	273
Beverley v. Brooke, 2 Leigh 425.....	389	Burley v. Evelyn, 16 Sim. 294.....	300
Bibb and Edwards, 43 Alab. 673.....	273	Burrill and Nightingale, 15 Pick. 104....	240
Bickerstaffe and Goring, 2 Freem. 166....	321	Burrow and Hill, 3 Call 342.....	220, 318
Bifield's Case, cited King v. Melling, 1 Vent. 225.....	220, 221	Butler and Baker's Case, 3 Rep. 256....	211
Bigg v. Bensley, 1 Bro. Ch. 188.....	317	Butler v. Butler, 3 Barb. Ch. 315.....	273
Billups and Bramble, 4 Leigh 90.....		Butler v. Gerard, 20 Beav. 341.....	319
..... 161, 167, 171, 220	220	Butler v. The Commonwealth of Pa., 10 How. 402.....	681
Birchard v. Booth, 4 Wisc. 67	54	Butterfield v. Butterfield, 1 Ves. 134..	282, 319
Birthright dem. Hall v. Hall, 3 Munf. 536....	205	Butts v. Blunt, 1 Rand. 255.....	7
Bishop of Bath & Wells and Proctor, 2 H. Bl. 358.. 181, 183, 186, 197, 267, 280,	281	Butt v. Thomas, 32 Eng. L. & E. 575, 2 Hurlst. & Gor. 235, 36 Eng. L. & E. 571	230
Bishop and Haxtum, 3 Wend. 13.....	746	Byram Man. Co. and McCall, 6 Conn. 427.	692
Bishop of Sodor v. Earl of Derby, 2 Ves. sr. 338.....	493	Cadell v. Palmer, 1 Cl. & Fin. 394, 7 Bligh N. S. 202, 10 Bingh. 140	292, 293, 294, 301, 302, 303
Biss v. Smith, 40 Eng. L. & E. 541, 2 Hurlst. & Nor. 105.....	318	Callava v. Pope, 3 Leigh 103....	156, 176, 220
Blackley v. Sheldon, 7 John. 32.....	823	Callis v. Kemp, 11 Gratt. 78.....	
Black v. Ray, 1 Dev. & Bat. 334.....	321	..... 171, 176, 220, 318	
Blackwell v. Child, Amb. 260....	796	Calvin's Case, 7 Rep. 2 a b, 28 b.....	211
Blake and Phillips, 1 Metc. 156.....	373	Cambridge and Rous, 8 Ves. 12.....	296, 298
Blanchard v. Brooks, 12 Pick. 47.....	205	Cammett v. Eagle Fire Ins. Co., 2 Eden 127.....	232
Bland v. Williams, 3 Myl. & Keene 411..	283	Campbell and Candy, 2 Cl. & Fin. 421, 8 Bligh N. S. 469.....	269
Blessig and Clementson, 11 Exch. 135, 32 Eng. L. & E. 544.....	400, 420	Campbell v. French, 3 Ves. 321.....	779
Blodget v. Morris, 14 New York 482.....	10	Campbell v. Harding, 2 Rus. & Myl. 406.	269
Blodget and Wilson, 4 McLean, 363.....	601	Campbell and Threlkelds, 2 Gratt. 198...	331
Blunt and Butts, 1 Rand. 255....	7	Candler v. Smith, 7 T. R. 531..	151, 164, 165
Board of Domestic Missions and Powell, 49 Penn. 46.....	205	Candy v. Campbell, 2 Cl. & Fin. 421, 8 Bligh N. S. 469....	269
Boggs v. Beasley, 1 Bro. Ch. 188....	175, 317	Cannon and White, 6 Wall. 443.....	411
Booth and Birchard, 4 Wisc. 67.....	54	Capel's Case, 1 Rep. 57 b.....	211
Boothby v. Vernon, 9 Mod. 147....	237, 253	Capries and Killand, 2 Dall. 368.....	492
Bowdoin and Parkman, 1 Sumn. 359....	240	Capron v. Van Noorden, 2 Cranch 126...	492
Bowyer & ux. and Hill, 18 Gratt. 364....	8	Carnagy and Woodcock, 2 Munf. 234....	239
Boys v. Williams, 2 Rus. & Myl. 689....	792	Carr v. Field, 5 Bingh. 13, 15 Eng. C. L. 348.....	373
Bradford v. Buffar, 2 Alab. 221.....	194	Carrick and Mandeville, 3 Ridgw. 352...	205
Bradley and Porter, 3 T. R. 143.....	175, 315	Carrington and Nelson, 4 Munf. 332.....	730
Bradshaw and Ashburnham, 2 Atk. 36..	779	Carter and Barnardiston, 1 P. Wms. 510, 3 Bro. P. C. 64.....	237, 249
Bramble v. Billups, 4 Leigh 90.....		Carter v. Tyler, 1 Call 165.....	
..... 161, 167, 171, 220	220	..... 160, 174, 203, 220, 263	
Brawford's ex'ors and Keyton's adm'r, 5 Leigh 39.....	730	Case of Sutton's Hospital, 10 Rep. 22 a..	211
Bray and Dunn, 1 Call 338.....	314, 318	Catlett & ux. v. Marshall & als., 10 Leigh 79.....	472
Brent v. Washington's adm'r, 18 Gratt. 522.....	472, 473	Cawood's Case, 2 Va. Cas. 527.....	647
Broadhurst v. Morris, 2 Barn. & Ad. 1	238, 240	Cazenove and Portner & Recker, 18 Gratt. 100.....	61
Broadus v. Turner, 5 Rand. 308....	160, 220	Center and State, 35 Verm. 378.....	660
Bromfield's estate, 8 Wall. 468.....	320	Chadwick and Bamford, 14 Com. Bench 78, 28 Eng. L. & E. 302.....	319
Brooke and Beverley, 2 Leigh 425....	328	Challis and Doe, 1 Ell. & Ell. 1091, 7 H. L. Cas. 531, 18 Ad. & El. N. S. 224....	300
Brooks and Blanchard, 12 Pick. 47.....	205	Champion and Spencer, 9 Conn. 436....	692
Brooks and Moore, 12 Gratt. 135.....		Chandler and Marine Bank of Chicago, 27 Illin. 525	376, 381
... 156, 171, 174, 175, 176, 204, 245,	319	Chandless v. Price, 3 Ves. 99.....	317
Brownell v. DeWolf, 3 Mason 486.....	788	Chapman and Forth, 1 P. Wms. 664....	
Brown v. Evans, 34 Barb. 594..	267	..... 154, 220, 314, 315, 316, 317, 318,	321
Brown and Geiger, 2 Strobb. Eq. 359n...	321	Chapman and Powell, 19 Eng. C. L. 499.	375
Brown's adm'r v. Johnson, 13 Gratt. 644.	10	Chapman and Smith, 1 Hen. & Mun. 240.	156, 157, 158, 193, 259, 263, 310
Brown v. Kelsey, 2 Cush. 243.....	321	Charlton's adm'r and Unis & als., 12 Gratt. 484.....	7
Brown and Powell, 1 Bail. 100.....	319	Chase v. Lovering, 7 Fost. 295.....	13
Brown v. Wallace, 4 Gill & John. 479....	737	Chatham and Tothill, 7 Bro. P. C. 453..	181, 280, 282, 319
Buckley and Stafford, 2 Ves. sr. 180....	317	Cheslyn and Cresswell, 2 Eden 123....	773, 788
Budling and Rathbone, 1 Amer. Lead. Cas. 606.....	356		
Buffar and Bradford, 2 Atk. 221.....	194		
Bull's Case, 14 Gratt. 613.....	663, 667		
Bull v. Pritchard, 1 Russ. 213.....	283		
Burchall and King, Amb. 379, 1 Eden 424.....	219		

Chew's Appeal, 7 Penn. 23.....	205	Corporation of Durham and Queen, 10	
Child and Blackwell, Amb. 260.....	795	Mod. 146.....	692
Cholmondely v. Clinton, 2 Jac. & Walk.		Coulter and Negus, 1 Dick. 326.....	305
96.....	243	Courtier v. Oram, 21 Beav. 91.....	319
Chorler v. People, 2 Comst. 193.....	660	Courtney and Kimpland, 2 Freem. 250....	321
Chudleigh's Case, 1 Rep. 117 b.....	211	Coventry and Hay, 3 T. R. 33. . . .	215, 246
Churchill v. Churchill, 2 Metc. Ken. 466..	274	Cox v. McMullin, 14 Gratt. 82.....	582
Church Wardens of St. Saviour's Case,		Cox and Sheldon, Amb. 624.....	376
10 Rep. 67 b.....	273	Cox & al. v. Thomas' adm'x, 9 Gratt. 323	
Church v. Wyatt, Moor 637.....	202	.....20, 21	
Circassian, 2 Wall. 135.....	405	Crabtree v. Hagenbaugh, 23 Illi. 349....	539
Clapp v. Fogleman, 1 Dev. & Rat. Eq.		Craddock and Foxwell, 1 Pat. & Heath	
466.....	314, 318	250.....	251
Clare and Atkyns, 1 Vent. 399.. . . .	211, 225	Craigen and See, 8 Leigh 449.....	
Clarke and Taylor, 2 Eden 203	314	.....157, 158, 166, 168, 206, 220, 231	
Clark v. Phillips, 21 Eng. L. & E. 129... 788		Crawford and Comstock, 3 Wall. 304....	611
Clarkson v. Reed, 15 Gratt. 288.....	731	Crepp v. Durden, 1 Smith's Lead. Cas.	
Clark v. Ward, 12 Gratt. 440..549, 550, 551, 552		378.....	22
Clemenston v. Blessig, 11 Exch. 135.....	400	Cresswell v. Cheslyn, 2 Eden 123 .. 773, 88	
Clinton and Cholmondely, 2 Jac. & Walk.		Cresswell v. Emberson, 6 Ired. Eq. 151..	326
96	243	Crompe v. Barrow, 4 Ves. 681.....	
Clinton and Jenkins, 6 Jur. N. S. 1045..	232	.....284, 285, 286, 308	
Cochran v. State, 7 Humph. 544.....	495	Cromwell's Case, 2 Rep. 72 b.....	211
Cock v. Cooper, 1 East 229.....		Crofts v. Middleton, 35 Eng. L. & E.	
.....150, 153, 154, 164, 165, 172, 220		466	258
Cocke v. Harrison, 3 Rand. 494	375	Crooke v. De Vandes, 9 Ves. 197.....	
Coffin v. State, 7 Port. Ind. 157.....	681	.....219, 314, 316, 317.	
Cohen and Wolff, 8 Rich. 144.....	56	Crump's ex'ors and Dudley, 3 Call 507... 321	
Cohon and Wright, 12 Leigh 376....231, 241		Crump and Omohundro, 18 Gratt. 703.. 337, 442	
Cole's adm'r v. McRae, 6 Rand. 644.....	617	Crump v. United States Mining Co., 7	
Cole v. Pennell & al., 2 Rand. 174.....	9	Gratt. 352.....	376
Cole v. Sewell, 2 Conn. & L. 344, 4 Dr.		Cudworth v. Thompson, 3 Dessau. 256..	314
& War. 1.....	311, 312	Culbertson and Vennerson, 10 Smeedes	
Collard v. Sampson, 21 Eng. L. & E. 352.. 729		& Marsh. 150.....	321
Collett and Lloyd, 4 Bro. Ch. 469.... 589, 591		Cummings and Gerrish, 4 Cush. 391.....	12
Collingwood v. Pace, 1 Sid. 193, 1 Vent.		Curd and Venable, 2 Head 582.....	640
413.....	211, 225	Curteis and Pincke, 4 Bro. Ch. 329.....	587
Collins v. Lowry & Co., 2 Wash. 75.....	8	Curtis v. Lonstreth, 44 Penn. 297....216, 246	
Collins and White, Comy. 289.....	256, 310	Curtis and Sheldon, 6 Call 241.....	541
Commercial Bank of Pa. v. Union Bank		Dabbs v. Nugent, 11 Jur. N. S. 943.....	70
of New York, 3 Kern. 203.....	381	Dade and Smock, 5 Rand. 639.....	375
Commissioners of Woods & Forests and		Daintry v. Daintry, 6 T. R. 314.....	317
Monck & als.—not reported.....	238	Dandridge's Case, 2 Va. Cas. 408.....	494
Commonwealth and Ashlock, 7 B. Mon.		Dangerfield and Slater, 15 Mees. & Welsb.	
44.....	506	263.....	205
Commonwealth and Butler, 10 How. 402. 681		Daniel v. Leitch, 13 Gratt. 195.. 731, 732, 737	
Commonwealth and Fox's adm'rs. 16		Dansey v. Griffiths, 4 Mau. & Sel. 61....	220
Gratt. 1	603	Darley v. Martin, 13 Com. Bench 683, 24	
Commonwealth v. Gibson, 2 Va. Cas.		Eng. L. & E. 275.....	314
70.....	823	Darnly v. Griffith, 4 Mau. & Sel. 61.....	318
Commonwealth and Hamlett, 3 Gratt.		Davies and Doe, 4 Barn. & Ad. 431, 1 Nev.	
82.....	499	& Man. 654.....	241
Commonwealth and Martyn, 1 Mass. 347. 462		Davies and Jones, Barn. & Ad. 43.....	176
Commonwealth v. Roby, 12 Pick. 406. . 496		Davies and Richards, 13 Com. Bench N.	
Commonwealth v. Tilton, 8 Metc. 232... 53		S. 68.....	861
Comstock and Crawford, 3 Wall. 304....	611	Davies v. Stevens, Doug. 320.....	
Conrad v. Harrison, 3 Leigh 532.. . . .	389	.....147, 177, 192, 239	
Considine and Doe, 6 Wall. 458.....	472	Davis ex parte, 2 Sim. N. S. 121, 9 Eng.	
Cook & al. and Baber, 11 Leigh 606.....	9	L. & E. 91.....	240
Cook v. Cook, 2 Vern. 545.....	145	Davis v. Cain, 1 Ired. Eq. 45.....	791
Cooke and Barton, 5 Ves. 461.....	779	Davis and Faulkner, 18 Gratt. 651.....	731
Cooke & al. and Doe, 7 East 269, 3 Smith		Davis and Flinn, 18 Alab. 132.....	314
236.....	323, 473	Davis and Gray, 27 Conn. 447.....	18
Cook and Ellis, 6 Hill 466....	566	Davis and Harris, 28 Eng. Ch. 416...772, 788	
Cook, Sheriff, v. Hayes, 9 Gratt. 142... 22, 24		Davis and Jiggetts, 1 Leigh 368..220, 232, 310	
Cooper and Cock, 1 East 229.....		Davis & al. and Rohr, 9 Leigh 30.....	9
.....150, 153, 154, 164, 165, 172, 220		Davis v. Teays & als., 3 Gratt. 283.....	731
Cooper and Webster, 14 How. 488.....	205	Davis and Wood, 18 How. 467.....	605
Copenhagen v. Shuler, 2 Paige 123.....	272	Deane v. Hansford, 9 Leigh 253.. 156, 176, 318	
Cordle's adm'r v. Cordle's ex'or, 6 Munf.		Deane v. Test, 9 Ves. 152.....	791
455.....	156	Dearing's adm'r v. Rucker, 18 Gratt. 486	
		.....337, 338, 341, 351	

Dennett <i>v.</i> Dennett, 40 New Hamp. 493, 43 Id. 499.....	218	Durour <i>v.</i> Motteux, 1 Ves. sr. 322.....	305
Den <i>v.</i> Page, 3 Doug. 294, 1 Bos. & Pul. 261 n.....	215, 246	Dyckman and Rathbone, 3 Paige 9.....	318
Den <i>v.</i> Parker, 12 Ired. 123	205	Eagle Fire Ins. Co. <i>v.</i> Cammett, 2 Edw. Ch. 127.....	232
Den <i>v.</i> Shenton, Cowp. 410.....	316, 317	Earl of Derby <i>v.</i> Athol, 1 Ves. sr. 202....	493
Den <i>v.</i> Turner, 9 Wheat. 541.....	492	Earl of Derby and Bishop of Sodor, 2 Ves. sr. 218.....	493
Depau <i>v.</i> Fowler, 26 Barb. 224.....	301	Earl of Suffolk and Lord Bindon, 1 P. Wms. 96.....	781
Dering and Monypenny, 15 Eng. L. & E. 551, 22 Law Jour. N. S. 313, 16 Mees. & Welsb. 418, 7 Hare 565, 2 De Gex &c. 145	198, 219, 302, 303, 305, 307	Early & wife <i>v.</i> Friend, 16 Gratt. 21... 38, 39	38, 39
De Vandes and Crooke, 9 Ves. 397	219, 314, 316, 317	Early <i>v.</i> Wilkinson & Hunt, 9 Gratt. 68.	356, 778
Devaughn <i>v.</i> Devaughn, 19 Gratt. 556....	611	East <i>v.</i> Cook, 2 Ves. sr. 32.....	272
De Wolf and Brownell, 3 Mason 486....	788	East Ind. Co. and Nabob of Carnatic, 1 Ves. jr. 372.....	494
Dickey and Reeves, 10 Gratt. 138.....	731	East <i>v.</i> Twyford, 31 Eng. L. & E. 72, 4 H. L. Cas. 517.....	241
Didlake <i>v.</i> Hooper, Gilm. 194.....	156, 176	Eastwood <i>v.</i> People, 3 Parker 25.....	497
Dilliard <i>v.</i> Tomlinson, 1 Munf. 203... ..	318	Eaton <i>v.</i> Barker, 2 Coll. 124.....	319
Dingwell <i>v.</i> Askew, 1 Cox Eq. 427.....	795	Edge and Scattergood, 11 Mod. 298.....	250
Diven <i>v.</i> Phelps, 34 Barb. 224.....	746, 747	Edridge and Bengough, 2 Cond. Eng. Ch. 112.....	281, 283
Dobson's Case, Law Rep. 1 P. & D. 88..	782	Edwards <i>v.</i> Bibb, 43 Alab. 673.....	273
Dodge and Wheatland, 10 Metc. 502....	240	Edwards and Goodman, 2 Myl. & Keen 59.....	239
Dodson <i>v.</i> Grew, Willes 323.....	151	Egerton <i>v.</i> Massey, 3 Com. Bench N. S. 338.....	252
Doe <i>v.</i> Applin, 4 T. R. 82.	164, 219, 256	Eldridge <i>v.</i> Fisher, 1 Hen. & Mun. 559... 220	220
Doe dem. Bean <i>v.</i> Halley, 8 T. R. 5.....	256	Elkin and Pinbury, 1 P. Wms. 564.. 155, 172	155, 172
Doe dem. Candler <i>v.</i> Smith, 7 T. R. 531	151, 164, 165, 219	Elliott and King, 5 Smeedes & Marsh. 428.	754
Doe <i>v.</i> Challis, 1 Ell. & Ell. 1091, 7 H. L. Cas. 531, 18 Ad. & El. N. S. 224.....	300	Ellis and Cook, 6 Hill 466.....	56
Doe dem. Cock <i>v.</i> Cooper, 1 East 229. ..	150, 153, 154, 164, 165, 172, 220	Ellis <i>v.</i> Paige, 1 Pick. 43.....	515
Doe <i>v.</i> Considine, 6 Wall. 458.....	472	Emberson and Cresswell, 6 Ired. Eq. 151.	326
Doe <i>v.</i> Cooke & al., 7 East 269.....	473	Essex County Bank and Smith, 22 Barb. 667.....	373
Doe <i>v.</i> Davies, 4 Barn. & Ad. 431, 1 Nev. & Man. 654.....	241	Evans and Brown, 34 Barb. 594.....	267
Doe dem. Evans <i>v.</i> Evans, 2 Per. & Dav. 378.....	779	Evans and Doe dem. Evans, 2 Per. & Dav. 378.....	779
Doe <i>v.</i> Ewart, 7 Ad. & El. 636, 3 New Rep. 197.....	318	Evans <i>v.</i> Greenhow, 15 Gratt. 153.....	377, 381, 747, 748
Doe <i>v.</i> Eyre, 3 Man. Gran. & Scott 557, 5 Id. 713.	319	Evelyn and Burley, 16 Sim. 294.	300
Doe <i>v.</i> Goldsmith, 7 Taunt. 209.....	162, 164, 172, 219	Everest <i>v.</i> Gall, 1 Ves. jr. 286.....	317
Doe <i>v.</i> Halley, 8 T. R. 5.....	232	Ewart and Doe, 7 Ad. & Ell. 636, 3 New Rep. 197.....	318
Doe <i>v.</i> Holme, 2 Wm. Bl. 778.....	250, 251	Ewing's Case, 5 Gratt. 701.....	505
Doe <i>v.</i> Jackman, 5 Ind. 288.....	205	Eyre and Doe, 3 Man., Gran. & Scott 557, 5 Id. 713.. ..	319
Doe <i>v.</i> Johnson, 8 Welsb., Hurl & Gor. 81, 16 Eng. L. & E. 550.....	301	Eyre and Kendall, 1 Rand. 288.....	220
Doe <i>v.</i> Rawding, 2 Barn. & Ald. 241.....	473	Fagent and Rex, 7 Car. & Payne 238, 39 Eng. C. L. 701.....	660
Doe <i>v.</i> Reason, 3 Wils. 246	250	Falkland and Ayres, 1 Ld. Ray. 235, 1 Salk. 231.....	321
Doe <i>v.</i> Sheffield, 13 East 526.....	781	Fant <i>v.</i> Miller & Mayhew, 17 Gratt. 47	6, 466
Doe <i>v.</i> Tofield, 11 East 246.....	239	Faulkner <i>v.</i> Davis, 18 Gratt. 651.....	731
Doe <i>v.</i> Vaughan, 5 Barn. & Ald. 464, 1 Dow. & Ryl. 52.....	215, 246	Field <i>v.</i> Carr, 5 Bingh. 13, 15 Eng. C. L. 348.....	373
Dormer and Beauclerk, 2 Atk. 314.....	316	Fisher <i>v.</i> Bassett, 9 Leigh 119.....	559, 566
Dougherty <i>v.</i> Dougherty, 4 Metc. Ken. 25.	781	Fisher and Eldridge, 1 Hen. & Mun. 559.	220
Doughty <i>v.</i> Stillwell, 1 Bradf. 300.....	798	Fisher & others and Rossett, 11 Gratt. 492.....	617
Drew and Walter, Comy. 372.....	175, 220	Fisher and Tarlton, Doug. 671	21
Drury's Case, 8 Coke 139.....	21	Fisher and United States, 2 Cranch 358.	516
Dry and Bagnell, 1 P. Wms. 700.....	781	Fisher and Sloper, 2 Ves. & Bea. 145....	588
Dubois <i>v.</i> Ray, 35 New York 165.....	273	Fish &c. <i>v.</i> Smith, 12 Indi. 563.....	539
Dudley <i>v.</i> Crump's ex'ors, 3 Call 507 ...	321	Flamer and Paddison's lessee, 1 Har. & McHen. 336.....	203
Duffield and Lucas, 6 Gratt. 456.....	173	Flemings <i>v.</i> Willis, 2 Call 5.....	778
Duke of Northumberland and Jervoise, 1 Jac. & Walk. 540.....	588	Fletcher's Case, 1 Equ. Abr. 193.....	313
Duncan and Pryor, 6 Gratt. 27.....	204, 246	Flinn <i>v.</i> Davis, 18 Alab. 132.....	314
Dungannon <i>v.</i> Smith, 12 Cl. & Fin. 546 .	321	Florentine <i>v.</i> Barton, 2 Wall. 210.....	611
Dunn <i>v.</i> Bray, 1 Call 338.....	314, 318	Floyd <i>v.</i> Baker & al., 1 Paige 480.....	788
Dunn <i>v.</i> State, 2 Ark. 229	660		
Durden and Crepps, 1 Smith's Lead. Cas. 378.....	22		

Fogleman <i>and</i> Clapp, 1 Dev. & Bat. Eq. 466..	314, 318	Goodtitle <i>v.</i> Woodhull, Willes 592...	253, 256
Foley <i>v.</i> Irwin, 2 Ball & Beat. 435...	314, 319	Goodwin <i>v.</i> Goodwin, 3 Atk. 370, 1 Ves. sr. 226.....	215, 216, 246
Folliott <i>v.</i> Ogden, 1 H. Bl. 123.....	778	Goodwyn <i>v.</i> State, 4 Smeedes & Marsh. 520.....	647, 648
Foot <i>and</i> Pratt, 5 Seld. 463..	381	Goring <i>v.</i> Bickerstaffe, 2 Freem. 166.....	321
Ford <i>v.</i> Ford, 3 Fost. 312.....	797	Goring <i>v.</i> Howard, 16 Sim. 395 .	197, 198, 300
Ford <i>and</i> Fordyce, 4 Bro. Ch. 494.....	589	Gould <i>and</i> Knight, 2 Myl. & Keen 291...	781
Fordyce <i>v.</i> Ford, 4 Bro. Ch. 494.....	589	Graves <i>and</i> Henry, 16 Gratt. 244.....	123, 124
Foreman <i>and</i> Harrison, 5 Ves. 207	473	Graves <i>and</i> Timberlake, 6 Munf. 174.....	156, 172, 176
Forth <i>v.</i> Chapman, 1 P. Wm. 664	154, 220, 314, 315, 317, 318, 319, 321	Gray <i>v.</i> Davis, 27 Conn. 447.....	18
Foster <i>v.</i> Jackson, Hob. 53.....	277	Green & ux. <i>v.</i> Hayman, Rook & als., 2 Ch. Cas. 10.....	169, 272
Foster <i>v.</i> Romney, 11 East 594.....	215, 246	Greenhow <i>and</i> Evans, 15 Gratt. 153.....	377, 381, 747, 748
Foster <i>v.</i> Woodward, Baldwin & Co., 18 Gratt. 200.....	337	Green <i>v.</i> Jackson, 5 Russ. 35, 2 Rus. & Myl. 238.....	305
Fowler <i>and</i> Keily, 6 Bro. P. C. 309	315, 316, 317	Green <i>v.</i> Ward, 1 Russ. 260.....	325
Fowler <i>v.</i> Depau, 26 Barb. 224.....	301	Greenwood <i>and</i> Barker, 2 Young & Col. 414	376
Fox <i>v.</i> The Commonwealth, 16 Gratt. 1..	603	Greenwood <i>and</i> Rothwell, 5 Man. & Gran. 628, 6 Scott N. R. 670, 6 Beav. 492.....	205
Foxwell <i>v.</i> Craddock, 1 Pat. & Heath 250.	257	Greenwood <i>v.</i> Verdon, 24 Law Jour. N. S. Ch. 65	265
Frampton <i>and</i> Turner, 2 Call 336.....	274	Gresham <i>v.</i> Gresham, 6 Munf. 187.....	156
Frances <i>and</i> Viner, 2 Cox 189.....	781	Grew <i>and</i> Dodson, 2 Willes 323.....	151
Franklin <i>and</i> Wilt, 1 Binn. 502.....	552	Grew <i>and</i> Roe, 2 Wils. 322.....	219
Frazier <i>v.</i> Frazier's ex'or & al., 2 Leigh 642.....	777	Griffith <i>v.</i> Frazier, 8 Cranch 23.....	514
Frazier <i>and</i> Griffith, 8 Cranch 23.....	514	Griffiths <i>and</i> Dansey, 4 Mau. & Sel. 61..	220, 318
French <i>and</i> Campbell, 3 Ves. 321.....	779	Griffith <i>v.</i> Thompson, 1 Leigh 321	156, 176, 177, 182, 274
French & als. <i>and</i> La Fayette Ins. Co., 18 How. 404.....	604	Grignon <i>v.</i> Astor's lessee, 2 How. 319....	565
Friend &c. <i>v.</i> Early & wife, 16 Gratt. 21. 38, 39		Griswold <i>v.</i> Waddington, 16 John. 438....	419, 422
Fry <i>and</i> Williams, T. Ray. 237, 1 Mad. 86.....	277	Grote <i>and</i> Attorney Gen'l, 3 Meriv. 316, 2 Rus. & Myl. 699.....	792
Fulton Bank <i>v.</i> Stafford, 2 Wend. 483....	13	Grove <i>and</i> Mansell, 2 Young & Col. 484..	314
Fuqua <i>and</i> Mackey, 3 Call 19.....	778	Grubbs <i>and</i> Sheets, 4 Metc. Ken. 339....	274
Gadsden <i>and</i> Stevens, 20 Beav. 541.....	339	Guild <i>v.</i> Lee, 3 Bost. Law Rep. 433.....	54
Gall <i>and</i> Everest, 1 Ves. jr. 286.....	317	Guthrie's Appeal, 37 Penn. 9.....	205
Gammon <i>v.</i> Stone, 1 Ves. sr. 339....	352	Gyles <i>v.</i> Hall, 2 P. Wms. 378.....	352
Gardiner <i>and</i> Bainbridge, O. Bridg. 402.	211	Hagenbaugh <i>and</i> Crabtree, 23 Illin. 349..	539
Gardiner <i>and</i> Mathews, 17 Beav. 257....	202	Halley <i>and</i> Doe, 2 T. R. 5.....	232
Gardiner & als. <i>and</i> Robinson & als., 18 Gratt. 509.....	745, 746	Halley <i>and</i> Doe d. Bean, 8 T. R. 5.....	256
Gardner & als. <i>v.</i> Printup, 2 Barb. S. C. 83.....	796	Hall <i>and</i> Gyles, 2 P. Wms. 378.....	352
Garner's Case, 18 Gratt. 989	481	Hall <i>v.</i> Hall, 3 Munf. 536.....	205
Garnett <i>v.</i> Macon, 2 Brock. 185.....	587, 591	Hall's lessee <i>v.</i> Vandergrift, 3 Binn. 374.	203
Garnett <i>and</i> Roy, 2 Wash. 9.....	158, 220	Hamilton <i>and</i> Stuart, 2 Hen. & Mun. 48.	23
Garth <i>v.</i> Baldwin, 2 Ves. sr. 65	242	Hamilton <i>v.</i> West, 10 Ired. Eq. 75.....	205
Gaskell <i>v.</i> Holmes, 25 Eng. Ch. 438.....	781	Hamlett <i>v.</i> Commonwealth, 3 Gratt. 82..	499
Gaunt <i>and</i> Target, 1 P. Wms. 432... 155, 175		Hampton's Case, 3 Gratt. 590.....	809, 812
Geiger <i>v.</i> Brown, 2 Strobb. Eq. 359 n....	321	Hanger <i>v.</i> Abbott, 6 Wall. 536... 401, 408, 430	
Gerard <i>v.</i> Butler, 20 Beav. 541.....	319	Hankey <i>and</i> Russell, 6 T. R. 12.....	373
Gernet <i>v.</i> Lynn, 31 Penn. 94.....	205	Hansford <i>and</i> Deane, 9 Leigh 253.....	150, 176, 318
Gerrard <i>v.</i> Gerrard, 1 Ld. Ray. 72.....	558	Hardaway's adm'r <i>and</i> Worsham, 5 Gratt. 60.....	731
Gerrish <i>v.</i> Cummings, 4 Cush. 391.....	12	Hardcastle <i>and</i> Robinson, 2 T. R. 251....	280
Gianini <i>and</i> Waldron, 6 Hill 601.....	319	Hardeman <i>and</i> Harris, 14 How. 334.....	610
Gibson <i>v.</i> Beckham & als., 16 Gratt. 321 22		Harding <i>and</i> Campbell, 2 Rus. & Myl. 390.	269
Gibson <i>and</i> Commonwealth, 2 Va. Cas. 70.....	823	Harding <i>and</i> Greenwood, 3 Rand. 280..	220
Gibson's heirs <i>v.</i> Jones, 5 Leigh 370....	617	Hardin <i>and</i> Page, 8 B. Monr. 648.....	695
Gibson <i>v.</i> Stevens, 8 How. 384.....	552	Hardwick <i>and</i> Ring, 2 Beav. 352.....	319
Giles <i>and</i> Sykes, 5 Mees. & Welsb. 645... 376		Hardy <i>and</i> State, 2 Mass. 303.....	492
Gillespie <i>and</i> Bells, 5 Rand. 273.....	157, 158, 159, 160, 172, 177, 220	Hare <i>v.</i> State, 4 How. Miss. 187.....	496
Ginger <i>v.</i> White, Willes 348.....	205	Harrington <i>v.</i> Harrington, 1 Ch. Ap. L. R. 564.....	321
Glover <i>v.</i> Harris, 4 Rich. Eq. 25.....	321	Harrington <i>v.</i> Smith, 2 Sid. 41.....	202
Goldfrass <i>and</i> Rawlins, 5 Ves. 440	317	Harris <i>v.</i> Davis, 28 Eng. Ch. 416 ... 22, 7	788
Golding <i>and</i> Parker, 13 Sim. 418.....	473	Jones <i>v.</i> Davies, 4 Barn. & Ad. 43.....	176
Goldsmith <i>and</i> Doe, 7 Taunt. 209. 162, 164, 172		Jones <i>and</i> Gibson's heirs, 5 Leigh 370....	617
Good <i>v.</i> Good, 7 Ell. & Bl. 295, 40 Eng. L. & E. 212.....	202		
Goodman <i>v.</i> Edwards, 2 Myl. & Keen 59.	239		
Goodrich <i>v.</i> Harding, 3 Rand. 280.....	220		
Goodtitle <i>v.</i> Pegden, 2 T. R. 720.... 314, 317			

Harris and Glover, 4 Rich. Eq. 25.....	321	Horton's Case, 3 Bulst. 193, 1 Rolle 398...	274
Harris v. Hardeman, 14 How. 334.....	610	Horton & als. v. Townes, 6 Leigh 47.....	511
Harrison and Cocke, 3 Rand. 494.....	377	Houlditch and Fulk, 1 Ves. & Bea. 248...	779
Harrison and Conrad, 3 Leigh 532.....	389	Howsum v. Rogers, 4 Wright 190	754
Harrison v. Foreman, 5 Ves. 207.....	473	Howard and Goring, 16 Sim. 395.. 197, 198,	300
Hartley and Mortimer, 6 Welsb. Hurl. & Gor. 59, 3 Eng. L. & E. 536.....	202	Howell's Case, 5 Gratt. 664.....	912
Hart and Stout, 2 Halst. Law 414... 780,	799	Hubbell v. Woolf, 15 Indi. 204.....	10
Harvey's adm'r v. Steptoe's adm'r & als., 17 Gratt. 289.....	376	Hudson and Massey, 2 Meriv. 133.....	268
Harvey v. Stracey, 22 Law Jour. N. S. Ch. 23, 1 Drury 73.....	319	Hudson and Ridge, 1 Bunb. 12.....	322
Harvey v. Tyler, 2 Wall. 328.....	611	Hughes v. Sayer, 1 P. Wms. 534.....	155
..... 20, 22, 560, 563, 564, 567,	611	Hughes v. Voyles, 23 Eng. L. & E. 271..	124
Hawkesworth v. Showler & Boyce, 12 Mees. & Welsb. 45.....	11	Humphrey v. State, Minor 64	492
Haxtum v. Bishop, 3 Wend. 13.....	746	Humphreys v. Taylor, Amb. 136 ... 772,	788
Hay v. Coventry, 3 T. R. 33	215, 246	Hunter and Bennett, 18 Gratt. 100.....	61
Hayes and Cook, sheriff, 9 Gratt. 142 22, 26	22, 26	Hurd's Case, 5 Leigh 715.....	514
Hayes and Prescott, 42 New Hamp. 56..	680	Hutchinson v. Atkinson, 3 P. Wms. 260 274, 314	314
Hayman, Rook & als. and Green & ux., 2 Ch. Cas. 10.....	169, 272	Hutchinson, sheriff, v. Priddy, 12 Gratt. 85.....	21
Hays v. Hays, 5 Rich. 31.....	205	Ibbertson v. Ibbertson, 10 Sim. 495, 5 Myl. & Cr. 26.....	325
Hayward and Rex, 6 Car. & Payne 157...	667	Inhab. of Berkshire and Merrill, 11 Pick. 269	13
Hemmings v. Pugh, 9 Jur. N. S. 1124...	68	Inhab. of Durton and Regin, 14 Eng. L. & E. 124.....	506
Henderson and Hoke, 4 Dev. Law 1. ...	681	Innes v. Johnson, 4 Ves. 568.....	792
Henderson v. Saunders, Sands Qu. Law R. April '60.....	193, 199, 265	In re Moresby, 1 Hagg. 378.....	779
Henkle v. Alstadt, 4 Gratt. 284.....	377, 398	In re Winn, Jurist 1861, part 1st, 764....	781
Henry v. Graves, 16 Gratt. 244.....	123, 124	Insurance Company and Manson, 6 Wall. 1.....	409
Hicks and Sherman's adm'r, 14 Gratt. 96.	253	Irwin and Foley, 2 Ball & Beat. 435..	314, 319
Higginbotham v. Rucker, 2 Call 313....	176	Jackson's adm'r and Bank of U. S., 9 Leigh 221.....	358
Hill's Case, 2 Gratt. 594.....	663	Jackson and Doe, 5 Indi. 288.....	205
Hill's Case, 5 Gratt. 682.....	809, 810	Jackson and Foster, Hob. 53.....	277
Hill & als. v. Bowyer & ux., 18 Gratt. 364.	8	Jackson and Green, 5 Russ. 35, 2 Russ. & Myl. 238.....	305
Hill v. Burrow, 3 Call 342.....	220, 318	Jackson v. Noble, 2 Keen 590.....	319
Hill and Lynch, 6 Munf. 114.....	189, 389	Jackson v. Stout, 11 John. 337.....	319
Hill v. Pride, 4 Call 107.....	492	James' ex'ors v. Masters, 3 Murph. 110...	326
Hills and Trustees of Vernon Society, 6 Cow. 23.....	692	James v. McWilliams, 6 Munf. 301.....	156, 265, 279, 277
Hines v. State, 8 Humph. 597.....	495	James and Merest, 1 Bro. & Bing. 484....	194
Hipkins and Bernard, 6 Call 163.....	265	Jee v. Audley, 1 Cox 326.....	268
Hitchcock and State, 1 Kans. 178.....	691	Jefferson v. Adams, 4 Harring. 321.....	56
Hite and Jolliffe, 1 Call 301.....	730	Jeffrey and Rae, 7 T. R. 595.....	317
Hite v. Long, 6 Rand. 457.....	71	Jeffries and Land, 5 Rand. 211.....	778, 781
Hobert v. State, 3 Minnes. 262.....	497	Jenkins v. Clinton, 6 Jurist N. S. 1045...	232
Hobson v. Thelusson, Law Rep. Q. B. 645.....	376	Jenkins and Willis, 30 Georg. 167.....	274
Hodges v. Middleton, Doug. 431	144, 148, 192, 237, 238	Jennings v. Newman, 3 Jar. 748.....	191
Hodson v. Ball, 14 Sim. 558.....	267	Jervois v. Duke of Northumberland, 1 Jac. & Walk. 540.....	588
Hoes v. Van Hoeson, 1 Barb. Ch. 379, 3 Den. 610, 1 Comst. 120....	321	Jesson v. Wright, 2 Bligh 1, 5 Mau. & Sel. 95.....	135, 143, 154, 171, ...172, 201, 202, 203, 205, 219, 233, 245, 246
Hoke v. Henderson, 4 Dev. Law 1.....	681	Jeter v. Taliaferro & al., 4 Munf. 80.....	8
Holford and Palmer, 4 Russ. 403.....	280, 308	Jiggetts v. Davis, 1 Leigh 368.. 220. 232,	310
Holford v. Wright, Cowp. 34.....	220	Jiggitts, v. Jiggitts, 40 Miss. 718....	559, 569
Hollingsworth v. Barbour, 4 Pet. 466....	610	Johnson and Brown's adm'r, 13 Gratt. 644.	10
Holloway and Wilkinson, 7 Leigh 377...	375	Johnson and Doe, 8 Welsb., Hurl. & Gor. 81, 16 Eng. L. & E. 550.....	301
Holman and Bates, 3 Hen. & Mun. 502..	778	Johnson and Innes, 4 Ves. 568	792
Holme and Doe, 3 Wils. 240, 2 W. Bl. 778 250, 251	250, 251	Johnson's adm'r v. Johnson's heirs, 8 B. Mon. 470.....	326
Holmes and Gaskell, 25 Eng. Ch. 438....	781	Johnson and Whitmell, 17 Mass. 452....	373
Holmes and Plunkett, 1 Keb. 29... 119,	236	Johnson & al. and Mackenzie, 4 Madd. 373 68, 69	68, 69
Home and Sinclair, 6 Ves. 607.....	780	Johnston and Norris, 17 Gratt. 8....	198, 271
Hon. Robt. Johnson and King, 6 East 583.....	493	Jolliffe v. Hite, 1 Call 301.....	730
Hooker's Case, 13 Gratt. 763.....	659	Jones and Kampf, 2 Keen 756.....	319
Hooker v. Hooker, 3 Barn. B. R. 201....	237	Jones v. Mackilwain, 1 Russ. 220.....	266
Hoop, 1 C. Rob. 196.....	408, 418	Jones and Mason, 2 Barb. 144.....	273
Hooper and Didlake, Gilm. 194.....	156	Jones v. Morgan, Fearne 597.....	220
Hooper and Nichols, 1 P. Wms. 198.....	155		
Hopkins v. Page, 2 Brock. 20.....	417		

Jones v. Robertson, 2 Munf. 187.....	778	Lewis' ex'ors v. Ruffners, 7 Leigh 720..	39
Jones v. Roe, 3 T. R. 96.....	220	Lewis and Wyld, 1 Atk. 432.....	230
Jones v. State, 2 Blackf. 475.....	495	Lilly v. Taylor, Owen 148..	234
Jones and Tinsley, 13 Gratt. 284.....	319	Lithgow's Case, 2 Va. Cas. 297.....	660
..... 158, 172, 174, 220, 231,	319	Livingston v. The People, 6 Wend. 526..	516
Jones v. Ward, 5 Ired. Eq. 400.....	205	Livingston's Case, 14 Gratt. 592 ..	663
Jordan v. Adams, 6 Con. Bench N. S. 748,	204,	Lloyd and Att'y Gen'l, 3 Atk. 551 .	779, 785
9 Id. 483.....	246	Lloyd v. Collett, 4 Bro. Ch. 469....	589, 591
Joy v. Aspinwall, 23 Eng. L. & E. 453, 18	283	Loddington v. Kime, 3 Lev. 431, 1 Salk.	
Jurist 284.....	283	224, 1 Ld. Ray. 203..	237, 247, 249, 250, 251
Kampf v. Jones, 2 Keen 756.....	319	Lodge's Case, 6 Gratt. 699.....	810
Keily v. Fowler, 6 Bro. P. C. 309..	315, 316,	Logan and Neal, 1 Gratt. 14.....	730
Kekewick v. Manning, 12 Eng. L. & E.	120.....	London v. Turner, 11 Leigh 403. 134, 182,	322
Kekewick and Peard, 11 Eng. L. & E. 126,	264	Longhead v. Phelps, 2 W. Bl. 704.....	
15 Beav. 166.....	56	..... 197, 198,	282
Kelly and Phillips, 29 Alab. 608.....	321	Long and Hite, 6 Rand. 457.....	71
Kelsey and Brown, 2 Cush. 243.....	319	Longstreth and Curtis, 44 Penn. 297..	216, 246
Kemp and Callis, 11 Gratt. 178.....	492	Lord Bindon v. Earl of Suffolk, 1 P.	
..... 171, 176, 220,	492	Wms. 96.....	781
Kemp v. Kennedy, 5 Cranch 172.....	220	Lord Carrington v. Payne, 5 Ves. 404..	779
Kendall v. Eyre, 1 Rand. 288.....	492	Lord Coningsby's Case, 9 Mod. 95.....	492
Kennedy and Kemp, 5 Cranch 172.....	123, 124	Lord Cromwell's Case, 2 Rep. 72 b.....	211
Kettlewell and Meek, 1 Hare 464.....	218	Lott v. Wykoff, 1 Barb. 565, 2 Comst. 355	263
Key v. Key, 19 Eng. L. & E. 617, 4 De	730	Lowndes and Edwards, 1 El. & Bl. 81....	66
Gex, Man. & Gr. 73.....	587	Lovering and Chase, 7 Fost. 295.....	13
Keyton's adm'r v. Brawford's ex'ors, 5	492	Lowes v. Lush, 14 Ves. 547.....	588
Leigh 39.....	321	Lowry & Co. and Collins, 2 Wash. 75....	8
Kidd and Rooke, 5 Ves. 647.....	219	Lowry v. Murray, 2 Port. 280.....	373
Killand v. Capriess, 2 Dall. 368.....	754	Lowry v. O'Bryan, 4 Rich. Eq. 202..	320
Kime and Loddington, 3 Liv. 431, 1 Salk.	493	Lucas v. Duffield, 6 Gratt. 456.....	173
224, 1 Ld. Ray. 203... 237, 247, 249, 250,	242	Lupton and Titball, 1 Rand. 194.....	220
Kimpland v. Courtney, 2 Freem. 251....	70	Lush and Lowes, 14 Ves. 547.....	588
King v. Burchall, Amb. 379, 1 Eden 424..	780	Luttrell & als. ex'ors of Carr, and Wood,	
King v. Elliott, 5 Smeed & Marsh. 428..	472	1 Call 232.....	398
King v. Hon. Rob't Johnson, 6 East 583.	791	Lynch v. Hill, 6 Munf. 114.....	189, 319
King v. Melling, 1 Vent. 225.....	211	Lynn and Gerret, 31 Penn. 94.	205
145, 148, 212, 213, 219, 220, 221-5, 235-7,	781	Lynn and Miller, 7 Penn. 443.....	205
King v. Rossett, 2 Young & Jer. 33....	309	Lyon v. Mitchell, 1 Madd. 253, 467.	314
King's ex'ors v. Sheffey's adm'r, 8 Leigh	604	Lyon and Parry, 5 Rich. Eq. 202.....	320
614.....	313	Mackenzie v. Johnston & al., 4 Madd. 373	
Kirby and Martin, 11 Gratt. 67.....	272	..... 68, 69	
Kirby v. Potter, 4 Ves. 748.....	778, 781	Mackey v. Fuqua, 3 Call 19.....	778
Knight's Case, 5 Rep. 55 a.	780	Mackilwain and Jones, 1 Russ. 220.....	266
Knight v. Gould, 2 Myl. & Keen 295....	308	Mackreth v. Symmons, 1 Lead. Cas. Eq.	
Lacklan v. Reynolds, 9 Hare 796, 15 Eng.	176	235.....	121
L. & E. 234.....	322	Macon and Garnett, 2 Brock. 185....	587, 591
La Fayette Ins. Co. v. French & als., 18	54	Macon and Shortridge, Chase Ch. J. Mss.	412
How. 404	473	Makepeace v. Rogers, 11 Jur. N. S. 215..	69
Lamb v. Archer, Carth. 266, Comb. 208,	205	Manby v. Scott, 2 Smith Lead. Cas. 248,	
Skin. 380, 1 Salk. 255.....	772	1 Sid. 193.....	211
Lampett's Case, 10 Rep. 46 b.....	707	Mandeville v. Carrick, 3 Ridgew. 352....	205
Land v. Jeffries, 5 Rand. 211.....	492	Manning's Case, 8 Rep. 94 b.....	272
Lanoe and Parsons, 1 Ves. sr. 190.....	337	Manning and Kekewick, 12 Eng. L. & E.	
Lantz v. Trusler, 37 Penn. 488.....	308	120.....	124
Larkins v. Larkins, 3 Bos. & Pul. 16....	176	Mann v. Mann, 2 Stra. 905.....	785
Lawhorne ex parte, 18 Gratt. 85. 686, 688,	322	Manns and McClintic, 4 Munf. 328.....	220
Lawrence v. Smith, 5 Mass. 362.....	54	Mansell v. Grove, 2 Young & Col. 484... 314	
Lazier and Wilson, 11 Gratt. 477.....	473	Marine Bank of Chicago v. Chandler, 27	
Leake v. Robinson, 2 Munf. 363.....	205	Illi. 525.....	376, 381
..... 266, 299, 305,	272	Marlow v. Smith, 2 P. Wms. 198.....	527
Ledbetter and Williamson, 2 Munf. 521..	781	Marshall & als. and Catlett & ux., 10	
Lee and Burford, 2 Freem. 210.....	780	Leigh 79.....	472
Lee and Guild, 3 Bost. Law Rep. 433....	781	Marshalsea, 10 Coke 76 a....	20
Leeming v. Sherriott, 2 Hare 14.....	780	Martin's Case, 2 Leigh 745.....	540
Lees v. Mosley, 1 Young & Col. 589. 205,	205	Martin & Co. and Wickham &c., 13 Gratt.	
Leitch and Daniel, 13 Gratt. 195 731, 732,	243	427.....	747
Leitendorfer & al. v. Webb, 20 How. 170.	737	Martin and Darley, 13 Com. Bench 683, 24	
Leland and Wilkinson, 2 Pet. 627.....	690	Eng. L. & E. 275.....	314
Le Neve v. Le Neve, Amb. 436.....	516	Martin v. Kirby, 11 Gratt. 67... ..	472
Leonard v. Leonard, 4 Mass. 533.....	376	Martin and North, 6 Sim. 266.....	205
Lethienllier v. Tracey, 3 Atk. 746, Amb.	558	Martin v. Snowden, trustee, 18 Gratt. 100	61
223....	221, 232,	Martyn v. Com., 1 Mass. 347.....	492
236			

Mason <i>v.</i> Jones, 2 Barb. 144.....	273	Mortimer <i>v.</i> Hartley, 6 Welsb. Hurl. & Gor. 59, 39 Eng. L. & E. 536.....	202
Mason & wife <i>and</i> Warners, 5 Munf. 242.	193	Mortimore's Case, Anon. 150	235
Massey <i>and</i> Egerton, 3 Com. Bench N. S. 338.....	252	Mosley <i>and</i> Lees, 1 Young & Col. 589. 205, 243	
Massey <i>v.</i> Hudson, 2 Meriv. 133.....	268	Motteus <i>and</i> Durour, 1 Ves. sr. 322.....	305
Masters <i>and</i> James' ex'ors, 3 Humph. 110	326	Munford <i>v.</i> Overseers &c., 2 Rand. 313..	9
Matthews' Case, 18 Gratt. 989.....	481, 661	Municipality No. 1 of New Orleans <i>and</i> Permoli, 3 How. 589.....	779
Matthews <i>v.</i> Gardiner. 17 Beav. 257.....	202	Murdock <i>v.</i> Shackelford's heirs, 1 Brock. 130	263
Matthews <i>and</i> Nelson, 2 Hen. & Mun. 164	730	Murray <i>v.</i> Lowry, 2 Port. 280	373
Mauran <i>v.</i> Insurance Company, 6 Wall. 1	409	Nabob of Carnatic <i>v.</i> East India Co., 1 Ves. jr. 372.....	494
Maxwell <i>v.</i> Maxwell, 3 Metc. Ken. 102...	781	Nance <i>v.</i> Woodward, Wythe 4, 180.....	321
Mayo <i>v.</i> Tompkins, 6 Munf. 520.....	377	Nanfan <i>v.</i> Legh, 7 Taunt. 82, 2 Marsh. 107.....	202
Mazyck <i>v.</i> Vanderhurst, 1 Bail Eq. 48....	314	Nash <i>v.</i> Towne, 5 Wall. 689.....	356
McCall <i>v.</i> Byram Man. Co., 6 Conn. 427..	692	Neal <i>v.</i> Logan, 1 Gratt. 14.....	730
McCann <i>v.</i> The State, 9 Smeedes & Marsh. 465	495	Negus <i>v.</i> Coutler, 1 Dick. 326.....	305
McCarter's Case, 11 Leigh 633.....	540	Nelson <i>v.</i> Carrington, 4 Munf. 332.....	730
McCaul's Case, 1 Va. Cas. 272.....	497, 540	Nelson <i>v.</i> Matthews, 2 Hen. & Mun. 164.	730
McClintic <i>v.</i> Manns, 4 Munf. 328.....	220	Newbill <i>and</i> Shackelford, 2 Pat. & Heath 232.....	205
McClurer's adm'r <i>and</i> Rogers, 4 Gratt. 81	389	Newhall <i>and</i> Woodward, 1 Pick. 500.....	9
McClung <i>v.</i> Beirne, 10 Leigh 394	389	Newman <i>v.</i> Jennings, 3 Jar. 749.....	191
McClung <i>and</i> Young's adm'r, 9 Gratt. 336	731	Nichols <i>v.</i> Hooper, 1 P. Wms. 198... 155, 175	
McClurkin <i>and</i> Ridenour, 6 Blackf. 411..	373	Nichols <i>and</i> James' Case, 7 Gratt. 589...	818
McGuire <i>and</i> Ashburnham, Lead. Cas. Eq. 201.....	780, 795, 796	Nichols <i>and</i> Shumaker, 6 Gratt. 592.....	352
McMahon <i>and</i> Shaw, 4 Dr. & War. 431..	788	Nightingale <i>v.</i> Burrell, 15 Pick. 104.....	240
McMullin <i>and</i> Cox, 14 Gratt. 82.....	558	Noakes <i>and</i> Warwick, Peake's Nis. Pri. Cas. 68.	373
McNeil <i>v.</i> Baird, 6 Munf. 316.....	336, 337	Noble <i>and</i> Jackson, 2 Keen 590.....	319
McRea <i>and</i> Coles' adm'r, 6 Rand. 644...	617	Norris <i>v.</i> Johnston, 17 Gratt. 8.....	198, 271
McWilliams <i>and</i> James, 6 Munf. 301.....	156, 265, 276, 277	Northcote <i>and</i> Skrymsher, 1 Swanst. 566	788
Mechanics Bank of Alexandria <i>and</i> Minor, 1 Pet. 46.....	9, 516	Northern Indiana Railroad Company, 3 Blackf. 82.....	601
Meek <i>v.</i> Kettlewell, 1 Hare 464	123, 124	North <i>v.</i> Martin, 6 Sim. 266.....	205
Meem <i>and</i> Cralle, 8 Gratt. 496.....	731	Norton <i>and</i> Ambler, 4 Hen. & Mun. 23...	778
Meeling <i>and</i> King, 1 Vent. 225.....	145, 148, 212, 213, 219, 222, 234, 235, 236, 237, 242	Nowlin <i>v.</i> Winfree, 8 Gratt. 356. 171, 176, 220	
Mellish <i>v.</i> Mellish, 2 Barn. & Cres. 527, 3 Dow. & Ryl. 804.....	148, 190, 240, 241	Nugent <i>v.</i> Dabbs, 11 Jurist N. S. 943....	70
Merest <i>v.</i> James, 1 Bro. & Bing. 484.....	194	Oakes <i>v.</i> Oakes, 15 Eng. L. & E. 193, 9 Hare 666.....	796
Merillo <i>v.</i> Inh. of Berkshire, 11 Pick. 269	13	O'Brien <i>and</i> Beebe, 10 Wisc. 481....	516
Middleton <i>and</i> Crofts, 35 Eng. L. & E. 466.....	258	O'Bryan <i>and</i> Lowry, 4 Rich. Eq. 262....	319
Middleton <i>and</i> Hodges, Doug. 431.....	144, 148, 192, 238	Ogden <i>and</i> Folliott, 1 H. Bl. 123.	778
Miller & al. <i>and</i> Fant, 17 Gratt. 47.....	6	Old's Case, 18 Gratt. 915.....	812
Miller <i>v.</i> Lynn, 7 Penn. 443.....	205	Omohundro <i>v.</i> Crump, 18 Gratt. 703..	337, 342
Miller & Mayhew <i>and</i> Fant, 17 Gratt. 187	466	Oram <i>and</i> Courtier, 21 Beav. 91.....	319
Miller <i>v.</i> Miller, 12 Mass. 454.....	558	Organ <i>v.</i> State, 26 Miss. 78.....	497
Miller <i>and</i> People, 12 Calif. 291.....	818	Orrery <i>and</i> Sheffield, 3 Atk. 288.....	317
Milliner <i>v.</i> Robinson, 1 Moor 682.....	224, 226-7-9-30-31	Otterback <i>and</i> Adams, 15 How. 539.....	375
Mills' Case, 7 Leigh 751.....	498	Ouachita Cotton Case, 6 Wall. 521..	407, 436
Mills <i>v.</i> Bank United States, 11 Wheat. 431.....	373	Oulton <i>and</i> People <i>ex rel.</i> Stratton, 28 Calif. 41.....	691
Minor <i>v.</i> Mechanics Bank of Alexandria, 1 Pet. 46.....	9, 516	Overbee's Case, 1 Rob. 756.....	540
Ninter <i>v.</i> Wrath, 13 Sim. 52.....	300	Overseers &c. <i>and</i> Munford, 2 Rand. 313.	9
Mitchell <i>and</i> Lyon, 1 Madd. 253.....	467, 314	Owen <i>and</i> Morris, 2 Call 520.....	265
Montgomery County Bank <i>v.</i> Albany City Bank, 3 Seld. 459.....	373	Oxendine <i>and</i> The State, 2 Dev. & Bat. Law 435.....	54
Monypenny <i>v.</i> Dering, 15 Eng. L. & E. 551.....	198	Oxhelm <i>and</i> Wolff, 6 Mau. & Sel. 92.....	778
Monypenny <i>v.</i> Dering, 9 Man. Gran. & Scott 793	218, 302, 305	Pace & Collingwood, O. Bridg. 410..	211, 225
Moody <i>and</i> Pomeroy, 4 Denio 115.....	495	Paddington's lessee <i>v.</i> Flamer, 1 Har. & McKen. 336.....	203
Moore <i>v.</i> Brooks, 12 Gratt. 135.....	156, 171, 174-5-6, 202-4, 245, 391	Page & Denn, 3 Doug. 294, 1 Bos. & Pul. 261 u.....	215, 246
Morgan <i>and</i> Jones, Fearne 597.....	220	Page & Hardin, 8 B. Mon. 648.....	695, 697
Morris <i>and</i> Blodget, 14 New York 482...	10	Page <i>and</i> Hopkirk, 2 Brock. 20.....	417
Morris <i>and</i> Broadhurst, 2 Barn. & Ad. 1.....	238, 240	Page <i>v.</i> Page, 2 Stra. 820	781
Morris <i>v.</i> Owen, 2 Call 520.....	265	Paige <i>and</i> Ellis, 1 Pick. 43.....	515
		Paine <i>v.</i> Stratton, 2 Atk. 647.....	313
		Palmer <i>and</i> Cadell, 1 Cl. & Fin. 394, 7 Bligh. N. S. 202, 10 Bingh. 140, 3 Mau. & Sel. 571.	292-3-4, 301-2-3

Palmer v. Holford, 4 Russ. 403.....	285, 308	Pomfraye's Case, Litt. R. 70.....	235
Paramour v. Yardley, Plowd. 540.....	272	Pond v. Burgh, 10 Paige 155.....	273
Pardoe v. Price, 16 Mees. & Welsb. 457..	65	Pope and Calava, 3 Leigh 103... 156, 176,	220
Parker and Den, 12 Ired. 123.	205	Popham and Bamfield, 1 P. Wms. 57.....	231
Parker v. Golding, 13 Sim. 418.....	473	Porter's Case, Law Rep. 2 P. & D. 22....	782
Parker v. Tootal, 3 Hulst. & C. 1013, 11		Porter v. Bradley, 3 T. R. 143. 175.....	317
H. L. Cas. 143.....	218, 237	Porter v. Seiler, 23 Penn. 424	56
Parker & wife v. Wasley's ex'or, 9 Gratt.		Porter and Tift, 4 Seld. 516.....	791
477.....	134	Portner & Recker v. Cazenove, 18 Gratt.	
Parkman v. Bowdoin, 1 Sumn. 359.....	240	100 ..	61
Parrott v. Worsford, 1 Jac. & Walk. 574.		Potter and Kirby, 4 Ves. 748.....	791
.....	779, 780	Powell v. Board of Domestic Missions,	
Parr and Webster, 26 Beav. 236.....	319	49 Penn. 46.....	205
Parry v. Lyon, 1 Rich. Eq. 202.....	319, 320	Powell v. Brown, 1 Bail. 100.....	319
Parsons v. Lanoe, 1 Ves. sr. 190.....	780	Powell v. Chapman, 19 Eng. C. L. 499..	375
Partington and Andrews, 3 Bro. Ch. 401.	781	Powell and Thatcher, 6 Wheat. 119.....	558
Partridge's Case, 1 Rolle's Abr. 837, pl. 13	236	Powers v. People, 4 John. 292.....	492
Partridge v. Bank of England, 58 Eng.		Pratt v. Foote, 5 Seld. 463.....	381
C. L. 396, 425.....	375, 378, 381	Prescott v. Hayes, 42 New Hamp. 56 ...	680
Patteson v. Patteson, 1 Myl. & Keen 12..	780	Price and Chandless, 3 Ves. 99.....	317
Pattison & al. and Willison, 7 Taunt. 439		Price and Pardoe, 16 Mees. & Welsb. 457	65
.....	420, 421	Priddy and Hutchison, sheriff, 12 Gratt.	
Payne and Ball, 6 Rand. 73.....	160, 220	85.....	21
Payne and Lord Carrington, 5 Ves. 404..	779	Pride and Hill, 4 Call 107.....	492
Pearce and Sweeting, 97 Eng. C. L. 449,		Printup and Gardner & als., 2 Barb. S.	
480, 99 Id. 534.....	375, 381	C. 83.....	798
Peard v. Kekewick, 11 Eng. L. & E. 126,		Pritchard and Bull, 1 Russ. 213.....	283
15 Beav. 166.....	266	Prize Cases, 2 Black 635.... 403, 404, 409,	424
Pearson and Sturgiss, 4 Madd. 411.....	473	Proctor v. Bishop of Bath & Wells, 2 H.	
Peas' Case, 4 Leigh 692, 2 Gratt. 629.....	812	Bl. 358... 181, 183, 186, 197, 267, 280,	281
Pegden and Goodtitle, 2 T. R. 720... 314,	317	Pruden v. Pruden, 14 Ohio 254.....	273
Pell v. Ball, 1 Spear's Eq. 48.....	792	Pryor v. Duncan, 6 Gratt. 27.....	204, 246
Pennel & al. and Cole, 2 Rand. 174.....	9	Pugh and Hemmings, 9 Jur. N. S. 1124..	68
Penobscot Railroad Co. v. Weeks, 52		Purefoy v. Rogers, 2 Saund. 382 n l.....	
Maine 456.....	610	.....	273, 310, 311, 312
People v. Backus, 5 Calif. 275.....	497	Purnell and Spark, Hob. 75.....	272
" and Chorler, 2 Comst. 193.....	660	Pyrke v. Waddingham, 17 Eng. L. & E.	
" and Eastwood, 3 Parker 25	497	534.....	729
" v. Livingston, 6 Wend. 526.....	516	Queen v. Corporation of Durham, 10	
" v. Miller, 12 Calif. 291.....	818	Mod. 146.....	691, 692
" v. Perkins, 1 Wend. 91.....	665	Queen v. Serra & als., 61 Eng. C. L. 53..	492
" and Powers, 4 John, 292.....	492	Queen v. Winsor, 1 Law Rep. Q. B. 309..	538
" ex rel. Stratton v. Oulton, 28		Railroad Company v. Rock, 4 Wall. 177.	514
Calif. 41.....	691	Ramsey v. Shelmadine, Law Rep. 1 Eq.	
People v. Tieman, 30 Barb. 193.....	680	122.....	788
" v. Warner, 2 Denio 272.....	696	Ratcliffe v. Allison, 3 Rand. 537.....	781
Perkins and People, 1 Wend. 91.....	665	Rathbone v. Budling, 1 Amer. Lead. Cas.	
Permoli v. Municipality No. 1 of New		606.....	356
Orleans, 3 How. 589.....	679	Rathbone v. Dyckman, 3 Paige 9.....	318
Perratt and Winter & als., 9 Cl. & Fin. 606	312	Rawding and Doe, 2 Barn. & Ald. 241... 473	
Perry's Case, 3 Gratt. 632.....	505, 527	Rawlins and Goldfrap, 5 Ves. 440.....	317
Perry and Sibley, 7 Ves. 522.....	779, 790	Ray and Dubois, 35 New York 165.....	273
Phelps and Diven, 34 Barb. 224	746, 747	Reason and Doe, Wils. 246	250
Phelps and Longhead, 2 W. Bl. 704.....		Redd and Wootten, 12 Gratt. 196	781
.....	197, 198, 282	Redford v. Redford, 1 Keen 486.....	314, 318
Phillips v. Blake, 1 Metc. 156.	373	Reed and Clarkson, 15 Gratt. 288 ..	731
Phillips and Clark, 21 Eng. L. & E. 122..	788	Ress and Bevans, 5 Mees. & Welsb. 306.	345
Phillips v. Kelley, 29 Alab. 628.....	56	Reeves v. Dickey, 10 Gratt. 138.....	731
Phillips v. Phillips, 9 Hare 471, 12 Eng.		Regina v. Inhab. of Denton, 14 Eng. L.	
L. & E. 259.....	69, 70	& E. 124.....	506
Phillips v. Vaughan, 1 Vern. 336	353	Reid v. Webster, 11 How. 437.....	610
Phipps v. Ackers, 9 Cl. & Fin. 589.....	301	Rex v. Fagent, 7 Car. & Payne 238.....	660
Picket v. Allen, 10 Conn. 140.....	692	Rex v. Hayward, 6 Car. & Payne 157....	667
Pierson v. Vickers, 5 East 518, 2 Smith		Rex v. Streek, 2 Car. & Payne 413.....	665
160.....	149, 219	Reynolds v. Lachlan, 9 Hare 796, 15 Eng.	
Pinbury v. Elkin, 1 P. Wms. 564.....	155, 172	L. & E. 234.....	309
Pincke v. Curteis, 4 Bro. Ch. 328.....	587	Rice and United States, 4 Wheat. 246....	408
Pingree v. Snell, 42 Maine 53.....	515	Richards v. Davies, 13 Com. Bench N. S.	
Pleasants v. Pleasants, 2 Call 338.....	318	69, 861.....	205
Plunket v. Holmes, 1 Keb. 29, 119... 236,	237	Richardson v. Yardley, Moor 397.....	
Pollard v. Baylor, 6 Munf. 437.....	277	.....	143, 207, 209, 213, 234
Pomeroy and Moody, 4 Denio 115.....	495	Ridenour v. McCluskin, 6 Blackf. 411...	373
		Rider v. Wager, 2 P. Wms. 328.....	780

Ridge <i>v.</i> Hudson, Bunb. 12.....	322	Sewell and Cole, 2 Conn. & L. 344, 4 Dr. & War. 1.....	311, 312
Ring <i>v.</i> Hardwick, 2 Beav. 352.....	319	Shackleford's heirs and Murdock. 1 Brock. 130.....	263
Robertson and Jones, 2 Munf. 187.	778	Shackleford <i>v.</i> Newbill, 2 Pat. & Heath 232.....	205
Roberts <i>v.</i> Roberts, Law Jour. 1862, No. 4, p. 46.....	781	Shanley <i>v.</i> Baker, 4 Ves. 732.....	305
Roberts and Sargeant, 1 Pick. 337.....	539	Shaw <i>v.</i> McMahon, 4 Dr. & War. 431....	788
.....494, 512, 539		Shearman's adm'r <i>v.</i> Hicks, 14 Gratt. 96..	253
Robinson <i>v.</i> Addison, 2 Beav. 515.....	790	Shedden <i>v.</i> Curtis, 6 Call 241.....	514
Robinson & als. <i>v.</i> Gardiner & als., 18 Gratt. 509.....	745, 746	Sheffey's adm'r and King's ex'ors, 8 Leigh 614.....	780
Robinson <i>v.</i> Hardcastle, 2 T. R. 251.....	280	Sheffield <i>v.</i> Orrery, 3 Atk. 288.....	317
Robinson and Leake, 2 Meriv. 393.....	308	Sheits <i>v.</i> Grubbs, 4 Metc. Ken. 339.....	274
.....266, 299, 305, 308		Sheldon and Blackley, 7 John. 32.....	823
Robinson and Miller, Moor 682, 2 Brownl. 271.....	224, 226, 227, 228, 229, 230, 231, 241	Sheldon <i>v.</i> Cox, Amb. 624.....	376
Robinson <i>v.</i> Robinson, 1 Burr. 38, 3 Atk. 738.....	140, 148, 150, 220, 222, 224, 256	Shelley's Case, 1 Rep. 92 b.....	211
Robinson <i>v.</i> Ward, 4 Jur. N. S. Ch. 726..	319	Shelton's ex'ors <i>v.</i> Shelton, 1 Wash. 53..	778
Roby and Commonwealth, 12 Pick. 406..	496	Shelton and Denn, Cowp. 410.....	316, 317
Rock and Railroad Company, 4 Wall. 177.	514	Shepperson <i>v.</i> Shepperson, 2 Gratt. 501..	253
Rodgers <i>v.</i> McCluer's adm'r & als., 4 Gratt. 81....	389	Sherriott <i>v.</i> Leeming, 2 Hare 14.....	473
Roe <i>v.</i> Grew, 2 Wils. 322.....	219	Shippen and State, Drayton 169.....	496
Roe <i>v.</i> Jeffery, 7 T. R. 595.....	317	Shortridge <i>v.</i> Macon, Chase Ch. J. mss..	412
Roe and Jones, 3 T. R. 96.....	221	Showler & Boyce and Hawkesworth, 12 Mees. & Welsb. 45.....	11
Rogers and Housum, 4 Wright 190.	754	Shrymser <i>v.</i> Northcote, 1 Swanst. 566..	788
Rogers and Makepeace, 11 Jur. N. S. 215.	69	Shugart's adm'r <i>v.</i> Thompson's adm'r, 10 Leigh 434.....	465
Rogers and Purefoy, 2 Saund. 382.....	317	Shuler and Copenhaver, 2 Paige 123.....	272
.....237, 310, 316, 317		Shumaker <i>v.</i> Nichols, 6 Gratt. 592.....	352
Rohr <i>v.</i> Davis & als., 9 Leigh 30.....	9	Sibley <i>v.</i> Perry, 7 Ves. 522.....	779, 790
Romney and Foster, 11 East 594....	215, 246	Simmons <i>v.</i> Simmons, 8 Sim. 22.....	219
Rooke <i>v.</i> Kidd, 5 Ves. 647.....	587	Sinclair <i>v.</i> Hone, 6 Ves. 607.	780
Roper <i>v.</i> Roper, 3 Com. Pl. (L. R.) 32... 240		Sisson <i>v.</i> Seabury, 1 Sumn. 235.....	205
Rossett <i>v.</i> Fisher & others, 11 Gratt. 492.	617	Skey <i>v.</i> Barnes & als., 3 Meriv. 335.....	473
Rossett and King, 2 Young & Jer. 33....	70	Slade's Case, 4 Rep. 92 a.....	211
Rothwell and Greenwood, 5 Man. & Gran. 628, 6 Scott N. R. 670, 6 Beav. 492....	205	Slade and Seaton, 3 Lead. Cas. Eq. 377	589, 591
Rous and Cambridge, 8 Ves. 12.....	296, 298	Slater <i>v.</i> Dangerfield, 15 Mees. & Welsb. 263.....	205
Roy <i>v.</i> Garnett, 2 Wash. 9... ..	158, 220	Slaughter's adm'r <i>v.</i> Tutt, 12 Leigh 147	364
Rucker and Dearing's adm'r, 18 Gratt. 426... ..	337, 338, 341, 351	Slave King and State, 12 Lou. Ann. 593	506
Rucker and Higginbotham, 2 Call 313... 176		Sloper <i>v.</i> Fish, 2 Ves. & Bea. 145.....	588
Ruffners <i>v.</i> Lewis' ex'ors, 7 Leigh 720... 39		Smith and Anthony, 1 Busb. Eq. 188. 780,	798
Russell <i>v.</i> Hankey, 6 T. R. 12.....	373	Smith and Biss, 40 Eng. L. & E. 302....	318
Russell and Sears, 8 Gray 86.....	267	Smith <i>v.</i> Chapman, 1 Hen. & Mun. 240	156-7-8, 193, 259, 263, 310
Salter and Barlow, 17 Ves. 479.....	317	Smith & Doe d. Candler, 7 T. R. 531....	219
.....160, 219, 268, 317		Smith and Dungannon, 12 Cl. & Fin. 546 5 Irish Eq. 84.....	325
Sampson and Collard, 21 Eng. L. & E. 352.....	729	Smith <i>v.</i> Essex County Bank, 22 Barb. 667.....	373
Sanders in re, 4 Paige 293.....	205	Smith and Fish &c., 12 Indi. 563.....	539
Sandford and Willett, 1 Ves. sr. 178....	779	Smith and Harrison, 2 Sid. 41.....	202
Sargeant <i>v.</i> Roberts, 1 Pick. 337..494, 512, 539		Smith and Lawrence, 5 Mass. 362.....	492
Saunders and Henderson, Sands Qu Law Jour. April 1860.....	193, 199, 263	Smith and Marlow, 2 P. Wms. 198.....	587
Savin and State, 4 Harring. 56 n.....	320	Smith <i>v.</i> Smith, 5 Dana 179.....	558
Sayer and Hughes, 1 P. Wms. 534.	155	Smith's ex'or <i>v.</i> Spiller, 10 Gratt. 318..	778
Scagg's Case, 8 Smeedes & Marsh. 722..	659	Smith and Turner, 18 Gratt. 830.....	61
Scattergood <i>v.</i> Edge, 11 Mod. 298.....	250	Smith and Warrain, 3 Bulst. 146.....	211
Scott and Bass, 2 Leigh 356.....	733	Smithwick <i>v.</i> Ward, 7 Jones 64.....	56
Scott and Manby, 2 Smith's Lead. Cas. 248, 1 Sid. 109.....	211	Smock <i>v.</i> Dade, 5 Rand. 639.....	375
Scott and Stapylton, 16 Ves. 272	587, 588	Snell and Pingree, 42 Maine 53.....	515
Seabury and Sisson, 1 Sumn. 235.....	205	Snowden trustee, and Martin, 18 Gratt. 100.....	61
Seale <i>v.</i> Barter, 2 Bos. & Pul. 485.....	239	Southby <i>v.</i> Stonehouse. 2 Ves. sr. 616....	317
.....143, 144, 146, 209, 239		Spark <i>v.</i> Purnell, Hob. 75.....	272
Seaton <i>v.</i> Slade, 3 Lead. Cas. Eq. 377. 589, 591		Speakman <i>v.</i> Speakman, 8 Hare 180....	308
Seaward <i>v.</i> Willock, 5 East 199.....	256	Spencer <i>v.</i> Champion, 9 Conn. 536.....	692
See <i>v.</i> Craigen, 8 Leigh 449.....	231	Sperry's Case, 9 Leigh 623.....	659, 662
.....157, 158, 167, 168, 173, 206, 209, 220,		Springfield and Williams, 1 Vern. 476..	393
Seiler and Porter, 23 Penn. 424.....	56	Staats and Jackson, 11 John. 337.....	319
Seip <i>v.</i> Storch, 52 Penn. 210.....	13		
Self <i>v.</i> Tune, 6 Munf. 470.....	172		
Serra & als. and Queen, 61 Eng. C. L. 53	492		

Stafford <i>v.</i> Buckley, 2 Ves. sr. 180.....	317	Test <i>and</i> Deane, 9 Ves. 152.....	791
Stafford <i>and</i> Fulton Bank, 2 Wend. 483..	13	Texas <i>v.</i> White & als., 7 Wall. 701.....	778
Staley <i>v.</i> Barhite, 2 Caines 221.....	496	Thatcher <i>v.</i> Powell, 6 Wheat. 119.....	558
Stapylton <i>v.</i> Scott, 16 Ves. 272.....	587, 588	Thelusson <i>and</i> Hobson, Law Rep. Q.B., 645,	376
State <i>and</i> Andrews, 2 Sneed 550.....	665	Thelusson <i>v.</i> Woodford, 4 Ves. 227.....	
State <i>and</i> Barrett, 1 Wisc. 181.....	535	.....	289, 292, 293
State <i>v.</i> Center, 35 Verm. 378.....	660	Thomas <i>and</i> Archibald, 3 Cow. 290.....	274
State <i>and</i> Cochran, 7 Humph. 544.....	495	Thomas <i>and</i> Butt, 32 Eng. L. & E. 575,	
State <i>and</i> Coffin, 7 Port. Indi. 157.....	681	36 Id. 571, 2 Hurl. & Gord. 235, 1 Hurl.	
State <i>v.</i> Dunn, 2 Ark. 229.....	660	& Nor. 109.....	230
State <i>and</i> Goodwyn, 4 Smeedes & Marsh.		Thomas' adm'r <i>and</i> Cox & al., 9 Gratt.	
520.....	647, 648	323.....	20, 21
State <i>v.</i> Hardy, 2 Mass. 303.....	492	Thomason <i>v.</i> Andersons, 4 Leigh 118....	
State <i>and</i> Hare, 4 How. Miss. 187.....	496	.....	156, 162, 167, 190, 220, 240, 265
State <i>and</i> Hines, 8 Humph. 597.....	495	Thomason's Case, 8 Gratt. 637..	512, 540, 541
State <i>v.</i> Hitchcock, 1 Kans. 178.....	691	Thompson <i>and</i> Cudworth, 3 Dessau. 256.	314
State <i>v.</i> Hoberg, 3 Minn. 262.....	497	Thompson <i>and</i> Griffith, 1 Leigh 321.....	
State <i>v.</i> Humphrey, Minor 64.....	492	.....	156, 162, 167, 180, 182, 274
State <i>and</i> Jones, 2 Blackf. 475.....	495	Thompson's adm'r <i>and</i> Shugart's adm'r,	
State <i>and</i> McCann, 9 Smeedes & Marsh.		10 Leigh 434	465
465.....	495	Thelkelds <i>v.</i> Campbell, 2 Gratt. 198.....	731
State <i>and</i> Organ, 26 Miss. 78.....	497	Tieman <i>and</i> People, 30 Barb. 193.....	680
State <i>v.</i> Oxendine, 2 Dev. & Bat. Law		Tift <i>v.</i> Porter, 4 Seld. 516	791
435.....	54	Tilton <i>and</i> Commonwealth, 8 Metc. 232..	53
State <i>v.</i> Savin, 4 Harring. 56 n.....	320	Timberlake <i>v.</i> Graves, 6 Munf. 174.....	
State <i>v.</i> Shippen, Drayton 169.....	496	.....	196, 172, 176
State <i>v.</i> Slave King, 12 Lou. Ann. 593...	506	Tinsley <i>v.</i> Jones, 13 Gratt. 284.....	
State <i>v.</i> Turner, Wright 21	492	.....	158, 172, 174, 220, 231, 319
State <i>v.</i> Wade, 12 Georg. 25.....	665	Titball <i>v.</i> Lupton, 1 Rand. 194.....	220
State <i>and</i> Wesley, 11 Humph. 502.....	496	Tofield <i>and</i> Doe, 11 East 246.....	239
Stearns & als. <i>and</i> Taylor, 18 Gratt. 244..	624	Tomlinson <i>and</i> Dilliard, 1 Munf. 208....	319
Steptoe's adm'r &c. <i>and</i> Harvey's adm'r,		Tompkins & Co. <i>v.</i> Wiley, 6 Rand. 242...	8
17 Gratt. 352.....	376	Tompkins <i>and</i> Mayo, 6 Munf. 520.....	377
Stevens <i>and</i> Davies, Doug. 320.....		Tootal <i>and</i> Parker, 3 Hulst. & C. 1013,	
.....	147, 177, 192, 239	19, 20, 11 H. L. Cas. 143.....	218, 237
Stevens <i>and</i> Gadsden, 20 Beav. 463.....	319	Tothill <i>and</i> Chatham, 7 Bro. P. C. 453	
Stevens <i>and</i> Gibson, 8 How. 384.....	552	.....	181, 280, 282, 283
Stevens <i>v.</i> Stevens, 3 Dana 371....	557, 566	Toulmin <i>v.</i> Steere, 3 Meriv. 209.....	376
Stewart's ex'or <i>v.</i> Wyatt, 8 B. Monr. 475.	326	Towne <i>and</i> Nash, 5 Wall. 689.....	356
Stillwell <i>and</i> Doughty, 1 Bradf. 300....	797	Townes <i>and</i> Horton & als., 6 Leigh 47...	511
Stone <i>and</i> Gammon, 1 Ves. sr. 339.....	352	Tracey <i>v.</i> Lethieullier, 3 Atk. 746, Amb.	
Stonehouse <i>and</i> Southby, 2 Ves. sr. 616..	317	223.....	221, 232
Storch <i>and</i> Seip, 52 Penn. 210.....	13	Trapnall <i>and</i> Woodruff, 10 How. 190	
Stout <i>v.</i> Hart, 2 Halst. Law 414.....	780, 799	.....	752, 753
Stracey <i>and</i> Harvey, 22 Law Jour. N. S.		Triplett <i>and</i> Bank of Washington, 1 Pet.	
Ch. 23, 1 Drew. 73.....	319	25.....	373, 375
Stratton <i>and</i> Paine, 2 Atk. 647.....	313	Trusler <i>and</i> Lantz, 33 Penn. 482.....	205
Streek <i>and</i> Rex, 2 Car. & Payne 413....	665	Trustees of Vernon Society <i>v.</i> Hills, 6	
Stuart's Case, 2 Va. Cas. 320.....	494	Cow. 23.....	692
Stuart <i>v.</i> Hamilton, 2 Hen. & Mun. 48...	23	Tucker <i>v.</i> Baker, 11 Ir. Eq. 104, 3 H. L.	
Sturgess <i>v.</i> Pearson, 4 Madd. 411.....	473	Cas. 106, 2 Eng. L. & E. 1.....	205
Sutton Hospital Case, 10 Rep. 22 a.....	211	Tulk <i>v.</i> Howlditch, 1 Ves. & Bea. 248....	779
Sweating <i>v.</i> Pearce, 97 Eug. C. L. 449,		Tune <i>and</i> Self, 6 Munf. 470.....	172
480, 99 Id. 534.....	375, 381	Turner <i>and</i> Broadus, 5 Rand. 308....	160, 220
Sydnor <i>v.</i> Sydnor, 2 Munf. 263.....	220	Turner <i>and</i> Den, 9 Wheat. 541.....	492
Sykes <i>v.</i> Giles, 5 Mees. & Welsb. 645....	376	Turner <i>and</i> Frampton, 2 Colly. 336.....	274
Sykes <i>v.</i> Sykes, 3 Law Rep. 1867-8, 299,		Turner <i>and</i> London, 11 Leigh 403.....	
3 Ch. Ass. 301.....	781, 788	.....	134, 181, 322
Symmons <i>and</i> Mackreth, 1 Lead. Cas.		Turner <i>v.</i> Smith, 18 Gratt. 830.....	61
Eq. 235.....	121	Turner <i>and</i> State, Wright 21.....	492
Taliaferro & al. <i>and</i> Jeter, 4 Munf. 80...	8	Tutt <i>and</i> Slaughter's adm'r, 12 Leigh	
Tally <i>and</i> Tate, 3 Call 354.....	220, 230, 318	147.....	364
Target <i>v.</i> Gaunt, 1 P. Wms. 432....	155, 175	Twyford <i>and</i> East, 31 Eng. L. & E. 72, 4	
Tarlton <i>v.</i> Fisher, Doug. 671.....	21	H. L. Cas. 517.....	241
Tate <i>v.</i> Tally, 3 Call 354.....	220, 230, 318	Tyler <i>and</i> Carter, 1 Call 165.....	
Taylor <i>v.</i> Beck, 3 Rand. 316.....	9, 13	.....	160, 174, 203, 220, 263
Taylor <i>v.</i> Clarke, 2 Eden 203.....	314	Tyler <i>and</i> Harvey, 2 Wall. 328.....	
Taylor <i>v.</i> Graves, Jefferson 40.....	320	.....	20, 22, 560, 563, 564, 567, 611
Taylor <i>and</i> Humphrey, Amb. 136...	772, 788	Tyree <i>v.</i> Wilson, 9 Gratt. 59.....	24
Taylor <i>and</i> Lilly, Owen 148.....	234	Union Bank of New York <i>and</i> Commer-	
Taylor <i>v.</i> Stearns & als., 18 Gratt. 244..	624	cial Bank of Pa., 3 Kern. 203.....	381
Teays & als. <i>and</i> Davis, 3 Gratt. 283....	731	Unis & als. <i>v.</i> Charlton's adm'r, 12 Gratt.	
Tebbs <i>v.</i> Duval, 17 Gratt. 349.....	239, 265	484.....	7

United States Bank <i>v.</i> Bank of Georgia, 12 Wheat. 333.....	373	White & als. <i>and</i> Texas, 7 Wall. 701.....	778
United States <i>v.</i> Fisher, 2 Cranch 358....	516	Whiting <i>v.</i> Wilkins, 1 Bulst. 219.....	234
United States Mining Co. <i>and</i> Crump, 7 Gratt. 352.....	376	Whitmell <i>v.</i> Johnson, 17 Mass. 452.....	373
United States <i>v.</i> Rice, 4 Wheat. 246.....	408	Wickham, &c. <i>v.</i> Martin & Co., 13 Gratt. 427.....	747
Vaiden's Case, 12 Gratt. 717.....	355, 362	Wild's Case, 6 Coke 16.....142, 147, 194, 206-7, 209, 211-2-3, 215-6, 224, 231, 242,	244
Vandegrift <i>and</i> Hall's lessee, 3 Binn. 374.	203	Wiley <i>and</i> Tompkins & Co., 6 Rand. 242..	8
Vanderhurst <i>and</i> Mazyck, 1 Bail. Eq. 48..	314	Wilkinson, &c. <i>and</i> Early, 9 Gratt. 68. 356,	778
Van Hoesen <i>and</i> Hoes, 1 Barb. Ch. 379, 3 Denio 610, 1 Comst. 120.....	321	Wilkinson <i>v.</i> Holloway, 7 Leigh 377....	375
Vannerson <i>v.</i> Culbertson, 10 Smeedes & Marsh. 150.....	321	Wilkinson <i>v.</i> Leland, 2 Pet. 627.....	516
Van Noorden <i>and</i> Capron, 2 Cranch 126..	492	Wilkins <i>and</i> Whiting, 1 Bulst. 219.....	234
Vass' Case, 3 Leigh 786.....	663, 668	Willet <i>v.</i> Sandford, 1 Ves. sr. 178.....	779
Vather <i>and</i> Zane, 6 Gratt. 246.....	337	William <i>v.</i> Ragaley, 5 Wall. 377.....	429
Vaughan <i>and</i> Doe, 3 Barn. & Ald. 464, 1 Dow. & Ryl. 52.....	215, 246	Williams <i>v.</i> Beasley, 1 Winst. 102.....	205
Vaughan <i>and</i> Phillips, 1 Vern. 336.....	353	Williams <i>v.</i> Bland, 3 Myl. & Keen 411....	283
Venable <i>v.</i> Curb, 2 Head 582.....	680	Williams <i>and</i> Boys, 2 Rus. & Myl. 689..	792
Venice, 2 Wall. 258.....	428	Williams <i>v.</i> Fry, T. Ray. 237, 1 Mod. 86..	277
Verdon <i>and</i> Greenwood, 24 Law Jour. N. S. 65, 33 Id. 65.....	269	Williamson <i>v.</i> Ledbetter, 2 Munf. 521....	176
Vernon <i>and</i> Boothby, 9 Mod. 147....	237, 253	Williams <i>v.</i> Springfield, 1 Vern. 476....	353
Vickers <i>and</i> Pierson, 5 East 518....	149, 219	Williams <i>v.</i> Taylor, 3 Call 155.....	318
Viner <i>v.</i> Francis, 2 Cox 189.....	781	Willis <i>and</i> Flemings, 2 Call 5.....	778
Voyles <i>v.</i> Hughes, 23 Eng. L. & E. 271..	124	Willis <i>v.</i> Jenkins, 30 Georg. 167.....	274
Vreeland's ex'or <i>and</i> Akerman's adm'rs, 1 McCart, 23.....	301	Willison <i>and</i> Pattison & al., 7 Taunt. 439	420, 421
Waddington <i>and</i> Pyrke, 17 Eng. L. & E. 534.....	729	Willock <i>v.</i> Seaward, 5 East 198.....	256
Wade's Case, 12 Georg. 25.....	659, 665	Wilson <i>v.</i> Lazier, 11 Gratt. 477.....	337
Waddington <i>and</i> Griswold, 16 John. 438	419, 422	Wilson <i>and</i> Tyree, 9 Gratt. 59.....	24
Wager <i>and</i> Rider, 2 P. Wms. 328.....	780	Wilt <i>v.</i> Franklin, 1 Binn. 502.....	552
Waldron <i>v.</i> Gianini, 6 Hill 601.....	319	Winfree <i>and</i> Nowlin, 8 Gratt. 356.....	171, 172, 176, 220
Wallace <i>and</i> Brown, 4 Gill & John 479..	737	Winser <i>v.</i> The Queen, 1 Law Rep. Q. B. 309.....	538
Walter <i>v.</i> Drew, Comy. 372.....	175, 220	Winter d. Doe <i>v.</i> Perratt, 9 Cl. & Fin 606.	312
Walton <i>v.</i> Walton, 7 John. 259..	791, 792, 797	Wilt's Case, 5 Coldw. 18.....	659, 665
Ward <i>and</i> Albree, 8 Mass. 86.....	492	Wolff <i>v.</i> Cohen, 8 Rich. 144.....	56
Ward <i>and</i> Andree, 1 Russ. 260.....	265, 325	Wolff <i>v.</i> Oxholm, 6 Mau. & Sel. 92.....	778
Ward <i>and</i> Att'y Gen'l, 3 Ves. 327.....	779	Wollen <i>v.</i> Andrews, 2 Bing. 126..	145, 175, 220
Ward <i>and</i> Clark & als., 12 Gratt. 440....	549, 550-1-2	Wood <i>v.</i> Baron, 1 East 258.....	152
Ward <i>and</i> Green, 1 Russ. 260.....	265, 325	Woodcock <i>and</i> Carnagy, 2 Munf. 234....	239
Ward <i>and</i> Jones, 5 Ired. Eq. 400.....	205	Woodford <i>and</i> Thelusson, 4 Ves. 227....	289, 292, 293
Ward <i>and</i> Smithwick, 7 Jones 64.....	56	Woodhull <i>and</i> Goodtitle, Willes 592..	253, 256
Warner <i>and</i> People, 2 Denio 272.....	696	Wood <i>v.</i> Luttrell & als., ex'ors of Carr, 1 Call 232.....	398
Warners <i>and</i> Mason & wife, 5 Munf. 242.	193	Woodruff <i>v.</i> Trapnall, 10 How. 190..	752, 753
Warrain <i>v.</i> Smith, 3 Bulst. 146.....	211	Woodward, Baldwin & Co. <i>v.</i> Foster, 18 Gratt. 200.....	337
Warwick <i>v.</i> Noakes, Peake's Nisi Pri. Cas. 68.....	373	Woodward <i>and</i> Nance, Wythe 4, 180.....	321
Wash's Case, 16 Gratt. 530.....	651	Woodward <i>v.</i> Newhall, 1 Pick. 500.....	9
Washington's adm'r <i>and</i> Brent, 18 Gratt. 529.....	472, 473	Woolf <i>and</i> Hubbell, 15 Indi. 204.....	10
Wasley's ex'or <i>and</i> Parker, 9 Gratt. 477..	134	Wooten <i>v.</i> Redd, 12 Gratt. 196.....	781
Webb <i>and</i> Leitensdorfer & al., 176.....	690	Wormley's Case, 8 Gratt. 714....	513, 540, 560
Webster <i>v.</i> Cooper, 14 How. 488.....	205	Worsham <i>v.</i> Hardaway's adm'r, 5 Gratt. 60.....	731
Webster <i>v.</i> Parr, 26 Beav. 236.....	319	Wright <i>v.</i> Baury, 7 Cush. 105.....	205
Webster <i>v.</i> Reid, 11 How. 437.....	610	Wright <i>v.</i> Cohoon, 12 Leigh 376..	230, 231, 240
Weeks <i>and</i> Penobscot Railroad Co., 52 Main 456.....	610	Wright <i>v.</i> Holford, Cowp. 34.....	220
Welcden <i>v.</i> Elkington, Plow. 522.....	272	Wright <i>and</i> Jesson, 2 Bligh 1, 5 Mau. & Sel. 95.....	135, 143, 154, 171-2, 201-2-3-4, 209, 239, 240, 242, 244-5-6,
Wesley <i>v.</i> State, 11 Humph. 502.....	496	Wyatt <i>and</i> Church, Moor 637.....	202
Westcott <i>and</i> Beard, 5 Taunt. 500....	286, 293-4-5-6, 301-2-3, 307, 308	Wyatt <i>and</i> Stewart's heirs, 8 B. Monr.	475, 326
West <i>and</i> Hamilton, 10 Ir. Eq. 75.....	205	Wykoff <i>and</i> Lott, 1 Barb. 565, 2 Comst. 355.....	263
Wheatland <i>v.</i> Dodge, 10 Metc. 502.....	240	Wyld <i>v.</i> Lewis, 1 Atk. 432.....	230
White <i>v.</i> Atkinson, 2 Wash. 94.....	342, 345, 352, 353	Yardley <i>and</i> Richardson, Moor 397.....	103, 207, 209, 213, 234
White <i>v.</i> Cannon, 6 Wall. 443.....	411	Yardly <i>and</i> Paramour, Plow. 540.....	272
White <i>v.</i> Collins, Comy. 289.....	256, 258, 310	Young's Case, 15 Gratt. 664.....	812
White <i>v.</i> Ginger, Willes 348.....	205	Young's adm'r <i>v.</i> McClung, 9 Leigh	336, 731
		Zane <i>and</i> Vathir, 6 Gratt. 246.....	337

CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Step toe v. Read, for, &c.

October Term, 1868, Richmond.

1. **Pleading—Joint Plea—Non-Assumpsit.**—Two defendants in assumpsit file a joint plea of non-assumpsit, on which issue is taken. Afterwards, one of them asks leave to withdraw the plea as to himself, and to file a separate plea, that the defendants did not assume, &c. This being refused, he asks leave to file such plea in addition, which is also refused: as the issue on both pleas would be the same, both rulings were correct.
2. **Commission to Take Deposition—Failure of Clerk to Sign.***—A commission to take a deposition being in all other respects correct, the omission, from inadvertence, of the clerk issuing it, to sign his name to it at the bottom, will not vitiate it.
3. **Certificate of Commissioner — Parties Not Named.**—Though the commissioner taking a deposition does not give the names of the parties in his certificate, or state it was taken in pursuance of a commission, yet as the names are given in the caption to the certificate, and the commission is returned with the deposition and attached to it, the certificate is sufficient.
4. **Same—Failure to State Notice—Objection in Appellate Court.**—The certificate of a commissioner who takes a deposition does not state that it was taken pursuant to notice; but though the deposition is excepted to on the ground that there was no commission, *and that the certificate does not state the parties to the suit in which it is taken, no objection is taken to it in the court below for want of notice. Although there is no notice, or evidence of notice, in the record, the objection for want of notice cannot be taken in the appellate court.
5. **Joint Action against Several Defendants—One Final Judgment.†**—At common law in a joint action against several parties, there can be but one final judgment, and it must be for or against all the defendants: and the rule is the same, whether the contract sued on is joint or joint and several, or whether the action is founded on several and distinct contracts, as the makers and endorsers of a negotiable note.
6. **Same—Same—Exceptions.**—This general rule does not apply where the plea of one of the defendants

*As to "Depositions," see monographic note appended to Field v. Brown, 24 Gratt. 74.

†**Joint Action against Several Defendants—One Final Judgment.**—See principal case cited and approved as to the proposition laid down in this headnote in Gibson v. Beveridge, 90 Va. 697, 19 S. E. Rep. 785. See also, Moffett v. Bickle, 21 Gratt. 280, and Muse v. Farmers' Bank, 27 Gratt. 252; Taylor v. Beck, 8 Rand. 316.

admits the contract and sets up a discharge by matter subsequent, as bankruptcy; or where he sets up a personal disability at the time of the contract sued on, as infancy. And these exceptions apply equally, whether the contract is joint, or joint and several.

7. **Statute—To What It Applies.‡**—The act Code, ed. 1860, ch. 177, § 19, applies only to cases in which some of the defendants are discharged upon the grounds of defence merely personal; and where the ground of defence goes to the foundation of the entire contract, the case remains as at common law.§

‡**Statute—To What It Applies.**—In both Choen v. Guthrie, 15 W. Va. 107, and Bush v. Campbell, 26 Gratt. 427, there is a discussion of the decision of the principal case as to the construction of this statute. In each of these cases, the court said that if the word "barred" in the act is to be confined to personal defences by one of the defendants then this act is a mere affirmation of the common law and the statute is of no avail. They suggest that "*non assumpsit*" and "*non est factum*" are both pleas in bar, and that, if the defendant makes good his defence under either of these, the plaintiff is "barred of his action" as to him. Therefore, under the statute, it would seem that the plaintiff may have judgment against one defendant, though the other defendant be discharged on a defence that "goes to the foundation of the contract," and not on a mere personal defence as at common law, though Bush v. Campbell, *supra*, seem to class "*non est factum*" as a personal defence. See note to Bush v. Campbell, 26 Gratt. 408, where the authorities are collected; also, see Muse v. Farmers' Bank of Va., 27 Gratt. 252, for further construction of this statute. See also, 4 Min. Inst. (3d Ed.) 968.

But in Hoffman v. Bircher, 22 W. Va. 552, the court citing the principal case, said: "It seems to us that by the enactment of § 19, ch. 181, of the Code of W. Va. [precisely same as ch. 177, § 19 of Va. Code of 1860], the Legislature only intended to relax the rigid rule of the common law, which we have been considering so far, as to permit a plaintiff who brings his joint action against all the joint contractors, to recover against one or more of them, although the action may be barred as to others, where the plaintiff's declaration shows that he could have recovered against any of them *separately*, if he had *sued them only*, and where he proves at the trial the contract as alleged in his declaration."

§Code, ch. 177, § 19: "In an action founded on contracts, against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any one or others of the defendants, against whom he would have been entitled to recover if he had sued them only."

8. **Action on Joint or Joint and Several Contract—Competent Witnesses.***—In an action upon a joint or joint and several contract against two defendants, one of them is not a competent witness for the other to prove that the witness was the only party to the contract, and is alone bound by it.

9. **Witness—Competent for One Purpose Competent for All.†**—A witness is not competent to give evidence for one purpose only. If he is competent at all, he may be examined upon any matter upon the record.

10. **Contract Action against Two Defendants—Judgment Confessed by One.‡**—In an action on a contract against two defendants, though one of them confesses a judgment, if the other proves a defence that goes to the foundation of the entire contract sued on, there must be final judgment in favor of both defendants.

3 This was an action of assumpsit in the Circuit court of Bedford county, brought in January 1857, by Wm. *J Read, suing for the benefit of H. D. Flood, against Jesse L. Quarles and John R. Steptoe, as partners doing business under the name and style of Quarles & Steptoe, to recover the sum of five hundred and two dollars and five cents. The declaration contained only the common counts. At the April term of the court the defendants pleaded jointly non-assumpsit; on which plea issue was joined. The cause came on to be tried at the April term of the court for 1859, when there was a verdict and judgment for the plaintiff against both defendants, for the sum of five hundred dollars, with interest from the 23d of December 1854, till paid, and costs.

Upon the trial of the cause the defendant Steptoe took three exceptions to decisions of the court. In the first it is stated—When this cause was called for trial the defendant Steptoe moved the court for leave to withdraw the joint plea of both defendants (Quarles making no objection thereto), and to file his separate plea; that the said defendants did not assume upon themselves in manner and form, &c., the counsel for Steptoe stating that the defence relied on was that the demand in controversy was the individual liability of Quarles, and not of the firm of Quarles & Steptoe; and that he wished to introduce

*Action on Joint or Joint and Several Contract—Competency of Witnesses.—See *Moffett v. Bickle*, 21 Gratt. 287; *Warwick v. Warwick*, 81 Gratt. 77.

†Witness Competent for One Purpose Competent for All.—In *Carter v. Hale*, 32 Gratt. 119, the court said: "Whether at common law a witness is competent to give evidence in a cause for one purpose only, and if he is competent at all, whether he may not be examined upon any matter in the record, see *Steptoe v. Read*, 19 Gratt. 1." See also, *Brock v. Brock*, 92 Va. 175, 23 S. E. Rep. 224.

‡Confessed Judgment.—In *Harner v. Price*, 17 W. Va. 554, the court said: "The case of *Steptoe v. Read*, 19 Gratt. 1, is cited to show, as I suppose, that the confessed judgment is a nullity. The principal subject discussed in this case has been considered by this court in the case of *Snyder v. Snyder*, 9 W. Va. 415, and I do not think that either the former or latter case sustains the position that the judgment is a nullity, and that it can be so considered in this case."

Quarles as a witness to prove this defence; and for that reason be wished to plead separately for Steptoe. But the court refused to permit the joint plea to be withdrawn, and the above plea to be filed. The defendant then asked leave to file said plea in addition to that heretofore filed, which the court refused. And thereupon the defendant excepted to both the rulings of the court.

The second exception states:

The jury having been empanelled, the plaintiff, to sustain his action, offered in evidence the deposition of N. H. Campbell; to the reading of which the defendant 4 *Steptoe objected, because it was taken without any commission; first, because the paper purporting to be a commission was not signed by the clerk; and second, because the commissioner who took it did not certify it was taken in pursuance of any commission. It appeared that a paper in the handwriting of R. D. Buford, the clerk of the court, was attached to the deposition by a ribbon, and they were received in this condition by the clerk of the court. This paper was addressed to any commissioner appointed by the governor of this State, or any justice or notary public of the State of New York, and was sent by the clerk to the counsel of the plaintiff or the witness. It was in the usual form of a commission, and referred to the suit correctly in which the deposition was to be taken. The conclusion of it was—Witness, Rowland D. Buford, clerk of our said court, at the courthouse, the 19th day of April 1857, in the 82d year of the Commonwealth. But the clerk, wholly through inadvertence, failed to write his name again at the foot of the commission.

The commissioner who certified the taking of the deposition commences it as follows:

State of New York, City of New York,
Commissioner's Office, April 23d, 1858.

William J. Read	}	State of Virginia,
v.		
Jesse L. Quarles and John R. Steptoe.		Bedford county.

I, Joseph C. Lawrence, a commissioner for the State of Virginia, do certify that on, &c. at, &c. N. H. Campbell, a witness produced on behalf of William J. Read in a suit depending in the Circuit court of Bedford county, State of Virginia, came before me, and the said N. H. Campbell having been first duly sworn to testify to the truth, &c. deposes, &c. The deposition on its face states that the witness was cross-examined by counsel for Steptoe.

5 *From the third exception, it appears that the defendant Steptoe offered to introduce the other defendant Quarles, as a witness to prove that the demand sued for was the individual debt of said Quarles, and that there was no liability of Steptoe therefor. But the plaintiff objected; and thereupon Quarles offered to withdraw the plea, so far as related to himself, theretofore pleaded; but the court refused to permit him to do so. Leave was then asked to permit him to acknowledge the plaintiff's action, to enable

him to testify for Steptoe; but the court refused. Steptoe again offered Quarles as a witness, the counsel for the defendants stating that Quarles was making no defence, and that the proof they offered applied wholly to Steptoe. But the court again refused to permit Quarles to testify. To all of which rulings the defendant Steptoe excepted: and he afterwards obtained a supersedeas to the judgment from a judge of this court.

Grattan, for the appellant.

McRae, for the appellee.

JOYNES, J. This is an action of assumpsit against Steptoe & Quarles as partners. At April term 1857, the defendants pleaded jointly that they did not assume upon themselves in manner and form, &c. Issue was joined upon this plea, and the case was tried upon that issue at April term 1859. When the case was called for trial at that term, Steptoe asked leave of the court to withdraw the plea previously entered (Quarles making no objection), and to file in lieu of it, a plea in his own behalf only; assigning as the reason for the application, that the defence relied upon was that the debt which the action was brought to recover, was the individual debt of Quarles, and not the debt of the partnership; and that Steptoe wished to introduce Quarles as a witness to establish this defence. But Quarles did not confess a judgment, or, as far as appears, offer to do so.

The plea then offered by Steptoe alleged that the "defendants did not assume upon themselves in manner and form, &c."—which was precisely the same as the plea on which issue was already joined. The issue upon the plea tendered would have been the same as that upon the other: namely, whether the defendants did or did not assume upon themselves in the manner and form, &c. The only difference between the pleas was, that in one the averment was made by both of the defendants, and in the other it was made by Steptoe only.

The court refused to allow the plea tendered by Steptoe to be substituted for the other, and afterwards refused to allow it to be pleaded as an additional plea. Inasmuch, however, as the issue tendered by the plea offered by Steptoe was precisely the same as that already joined upon the first plea, no injury was done to Steptoe by refusing his application. To have allowed it would only have incumbered the record with two issues in the same words. *Fant v. Miller & al.*, 17 Gratt. 47.

The next error assigned is, that the court overruled the objection of Steptoe to the reading of Campbell's deposition; the ground of which was, that it was taken without the commission required by law. The commissioner who took the deposition did not certify that it was taken in pursuance of any commission. It appeared that a paper not subscribed by the clerk, but otherwise in the usual form of a commission, and wholly in the handwriting of the clerk, was attached

to the deposition, being tied to it by a ribbon. This paper, though not subscribed, concluded thus: "Witness, Rowland D. Buford, clerk of our said court, at the courthouse, on the 19th day of April 1858, in the 82d year of the Commonwealth."

It was proved by the deputy clerk, that he, on the 27th April 1858, received the deposition with the notice and commission attached to it, as at present. It was proved by the clerk that this commission was issued and sent by him in pursuance of an affidavit in the cause, and that his failure to subscribe his name to it was from inadvertence.

In the usual recital at the commencement of the deposition, it is stated by the commissioner to be taken "on behalf of Wm. J. Read in a suit depending in the Circuit court of Bedford county, State of Virginia;" but the style of the suit is not there given. But the style of the suit is given in a caption which precedes this recital, in which caption are given the names in full of the plaintiff and defendants. It is obvious that this caption was intended to indicate the style of the suit in which the deposition was taken. The questions and answers likewise identify the suit in which the deposition was taken as one in which Read was plaintiff, and Quarles and Steptoe were defendants.

The paper purporting to be a commission was sufficiently authenticated by this evidence, and it sufficiently appeared that the deposition was taken in pursuance of it. The statute does not require that a commission shall be subscribed by the clerk. Though a subscription by the clerk is usual and proper as a mode of authenticating the paper, its omission, through inadvertence, as in this case, when the paper bears on its face the usual attestation clause denoting its official character and finality, and is in the handwriting of the clerk, cannot be held to invalidate the commission. In *Butts v. Blunt*, 1 Rand. 255, and *Unis & al. v. Charlton's adm'r*, 12 Gratt. 484, cited by the counsel for the plaintiff in error, there was no proof that any commission existed.

*It was further objected in the argument here, that the judgment ought to be reversed, because it does not appear in the record that notice of the time and place of taking the deposition had been given; and *Collins v. Lowry & Co.*, 2 Wash. 75, was cited to sustain the objection. In that case, as pointed out by counsel in the argument of *Jeter v. Taliaferro & al.*, 4 Munf. 80, the objection taken to the reading of the deposition was a general one, specifying no particular grounds, and the opinion of the court was, that it was incumbent on the party who offered the deposition to show that he was entitled to read it, by showing that it was regularly taken in all respects. See *Tompkins & Co. v. Wiley*, 6 Rand. 242; *Barker v. Barker's adm'r*, 2 Gratt. 344. But in the present case, the reading of the deposition was objected to on the special ground, and no other, that it was taken without a commission. It would be a surprise upon the plaintiff to allow the objection of want of notice to be made for

the first time in this court. *Hill & als. v. Bowyer & ux.*, 18 Gratt. 364.

The remaining error assigned, and the most important, is the refusal of the court to allow Quarles to testify as a witness for Steptoe. The facts are these: After the jury had been sworn, Steptoe offered to introduce Quarles as a witness to prove that the demand sued for was the individual debt of Quarles, for which Steptoe was not liable. The plaintiff objected. Quarles thereupon offered to withdraw the plea, so far as it related to himself, which the court refused to permit. Leave was then asked for Quarles to acknowledge the plaintiff's action, to enable him to testify on behalf of Steptoe; which was likewise refused. Then Steptoe again offered Quarles as a witness; the counsel for the defendant stating that Quarles was making no defence, and that the evidence offered applied to Steptoe alone. The court again refused to allow Quarles to testify.

9 *The first question is, whether Quarles was a competent witness for Steptoe as the cause then stood; that is to say, upon the trial of a joint plea of non-assumpsit by both defendants.

It is a general rule of the common law, that in a joint action upon contract, there can be but one final judgment, which must be either for or against all the defendants. And the rule is the same whether the contract on which the action is founded is joint or joint and several, or whether the action is founded on several and distinct contracts, as in a joint action under the statute against the maker and endorser of a note. *Taylor v. Beck*, 3 Rand. 316. This general rule does not apply where the plea of one of the defendants admits the contract alleged, and sets up his discharge by matter subsequent; as bankruptcy. Nor does it apply where one of the defendants alleges that he is not bound to perform his contract by reason of personal disability at the time it was entered into; as infancy. And these exceptions to the general rule apply equally, whether the contract sued upon is joint or joint and several. *Cole v. Pennel & al.*, 2 Rand. 174; *Woodward v. Newhall*, 1 Pick. R. 500; *Minor v. Mech. Bank of Alexandria*, 1 Peters' U. S. R. 46.

But an exception to the general rule is not allowed where the defence, though personal to one of the defendants, involves a denial of the making of the contract on which the action is founded. 3 Rand. 334, per Green, J. So that in an action against several defendants upon a joint or joint and several contract, if it appear from the proof that one of the defendants was not a party to the contract, though all the other defendants were parties to it, judgment will be rendered in favor of all the defendants. *Rohr v. Davis & al.*, 9 Leigh 30; *Baber v. Cook & al.*, 11 Leigh 606; *Munford v. Overseers, &c.*, 2 Rand. 313.

10 Upon the principles of the common law, therefore, *Quarles could not have been a witness for Steptoe, to prove that he was no party to the contract; for there could have been at common law but one final judgment in the action, and Quarles could

have said nothing in favor of Steptoe, that would not have enured equally to his own benefit. If Steptoe defeated the action, on the ground that Quarles alone made the contract, judgment would go for Quarles, as well as for him.

But it is provided by the Code, ch. 177, § 19, that "in an action founded on contract against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants against whom he would have been entitled to recover if he had sued them only." It is contended that under this provision, Quarles was not incompetent as a witness for his co-defendant, as he would have been at common law.

The construction of this provision of the Code has not been settled by this court. It would seem, however, to be clear that it applies only to cases in which some of the defendants are discharged upon grounds of defence merely personal, and that where the ground of defence goes to the foundation of the entire contract, the case remains as at common law. The section, in terms, only applies to cases in which the plaintiff shows a cause of action against some of the defendants, upon which he would have been entitled to recover in case he had sued them only, and there could be no such recovery in any case where there is a defence going to the foundation of the entire contract. Such is the construction placed by the courts of other States upon statutes similar to ours. *Blodget v. Morris*, 14 N. York R. 482; *Hubbell v. Woolf*, 15 Indi. R. 204. And this construction is sustained by the decision of this court in *Brown's adm'r v. Johnson*, 13 Gratt.

11 644, *where it was held that the statute which gives an action against the representative of a deceased joint obligor, in the same manner as if those bound jointly had been bound severally as well as jointly, does not affect the principle of the common law, that the defeat of the remedy against one joint obligor, upon a ground not personal to himself, defeats it as to all the obligors.

Under the plea of non-assumpsit it was competent to the defendants to defeat the action upon grounds going to the foundation of the entire contract. Thus, it might be shown that no such contract was made by any of the defendants; that it was void for illegality or usury; that there was a want or a failure of consideration; or that the contract had been discharged by payment or release. 5 Rob. Pract. 255. Quarles would have been incompetent to prove any such defence for Steptoe, because if the defence was sustained, the judgment would have been for both defendants. It is no answer to say that Quarles was not offered as a witness to prove any such defence, but only to prove that Steptoe was not a party to the contract, which was a defence personal to Steptoe. In *Hawkesworth v. Showler and Boyce*, 12 Mees. & Welsb. 45, the action was trespass for wrongfully taking the plaintiff's goods under a distress for rent. The case having been clearly proved against the defendant Boyce, who was the broker employed to make the

distress, the other defendant, Showler, for the purpose of showing that he had not authorized the taking of the goods by Boyce, offered the wife of Boyce as a witness. Lord Abinger, C. B., rejected the witness; and the Court of Exchequer sustained his judgment. Lord Abinger said: "I am clearly of opinion that this motion ought not to be granted. It is opposed to every principle of law. It is the first attempt which, after a

very long experience, I ever remember to have heard *made, to endeavor to make a party to the record and a party to the issue, a witness in the cause. Nothing is clearer than this—that a person cannot be a witness who is a party to the record, and affected by the determination of the issue, and that the wife of such a person is equally incapable of being a witness. I take both propositions to be identical." * * * "But it is said she is only required to be examined as a witness on a particular point, which would not prejudice or affect her husband. But I deny the proposition that a witness is competent to give evidence for one purpose only. If a witness is competent at all, he may be examined upon every matter upon the record. I remember at one time it was thought that an objection could be made to a witness with reference to the particular kind of question to be put to him; but that notion is long since exploded; and now a witness is considered competent or incompetent upon the general ground of exclusion of his interest one way or other. When once a witness is sworn, he is not sworn to answer particular questions, but to give evidence on all the matters in dispute between the parties." The other Barons expressed themselves to the same effect.

Gerrish v. Cummings, 4 Cush. R. 391, was an action of trover against two defendants for the conversion of a horse hired to them. One of the defendants suffered judgment by default, and upon the trial he was called by the other defendant as a witness for him. He was rejected, and the Supreme court held the rejection to be right, because the jury had to assess damages against the defaulted defendant. It was then proposed to examine the defaulted defendant as to the hiring only, to prove that he was himself the only party to the contract, without any reference to the question of damages. This was refused, and the Supreme court sustained the decision. That court said that the witness, if admissible at all, would be liable to be examined *upon all questions pertinent to the issue; that his competency depended on his interest in the event of the cause, and not on the particular question to which the party calling him might choose to examine him. See also Chase v. Lovering, 7 Foster R. 295; Fulton Bank v. Stafford, 2 Wend. R. 483; Merrill v. Inhab. of Berkshire, 11 Pick. R. 269; Seip v. Storch, 52 Penn. R. 210.

If, therefore, Quarles had been put upon the stand as a witness, there was nothing to prevent his giving evidence to establish a defence going to the foundation of the entire contract, though called only for the

special purpose of proving that Steptoe was no party to the contract. The offer of Quarles to withdraw his plea, and to acknowledge the plaintiff's action, did not alter the case. For upon proof by Steptoe of any ground of defence going to the foundation of the entire contract, final judgment must have been given for both defendants, notwithstanding the confession of judgment by Quarles. Quarles would, therefore, have been equally incompetent if he had confessed a judgment. Taylor v. Beck, 3 Rand. 316.

The result is, that the court did not err in excluding Quarles as a witness, or in refusing to allow him to confess a judgment as proposed, and that the judgment should be affirmed.

The other judges concurred in the opinion of JOYNES, J.

Judgment affirmed.

14 *Ballard & als. v. Thomas & Ammon.

October Term, 1868, Richmond.

1. **Original Order Book of County Court—Where Competent Evidence.**—The original order book of a County court is competent evidence wherever a certified copy would be evidence.
2. **Same—How Proved.**—The original order book may be proved to be such by a deputy clerk, or any other person who can identify it.
3. **County Court—General Jurisdiction—Collateral Impeachment.***—The County court which lays the county levy is not a special tribunal erected for that special purpose. It is the ordinary County court; and that court is a court of general jurisdiction. Therefore, though the record does not shew that the justices had been summoned for the purpose, or a majority were present, the act of the court in laying the levy cannot be questioned in any collateral proceeding.
4. **Levy—Sheriff—Responsibility to County Creditors.**—The sheriff and his sureties in office when the county levy is laid, are responsible, at the end of six months from the date of the levy, to all of the

***County Court—Decree—Judgment—Collateral Impeachment.**—In Quesenberry v. Barbour, 81 Gratt. 500, the court, citing among others the principal case as authority said: "The judgment or decree of a court of competent jurisdiction over the subject matter thereof is conclusive against the parties thereto until it is set aside or reversed by some proceeding in the case in the same or an appellate court. It cannot be set aside or annulled in any collateral proceeding." See to the same effect, Lancaster v. Wilson, 27 Gratt. 630, and *note* collecting many cases in point; also, Fisher v. Bassett, 9 Leigh 119; Devaughn v. Devaughn, 19 Gratt. 556; Durrett v. Davis, 24 Gratt. 302; *note* appended to Pulaski County v. Stuart, etc., 28 Gratt. 872, collecting authorities on this point; Cline v. Catron, 22 Gratt. 378; Spilman v. Johnson, 27 Gratt. 41.

See the principal case distinguished in Pulaski County v. Stuart, etc., 28 Gratt. 876; Dinwiddie County v. Stuart, etc., 28 Gratt. 531; Chesterfield County v. Hall, 80 Va. 324. In each of these cases, the court draws a distinction between a decree or judgment rendered in a *judicial proceeding* within

creditors of the county provided for by it, though the sheriff has not collected the money, or any part of it.

5. **Same—Same—Same.**—Though after the levy the sheriff is removed from his office, on the motion of his sureties, before the six months has expired, the sheriff and his sureties are liable to the county creditors provided for in the levy.

6. **Same—Same—Same.**—Though the sheriff is removed from his office on the motion of his sureties, he still has authority to collect the levy, and his sureties are responsible, for his failure to account to the county creditor.

7. **Statute—To Appoint Collector—Permissive.**—The act of 1851, Code, ed. of 1860, ch. 49, § 18, which authorizes the County court, where there is a vacancy in the office of sheriff, from other causes than his death, to appoint a collector of the taxes, levies, &c., is permissive only, not mandatory; and if not acted on, a sheriff removed from office must proceed to collect them, and his sureties are liable for his defaults.

8. **County Creditor—Payment Demanded of Sheriff Unnecessary.**—A county creditor provided for in the county levy, is not bound to apply to the sheriff or his deputies for payment, before he proceeds to enforce payment of his debts by the sheriff and his sureties.

9. **Same—Proper Recovery.**—The proper recovery by the county creditor, is the principal of his
15 *debt, with interest from the end of the six months, to the date of the judgment, and ten per cent. damages upon the amount of such principal and interest, and interest upon the whole from the date of the judgment till paid.

This was a motion in the County court of Grayson, which was removed to the Circuit court of that county, made in June 1862, by Thomas & Ammon, partners, against Robert B. Baker, late sheriff of Grayson county, and J. K. Ballard and several others, his sureties, to recover the sum of four hundred and twenty dollars, the amount levied by the County court of Grayson on the 25th of June 1861, in favor of the plaintiffs, with interest and damages. The notice was not served upon Baker the sheriff, but the case proceeded against the sureties.

On the hearing of the motion, on the 24th of September 1862, the plaintiffs, to prove the

the court's ordinary jurisdiction, as in the principal case, and a decree or judgment rendered by a court acting upon a matter of special jurisdiction wholly in pursuance of a *special* statute and upon a matter outside of its ordinary jurisdiction, and when its action is *ministerial* only and not judicial. In the former case, the rule laid down in the principal case as to the presumed validity of the proceedings applies; but in the latter, the jurisdiction is special, fixed by a special statute, and must be exercised in accordance with the statute. It ought to appear *affirmatively* that the proceedings are strictly within the statute, for the power is merely ministerial and is not exercised judicially according to the course of the common law. *Substantial* compliance with the statutory requirements must be shown, else the whole proceedings are invalid and of no effect. "The facts essential to give the court jurisdiction must appear affirmatively and no presumption of jurisdiction will attend the judgment."

qualification of Baker as sheriff, on the 1st of January 1861, and the execution of his official bond, with the defendants as his sureties, and also to prove that in June 1861, the County court laid a levy for the county which embraced the sum of four hundred and twenty dollars due from the county to the plaintiff, offered in evidence a book, which they contended was the original order book of the County court for the year 1861. This the defendants denied, and called for proof; whereupon F. S. Thomas was sworn, and was asked by the plaintiffs if he was not the deputy clerk of the county of Grayson. To his answering the question the defendants objected, on the ground that it was not the best evidence that the subject was capable of. Whereupon the court asked the witness, if there was not an order in said book appointing him deputy clerk of that court: to which he answered yes. And to a further question, if he had not qualified as deputy clerk of that court, he answered yes. And being asked if
16 said book was not the order book of said *court, he replied yes; when the court directed him to find the order; which failing to do, the court declared that without any further proof, it would receive said book as the genuine order book of the County court of Grayson county, and as coming from the proper custody.

The order book having been admitted as evidence, the plaintiffs proved from it the election and qualification of Baker as sheriff, and the execution of his official bond with the defendants as his sureties: his term commencing on the 1st of January 1861.

At the August term 1861, of the County court, some of the sureties of Baker applied to the court to be released from their suretyship; and an order was made requiring Baker to give a new bond by the next term of the court. And at the September term of the court, the court made another order, reciting that Baker had failed to give the new bond, and therefore removed him from his office of sheriff, and declared the office vacant. And on the next day the court made another order appointing Peyton G. Hale, coroner of the county, to fill the office of sheriff until the same should be filled by an election, which was appointed to be held on the 6th of the following November. And Hale thereupon executed his official bond with sureties, and took the oaths of office, and discharged its duties.

It did not appear from the record of the County court, or otherwise, that the justices were summoned to attend, or that a majority of the justices of the county was present when the county levy was laid: on that point the record says nothing. The whole county levy for the year 1861 amounted to \$4,442 50; of which Baker had paid \$1 00; and he deposited in the clerk's office, after his removal from office, tax tickets, including the county levy and revenue, between six
and seven thousand dollars. And it
17 was further *proved that after Baker was removed from office, his sureties collected upon the tax tickets for the year 1861, \$3,517; the said tax tickets including

the county levy and revenue. It was further proved that Baker received from one of his deputies some four thousand dollars on account of the levy and revenue, the greater part of which was received by him before he went out of office, and that he had collected some \$300 himself. The commissioners' books for 1861 went into his hands on 13th of June 1861. And it was agreed between the parties that the plaintiffs were not at the time of the levy, or since, residents of the county of Grayson, and that there had been no demand made by the plaintiffs or either of them, on the sheriff or any of his deputies, or any of his securities for this claim.

The evidence having been introduced and the parties heard, the court rendered a judgment in favour of the plaintiffs against Ballard and the other sureties, upon whom the notice had been served, for the sum of four hundred and eighty-two dollars and seventy-nine cents, with legal interest thereon from the 25th of December 1861, until the 24th of September, 1862, and with ten per cent. damages on the said amount, with legal interest upon the whole from the last date until paid, and their costs.

Upon the rendering of the judgment the defendants excepted to the opinions of the court, and also the judgment, setting out the facts; and applied to this court for a superseas, which was awarded.

Fisher and Tipton, for the appellants.

G. W. Jones, for the appellees.

JOYNES, J. This is a motion by Thomas & Ammon against Baker, late sheriff of Grayson county, and his sureties, to recover the sum of \$420, levied for them by the County court of said county on the 25th day of 1st June 1861. At September term 1861,

Baker was removed from office for his failure to give a new bond, which had been required of him upon the petition of some of his sureties. Judgment was rendered for the plaintiffs, and various errors are assigned in the petition.

The first error assigned is, that there was no proper evidence before the Circuit court that any levy had been laid by the County court. The ground of the objection is, that the only evidence that a levy had been made, was a book produced before the Circuit court as the original order book of the County court. It has not been contended that the order book of the County Court, if authenticated as such, was not competent evidence of its contents, to the same extent as a certified copy would have been; and such an objection, if made, could not have been sustained. The usual mode of proving the record of another court, is by the production of a certified copy. But the copy is not produced in such cases, because it is better evidence than the original. It is received only on the ground of convenience, as a substitute for the original record. The reception of a copy avoids the inconvenience of removing the original record from place to place; and as one court will not take judicial

notice of the records of another, the certificate supplies the necessary authentication. But the original, if properly authenticated, is equally admissible, and is, in its nature, the highest evidence. *Gray v. Davis*, 27 Conn. R. 447.

The objection was, that it did not sufficiently appear that the book produced was the order book of the County court. To prove that fact, the plaintiffs examined one Thomas, who was asked if he was not the deputy clerk of the County court of Grayson. The question was objected to, and does not appear to have been answered by the witness.

19 The court thereupon asked the witness if there was not an order in the book appointing him deputy clerk, to which he replied in the affirmative, and if he had not qualified as deputy clerk, to which he also replied in the affirmative. The witness then said, in reply to a further question from the court, that the book produced was the order book of the County court. The court thereupon declared that it would receive the book without further proof, as the genuine order book of the County court, and as coming from the proper custody.

There was no error in this decision. The questions put to the witness by the court were not objected to. The answer showed that the witness had been appointed and qualified as deputy clerk, and the court might well have inferred that he also acted as deputy clerk. In this view, the proof was as complete as if the clerk himself had produced the book and proved its authenticity. But even if the witness was not deputy clerk, or was not proved by any competent evidence to be such, he might still be able to identify the order book of the County court. He professed to identify it, and it was for the court to judge of the credit due to his testimony. The book was before the court, and it could judge of its genuineness from inspection. In such a case it is hardly possible that there could ever be a mistake, and in this case there is not a particle of evidence to raise a suspicion that the book was not in fact what it was represented to be.

The next error assigned is, that the County court had no authority to lay the levy, the justices not having been summoned for the purpose.

The record does not show that the justices had not been summoned. It is silent on that subject. The real question, therefore, is, whether it is necessary, upon this motion, that the record should show affirmatively that the justices had been summoned.

20 The court which lays the county levy is not a special tribunal created for that particular purpose. It is the ordinary County court. That court is a court of general jurisdiction. *Harvey v. Tyler*, 2 Wall. U. S. R. 328. Before the court can lawfully proceed to lay the levy, all the justices must have been summoned for the purpose, or a majority of the justices must be present. If all the justices have been summoned, the levy may be laid, provided a sufficient number be present to form a court for ordinary purposes. When the court is about to lay the county

levy, the first question to be determined is, whether the justices have all been summoned, or, if they have not been summoned, whether a majority of them is present. And when the court proceeds to lay the levy, it in effect determines these questions, and decides that the justices have been summoned, or that a majority of them is present. The propriety of that decision cannot be called in question in any collateral proceeding.

In *Cox & al. v. Thomas' adm'x*, 9 Gratt. 323, a motion was made in the Circuit court by the representative of Thomas, late sheriff, to recover from Cox, his deputy, for his default in not paying over money received by him upon an execution issued from the County court. The plaintiff in the execution had obtained a judgment in the Circuit court against the representative of Thomas, and in this motion Cox sought to impeach that judgment, on the ground that the Circuit court had no jurisdiction to render it, inasmuch as the statute only authorizes the motion of the execution creditor to be made in the court from which the execution issued.

But this court overruled the objection. Judge Allen delivering the opinion of the whole court, said: "In the case of the *Marshalsea*, 10 Coke 76 a, it was resolved, that where a court has jurisdiction of a cause but proceeds erroneously, no action lies against

the party who sues, or the officer who
21 executes the precept *of the court. But

if the court had no jurisdiction, the whole proceeding is *coram non iudice*, and actions will lie against them without regard to the precept. If the court has cognizance of the cause, advantage cannot be taken of an erroneous judgment collaterally. For though the error be apparent, the judgment remains in force until reversed. *Drury case*, 8 Coke 139; *Tarlton v. Fisher*, Dougl. R. 671. The only question, then, would seem to be, whether the subject matter was within the jurisdiction of the court; if it was, if the jurisdiction of the court extended over that class of cases, it was the province of the court to determine for itself whether the particular case was one within its jurisdiction. The Circuit court is one of general jurisdiction, taking cognizance of all actions at law between individuals, with authority to pronounce judgments, and to issue executions for their enforcement. The jurisdiction of this court to take cognizance of all controversies between individuals in proceedings at law need not (as in the case of courts of restricted and limited jurisdiction), appear on the face of the proceedings. When its jurisdiction is questioned, it must decide the question for itself. Nor is it bound to set forth on the record the facts on which its jurisdiction depends. Whenever the subject matter is a controversy at law between individuals, the jurisdiction is presumed from the fact that it has rendered the judgment. And the correctness of such judgment can be inquired into only in some appellate tribunal." It was held, therefore, that the judgment rendered by the Circuit court in favor of the execution creditor, was an adjudication of the facts on which the jurisdiction of

the court depended, the correctness of which could not be called in question in a collateral proceeding.

The case of *Cox & al. v. Thomas' adm'x*, has been followed by *Hutchinson, sheriff, v. Priddy*, 12 Gratt. 85; *Andrews v. Avery*, 13

Gratt. 229; and *Gibson v. Beckham*
22 *& als., 16 Gratt. 321. These cases,

and others cited in them, have settled the law of this State in respect to the conclusiveness of records upon jurisdictional questions, a subject upon which there exists an irreconcilable diversity in the decisions elsewhere. See notes to *Crepps v. Durden*, 1 Smith Lead. Cas. 378.

In conformity with the principle thus established, the order of the court in this case laying the county levy at June term, was an adjudication that the facts existed which were necessary to authorize that proceeding, and that adjudication cannot be called in question in this collateral proceeding. And it was accordingly so held by this court in *Cook, sheriff, v. Hayes*, 9 Gratt. 142.

It was conceded by counsel in this case, that *Cook v. Hayes* is an authority in point. We were urged to overrule it, however, on the ground, that the laying of the county levy is not a judicial proceeding, and that the jurisdiction of the County courts cannot be presumed in respect to any of their proceedings which are not strictly judicial. No authority has been cited for this proposition, and I shall not stop to consider it. For while in the assessment of the tax the County court exercises power which does not come within the ordinary scope of judicial power, in the adjudication of the debts chargeable upon the county, on which rests the right of the creditor to proceed against the sheriff and his securities, the court exercises a power which is purely judicial in its nature, though it is not exercised in the usual form of judicial proceedings. The action of the court in the exercise of such a power cannot be questioned in a collateral proceeding. *Harvey v. Tyler*, *ubi supra*.

The statute provides that every sum, payment whereof is directed out of the levy, shall be paid within six months from the date of the order, and that if any such sum

is not so paid, judgment therefor may
23 *be obtained against the sheriff and

his sureties, on motion. Code of 1860, ch. 53, § 17. The effect of the statute is, that the sheriff and his securities are liable to the creditor, after the expiration of the six months, whether the money has been collected from the taxpayers or not. *Stuart v. Hamilton*, 2 Hen. & Mun. 48. This liability was not affected, in the present case, by the removal of the sheriff from office before the expiration of the six months. The duty of collecting the levies had devolved upon the sheriff, and he had commenced the execution of it before his removal from office, and he was bound to complete it, notwithstanding his removal.

The statute, taken from the Code of 1849, provides, that when there is no person acting as sheriff, the coroner shall perform all the duties of sheriff, except such as relate to the

collection of taxes, levies, &c. Code of 1860, ch. 49, § 20. The act of 1851 provides, that in any case of vacancy in the office of sheriff, from other causes than the death of the sheriff, the County court may appoint a collector of the taxes, levies, &c. Code of 1860, ch. 49, § 18. But this provision is permissive only, and not mandatory. Where no such appointment is made, the duty of the sheriff to collect the taxes, levies, &c., remains, and the sureties remain liable for its due performance. Besides, one of the duties which devolved upon the sheriff was to pay to each person the sum levied for him, within six months from the date of the order. The present motion is founded on a breach of that duty. As soon as that duty was undertaken by the sheriff, the securities became liable for its due fulfillment by him. The sureties did not undertake merely that the sheriff should faithfully account for the money which he might collect from the levies, but also that he should, within six months, pay to each person the sum levied in his favor.

24 In case of non-payment by the sheriff, *they were liable, as I have said before, though the sheriff had not collected a dollar. If the sureties are liable though the sheriff has collected nothing, they must be equally so when he has collected a part, though it was not collected until after his removal from office.

There is no force in the objection, so strenuously urged, that the sureties are thus made liable for acts and defaults of the sheriff committed after he ceased to be sheriff. The sureties of the sheriff undertake that he shall perform the duties of the office of sheriff, and their liabilities are commensurate with his duties. Many of such duties are to be performed after the sheriff has ceased to hold the office. Thus, it is well settled at common law, that when a sheriff has levied a fieri facias while in office, he is authorized, and may be compelled, to complete the execution by a sale of the goods, after he is out of office. The sureties of the sheriff are as much liable for his acts and defaults in the execution of these duties, after he is out of office as while he is in it. The undertaking of the sureties is entire, that he shall faithfully perform his duties, and it is immaterial when the acts or defaults in respect to them took place. So a deputy sheriff has authority to act after the term of office of the sheriff is ended, in the completion of duties, the execution of which was commenced during the term, and the sureties of the sheriff are responsible for acts of the deputy thus done after the term of his principal has expired. *Tyree v. Wilson*, 9 Gratt. 59. So when a sheriff goes out of office, his power and duty to continue the collection of the taxes and levies remain, in like manner, and the statute preserves to him the same power of distress and sale as while he continued in office. Code of 1860, ch. 36, § 4.

Nor is there any force in the other objection insisted upon, that to hold the sureties liable for the payment *of the money due to the plaintiffs in this case, is in conflict with the provisions and policy

of chap. 146 of the Code, under which the sheriff was removed from office. That chapter provides, that when an officer who has been required to give a new bond, as therein prescribed, fails to do so, he shall be deemed to have been guilty of a breach of official duty, and shall be forthwith removed from office. But it is silent as to the effect of such removal upon the liability of the sureties. There is no difficulty, however, in fixing its meaning and effect. After his removal from office, the sheriff can undertake no new duty, and make the sureties responsible for its due performance. But when the duty was undertaken by the sheriff and the performance commenced, before his removal, he must go on to complete it, unless provision is made by law for transferring it to other hands. In such a case, the liability of the securities for the performance of the duty has attached, and their liability, as in other cases, is commensurate with the duty of the sheriff.

These views dispose of the third, fourth and fifth assignments of error, which all proceed upon the assumption, that the defendants cannot be held liable in this case, unless it can be shown that money sufficient to satisfy the claim of the plaintiffs remained in the hands of the sheriff, arising from collections made before his removal from office.

The next error assigned is, that the plaintiffs are non-residents of the county, and that no demand of payment was made upon the sheriff before the motion was instituted. The provision of chapter 187, § 20 of the Code, which is relied upon to sustain the position that a previous demand was necessary, is confined to the case of money made under execution, and does not, therefore, apply to this case. The statute upon which this proceeding is founded provides, that every

26 *sum, whereof payment is directed out of the levy, "shall be paid" by the sheriff to the person to whom payment is so directed, within six months from the date of the order. This imposes an absolute duty on the sheriff. And the statute further provides, that "if any such sum be not so paid," judgment may be obtained, on motion, against the sheriff and his securities. The liability upon non-payment is direct and unconditional. No previous demand is necessary in such a case. 3 Rob. Pract. (new) 601, 603.

I do not understand this court to have decided, in *Cook v. Hayes*, that a previous demand is necessary, before such a motion as this can be maintained. The court held, in that case, that if a demand was necessary, the objection for the want of it could not be made for the first time in this court, and moreover, that upon the evidence, in that case, it might be inferred that a demand had been made.

The only remaining assignment of error is, that if the plaintiffs were entitled to judgment at all, the court gave them judgment for too much. The sum levied for the plaintiffs was \$420, which was payable on the 25th day of December 1861. To this sum the court added interest up to the date of the judgment (September 25, 1862), and ten per cent. dam-

ages on the amount of principal and interest. These amounted together (principal, interest and damages) to \$482 79. The court then gave judgment for the said sum of \$482 79, with interest thereon from December 25, 1861, to the date of the judgment, with ten per cent. damages on the aggregate, and interest on the whole from the date of the judgment till paid. This was an error, for which the judgment must be reversed, and a judgment rendered for the proper amount, namely: for \$420, with interest thereon from December 25, 1861, to September 25, 1862, with ten per cent. damages *on the amount of such principal and interest, and interest on the whole from September 25, 1862, till paid.

The other judges concurred in the opinion of JOYNES, J.

Judgment reversed.

28 *Graham & als. v. Pierce.

January Term, 1869, Richmond.

[100 Am. Dec. 658.]

1. **Tenants in Common—Statute.**—Every tenant in common has a right to possess, use and enjoy the common property, without being accountable to his co-tenants for rents or profits, except under the statute, for so much as he may receive beyond his just share or proportion. Code, ch. 145, § 14.*
2. **Same—How the Common Property to Be Used.**—Tenants in common are not bound to use the common property jointly, by means of a contract of partnership between them, but may possess, use and enjoy the common property severally, accounting to their co-tenants for so much of the rents and profits as they may receive beyond their just share and proportion.
3. **Same—Measure of Accountability to Co-Tenants—Rents.**†—As a general rule, where a tenant in common uses the common property to the exclusion of his co-tenants, or occupies and uses more than his just share or proportion, the best measure of his accountability to his co-tenants is their shares of a fair rent of the property so occupied and used by him.

*Code, ch. 145, § 14: "An action of account may be maintained against the personal representative of any guardian, baliff or receiver, and also by one joint tenant or tenant in common, or his personal representative, against the other as baliff, for receiving more than his just share and proportion, and against the personal representative of any such joint tenant or tenant in common."

†**Tenants in Common—Measure of Accountability.**—As a general rule, the proposition laid down in the third headnote, that where a tenant in common occupies the common property to the exclusion of his co-tenants, he is liable for a reasonable *rent* of the common property which he occupies, seems well settled. But, as held in *Early v. Friend*, 16 Gratt. 21, he is only liable for a reasonable rent for the property in the condition it was when he came into possession, and he is not accountable for issues and profits actually made by the application of his skill, labor and capital to the property. This case is ap-

4. **Same—Same—Exceptions—Issues and Profits.**‡—But there may be peculiar circumstances in a case making it proper to resort to an account of issues, profits, &c. as a mode of adjustment between the tenants in common.

5. **Same—Lead Mines—Adjustment—Issue and Profits.**—In the case of a tenancy in common in lead mines, an account of issues and profits is the proper mode of adjustment. And in settling the accounts of the operating tenants, they should not be charged a certain sum per ton for the ore raised from the mine, or credited with an estimated sum per ton for raising the ore and manufacturing the lead: but each so operating is to be charged with all his receipts and credited with all his expenses on account of the operation of the mine.

29 *6. **Same—Same—Same—Improvements by Tenant in Common.**—In such a case the operating tenant in common should have a credit in his account for improvements made by him which were necessary to his operation of the mine.

7. **Same—Liability to Co-Tenants for Destruction of Common Property.**—A tenant in common occupying and using the common property separately, will be responsible to his co-tenants, if he wilfully or by gross negligence, has destroyed or wasted the common property.

8. **Same—Same—Bill Must So Charge.**—But he cannot be held responsible for such destruction or waste in a case in which the bill does not charge it.

9. **Same—Commissioner's Report—Exceptions to Accounts Stated.**—The commissioner for settling the accounts of the parties, says in his report—"The complainants will hereafter render an account of a remnant of the business still left in their hands." There are exceptions by both parties to the accounts as stated; but the court overrules them all, confirms the report, and makes a final decree in favor of the defendant. It being not probable that the further account referred to by the commissioner, will lessen the amount due the defendant, if there be no other error, the appellate court may amend the decree by providing for the further account, and affirm it.

In February 1854 David Graham and thirteen other persons, partners under the name of the Wythe Union Lead Mines Company,

proved in *White v. Stuart*, etc., 76 Va. 546, and in the principal case. See also, *Paxton v. Gamewell*, 83 Va. 706, approving the principal case as to the point here laid down, and *Rust v. Rust*, 17 W. Va. 910.

As to this rule there seems to be no distinction between tenants in common and joint tenants. See *Newman v. Newman*, 27 Gratt. 722, where the rule of the principal case is applied to a case of joint tenants.

‡**Same—Same—Exceptions—Issues and Profits.**—But, as stated in the fourth headnote to the principal case, the rule stated in the above note is subject to an exception, growing out of the peculiar circumstances of the case, where it *may* be necessary to resort to issues and profits that an equitable and fair adjustment may be reached. As to this exception, and the method of adjustment in such case, see *Early v. Friend*, 16 Gratt. 21; *Newman v. Newman*, 27 Gratt. 722 *et seq.*, quoting at length from, and sustaining, the principal case; *Ruffners v. Lewis*, 7 Leigh 720; 2 Min. Inst. (4th Ed.) 498; *note* appended to *Newman v. Newman*, 27 Gratt. 722; *Williamson v. Jones*, 48 W. Va. 582, 27 S. E. Rep. 419.

filed their bill in the circuit court of Wythe county, against Alexander Pierce and Alexander N. Chaffin. The plaintiffs allege in their bill, that they are the owners of fourteen sixteenths of valuable lead mines lying in the county of Wythe, to which is attached a large quantity of land and valuable fixtures for the manufacture of lead on an extensive scale; and the remaining two sixteenths belong to Alexander Pierce and Alexander N. Chaffin. That the property is incapable of division without greatly impairing its value. That the plaintiffs formed a partnership in February 1848, under the style of the Wythe Union Lead Mines Company, to continue until February 1858, for the purpose of mining and manufacturing lead. That they had purposed to the other parties to join them, but that Pierce had refused to do so, and had taken possession of a part of the property and improvements and was working
30 them separately. *That whilst the plaintiffs were working on the principle of reducing all their expenditures to the cash value, and their business showed large profits, Pierce was doing great injury to the property, expending a great deal in improvements that were not necessary to the working of the mines as a whole, and was employing hands who were incompetent and idle. That he was carrying on a store in connection with his mining operations, and would employ only such hands as would take their payment for wages from his store, and was conducting his operations so as to shew small profits from his mining, and would afford large profits upon his sales from his store, which he claims as his own, and that he had not made any dividend of his profits from mining, up to the time of filing the bill, and from what they knew of the principle on which his business was conducted, they had but little hope that any length of time would produce a different result. They insist that the profits from the store should be considered as partnership profits, and should be accounted for as such. The defendant Chaffin had stood aloof, taking no part in the business.

The prayer of the bill is, that an account may be directed, of the operations of the said Pierce in the manufacture of lead at the mines where he was operating, from the commencement of his business in February 1848, to the time of filing the bill, and that in taking said account the commissioner be directed to ascertain what amount of lead he had made, and at what average price per ton; what profits had been derived therefrom, and to whom they rightfully belonged. Also what profits had been realized by Pierce during the same time, from the mercantile establishment which had been carried on by him in connection with the making of lead at the mine, and any other account which will be necessary to show the liability of Pierce
31 to the other owners of the joint *property, growing out of his operations at the said mines; and that all the joint owners may be decreed their just proportion thereof: That if it shall seem equitable and just, the profits of the mercantile concerns which may be carried on at the

mines in connection with the making of lead shall be the common property of the joint owners thereof, and distribution decreed to them according to their respective rights; and for general relief. There was a prayer for partition by a sale or an allotment of part and sale of the residue, if upon the final hearing this should seem advisable; but there was no action upon this question.

Pierce filed his answer on the 10th day of May 1855. He says that all the owners joined in carrying on the business of manufacturing lead from the year 1838 to 1848, at which time the partnership expired. That the parties could not agree upon terms for continuing the business jointly. That the plaintiffs took possession of all the improvements. That the defendant before he could realize anything from his interest in the property, was obliged to make large expenditures for sinking shafts, building furnaces, and constructing buddles and crushing mills; all of which became fixtures on the estate, and are valuable improvements; and as such his outlay upon them, out of his own means, is a proper charge against the receipts of the proceeds of lead. As to the profits of the store, he claimed they were his own, made by his own means; and in fact the plaintiffs had abandoned the claim, to share them. He insists the plaintiffs shall account to him for his share of the profits of manufacturing lead made by them; says he is ready to account for rent and profits of the property after deducting from the gross receipts all his expenses in putting up fixtures &c., cost of manufacture, transportation and sale; and he asks that whatever sum is due him
32 from plaintiffs may be set off against what is due from him to them; *and he insists that to see what the proper balance would be, the plaintiffs must render a full account of their operations.

On the day before the answer of Pierce was filed, viz. on the 9th of May 1855, the plaintiffs and Pierce entered into an agreement under seal, by which Pierce sold to them all his interest in the property belonging jointly so the parties in the suit except a certain tract of land specified, for fifteen thousand dollars; and he bound himself, if he should thereafter acquire an interest in the property, that he would not come into competition with the owners of the property in the manufacture of lead; but that the business should be conducted jointly with the other owners who might be operating for the joint benefit of all interested. And it was further agreed that Pierce might continue to smelt the ore he then had on hand ready washed for smelting, until the 1st of June following; and that the contracts made by Pierce with other parties for raising lead &c. which were in progress, should be carried out; and that the plaintiffs were to receive from Pierce all the ore both washed and unwashed, and slag that was on hand on the 1st of June. And it was further agreed that as they had each been engaged in merchandising in connection with the manufacture of lead, they will, in the future settlement of their accounts, relinquish and

abandon all claims, each upon the other, to mercantile profits, and in the settlement of their accounts they will have reference only to the quantity of lead made, the expense of making, transportation and sales, as disconnected with the mercantile business. And it was further agreed, that in respect to the privilege of Pierce continuing the business as above stated, until the 1st of June, the expenses incurred or to be incurred, and the profits, were to be brought into account, and settled between the parties; and that

33 this agreement was not to preclude either *party from having a fair and full settlement of all matters between them concerning the manufacture and sale of lead, with the single exception, that the mercantile profits made by either party was not to be brought into the account.

On the 10th of May, by consent of parties, Wm. A. Stuart was appointed a commissioner to take an account of the manufacture and sale of lead by the plaintiffs and the defendant Pierce from and after the 17th day of February 1848, to be reported to the court together with any matters specially stated &c.

The commissioner returned his report on the 6th of April 1857, in which he states that he has taken the account as directed, from February 1848 to the 17th of February 1857; and the complainants will hereafter render an account of a remnant of the business still left in their hands. He reported that the profits made by the plaintiffs during the period, was \$98,762 65, of which the share of Pierce and of Chaffin was each, \$5,904 05; that the profits made by Pierce, which were due to the joint owners of the property, were \$3,815 38, of which Pierce and Chaffin would each be entitled to \$229 62, and the balance was due to the plaintiffs. And that upon the settlement of both accounts there was due from the plaintiffs to the defendant Pierce, \$2,587 91, on the 17th of February 1857.

All the parties excepted to the report; but it will only be necessary to state those of the plaintiffs, as the other exceptions did not come before this court. The plaintiffs excepted to the report:

1st. To all allowances made by the commissioner to the defendant Pierce, for buildings, fixtures and other supposed improvements; upon the ground that an occupying tenant in common, before he can entitle himself to such allowances, must show that such buildings &c. were necessary to the interest of the entire estate, or added permanently to the

34 value thereof. The supposed *improvements, for which said Pierce has claimed credits, are shewn by the evidence in the cause, to have been unnecessary for the general interests of the estate; to have added nothing to its permanent value; and to have merely subserved the temporary purposes and promoted the individual interest of the defendant Pierce.

2d. To the whole frame and principle of the report. Instead of going into a detailed statement and account of the transactions and expenditures of the defendant Pierce—transactions and expenditures in which it is shewn by his own manager, that his object

seemed to be to make money for himself, regardless of the interests of the other owners—it was the duty of the commissioner to fix a proper cash value per ton on the manufacture of lead, thus reducing all the operations and transactions of both concerns to a uniform standard. In this connection it will be seen that the two concerns worked on wholly different principles. The complainants reduced everything to a strict cash value, and charged the miners no profit on articles furnished by them. The defendant Pierce, on the contrary, charged a profit (usually fifty per cent.) upon everything furnished by him. It is further shewn that Pierce only employed such hands as consumed all their wages in living; that all were trifling; none worth their wages. It is also in proof that Pierce declared that a small proprietor might make a large quantity of lead, and make a profit on expenditure by selling goods. He has not denied the charge in the bill that his great object was to conduct the business in such a manner as to shew no profits for dividend with his co-tenants, but to make a large profit for himself upon the expenditures. His own account, and the report of the commissioner, show how fully and unflinchingly he has carried out this design. He operated for

35 seven years and a little over three months; and by his own *account he brought the mines several thousand dollars in debt. The commissioner's account, after scaling his charges in many instances, shews only a profit of \$3,875 38, upon a manufacture of 1250½ tons, or at the rate of \$3 05 1-9 per ton on the lead sold; Whilst at the same time, upon the operations of the complainants manufacturing and selling 2668½ tons, there is a profit shewn of \$98,762 65, or at the rate of about \$37 per ton; and this, too, whilst the complainants have expended many thousands of dollars on valuable and permanent improvements; have paid the taxes on the entire estate; purchased and paid for the Preston survey of 242,000 acres, at the price of \$, and paid the taxes thereon; and have incurred law expenses and other charges to a large amount, with which their expense account is burdened, and which contributed to swell the amount of their charges in the commissioner's report.

3d. Because the commissioner has not charged the defendant Pierce with the sum of \$920, the damages recovered against the complainants upon the dissolution of an injunction. Pierce claims that he was working the mines on joint account. The damages to the business thus carried on by him are in lieu of the profits which he would have made while the injunction was pending. Those profits would have accrued to the general owner, not to Pierce alone. The damages allowed in their stead must take the same direction.

4th. To the allowance to Pierce of a credit for the amount of claim on George Earp, of \$2,789 22. In his account he charges himself with the nett sales of lead made by said Earp of Philadelphia, and afterwards credits himself with said sum of \$2,780 22, on the grounds

of Earp's insolvency; this credit being objected to on the ground that Pierce had not shown *that due diligence was used by him in attempting to recover the debt.

5th. Should the commissioner's plan and principle of stating the account be approved and adopted by the court, then we except to the allowance of the salary, board, &c. of R. C. Fox, T. W. Carter and J. W. Brown, on the ground that Pierce individually should bear one-half of their salaries, &c. they being employed one-half their time or more in his business.

It is impossible to give a statement of the evidence in the record. It may be stated, that although these parties owned a large tract of land, the lead mines seem to have been located on about twenty acres of it. They had been worked previous to 1838, by several of the joint owners, separately, each accounting for the profits he made to all the owners. In 1838, a partnership was formed by all the owners for the joint working of the mines, which was to continue until 1848. In February 1848, all the owners but Pierce and Chaffin formed another partnership for carrying on the manufacture and sale of lead, which was to continue until 1858; and they took possession of all the localities and machinery which had been used by the former company. Chaffin declined to join the partnership, and did not attempt to carry on the business himself; but Pierce took possession of a part of the land and proceeded to carry on the manufacture and sale of lead separately. In what spirit the business was conducted by both the parties, as well as the nature and sufficiency of the evidence upon which the exceptions of the complainants are based, will appear from the opinion of the court.

In May 1857 the cause came on to be heard, when the court overruled all the exceptions, both of the plaintiffs and the defendant, and confirmed the report, and decreed that the plaintiffs should pay to the defendant Pierce the sum of two thousand five hundred
37 *and eighty-seven dollars and ninety-one cents, with legal interest thereon, from the 17th of February 1857 till paid; that being the amount reported by the commissioner as due from the plaintiffs to Pierce; and that they should pay the costs in proportion to their respective interests in the property, as it was held before the sale by Pierce to the plaintiffs.

From this decree the plaintiffs applied to the Court of Appeals at Lewisburg for an appeal; and in their petition they made another question, which is stated in the opinion of the court. Pierce also applied for an appeal; and both appeals were allowed. After the war the case was sent to Richmond, and from thence to the District Court of Appeals at Abingdon. In July 1867 the case came on to be heard, when the District court was of opinion—that as it appeared from the commissioner's report that the accounts between the parties were not fully settled and stated, but that the complainants were thereafter to render an account of some matters not re-

ported on by him, the Circuit court should not have proceeded to a final determination of the cause, but should have confirmed the said report and recommitted the cause to the commissioner, with instructions to state and settle the matters of account between the parties, referred to as not settled; but not to reopen or disturb the account so far as already settled, and make report of his proceedings to the Circuit court; and upon the coming in and confirmation of such new report should pronounce such decree as equity may require. It was therefore decreed that so much of said decree as is declared to be erroneous be reversed and annulled, with costs to Pierce against the plaintiffs; and that the residue of the decree be affirmed. And the cause was remanded, &c.

From this decree the plaintiffs applied to this court for an appeal, which was allowed.

38 *Wm. Daniel, for the appellants.

Staples and Johnston, for the appellee.

MONCURE, P. delivered the opinion of the court.

The court is of opinion that every tenant in common has a right to possess, use and enjoy the common property without being accountable to his co-tenants for rents or profits, except under the statute for so much as he may receive beyond his just share or proportion. Code, p. 586, ch. 145, § 14. And although it may be best for the interests of all the tenants in common to use the common property jointly, by means of a contract of partnership between them, yet the individual owners have a right to decide that question for themselves, and are not bound to enter into such contract of partnership; but may possess, use and enjoy the property severally, accounting to their co-tenants for so much of the rents and profits as they may receive beyond their just share and proportion as aforesaid. Therefore the appellee, Alexander Pierce, was not bound to enter into copartnership with his co-tenants in the use and operation of the lead mines in question; but had a right to use and enjoy the property separately on the conditions aforesaid.

The court is further of opinion, that although, as a general rule, where one tenant in common occupies and uses the common property to the exclusion of his co-tenants, or occupies and uses more of the common property than his just share or proportion, the best measure of his accountability to his co-tenants may be their shares or proportions of a fair rent of the property so occupied and used by him, according to the principle laid down in the case of Early & wife v. Friend, &c., 16 Gratt. 21, 52. Yet, as was said in that case, "there may be peculiar circumstances in a case, making it proper to
39 resort to an account of issues, *profits, &c. as a mode of adjustment between the tenants in common." Id. p. 54; Ruffners v. Lewis' ex'ors, 7 Leigh 720. Under the

circumstances of this case it was proper to resort to an account of issues, profits, &c. as a mode of adjustment between the tenants in common. It is not a case of land used for agricultural purposes only, in which there is no difficulty in ascertaining a fair rent for use and occupation; nor is it such a case as that of *Early & wife v. Friend, &c.* where the property consisted of salt works, the yearly value of which might be ascertained with reasonable certainty, and where a money rent had been contracted for and paid to some of the tenants in common, which furnished a standard for ascertaining the amount due to others; but it is the case of a lead mine, the yearly value of which, and more especially of an undivided and uncertain portion of which, is incapable of ascertainment. Nor would it be just, in settling the account of issues and profits, to charge the occupying and operating tenants with a certain sum per ton for the quantity of ore raised from the mine, nor to credit them with an estimated sum per ton for raising the ore and manufacturing the lead, as contended for by the appellants. Such a mode would be founded on conjecture merely, and would be very unequal and unjust, as it could not be known what would be the cost of raising ore, which would depend upon its situation in the mine, its degree of richness, and the facility or difficulty of getting at it, as well as upon the uncertain price of labor; nor what would be the cost of manufacturing lead, which would depend upon the varying price of labor and supplies. The best mode of settling such an account, and one which is perfectly just, supposing the tenant to have been capable and faithful, is to charge him with all his receipts, and credit him with all his expenses, on account of the operation of the mine.

40 This mode had been pursued *by the owners of this mine prior to 1838, when several operations were conducted by different owners, who accounted with the other tenants for their shares and proportions of the nett profits. It was also pursued by them from 1838 to 1848, during which period they all operated in one partnership. The same course ought to be pursued in regard to the operations since 1848, which were conducted by the appellants and the appellee separately. They severally conducted their operations with the expectation of accounting for nett profits with the other tenants in common, and kept their accounts accordingly. The agreement of the 9th of May 1855, recognizes that mode of settlement as the proper one, and provides for the making of such a settlement. And the consent decree entered on the next day, the 10th of May 1855, directs accordingly. The account was therefore properly settled in that mode.

The court is further of opinion that in settling the account of the appellee Pierce the commissioner properly gave him credit for improvements made by him, and the Circuit court therefore did not err in overruling the appellants' 1st exception to the report of the said commissioner. The said Pierce having a right as tenant in common to occupy and operate the mine, had also a right to make

such improvements as were necessary for that purpose and to deduct the cost of such improvements from the proceeds of the operation. It does not appear that he made any improvements which were not necessary or were not of permanent value to the estate, or that he incurred any unnecessary expense in making them. All of them were necessary to his convenient occupation and use of the mine, except perhaps the small expense incurred in fixing up a building already on the land, for a store; and if it be true as seems to be the case, that good management in conducting the operations

41 of a mine requires that a *store should be kept in connection with such operations, then the fixing of the storehouse was a proper improvement to be made and charged for in the account. But whether it was necessary or proper for the operation of the mine or not, it was a permanent improvement of the property, which enured to the benefit of all the owners, and the expense of making it is therefore properly chargeable to them in the account. Although the improvements which were already on the property when Pierce commenced his operations may have been, as alleged, "amply sufficient for the judicious and beneficial conduct of the business," yet those improvements, or nearly all of them, were in the exclusive use of the appellants; and Pierce could not exercise his right as a tenant in common to occupy and use the mine without making other improvements which were necessary for that purpose. But it appears from the account of the appellants that a large amount was expended by them in making improvements after Pierce commenced his operations, which amount is charged in the said account and was allowed by the commissioner. And it appears from the evidence that the improvements made by Pierce, or nearly all of them, have been actually used by the appellants since they became purchasers of Pierce's interest in the mine.

The court is further of opinion that the Circuit court did not err in overruling the appellant's second exception to the commissioner's report, being "to the whole frame and principle of the report." Reasons have already been given to show that in this case it was not "the duty of the commissioner to fix a proper cash value per ton on the manufacture of lead," with a view of settling the account upon that basis, but to go "into a detailed statement and account of the transactions and expenditures" of the parties, with a view to a fair and just settlement between them on account of profits actually received. The chief complaint

42 *of the appellants is, that Pierce conceived and conducted his separate operations of the mine with a view to his own profit and without any regard to the interests of his co-tenants in common; that he conducted a store in connection with his operations of the mine; that his plan was, to turn the profits of the combined operation as much as possible in the channel of the store, the whole of the profits of which were

his, and to divert them from the business of the mine, the profits of which he had to share with his co-tenants; that he charged a large profit upon every thing furnished by him from his store, and only employed such hands as would consume all or most of their wages in living, requiring them to buy all of their supplies from him; that all of them were trifling, and none of them were worth their wages; and that the result of his operations of the mine has been to make a very small profit compared with the profit made by the appellants, whose operations they say were conducted on a different principle. If this complaint had been materially sustained by the proofs, it ought to have had an important effect on the result of the case; but we are of opinion that it is not. As to the remark of Pierce, to which one or two of the witnesses testify that a small proprietor might make a large quantity of lead, and make a profit on expenditures by selling goods; it does not appear when it was made, and it seems to have been a casual remark not sufficient to indicate a fraudulent purpose on the part of Pierce to pursue such a plan. He had a right to keep a store in connection with his mining operations, as the appellants did in connection with theirs; and according to the testimony it appears that it is conducive to the convenient and profitable operation of the mine to keep a store in connection therewith. He did not charge any thing more for articles furnished from the store for use in

his mining operations, or for the use of
43 the hands, than he *charged for similar articles sold by him to other customers, or than other merchants in the neighbourhood charged for similar articles sold to their customers. And the commissioner, in settling his account, deducted the profits included in the charges for articles used in his mining operations, so as to place him and the appellants on the same footing in that respect, they having charged only cost for such articles used in their operation. If his hands were trifling and their services not worth their wages, it does not appear that he did not employ the best he could procure, and it is not pretended that he employed more than were necessary to his mining operations, or that he paid them higher wages than were paid by the appellants for similar hands. The profits of his store were small, and much less than were the profits of the appellants' store during the same period. As to the profits of his mining operations compared with those of the appellants, it is impossible to ascertain them from the materials in the record, as a large amount of ore extracted by him from the mine was turned over by him when he sold out to the appellants, and the proceeds of it have gone into their accounts, thus swelling their apparent profits, while the apparent profits made by him are reduced by the expense of raising the ore and partly manufacturing it. The appellants had the great advantage of being in possession of almost all the old improvements and fixtures, and proceeded to carry on their mining operations without interruption, and no doubt with experienced hands, while the

appellee had to make new improvements and probably employ new hands, and it was therefore a long time before he could commence his mining operations. He seems to have desired to do the best he could for the interest of himself and his co-tenants. Unfortunately, he and they conducted rival establishments, both in regard to mining and merchandising; and still more unfortunately, the effect *of this rivalry was to produce ill feeling between them and to cause them to throw stumbling blocks, instead of facilities, into each other's way. The natural fruit of all this was, to involve them in angry and expensive litigation. But the appellants have no cause to complain of the appellee in this respect, and seem to have been, at least, as much in fault as he in bringing about these evils. The account between them may therefore be considered as balanced on that score. The necessary effect of rival establishments, even if they had produced no ill feeling nor conflict of action between the parties, would have been, to reduce the profits of each by increasing the price of labour and supplies, and reducing the price of goods sold at the stores. The evil was greatly increased in this instance by the ill feeling and conflicts which were engendered by the rivalry between those parties. But, as before stated, the appellants have no just cause of complaint on that ground.

The court is further of opinion that the Circuit court did not err in overruling the appellants' third exception to the commissioner's report, "because he has not charged the defendant Pierce with the sum of \$920, the damages recovered against the complainants upon the dissolution of an injunction." The ground of this exception is, that these damages were allowed by the jury in lieu of profits which Pierce would have made but for the injunction; and as the profits would have belonged to all the tenants in common, so ought the damages. But we cannot tell what influenced the jury in allowing damages in the action brought by Pierce upon the injunction bond. We cannot presume that they intended to compensate, not only the loss which Pierce alone sustained by the injunction, but also the loss which the appellants themselves, who were in effect the defendants in the action, sustained by their own injunction. We cannot presume that the
45 *jury intended to allow damages, of which only one sixteenth would enure to the plaintiff in the action, while fourteen sixteenths would enure and be returned to the defendants themselves. The action, though in form *ex contractu*, was in substance *ex delicto*, and the evidence may have been such as to warrant the jury in allowing exemplary damages; in which case, of course, the defendants who did the wrong could have no right to participate in the benefit of the damages. Besides, we have no account in the case of the cost and expenses incurred by the plaintiff in prosecuting the action, or of the costs and expenses incurred by him in the injunction suit, over and above the legal costs recovered against the other parties.

The court is further of opinion, that the Circuit court did not err in overruling the appellants' fourth exception, which is "to the allowance to Pierce for the amount of claim on George Earp of \$2,780, upon the ground that it was lost." Without reviewing the evidence in regard to this claim, it is enough to say that we do not consider it sufficient to show that the claim was lost by the negligence of Pierce. On the contrary, we think it shows that the claim was not lost by such negligence.

The court is further of opinion, that the Circuit court did not err in overruling the appellants fifth and last exception, which is to the allowance of the salary, board &c. of agents employed by Pierce. The ground of this exception is that these agents were employed as well about the individual business of Pierce as in his mining operations. But the salary of only one agent during the period of those operations is allowed by the commissioner, and it appears that at least one agent was necessary and was employed in those operations during said period.

There is another assignment of error in the petition of the appellants to the
46 District court for a supersedeas *to the decree of the Circuit court, being the 7th which remains to be noticed, and is in these words: "The court erred in decreeing a balance in favor of Pierce against your petitioners under the facts of the case. Pierce refused to co-operate with them and set up a rival establishment which he so conducted as to yield comparatively no profits, and he is shown to have injured the common interests far more than the amount of his interest in the profits made by the company. No damage is allowed your petitioners for the injuries they have sustained. The decree allows him profits in their operation without holding him to account for corresponding profits or damages inflicted." Damage necessarily resulted to the appellants, both in their mining and mercantile operations, from the carrying on of similar operations by appellee, and that is the kind of damage to which the witnesses no doubt generally refer in their testimony in this cause. But as the appellee had as much right to carry on his operations as the appellants had to carry on theirs, such damage is merely *damnum absque injuria*. The appellee had no right to destroy or waste the common property, and if he had wilfully done so, or by gross negligence had occasioned such destruction or waste, he would, undoubtedly, have been responsible, in some form or other, for the injury thus done to his co-tenants. Some of the witnesses in this case speak of much waste having been committed in the mining operations of the appellee by the unskillful and careless conduct of his agents hands. It does not appear that he did not employ the best agents and hands he could under the circumstances. But a sufficient answer to this complaint is, that there is no charge in the bill of any such waste or destruction. It is a bill for partition and for the settlement of an account by the appellee both of his mining and mercantile operations. The

chief complaint of it is, that he had so
47 conducted his operations *as to make a large profit by merchandising and a small profit by mining, and the complainants say, that "after very mature reflection and much actual experience, at least a portion of them have come to the conclusion that the profits of the mercantile establishment, the necessary and indispensable accompaniment of the successful manufacture of lead, ought in equity and justice to be regarded as the joint property of the owners thereof, and that they ought to be participants in them equally, to the extent of their several interests in the subject out of which they were made." The complainants therefore pray for an account and relief accordingly. After the bill, but before the answers were filed, to wit, on the 9th of May 1855, an agreement was made between the parties, whereby it was, among other things, agreed that Pierce should sell his interest in the mine and certain lands thereto attached for \$15,000; and that "if said Pierce should hereafter acquire or purchase, lease or otherwise, any interest in the property before described, he is under no circumstances to work his own interest, or to come into competition with the other owners in the manufacture of lead, but the business in regard to the manufacture of lead, in the event he shall acquire any further interest, is to be conducted jointly, in conjunction with the other proprietors, who may be operating for the joint benefit of all interested." And it was further agreed by the parties, "that as they have each been engaged in merchandising in connection with the manufacture of lead, they will in the future settlement of their accounts, relinquish and abandon all claim, each upon the other, to mercantile profits, and in the settlement of their accounts they will have reference only to the quantity of lead made, the expense of making, transportation and sales, as disconnected with the mercantile business," "and that this agreement is not to preclude either
48 party from having a fair and full settlement of all the matters *between them concerning the manufacture and sale of lead, with the single exception, that any mercantile profits made by either party is not to be brought into the account." On the day after this agreement was entered into, a consent decree was made, directing a commissioner to "take an account of the manufacture and sales of lead by the said complainants and by the said defendant Pierce from and after the 17th day of February 1848, to be by him stated," &c. It was the duty of the commissioner under this decree to take an account only "of the manufacture and sale of lead by the" parties respectively, and not of any conjectural damages arising from any supposed destruction or waste of the property occasioned by the act or neglect of any of the parties, as that matter was not embraced in the bill, nor in the agreement aforesaid, nor in the said decree for an account. The commissioner therefore, in taking the account, properly disregarded that matter, and all the evidence in relation thereto.

The commissioner having taken the ac-

count, and ascertained a balance to be due thereon by the appellants to the appellee, made his report, in which this passage occurs: "The complainants will hereafter render an account of a remnant of the business still left in their hands." The Circuit court overruled all the exceptions to the report, confirmed the same, and rendered a decree for the payment of the said balance, but took no notice of what was said in the report in regard to the future account to be rendered by the complainants as before stated, although the decree was final. The District court was of opinion that the Circuit court should not have proceeded to a final determination of the cause, but should have confirmed the said report and recommitted the cause to the commissioners, with instructions to state and settle the matters of account between the parties, referred to in his report as not settled, but not to reopen or disturb the

account so far as already settled, and
49 make report of *his proceedings to the court, and upon the coming in and confirmation of such new report, should pronounce such decree as equity may require; and the District court decreed accordingly, reversing in part and affirming in part the decree of the Circuit court, and remanding the cause for further proceedings, but gave to Pierce his costs in the District court. We think that instead of reversing in part and affirming in part the decree of the Circuit court as aforesaid, the District court might perhaps, more properly, have amended the decree of the Circuit court by directing the account to be taken which, according to the commissioner's report, the complainants were thereafter to render as aforesaid, or by reserving liberty to any of the parties thereafter to apply by motion in the cause in the said Circuit court for an order for such an account, and then have affirmed the said decree thus amended. It is not probable that the result of that account will diminish the balance already reported to be due to the appellee, and it seems therefore to be unnecessary to withhold the payment of the said balance until that further account can be settled. The appellants do not object to the decree of the Circuit court for not directing a further account. On the contrary, they say that "no exception was ever taken to the report because it was incomplete, or was not a finality;" "neither party asked for a new order for an account, nor for a recommitment of the report;" "the decree taken by Alexander Pierce was final, disposing of the subject and the costs—no other or further proceeding was asked for by him;" and they therefore contend that the decree of reversal on that ground is erroneous. But as this error, if it be one, is to the prejudice of the appellee, and he does not complain, but is content with the decree of the District court as it is, we therefore think it ought to be affirmed.

Decree affirmed.

50

*Honaker v. Howe.

January Term, 1869, Richmond.

1. Evidence—Civil Action—Record in Criminal Case.—
At common law, if upon a prosecution for an as-

sault and battery the defendant pleaded guilty, the record was competent evidence in a civil action for the same assault and battery, to prove it.

2. Same—Same—Same.—But where the defendant, without pleading, throws himself upon the mercy of the court and submits to a fine, the record is not evidence in a civil action for the same act, to prove it.

3. Same—Same—Same—Statute.*—In Virginia, where the defendant on an indictment for a misdemeanor, without pleading, confesses a judgment for a specific sum as a fine, the record is not evidence in a civil action for the same cause, to prove the fact. Nor is it evidence to enhance the damages.

This was an action of assault and battery in the Circuit court of the county of Pulaski, brought by Joseph H. Howe against Henry Honaker. The defendant pleaded not guilty, and son assault; on which issues were taken.

On the trial of the cause the plaintiff offered in evidence the record of an indictment in the Circuit court of Pulaski, in the name of the Commonwealth against the defendant, for an assault upon the plaintiff with an intent to kill him. To this indictment the defendant Honaker, without pleading in proper person, with the assent of the court, confessed a judgment for five dollars and the costs; upon which the court entered up a judgment. The defendant moved to exclude this evidence; but the court overruled the motion, and allowed the evidence to be introduced: and the defendant excepted.

The jury found a verdict for the plaintiff, and assessed his damages at one thousand
51 sand dollars. The *defendant thereupon moved the court for a new trial, on the grounds that the verdict was contrary to the evidence, and that the damages were excessive. But the court overruled the motion, and rendered judgment according to the verdict; and the defendant again excepted. This exception was not noticed in this court.

The case was taken to the District Court of Appeals at Abingdon, where the judgment was affirmed. And Honaker then applied to a judge of this court for a supersedeas; which was awarded.

John W. Johnston, for the appellant.

Staples, for the appellee.

JOYNES, J. The only question raised in the argument here, and the only one we have to decide, is, whether the Circuit court erred in admitting as evidence for the plaintiff the record of the proceedings, upon an indictment against the defendant for the same assault and battery on which this action is founded. Upon that indictment the defendant, without filing any plea, came into court, according to a practice which is familiar in this State, and confessed a judgment for five dollars and the costs; the entry being as follows: "The defendant, in proper person, with the assent of the court, confessed a judgment for five dollars fine and the costs. Therefore it is considered by the court that the defend-

*See principal case, cited in Womack v. Circle, 32 Gratt. 844.

ant forfeit and pay to the Commonwealth the fine aforesaid, besides her costs by her about her prosecution in this behalf expended."

It was very properly conceded in the argument, that the judgment upon an indictment for an assault, cannot, by reason of want of mutuality, be given in evidence in a civil action for the same assault, to establish as *res adjudicata*, the fact on which it was

52 founded. But while such a judgment cannot be given in evidence *as a judgment, yet when it is founded on the plea of guilty, the record is admissible in the civil action, because the plea of guilty was a direct and express confession of the truth of the charge, and the record is admissible to prove this confession. Upon such a plea, the entry, according to the old form, is *quod cognovit indictamentum*. And it is laid down in many books, upon the authority of a case in the Year Book, 9 H. 6, 60 a, that such a direct and express confession on an indictment for a trespass, concludes the defendant, so that he cannot afterwards plead not guilty in a civil action brought against him for the same matter. Whether such an admission of guilt ought to be held conclusive on the defendant in a civil action, it is not necessary to enquire, but there is no doubt that it would be admissible evidence in such an action. And so it is contended, that the confession of judgment in this case was an admission of the facts charged in the indictment, and was on that ground admissible as evidence for the plaintiff in the present action.

There is another kind of confession known in the practice of criminal courts under the common law, which is spoken of as an implied confession. That is, where, in a case not capital, the defendant, without pleading guilty, or expressly confessing the truth of the indictment, throws himself on the mercy of the court, and desires to submit to a small fine. This request may be granted or refused by the court, as it may think proper. If the court grants the request, the entry on the record is not *quod cognovit indictamentum*, as in the case of an express confession, but *quod non vult contendere cum domino rege, et se posuit in gratiam curiæ*, and the defendant is not put to a more direct confession. 1 Chit. Cr. Law 431. The effect of such an implied confession is not the same as that of a direct and express confession by the plea of guilty. Thus, in the case before referred

53 to from the Year Book, it was held *that the defendant will not be concluded by such an implied confession from pleading not guilty in a civil action founded on the same fact, as it was held he will be by an express confession. But it is material to enquire whether this proceeding on the part of a defendant involves such a confession of the truth of the charge made in the indictment, as to make it admissible at all as evidence against him in a civil action.

The essential difference between the effect of a direct or express confession, and that of a confession implied upon a *nolo contendere*, seems to be clearly marked by the difference

in the form of the entry. The direct confession is an acknowledgment of the fact charged in the indictment, and accordingly the entry is *cognovit indictamentum*. No such entry is made upon the plea of *nolo contendere*, which indicates that it is not understood as an acknowledgment of the fact charged. The entry in such a case imports merely, that the defendant is willing and desirous, if the court will allow it, to pay a small fine in order to get rid of the prosecution. Such a proceeding on the part of defendant implies a confession "in a manner," as Hawkins says, of the truth of the charge. But it is, strictly speaking, only an agreement on the part of the defendant, that the fact charged may be considered as true for the purposes of the case, but for them only. Being unwilling to confess the truth of the charge, he will not plead guilty: thinking it best for him not to submit to a trial, he will not plead not guilty: but desiring to make his peace on the best terms, he throws himself on the mercy of the court, and declares his willingness to pay a fine, without confessing or denying his guilt. He agrees that the court may consider him guilty for the purpose of imposing a fine upon him, but the agreement goes no further. Accordingly, it was said by the court in *Commonwealth v. Tilton*, 8 Metc. R. 232,

54 that the plea of *nolo contendere*, *like a demurrer, admits, for the purposes of the case, all the facts which are well stated, but is not to be used as an admission elsewhere. And in *Guile v. Lee*, 3 Bost. Law R. 433, which was an action of assault and battery, it was held by Shaw, C. J., that the plaintiff could not give in evidence the proceedings on an indictment against the defendant for the same assault, to which he had pleaded *nolo contendere*. The Chief Justice said: "I have no doubt on the subject whatever. The plea was *nolo contendere*, and the proceedings are not competent evidence in a civil suit for the same assault. One object of this plea is to prevent the proceedings being used in any other place." And this was held to be the law in *Birchard v. Booth*, 4 Wisc. R. 67, where the court regarded the proceeding on the indictment as amounting to a plea of guilty, and not merely to a *nolo contendere*, and therefore held the record to be admissible in the civil action. The same doctrine as to the effect of the plea of *nolo contendere* is laid down in the last edition of *Greenleaf's Evidence*, in the text, vol. 1, § 179, and in Judge *Redfield's* note, vol. 1, § 537. The difference between an express confession of the truth of the indictment, and the sort of confession which is implied where the defendant "submits" upon a *nolo contendere*, is illustrated by the decision of the Supreme court of North Carolina in *The State v. Oxendine*, 2 Dev. & Bat. Law R. 435. In that case the defendant, on an indictment for assault and battery, submitted himself to the mercy of the court, and was fined, and it was held that this did not amount to a conviction of the offence.

This practice of pleading *nolo contendere*,

or "submitting," as it is familiarly termed, does not prevail in Virginia. The reason is, as I apprehend, that in Virginia the fine, in cases of misdemeanor for which no specific fine is prescribed by statute, is assessed by the jury, and not by the court, as it is in England, and in *the States which follow the common law in this respect. The same substantial purpose, however, is effected here by an arrangement with the attorney for the Commonwealth, in pursuance of which the defendant, with the assent of the court, confesses a judgment for such fine as the attorney agrees to accept. The amount of the fine is thus ascertained beforehand; while on a submission, under the common law practice, it is left to the court to fix the amount of the fine in its discretion.

Where the defendant "submits," under the common law practice, the court treats the submission as a confession of guilt, and imposes the fine in the exercise of its ordinary jurisdiction. It is indispensable that the proceeding should be thus regarded as a confession of the charge, for otherwise there would be no foundation for the judgment to stand upon. But in Virginia, if the defendant in an indictment for an assault and battery, or other misdemeanor, for which no particular fine is prescribed by statute, confesses the truth of the indictment by a plea of guilty, the court cannot proceed to assess the fine, but a jury must be called for that purpose. Code, ch. 199. § 24. Cases of special fines prescribed by statute, are governed by sect. 3, ch. 43 of the Code. It is not necessary, therefore, in order to afford a foundation for the judgment, as it is in the case of a "submission," to regard the proceeding as implying a confession of guilt, for the purposes of the case. Such a confession is neither necessary nor sufficient to support the judgment. The judgment in such a case stands on no other foundation than the consent of the defendant, given in pursuance of the compromise with the Commonwealth, that judgment may be entered up against him for the fine agreed upon. Nor is there anything in the fact of proposing or assenting to such a compromise arrangement, which necessarily implies an admission of guilt. A defendant *may be, and often is, induced to adopt that course by other considerations. But if the proceeding can justly be regarded as implying a confession of guilt for the purposes of the case, the reasons for excluding the record in case of a nolo contendere, as evidence against the defendant in a civil action, apply with at least equal force to a confession of judgment under our practice.

It has been suggested that the plaintiff may have introduced the evidence in question with a view to enhance the damages, by showing that the defendant had got off with only a nominal fine in the criminal proceeding. But the evidence was not admissible for that purpose. The indictment and the action, though founded on the same fact, are distinct remedies, prosecuted by different parties and for different purposes. On this

ground it has been often held, that the defendant in an action for assault and battery, cannot prove that he has been already punished criminally for the same act, for the purpose of mitigating the damages. *Cook v. Ellis*, 6 Hill R. 466; *Wolff v. Cohen*, 8 Rich. R. 144; *Jefferson v. Adams*, 4 Harring. R. 321; *Phillips v. Kelly*, 29 Alab. R. 628; 28 Miss. R. 621.

On the same ground, if not indeed with stronger reason, the plaintiff in a civil action ought not to be allowed to prove that the defendant has paid only nominal damages to the Commonwealth, for the purpose of enhancing his damages in the action. It has sometimes been thought that a defendant, in order to protect himself against the injustice of a double punishment for the same act, ought to be allowed to avoid the infliction of damages for the sake of punishment in the civil action, where the plaintiff seeks to obtain such damages, by showing that he has been punished already at the suit of the Commonwealth. *Smithwick v. Ward*, 7 Jones R. 64. See *Porter v. Seiler*, 23 Penn.

R. 424. I express no opinion on this question, because *it is not before us.

But the considerations which would justify the admission of such evidence in a case of that sort, would not authorize the plaintiff in the civil action to enhance his damages, by showing, as evidence in chief, that the defendant had paid only small damages on the indictment.

I am, therefore, of opinion, that the Circuit court erred in admitting the evidence set forth in the first bill of exceptions, and that the judgment of the District court, and the judgment of the Circuit court, should both be reversed.

The other judges concurred in the opinion of JOYNES, J.

The judgment of the court was as follows :

The court is of opinion, for reasons, &c., that the record of the indictment and of the confession of judgment therein set out in the first bill of exceptions, are not admissible evidence in this action, and that the same ought, therefore, to have been excluded from the jury; and that the said judgment of the said District court is therefore erroneous.

Therefore it is considered by the court, that the said judgment of the said District court be reversed and annulled, and that the appellant recover against the appellee his costs by him expended in the prosecution of his writ of supersedeas aforesaid here.

And this court, proceeding to render such judgment as the said District court ought to have rendered, it is further considered by the court, that the judgment of the said Circuit court be reversed and annulled, and that the appellant recover against the appellee his costs by him expended in the prosecution of his writ of supersedeas in the said Circuit court. And it is ordered that the cause be remanded to the said Circuit court for a new trial to be had therein, upon which the evidence *aforesaid, if again offered by

the plaintiff, and objected to by the defendant shall not be admitted by the court. Which is ordered to be certified to the said District court, the clerk of which court is directed forthwith to certify the same to the said Circuit court.

Judgment reversed.

59

***Downey v. Nutt.**

January Term, 1869, Richmond.

Act of Congress—Taxes—Sale of Delinquent Land.—The principles decided in the cases of *Martin v. Snowden*, trustee, *Bennett v. Hunter*, and *Portner & Recker v. Cazenove*, 18 Gratt. 100, and in *Turner v. Smith, &c.*, Id. 830, reaffirmed and acted on.

This was an action of ejectment in the Circuit court of the county of Alexandria, brought in March 1867, by William D. Nutt against James M. Downey, to recover a tract of one hundred and eighty acres of land lying in that county, and called Parm-Will-Alice. The defendant appeared and pleaded the general issue, and the parties agreed the facts, and waiving a jury, further agreed that the suit might be decided by the court.

It appears that until the sale of the land by the tax commissioners, the plaintiff was seized in fee of the land. That the board of tax commissioners, acting under the acts of Congress of the 7th of June 1862, entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," fixed the amount of tax charged upon said land under the acts of Congress at seventeen dollars and one cent; penalty eight dollars and fifty-one cents; and fifteen per cent. damages. That the taxes charged upon said land were not paid within sixty days from the time the amount of said tax was fixed by the commissioners, as provided for in the third section of said act of Congress of June 7th, 1862, and that thereupon the said board of commissioners caused the said land to be duly advertised

to be sold at Alexandria, Virginia, on the 29th of February 1864. That pursuant to said notice the said board caused the said land to be sold in accordance with the provisions of said acts of Congress to F. H. Pierpoint, as the highest bidder, at the sum of twenty-four hundred dollars. That the said sale was made without the knowledge or consent of the said Wm. D. Nutt, the plaintiff. That Pierpoint transferred the said purchase to the defendant Downey, to whom the commissioners issued a certificate. The certificate is set out, and is in the usual form; and states that the tract of land was charged to the plaintiff Nutt on the land book of the State of Virginia for the year 1860, and valued on said book at \$6,300; and was struck off to the purchaser at \$2,400. That this is the land sued for in this action; that it is valued on the commissioners' books for the county of Alexandria for the year 1860, at the sum of \$6,300; that at the time of the sale and at the time of the trial it was worth twenty dollars per acre; is

easily susceptible of division into smaller tracts, and contains one hundred and eighty acres. And that the plaintiff has not conveyed away or parted with said land, or any part thereof, nor is his title thereto in any wise affected unless by and under the tax sale above mentioned.

Upon this statement of the facts the Circuit court rendered a judgment for the plaintiff; which, upon a supersedeas to the District Court of Appeals at Fredericksburg, was affirmed. And then Downey applied to a judge of this court for a supersedeas; which was awarded.

Willoughby, for the appellant.

F. L. Smith and Ould & Carrington, for the appellee.

MONCURE, P., delivered the judgment of the court: The court is of opinion that for reasons stated in the cases of *Martin v. Snowden*, trustee, *Bennett v. Hunter*, *Portner & Recker v. Cazenove*, 18 Gratt. 100; and *Turner v. Smith, &c.*, Id. 830, which rule this case, there is no error in the said judgment. Therefore, it is considered that the same be affirmed, and that the defendant recover of the plaintiff thirty dollars damages, and also his costs by him about his defence in this behalf expended; which is ordered to be certified, &c.

RIVES, J., dissented.

Judgment affirmed.

62

***Zetelle v. Myers & al.**

January Term, 1869, Richmond.

1. **Agency—Fiduciary Character—Equity Jurisdiction.**—Where an agency is of a fiduciary character, the principal may sue his agent in equity for an account of his agency.
2. **Same—Same—Example of.**—An agency to manage, lease, and sell property, and pay expenses upon it, to collect debts, and pay over the moneys received to the principal, is of a fiduciary character.
3. **Case at Bar—Action at Law—Suit in Equity.**—Z. being about to leave the country, executes a power

***Agency—Fiduciary Character—Equity Jurisdiction.**—In *Simmons v. Simmons*, 83 Gratt. 456, the court citing the principal case, said: "The bill was filed to have a discovery, account and settlement of the transactions of the defendant as general agent for several years. It is not the case of a single money demand, which might conveniently and should be enforced in a court of law, nor of mutual demands merely, of which equity would take cognizance, but it is a case involving a trust, where the fiduciary character of the employment imposed upon the person employed the duty of keeping accounts and preserving vouchers. It is well settled that equity has jurisdiction in such a case." And in *Huff v. Thrash*, 75 Va. 548, the court citing the principal case, said: "It is upon the principle of trust mainly, that equity takes jurisdiction at the instance of the principal to compel his agent to account." See also, *Salamond v. Kelley*, 80 Va. 99; *Vilwig v. B. & O. R. Co.*, 79 Va. 456; *Coffman v. Sangston*, 21 Gratt. 263; *Bank v. Jeffries*, 21 W. Va. 508.

of attorney, by which he gives to M. and C. the amplest power to manage and dispose of all his property here for his benefit, and collect debts due him. On the same day Z. and his wife convey to M. and C. a house and lot, in trust to lease or sell the same, and pay over the proceeds as received to Z. The deed of trust and power of attorney being designed to effect one common object, Z. cannot file a bill against M. and C. for an account of the trust subject under the deed, and bring an action at law for the moneys received from the personal property and debts, under the power of attorney; but if he chooses to proceed in equity, must embrace the whole in that suit.

4. **Same—Same—Same—Election as to Remedy.**—The court should have required the plaintiff to elect whether he would amend his bill so as to embrace the whole of the transactions, and dismiss his action at law, or whether he would prosecute that action; and upon his failure to elect, or electing to prosecute his action at law, should have dismissed the bill.

This was a suit in equity in the Circuit court of the city of Richmond, brought in February 1867, by Spiro Zetelle, against Gustavus A. Myers and Frederic J. Cridland, seeking to hold them responsible for the purchase money of a house and lot in the city of Richmond, sold by them under a deed of trust from Zetelle and wife to Myers and Cridland. The circuit court dismissed the bill, and Zetelle obtained an appeal to this court.

63 *The cause was very fully argued on the merits by Roberts, Macfarland and Wise, for the appellant, and by Jones, Conway Robinson and Andrew Johnston, for the appellees; but it went off on a point of form. The case is sufficiently stated by Judge Joynes in his opinion.

JOYNES, J. On the 9th day of September 1861, Spiro Zetelle, then a resident of Richmond, being about to go to Europe, to remain there for an indefinite time, executed a power of attorney by which he constituted Gustavus A. Myers and Frederic J. Cridland his agents and attorneys in fact. The powers conferred by this instrument were of the most ample character. Besides the enumeration of many particular powers, there is this general clause, "to do, transact, execute, and perform, all proper, legal, equitable, needful, and requisite acts, matters, and things, relative to my affairs, business, and concerns, of all and every kind whatsoever, in the city of Richmond aforesaid, none excepted or reserved." There is also this general clause, designed to comprehend any thing that might possibly have been omitted: "It being meant and intended by me to authorize and empower, and I do hereby authorize and empower my said attorneys, or either of them, to do every matter and thing for me, in any right and capacity whatsoever, which can possibly be devised and lawfully done, although the same may be omitted to be herein particularly set forth."

At the time this power was executed, Zetelle owned a house and lot in Richmond, which was in the occupation of a tenant, and some furniture and personal effects, and had debts due to him to the amount of sev-

eral thousand dollars, falling due at different times, from November 1, 1861, to November 1, 1865.

On the same day (September 9, 1861) Zetelle and wife executed a deed, whereby they 64 conveyed the said house *and lot to the said Myers and Cridland, upon trust, and with power to lease the same for such term, and for such rent as they, or either of them, might deem most advantageous, to cause to be made all necessary repairs, and to pay all necessary and proper charges, taxes, premiums of insurance, assessments, and dues accruing on the said property. And upon further trust, at such time, in such manner, and upon such terms as the said trustees, or either of them, should think most beneficial, to make sale of the said property, and to collect all sums of money arising from such rents and sale. And upon further trust, from time to time, as they should come to their hands, to pay over to said Zetelle, his representative or assigns, all sums of money that may come to their, or either of their, hands, after deducting a commission of five per cent. One object, certainly, for the execution of this deed, was to enable Myers and Cridland to pass the title of Mrs. Zetelle, by their conveyance of the house and lot in case of a sale. Whether there was any other object it is not necessary now to say. That may be a question hereafter.

Myers and Cridland made sale of the real estate in March 1862, and received the proceeds of sale. After the close of the war in 1865, Zetelle returned to Richmond, and in February 1867, filed the bill in this case, charging Myers and Cridland with a breach of trust in failing to remit to him the money arising from the sale of the house and lot under the deed, and from rents received by them before the sale. The deed and power of attorney are both exhibited with the bill. It is alleged that the plaintiff has sued the defendants at law in reference to their proceedings under the power of attorney, and the declaration and bill of particulars in that action are in the record. The plaintiff in that action seeks to charge the defendants with the amount of the several

65 debts and the value of the personal *effects, as having been received by them, and not accounted for.

The bill alleges, that after the plaintiff returned to Richmond, he applied to Myers (Cridland having removed to another State), for an account of the agency and trust; that Myers informed him that the money arising from the sales and collections made by himself and Cridland had been invested in Confederate bonds, (except a small sum which remained in Confederate notes), so that the whole had been entirely lost; and that he exhibited an account of the transactions of himself and Cridland; which account he indignantly rejected. This account is exhibited with the bill.

Cridland was proceeded against as a non-resident. Myers filed an answer, in which he embodied a demurrer to the bill, and among other things, insisted that the power of attorney covered the money which came

to the hands of Cridland and himself under the deed of trust, so that the action at law would embrace the claim set up in his suit. He therefore submitted a motion that the plaintiff should be put to his election whether he would proceed in this suit or in the action at law, alleging that both were for the same subject matter and cause of action. The motion was overruled; and upon the final hearing on the pleadings and evidence, the bill was dismissed with costs.

It is a general rule, that an action at law cannot be maintained against a trustee to recover money due from him in that character. *Pardoe v. Price*, 16 Mees. & Welsb. R. 457. If, however, the trustee has appropriated a certain sum as payable to the cestuis que trust, as for example, by the settlement of an account showing a balance due him, or otherwise admits that he holds it to be paid to the cestuis que trust, or for his use, an action at law for money had and received will lie, because the character of the relation

between the parties in respect to the money is changed. The trustee no longer holds the money as trustee, properly so called, but he holds it as a receiver for the use of the cestuis que trust. *Edwards v. Lowndes*, 1 El. & Bl. R. 81, (27 Eng. Com. L. R.).

It was contended here by the counsel for the defendants, that the money which came into their hands as trustees under the deed, had been carried into their account as agents, and was no longer held by them as trustees, properly so called, and so might be the subject of an action at law, in like manner as the money received immediately under the power of attorney. Indeed, it was contended that after the money had been, as thus alleged, transferred from the hands of the defendants as trustees to their hands as agents, the only remedy of the plaintiff was at law; so that this suit should be dismissed for want of jurisdiction. But as we shall presently see, the transactions of the defendants as agents under the power of attorney, are a proper subject for the jurisdiction of equity, as well as their transactions under the deed of trust; so that if the money received by the defendants under the deed did, as contended for, pass into their hands as agents, and become thereby the subject of an action at law, it did not cease to be the subject of equitable jurisdiction. It is not necessary, however, to decide whether the trust fund became thus, along with the fund arising under the power, the subject of an action at law, so as to entitle the plaintiff, at his option, to sue for the entire subject at law or in equity. For this is not a case for applying the ordinary rule, by which a plaintiff, who is asserting the same demand at law and in equity, is put to his election. Whatever it may have been competent for him to do, the plaintiff is not, in point of fact, asserting the same demand in both suits. We may, however, reach substantially the same result in another way.

The deed of trust and power of attorney were executed at the same time, and for the purpose of effecting the

same general object, namely, the management and disposition of the plaintiff's property and business during his absence from the country. They constituted in fact but one general agency; the power of attorney embracing all the property, and the deed of trust embracing the real estate only; for the purpose of investing the agents with an authority which was not, and could not have been, conferred by the power of attorney, namely, the authority to pass the interest of Mrs. Zetelle. Whether the deed of trust devolved any duty upon the trustees in respect to the money they were to receive under it, which was not devolved upon them by the power of attorney in respect to other money, is immaterial to the present purpose. And accordingly, the plaintiff in his bill treats these instruments as designed for a common purpose, and to create one general agency for the management of his affairs; and the defendant so regarded them, as appears from their blending all their transactions in one common account.

It is a rule, founded on the principle of preventing unnecessary and vexatious litigation, that a plaintiff shall not be allowed to split up a single cause of action, so as to make it the subject of several suits. On this ground, a court of equity will not allow a bill to be brought for part of a matter only, when the whole is the proper subject of one suit. Thus, it will not permit a party to bring a bill for part of one entire account, but will compel him to unite the whole in one suit; for otherwise he might split it up into various suits, and thus promote the most oppressive litigation. *Story Eq. Pl. 287*. If, therefore, the transactions under the power of attorney were proper for the jurisdiction of a court of equity, they ought to have been united in this suit with the transactions

under the deed of trust, as they all pertained to the same general and common agency. And that course would be attended with this practical advantage in addition: that it would avoid having the same questions between the same parties, and in reference to the same general subject matter, litigated before different forums, which might come to different conclusions on the same facts. It is important, therefore, to enquire, whether the transactions of the defendants under the power of attorney were proper for the jurisdiction of a court of equity.

In *Mackenzie v. Johnston & al.*, 4 Madd. R. 373, the bill was filed for an account of certain earthenware which the plaintiff had delivered to the defendants, who were the owners of a vessel, to be shipped by them to Bombay and sold. The defendants demurred, and it was contended that equity had no jurisdiction of the case. The Vice Chancellor (Sir John Leach) overruled the demurrer. He said: "The defendants here were agents for the sale of the property of the plaintiff; and wherever such a relation exists, a bill will lie for an account. The plaintiff can only learn from the discovery of the defendants how they have acted in the execution of their trust, and it would be most unreasonable that he should pay them for

that discovery, if it turned out that they had abused his confidence. Yet such must be the case, if a bill for relief will not lie."

The agency in that case, as in the one now before us, was of a fiduciary character, involving trust and confidence, and making it necessary for the agents to keep accounts and preserve vouchers. The jurisdiction, thus for the first time in the year 1819, distinctly asserted over this class of cases, has been fully established by subsequent cases in England. Thus, in *Hemmings v. Pugh*, 9 Jurist. N. S. 1124, decided in 1863, Vice Chancellor Stuart said: "I take it to be the law of

this court, where the agency partakes
69 of a fiduciary *character, that the jurisdiction of this court attaches, and that the court will ordain a decree for an account, although all the items of it may be on one side, and although there may be no mutual dealings between the parties." The jurisdiction was declined in that case, because although there was an agency, it did not have any fiduciary character.

In *Phillips v. Phillips*, 9 Hare R. 471, S. C. 12 Eng. L. & Eq. 259, Vice Chancellor Turner was of opinion that a bill would not lie in every case by a principal against his agent, and that the equity would not entertain a bill for an account except in a case of mutual accounts; which he understood to mean, not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid money on account of the other. This objection had been urged by counsel and overruled in *Mackenzie v. Johnston*. And the same objection was made and overruled in *Makepeace v. Rogers*, 11 Jurist. N. S. 215, decided in 1865. In that case a land owner filed a bill against the agent and manager of his estates, for an account of all moneys received, and of all expenses paid by such agent, and for payment of the balance that might be found to be due. The defendant filed a demurrer, which was overruled by Vice Chancellor Stuart. He said, in the course of his opinion, "I conceive that wherever the relation between the person who seeks an account, and the person against whom he seeks it, partakes of a fiduciary character, a trust is reposed by the plaintiff in the defendant, and that that trust is not the same as is represented to exist in the ordinary employment of an agent, such as a builder or other tradesman. The fiduciary character of the employment imposes upon the person employed [the duty of keeping accounts and of preserving vouchers; and according to the old law, which I trust will

continue to be the law of this court,
70 *a bill for an account in equity may be filed and sustained." The Vice Chancellor disapproved of the opinion of Chief Baron Alexander, in *King v. Rossett*. 2 Young & Jev. 33, that before a court of equity will interfere upon a bill filed by a principal against his agent for an account, it must be shown that the accounts are so complicated that they cannot be properly investigated at law. The decree of the Vice Chancellor was

affirmed by the Lords Justices of the Court of Appeals. 11 Jurist. N. S. 314. Lord Justice Knight Bruce said, that there was no authority for saying that there must be demands on both sides; and that an account might be obtained without any charge of fraud or misrepresentation. Lord Justice Turner said, that there was no authority to show that a bill would not lie at any time by a principal against an agent for an account. He said there was nothing to the contrary in the decision of *Phillips v. Phillips* (above cited), and that he regretted that any thing he had said in deciding that case should have misled any one.

There are many other cases in the English courts bearing upon the jurisdiction of courts of equity in cases of account, which show that the extent and grounds of that jurisdiction have been the subject of much diversity of decision. See Haynes' *Outlines*, 236-254; *Dabbs v. Nugent*, 11 Jurist. N. S. 943. It is not necessary to consider them, for the cases which have been cited, and which rest on the most satisfactory grounds, fully establish the jurisdiction of equity in the case of such an agency as that created by the power of attorney in the present case.

It was the contrary, therefore, to the principles which govern the proceedings of courts of equity, to embrace in this suit only such of the transactions under the general agency as took place under the deed of trust; while those under the power were made the

subject of an action at law. The bill
71 was liable to the demurrer *filed by

Myers for thus embracing only part of the subject matter, the whole of which should have been embraced in it. And the objection was sufficiently raised, too, by the motion to put the plaintiff to his election. The Circuit court should not, therefore, have overruled that motion, thus leaving the plaintiff at liberty to proceed in both suits. Instead of that, the Circuit court should have made an order requiring the plaintiff to make his election, within a time specified, whether he would amend his bill in this case so as to embrace therein the transaction under the power of attorney, as well as those under the deed of trust, and dismiss his action at law; or whether he would prosecute his action at law, and in the event of his electing to prosecute his action at law, or failing to make any election, the bill in this case should have been dismissed with costs. This would have been the same, in effect, as to sustain the demurrer, with leave to the plaintiff to amend the bill and make his election.

The appellee, having obtained a decision of the Circuit court in his favor, on the merits, has not insisted here, as he did there, that the plaintiff should not have been allowed to prosecute both suits, and of course the objection is one that could not be made by the appellant. But we are satisfied that the justice of the case requires that that objection should be sustained, and we therefore put our decision on that ground, without intimating any opinion on the merits. If we should decide the case upon the merits, a

serious question might arise in the action at law, whether it could be proceeded in, inasmuch as this suit, involving part of the entire cause of action, had been decided on the merits. It is a general rule, that a judgment in an action for any part of an entire cause of action, is a bar to another action founded on any other part of the same entire cause of action. *Hite v. Long*, 6 Rand. 457.

72 *The decree must therefore be reversed, and the cause remanded.

The other judges concurred in the opinion of JOYNES, J.

The decree was as follows :

The court is of opinion, for reasons, &c. that the power of attorney and deed of trust in the bill mentioned were designed to effect one general and common object, namely, to entrust the defendants with the control, management and disposition of the property and affairs of the plaintiff, in the manner set forth therein, during his contemplated absence from the country. The court is further of opinion, that the transactions of the said defendant under the authority conferred by the said power of attorney, as well as their transactions under the authority conferred by the deed of trust, were proper subjects for the cognizance and jurisdiction of a court of equity; and that it was not competent for the plaintiff to proceed against the defendants in this suit in respect to the transactions under the deed of trust, and in the action at law in the bill mentioned in respect to the transactions under the power of attorney. The court is further of opinion, that instead of overruling the motion of the defendant Myers to put the plaintiff to his election whether he would prosecute this suit or the said action at law, the said Circuit court should have made an order requiring the said plaintiff to make his election within a time specified, whether he would amend his bill in this case so as to embrace therein the transactions under the power of attorney, as well as those under the deed of trust, and dismiss his said action at law, or whether he would prosecute his action at law; and that in the event of his electing to prosecute his said actions at law, or failing to make any election, the *said Circuit court should have dismissed the bill in this case with costs; and that the said decree is therefore erroneous.

Wherefore, it is adjudged, ordered and decreed, that the said decree be reversed and annulled, and that the appellant pay to the appellees as the parties substantially prevailing, their costs by them expended in this court; the appellees being regarded as the party substantially prevailing, because the decree of the Circuit court is reversed for an error committed by the appellant.

And it is ordered that the cause be remanded to the said Circuit court for further proceedings, in conformity to the foregoing opinion and decree. Which is ordered to be certified, &c.

74 *Mayor's Ex'or & als. v. Carrington's Ex'or & als.

January Term, 1869. Richmond.

1. **Case at Bar—Deed of Trust—Security for Debts.**—C. executes a deed in which, reciting that W. had endorsed for C. three notes, which he specifies, he conveys to O. certain property in trust that if the said notes are not paid by C. when due, O. shall, on the request of W., sell the property, and out of the proceeds pay the notes; and upon further trust, after paying the notes, any surplus of proceeds of sale shall be applied to the payment of any debt which at the time may be due from C. to W. The notes are not paid when due, and three years afterwards, the trustee being about to sell the property, C. pays the notes. The deed is nevertheless a security for any debt that C. then owed to W., and it became such security at least from the time of the default in paying the notes.

2. **Same—Same—Leased Property.**—W. held a long lease on a part of the property conveyed in trust by C., and W. conveyed all his property of every kind, to secure his creditors. By a decree of the court the lease of the property is sold, with authority to the purchaser to set off the debt due from C. to W. against the rent, as it falls due. And this is proper.

3. **Leased Property—Rent—Deduction for Taxes.**—The leased property, when sold, was only valuable for the sand taken from it. The purchaser builds upon it, and makes extensive improvements. He is entitled to deduct from the rent the taxes upon the property as he purchased it, but not the taxes occasioned by his improvements.

4. **Reversionary Interest—Purchase of—Inadequate Consideration.***—Where there is no actual fraud and no fiduciary relation between a purchaser of a reversionary interest and his vendor, mere inadequacy of consideration is not sufficient to avoid a sale, unless it is so great as to shock the moral sense.

5. **Case at Bar—Cases Heard Together.**—M. files a bill to have his title to certain real estate established, and to obtain the legal title from a trustee. J. files her bill in the same court against M., claiming as assignee of the vendor, the purchase money for the land, which she claims is still unpaid. The cases were properly heard together.

6. **Case at Bar—Papers in Suit Lost.**—The papers in the suit of J. were lost at the time the decree appealed from was made, but there were found decrees and reports of *commissioners, and exceptions thereto, made in the two suits, sufficient to enable the court to ascertain the merits of her claim. It was proper to decree upon the claim.

7. **Evidence—Answer—Belief of Part.**—Though all of an answer responsive to a bill is to be received as evidence, the court may believe a part of it and disbelieve another part.

8. **Assignment Unquestioned—Need Not Be Proved.**—In a bill by an assignee against the obligor and

***Inadequate Consideration.**—In *Whittaker v. S. W. Va. Imp. Co.*, 34 W. Va. 223, 12 S. E. Rep. 509, the court, citing the principal case, said: "If there be no fraud shown, as the law requires, inadequacy alone cannot affect the contract, unless so gross as to shock the conscience." See also, same proposition approved in *Pennybacker v. Laidley*, 33 W. Va. 639, 11 S. E. Rep. 44, citing the principal case as authority.

assignor, the assignment is not questioned by the assignor. There is no necessity for proving it as against the obligor.

9. **Assignment of Debt—Without Recourse—Effect.**—If the assignment of a debt is without recourse, it is doubtful whether it will carry with it an equitable lien for the debt; but if the assignment is general, the equitable lien passes with it.

10. **Voluntary Gifts—Valid if Complete.**—It was stated in *Henry v. Graves*, 16 Gratt. 244, and reaffirmed in this case, as the result of all the authorities, that a voluntary gift valid in law or equity, may be made of any property, real or personal, legal or equitable, in possession, reversion or remainder, vested or contingent, and including choses in action, unless they be of such a nature as that an assignment of them would be a violation of the law against maintenance and champerty; that such a gift to be valid, must be complete and not executory; that what is necessary to the completion of the gift, depends on the nature of the subject and the circumstances of the case; and that it is always sufficient, though not always necessary, to the completion of a gift, at least between the parties, that the donor do everything in his power, or which the nature of the case will admit of, to make it complete.

11. **Case at Bar—Assignment Complete.**—M. proposes in writing to purchase of C. certain real estate upon specified terms. This proposition is accepted by C. by a writing at the foot of the proposal, and the real estate is conveyed to M.; and C. then assigns the instrument by a writing upon it, to J. The assignment is complete, and J. may sue M. in equity upon it in her own name.

12. **Specific Performance of Contract—Statute of Limitations.**—J. is not barred by the statute of limitations, her suit being for a specific performance of the contract.

13. **Laches—Excused.**—Great laches in prosecuting a suit in equity after it had been commenced by an assignee of the purchase money of land against the debtor purchaser, excused under the circumstances.

This was an appeal from a decree of the Circuit court of the city of Richmond, made on the 26th of February 1868, in three suits, styled Mayo v. Carrington, *Coutts v. Mayo, and Coutts' adm'r v. Mayo. The case was argued by R. T. Daniel, for the appellants, and by Roberts, Sands, C. Robinson and Griswold, for the different appellees. But the questions disputed were rather questions of fact than of law; and the facts, as they were viewed by the court, are stated in the opinion of the President of the court.

MONCURE, P. This is an appeal from a decree of the Circuit court of the city of Richmond in three suits, the styles of which were "Mayo v. Carrington," "Coutts v. Mayo," and "Coutts' adm'r v. Mayo," the printed record of which contains 550 pages. The difficulty of deciding it is necessarily very great, and is much increased by the obscurity arising from lapse of time, the extraordinary laches of most of the parties concerned, and the death of all the original actors in the transactions which gave rise to the suits. The subject of controversy is what is

familiarly known by the name of the "Sandy bar;" which was at one time, as its name imports, a mere sand bar, valuable in itself only for the sand it afforded, yet so valuable, even for that, as to afford an annual rent of \$450. And there was then appurtenant to it a fishery, which was so valuable as to yield, for a short time at least, an annual rent of \$1,000. But the fishery soon diminished in value, and has long since become utterly valueless. If this bar was then worth anything for any other purpose than the sand and the fishery, in the estimation either of the parties concerned or the public, it was only in its connection, if it had any connection, with "Coutts's ferry," to which it was in close proximity, and which was then held by the same owner. That ferry was across James river, between Richmond and Manchester, and just below "Mayo's bridge." It was therefore, naturally, a subject of interest to

77 the proprietor of that bridge, which has always belonged to the *appellants and their ancestors. But the ferry has long since gone down and ceased to have any existence. The sandy bar, which in the origin of the transactions aforesaid was thus of limited value, has long been increasing in value by reason of improvements, public and private, and is now, it seems, very valuable. It is situated on James river, nearly opposite the centre of the city, is lot No. 341 in the plan of Byrd's addition to the city, and the Richmond dock occupies a part of it. Many buildings have been erected upon it, which now yield a large amount of rent. These changes have had the effect of waking up the parties concerned from their long sleep, and stimulating them to enquire into their rights. Not being able to settle those rights themselves, they have invoked the aid of the courts for that purpose, and it now devolves on this court to decide the questions of controversy between them. Difficult as that duty is, we must address ourselves to the work and perform it as well as we can. After all, we can hardly expect to effectuate perfect justice in the case.

The representatives, real or personal, of four persons long since deceased, are conflicting claimants of the subject in controversy, or an interest therein. First, George M. Carrington; secondly, Edward C. Mayo; thirdly, Jane Coutts; and fourthly, Patrick Coutts. We will consider the claims of these in their order. And,

78 First, George M. Carrington. He and his representatives and assigns have been in the possession and enjoyment of the subject ever since the year 1833, claiming to be entitled to a term for years therein which will expire on the 10th day of February 1876; and also claiming a right to set off against the rent, accrued and accruing, or hereafter to accrue during all that time, so much as may be necessary of the debt due by Patrick Coutts to James Winston, claimed to be secured by the deed of trust from said Coutts to Coleman *and Otis of the 8th of November 1819, and to charge the balance remaining, or which may remain,

unpaid of that debt, after crediting the rents aforesaid, on the subject itself, upon the ground that the said debt, with the said right of set off, was sold and assigned to said Carrington along with the said term, and that the annual rent is insufficient to keep down the annual interest upon the balance due on account of the said debt. We will now examine his chain of title, link by link, and see whether, and to what extent, it is sufficient to sustain his claim.

Patrick Coutts is the source from whom all the conflicting claims in this case arise, and it will therefore be unnecessary to trace the title beyond that source. It may be proper to say, however, that he derived it under a marriage settlement between his father and mother, Reuben and Jane Coutts, dated the 10th day of September 1799, which created a charge upon all the property conveyed by that settlement, to secure an annuity for life of five hundred dollars to said Jane Coutts, who lived until some time in 1831. But as there is no claim in this case on account of that annuity, no further notice need be taken of it. The links then in the claim of Carrington's title under Patrick Coutts are as follows:

1st. The lease dated the 16th day of March 1815, from Patrick Coutts, McCraw, surviving trustee in the marriage settlement aforesaid, and Jane Coutts to James and Pleasant Winston, demising to them the said Winstons, the said "Sandy bar," "with liberty to use and to carry away, sell or otherwise dispose of, so much sand of or from the said sandy bar as they the said James and Pleasant Winston," &c. "may or shall find it convenient or necessary to use, take, carry away, sell or otherwise dispose of, with the exception of so much sand as the aforesaid Patrick Coutts, his executors," &c. "may

79 find necessary or expedient for his or *their own proper use," &c.: "To have and to hold the said sandy bar (except as before excepted), as to the full and free use of sand from the same as aforesaid and none other, unto the said James and Pleasant Winston," &c., "from the first day of April next ensuing the date hereof, for and during and to the full end and term of 20 years, yielding and paying therefor unto the said McCraw as trustee for the uses expressed in said trust," &c., "the yearly rent or sum of \$450," &c., "in the following manner," &c. The lease contains a proviso for re-entry for non-payment of rent, or if no sufficient distress should be found on the premises, and also a provision for the surrender of the lease by the lessees upon giving to the said "McCraw, trustee as aforesaid, or to the said Patrick Coutts, his heirs or assigns, six months previous notice in writing of such intention." The only remaining clauses of the lease which it is material to notice are the following: "And it is hereby understood, covenanted and agreed," &c. "that the only interest or right intended by these presents to be demised," &c. "is the full and perfect liberty to use, take, carry away, sell or dispose of, and enjoy the sand of the said premises, together with the fish house now erecting on

the said sandy bar in the manner and time hereinafter covenanted and agreed upon, in as full and ample a manner as the said lessees might lawfully enjoy the same, according to the true intent and meaning of these presents (excepting as before excepted) to the exclusion of every interest whatever and particularly all interest and right in or to the ferry and the aforesaid fishery, each and both of which the said McCraw, trustee as aforesaid, hereby wholly reserves from the operation of the lease." "And also that it shall and may be lawful to and for the said J. & P. Winston, their" &c., "to occupy, possess and enjoy the fish house erecting upon the said

sandy bar (as soon as the same shall be
80 finished) during *the following months of each and every year of the aforesaid term of 20 years, and for and during no other time," viz. "June, July, August, September, October, November, December, January and February."—"And should they the said J. and P. Winston, their" &c., "be disposed to erect or put any other additional buildings thereon, it shall and may be lawful to and for them, or either of them, their" &c., "to erect or put a house or houses on any part of the said sandy bar, or in any way to improve the said premises by watling or any other ways or means whatever, so as to enable them the said J. & P. Winston, their" &c., "to catch or procure as much sand as possible. And should the said J. & P. Winston, their" &c., "surrender the premises as aforesaid, at any time before the expiration of the term of 20 years before mentioned," "then and in that case the said P. Coutts, his heirs," &c., "shall and will well and truly pay or cause to be paid to them the said J. & P. Winston, their" &c., one-half of the value of any house or houses and the appurtenances to the same," which may have been so erected, and be upon the premises at the time of such surrender, to be ascertained in the manner prescribed in the lease.

It was contended that this lease was in effect only a license to the lessee and his assigns to get sand from the demised premises during the term, and that only such privileges, by making improvements or otherwise, were intended to be conferred on the lessee, &c., as were convenient to the business of getting sand. The literal terms of the lease seem to support that view. But if that had been the only intention of the parties, it would have been much more aptly expressed by giving a mere license to enter and take sand, instead of conveying the estate during the term. If such a mere license had been given, the estate would have remained in the lessor, subject only to the license. Whereas the estate is conveyed to the lessee during the term, with

81 *liberty to the lessees (which they would not have had if it had not been expressly given) to use and carry away, sell or otherwise dispose of the sand at pleasure, with the exception of so much thereof as Patrick Coutts, or his assigns, might find necessary or convenient for his or their own proper use, the right to take and remove which is expressly reserved in the lease—

an exception and reservation which would have been wholly unnecessary if the only purpose of the parties had been to confer a license to take and carry away sand. The peculiar terms of the lease which gave rise to the objection we are now considering, were no doubt occasioned in this way. The sandy bar was of no value at that time except for these purposes, 1st, for getting sand, 2dly, for the fishery which was appurtenant thereto, and 3dly, on account of the ferry, which was in some way connected therewith. The fishery and the ferry were considered very valuable, and the lessors were very anxious to guard them as much as possible against any claim or interruption on the part of the lessees or their assigns. The sandy bar is therefore leased only for the first of the three purposes aforesaid, for which alone it was deemed to be of any value, and not for the 2d or 3d, which are expressly reserved and excluded from the operation of the lease. Although the improvements which the lessees are authorized by the lease to make, seem to refer only to the business of getting sand, no doubt because it was supposed that there could be no inducement for making any other, yet it cannot be supposed that the lessees were intended to be restricted in any manner in the making of any improvements which would not interfere with the fishery or the ferry. There could have been no motive for such a restriction, for every permanent improvement put upon the property, not interfering with the fishery or the ferry, would benefit the lessors as well

as the lessees. The lessors certainly
82 had no right to enter upon *the demised premises during the term for the purpose of making improvements, except in connection with the fishery or the ferry. The only right of entry which they had, except for the purposes of the fishery or the ferry, was the right reserved to Patrick Coutts and his assigns, to enter and take sand for their own use, and the right to re-enter for non-payment of the rent, or because there is no sufficient distress on the premises. Who then had the right of improving the property when occasion required, or inducements were held out to its improvement, if the lessees or their assigns had not? They therefore had that right. The next link in the chain of Carrington's title is,

2nd. The lease, dated the 10th day of February 1816, from the same lessors to the same lessees, demising the fishery aforesaid and its appurtenances for the term of sixty years for the yearly rent of \$1,000, and extending the lease of the sandy bar (except as aforesaid) as to the full and free use of sand from the same as aforesaid, and none other, from the first day of April 1835, the termination of the former lease, for the term of 40 years, 10 months and 9 days (so as to make the extended lease of the sandy bar terminate on the same day with the term thereby granted in the fishery as aforesaid), for the yearly rent of \$450. This lease contains a similar provision in regard to re-entry, and also in regard to surrender of the lease, as is contained in the said lease of the 16th day of

March 1815, and authorizes a surrender of the lease so far as the same relates to the fishery, without surrendering the lease so far as relates to the use of sand from the same. It also provides that if the lessees or their assigns should be disposed to erect or put any additional buildings further and other than are mentioned and provided for in the said former lease, it shall be lawful for them to erect or put a house or houses on any part of

the said sandy bar, or in any way to
83 improve *said premises. This provision seems to be regarded as an enlargement of the power of improvement given by the former lease; and it no doubt is so, to this extent, at least, that the former lease is only of the sandy bar, excluding the fishery, whereas this lease is of both; and as the former lease contemplated the making of such improvements as would be useful in the operation of getting sand, this lease contemplated also the making of such as would be useful in conducting the fishery. But perhaps the provision in each case ought to be construed with what immediately follows; and that is, a covenant on the part of Patrick Coutts, his heirs and assigns, to pay to the lessees or their assigns one-half of the value of such improvements, in case of a surrender of the property before the expiration of the term. In case of such a surrender, it was no doubt considered reasonable, that the tenants should be compensated for one-half of the permanent improvements made by them in the prosecution of the business for which the property was leased; while it might have been considered very unreasonable to compel the lessor, his heirs or assigns, to pay one-half of the value of any improvements which the lessees or their assigns might choose to put upon the property, though wholly unconnected with the purpose for which the property was leased. The limitation, if any, on the power of the lessees or their assigns to improve the property, was only intended, in that view, to limit the liability of the lessor or his assigns for one-half of the value of such improvements in case of a surrender as aforesaid. It could hardly have been intended, in either lease, to deny to the lessees or their assigns the right to make any improvements they might please on the property, at their own expense and without any recourse whatever against the lessor or his assigns for indemnity in whole or in part,
84 whether the lease was terminated by a surrender *or by lapse of time, at least unless such improvements interfered with the fishery or the ferry.

3. A deed from Pleasant to James Winston, dated in 1816, assigning the former's right under the aforesaid lease of the 16th day of March 1815. The day and month of the execution of this deed are blank, but it was recorded on the 18th day of October 1816, and was probably executed after the lease of the 10th of February 1816, especially as that lease is to both James and Pleasant Winston, which it would hardly have been if Pleasant had previously assigned his interest under the former lease to James. The assignment

was no doubt intended to be of the right of Pleasant to the sandy bar under both leases, as we cannot suppose that he intended to part with his interest in an existing lease for 20 years, and retain his interest under a lease of the same subject which is not to commence until the end of that term. At all events, it does not appear that he has ever claimed any interest in the subject since the execution of that assignment, and it is not pretended that he has had any. His entire interest must therefore be considered as having been assigned to James Winston.

4. A deed of trust dated the 8th day of November 1819, from Patrick Coutts to Coleman and Otis for the benefit of James Winston, conveying, besides other property, "all the right, title, and interest, reversion or reversions, remainder or remainders, of the said Coutts in the property called the sandy bar and fishery, and otherwise described in the plan of the city by lot No. 341." The deed recites, that Winston, at the request of Coutts, had endorsed for him three negotiable notes of specified amounts, all dated the first of November, and payable at the Farmers Bank of Virginia, two of them at nine months, and the other at twelve months, after date, and that Coutts was "willing and desirous of securing the payment of the

85 said notes by the conveyance "of property in trust for that purpose." The deed then proceeds to convey the property; after which the trusts are declared to be, that if the said Coutts shall fail to pay either or all of the said notes when they are due, it may be lawful for the said trustees, or either of them, or the survivor of them, his ex'ors or adm'rs, to sell the whole of the property conveyed, "at the request of said Winston, his ex'or or adm'r, and convey the same to the purchasers, and out of the proceeds of such sale, shall pay and satisfy the notes aforesaid, together with all costs, interest and expenses attending the execution of the trust." "And upon the further trust and confidence, that after full payment or satisfaction of the notes aforesaid shall have been made, any surplus of the proceeds of such sale or sales as aforesaid, which may remain in the hands of the trustees, or either of them, or the ex'or or adm'r of either, shall be applied to the payment of any debt and interest which may at the time be due from the said Coutts to the said Winston, and any surplus to be paid to the said Coutts."

There never was any sale made under this deed of trust. Default was made in the payment of all the negotiable notes secured by it. At the request of Winston, the endorser, Otis, the surviving trustee, advertised a sale to be made under the deed on the 6th day of December 1823, more than three years after the last of the said notes had become payable. But the day before the sale was to have been made, to wit, the 5th of December, Coutts paid the whole amount of the said three notes with Edward C. Mayo's check. And the holders of the notes, by John Forbes, their attorney, thereupon surrendered the notes and instruments of protest to said Coutts, and re-

leased all liens, trust deeds, &c., for their security. But there never was any release of the deed of trust by the trustees, or either of them, or the representatives of either, or by Winston.

86 *5. A surrender was made of the lease of the 10th of February 1861, so far as related to the fishery, in conformity with the provisions of that deed, and in pursuance of a notice from "James Winston, assignee of Jas. & P. Winston," to Patrick Coutts, executed on the latter June 21st, 1820, to take effect at the expiration of six months from that day. In consequence of that surrender, since 1820 James Winston and his assigns have not held the fishery nor been accountable for the rent thereof.

6. A deed of trust from James Winston to Charles J. Macmurdo and George Winston, dated on the 21st day of November 1820, conveying certain property therein mentioned, including "the interest of every kind, by lease, deed of trust or otherwise, which the said Winston has in the sandy bar property in the said city," and all other property of said Winston, except a bond and note mentioned in the deed.

7. The decrees and other proceedings in the suit of "Pugh v. Winston," brought by a judgment creditor of James Winston to impeach the said deed of trust of the 21st day of November 1820, to Macmurdo and Winston, as fraudulent and void in regard to the creditors of said James Winston. The said deed was accordingly adjudged to be fraudulent and void, and on the 16th day of November 1832, Samuel T. Pulliam was appointed commissioner to sell all the real estate conveyed by the deed, with the exception of a certain specified portion. The said commissioner, after making a sale under that decree, made a report, in which is contained the following statement: "The interest of James Winston in the sandy bar property, the commissioner did not offer for sale, doubting whether it was intended by the decree that he should do so. The interest spoken of he understands to be, a lease on that property, which will expire some time in the year 1835. It is

87 represented that Winston holds "the property under a lease from Coutts at an annual rent, and Mayo has acquired the title of Coutts. Mayo states, that Winston pays him no rent, on the ground that Coutts is indebted to him more than the amount of rent that will become due during the lease. If the court should direct a sale of the sandy bar property, the sale thereof would no doubt be promoted by giving to the purchaser of the leasehold estate the same right of setting off against the rent the debt due by Coutts to Winston, that Winston now has." On the 1st day of July 1833, another decree was made in the suit, reciting substantially the above mentioned statement of the commissioner, and directing him to sell at public auction to the highest bidder, upon a credit of one year (after advertising the time, place and terms of sale as directed by the decree), "all the interest of every kind which the said Winston, at the date of the deed of trust before specified," to wit, the deed

to Macmurdo and Winston, "had in the sandy bar property in the city of Richmond, whether such interest be by lease, deed of trust or otherwise, together with a right on the part of the purchaser of setting off against the rent that will accrue after such purchase under the lease, so much of the debt due by Coutts to Winston as will be equal to the rent that may so accrue." The commissioner afterwards reported that on the 16th day of August 1833, he made a sale in strict pursuance of the directions of said decree, after advertising the time and place of sale as therein directed, when George M. Carrington being the highest bidder, became the purchaser at the price of nine thousand two hundred and forty-five dollars, who had executed his bond for that sum payable at the end of one year from the day of sale, with securities. The report contains this further statement: "This commissioner heretofore reported that he understood the interest

of Winston in the sandy bar property to be by *lease which would expire in 1835.

This is true; but there existed another lease, unknown to the commissioner at that time, which will not expire until the end of 40 years from the expiration of the first. The existence of this last lease was known of at the sale above reported." On the 23rd day of November 1833, the sale was confirmed by the court and a conveyance directed to be made to the purchaser. And accordingly, on the 18th day of August 1834, the purchase money having been paid, a deed was executed by said Samuel T. Pulliam, commissioner as aforesaid, conveying the property to George M. Carrington, describing it in manner aforesaid, that is, "all the interest of every kind which the defendant James Winston at the date of the deed of trust of the 21st day of November 1820 (from said James Winston to Charles J. Macmurdo and George Winston), had in the sandy bar property in the city of Richmond, whether such interest be by lease, deed of trust or otherwise, together with a right on the part of the said George M. Carrington, of setting off against the rent that will accrue after his purchase under the lease, so much of the debt due by Coutts to Winston as will be equal to the rent that may so accrue." The said deed was duly recorded.

Under the foregoing chain of title, Carrington, his representatives and assigns, have ever since been in the possession, use and enjoyment of the property according to the terms of the sale and conveyance to him as aforesaid, claiming to be entitled so to hold, and to continue so to hold it, until the expiration of the term of 60 years created by the said lease of the 10th day of February 1816, to wit, until the 10th day of February 1876. Is the claim well founded?

Several objections were made to the claim in the course of the argument, and especially by the counsel of Mayo's representatives, which will now be noticed.

*The objection taken on account of the limited right supposed to be conferred by the leases, to wit, the mere right to get sand and make such improvements as

related thereto, has already been sufficiently answered.

Another objection is, that the leases have been long since forfeited by non-payment of rent, and indeed were so forfeited by James Winston long before the sale to Carrington. It is a sufficient answer to this objection to say that no such forfeiture has ever been enforced or attempted to be enforced, even if there had been any just ground for enforcing it. The deed expressly reserves a right of re-entry for non-payment of rent, and yet no such re-entry ever has been made or attempted to be made. In the lease to Mayo of the 12th day of November 1823, leasing to him the ferry and other property, including the sandy bar, for ten years at an annual rent of one thousand dollars, it was stated that the lease of the sandy bar to the Winstons had been forfeited, but it was provided that if Mayo should use all due diligence to obtain possession of the said sandy bar and fail therein, or if having obtained possession, he should be evicted therefrom, then and in either such case the said Mayo should be entitled to a deduction at the rate of \$200 per annum from the said rent of \$1,000. Mayo, not having obtained such possession, received the benefit of the said deduction from his rent. His lease extended down to the time of Carrington's purchase. If the forfeiture had been enforced during that period, it would have been for the benefit of Mayo, by the express terms of the lease to him. Not only had Mayo a right during his term to enforce the forfeiture, if any, but a right to do so was also reserved to Scott, trustee of Reuben Coutts, who joined in the lease, though the exercise of said right by him was to enure to the benefit of Mayo. Thus there

was the strongest inducement at that time to *enforce the forfeiture, if any, and yet no attempt was made to enforce it. The presumption is irresistible that there was no such forfeiture. At all events there was no re-entry or statutory proceeding equivalent thereto, without which a forfeiture cannot be enforced. It is therefore now quite too late, and was too late in 1846 when Mayo's suit was brought, to say there was a forfeiture.

Another objection is, that the debts from Coutts to Winston was secured by the deed of trust to Coleman and Otis of the 8th of November 1819, only on condition that a sale was made under that deed to satisfy the three negotiable notes, called "the Micks debt," for the security of which it was executed, and that those notes having been paid without making a sale under the deed, it therefore cannot operate as a security of the debt to Winston.

The Circuit court was of opinion that this deed of trust was an unconditional security as well of the Winston debt as of the "Micks debt," while the counsel for Carrington's representatives seemed to think that it became an absolute security of the Winston debt only from the time of default in the payment of the negotiable notes, or one of them, upon which default a sale could be made at the instance of Winston, according to the terms

of the deed. Much may be said to sustain the view of the Circuit court. The deed is not a mere power of sale. Nor is it a mortgage with condition to be void on the punctual payment of the notes, in which case the estate, upon such punctual payment, would be, ipso facto, revested in the mortgagor. But it is a deed of trust for the benefit only of James Winston, who is one of the parties to the deed. He is the endorser of the three negotiable notes, the holders of which are not named, probably because the notes had not been negotiated at the date of the deed. It recites that the

91 grantor is desirous of securing the payment of *those notes by the conveyance of property in trust for that purpose, and he therefore proceeds to make the conveyance. The debt to Winston is not mentioned in the recital of the deed, nor until direction is given for the disposition of the proceeds of sale, when provision is made for the payment of the debt to Winston out of the surplus, after satisfying the negotiable notes. An estate in fee in the trust subject being conveyed by the deed to the trustees in trust for the benefit of Winston, a party to the deed, it may well be doubted whether a court of equity would compel or permit the trustees to release the property to the grantor without payment of the debt to Winston expressly provided for in the deed. The trustees hold the legal title for the benefit of Winston. It is in effect his legal title, and the maxim that he who asks equity must do equity, might require the payment of that debt as a condition for affording equitable relief to the grantor. But it is unnecessary to decide that question, as the effect in this case is precisely the same if the said deed became an absolute security of the debt to Winston only from the time of default in the payment of the negotiable notes or any of them. We think it became such a security at least from that time, if it was not before. All the notes became due within 12 months after date of the deed, which was the 8th of November 1819, and all were protested for non-payment. In November 1820, and even before, Winston had a right to require the trustees to execute the trust by a sale of the subject and application of the proceeds according to the directions of the deed, which included the payment of the debt to him. His right to have this debt paid out of the trust subject could not be thereafter defeated by payment only of the Micks debt. There might have been some reason for affording the debtor an opportunity to defeat the deed as a security for the

92 Winston debt, by punctual payment of the negotiable notes; but there *would have been none in reserving to him the right of doing so at any time after default in such payment and before an actual sale under the deed. It would have been worth little or nothing as a security of that debt if it could have been thus defeated by the debtor at any time before an actual sale. A debtor in insolvent circumstances would be strongly tempted to defeat it, by a fraudulent combination with an unsecured creditor, or some

other person. In this case, not only were the negotiable notes protested for non-payment, but the debtor remained in default for more than three years; during all which time he was in insolvent circumstances, and he actually took the oath of insolvency. It was not until after the trustee in the deed, at the instance of Winston, the endorser of the notes, had advertised a sale of the trust subject, or part of it, and the very day before the sale was to have been made, that the notes were paid by the debtor; and then they were paid by some arrangement made by him with Mayo. But the deed of trust was not released. There was executed, at the time of payment of the notes, a very full release of them, and of the lien of the deed of trust so far as it secured them, but executed only by the holders of the notes by their attorney. No release at all was executed by Winston, nor by the trustee in the deed. Why was not such a release executed, at least by the trustee, if the deed was then considered as satisfied? No such release has ever been executed, nor was ever required or claimed, so far as the record shows, until Mayo's suit was instituted in 1846, 27 years after the date of the deed. We therefore think the deed continued to be a security of the Winston debt after, and notwithstanding, the payment of the protested negotiable notes.

Another objection is, that Winston and his assigns had no right to set off so much of his debt as was necessary against the annual rent of the sandy bar as it accrued, in payment and satisfaction of said rent.

93 *The sandy bar, as we have seen, was a part, and only a part, but what portion we do not know, of the trust subject created by the marriage settlement between Reuben and Jane Coutts, before referred to. At the time of the execution of the leases in 1815 and 1816 as aforesaid, it was bound for a proportional part, we know not how much, of the annuity of \$500 secured to Jane Coutts for life by that settlement. Subject only to that charge, it belonged absolutely to Patrick Coutts, a son of Reuben and Jane. McCraw, the trustee, and Jane Coutts, the annuitant, joined Patrick Coutts in the execution of the leases, and the rent was made payable to the trustee, for the purpose, no doubt, of securing the payment of that portion of the annuity for which Patrick Coutts's part of the trust subject was bound. In every other respect the rent belonged, as the property belonged, to Patrick Coutts, and at the death of Jane Coutts, which happened in 1831, the rent belonged, as the property belonged, absolutely to him free of any charge or trust whatever. During the existence of the trust the trustee might have required the rent to be paid to him in pursuance of the literal terms of the leases, for the purpose, but only for the purpose, aforesaid. That purpose being satisfied, the residue of the rent belonged to Patrick Coutts; and so much of his debt to Winston as was necessary to pay so much of the rent as thus belonged to Patrick Coutts might well have been set off against it as it accrued; and a court of equity would have enforced the right, especially as Patrick

Coutts was insolvent. See *Coutts v. Walker*, 2 Leigh 268. After the death of Mrs. Coutts in 1831, which was several years before the sale to Carrington, when the whole rent belonged to Patrick Coutts or his assigns, there could be no doubt as to the right of set-off. But even before her death, and while the trust existed, the whole rent, by the permission of Jane Coutts and her trustee,

94 *practically enured to the benefit of Patrick Coutts, who received and applied it to his own use. There were many transactions between Patrick and Jane Coutts, and we do not know how their accounts stood in the end. Scott who was appointed trustee in McCraw's place in 1823, and continued to act as such until 1829, proves that Mrs. Coutts' annuity was paid during that period; and he had in his own hands the means of such payment, for in November 1823 he leased the ferry and other portions of the trust subject to Mayo for ten years at a rent of \$800 per annum, which he received while he was trustee. Winston then might well have retained the rent which accrued, even during the life of Jane Coutts, as to every body at least but herself to the extent of her rights, and as to her with her consent, on account and in part payment of his debt. He did so retain it after 1820, without any objection or complaint so far as the record shows, and the transaction being thus so long since settled, it was too late in 1846, when Mayo filed his bill, to make the objection for the first time. We therefore think this objection cannot be sustained.

Another objection is, that this supposed right of set-off or retainer of the annual rent on account of the debt to Winston, was incapable of being sold, and was improperly decreed to be sold in *Pugh v. Winston*; that neither the parties to these suits who are now claiming against Carrington, nor those under whom they claim, were parties to that, or bound by the decree therein made; and that therefore Carrington acquired no such right of set-off or retainer under the said decree, and the sale and conveyance made to him in pursuance thereof.

By the deed of the 21st of November 1820, James Winston conveyed to Macmurdo and Winston the interest of every kind, by lease, deed of trust or otherwise, which he had 95 in the sandy bar, "and all other *property of every kind and description whatsoever, belonging or appertaining to the said James Winston, with all the privileges, rents, profits and advantages of every kind thereto belonging;" excepting only a certain bond and note not affecting the matter under consideration. In *Pugh v. Winston* this deed was set aside as to the creditors of Winston, and all the property thereby conveyed was subjected to the payment of his debts. It became the duty of the court by its decrees in that case, so to dispose of the trust subject as to realize the largest possible fund for the benefit of the creditors. All the rights of Winston in regard to the sandy bar, the debt of Coutts, and the right of setoff and retainer aforesaid as they existed at the date of the said deed, constituted a part of the

trust subject so to be disposed of. The commissioner appointed to sell the real estate reported that he did not offer for sale the interest of Winston in the sandy bar, doubting whether it was intended by the decree that he should do so; that Mayo stated that Winston paid him no rent, on the ground that Coutts was indebted to him more than the amount of rent that would become due during the lease; and that if the court should direct a sale of the sandy bar property, the sale thereof would no doubt be promoted by giving to the purchaser of the leasehold estate the same right of setting off against the rent, the debt due by Coutts to Winston that Winston then had. The court accordingly decreed a sale of "all the interest of every kind, which the said Winston at the date of the deed of trust before specified, had in the sandy bar property, whether such interest be by lease, deed of trust or otherwise, together with a right on the part of the purchaser of setting off against the rent that will accrue after such purchase under the lease, so much of the debt due by Coutts to Winston as will be equal to the rent that may so accrue."

And in strict conformity with this 96 *decree, a sale was made and a conveyance executed to Carrington, the purchaser at the sale, as has already been stated. That this part of the trust subject was thus disposed of to the best possible advantage, there can be no doubt. The price at which it was sold greatly exceeded what was expected by the commissioner and the counsel in the case. He was astonished at it, and supposed, from the great price at which the property was sold, that the competing bidders, Mayo and Carrington, knew more about the property than he did. He would not have thought the property sacrificed if it had brought only one-tenth of what it sold for. The court therefore did right in decreeing and confirming the sale in manner aforesaid. But even if the court had done wrong in that respect, Winston and his creditors, who were parties to the suit of *Pugh v. Winston*, alone could have complained of it, and they did not complain, but acquiesced in what was done, as well they might. Mayo, surely, has no right to complain, (supposing all the other objections we have been previously considering to have been rightly disposed of); for he had no interest in the question as to the manner of selling the trust subject. But besides, he impliedly acquiesced in the sale and gave it his sanction, by what he said to the commissioner before the sale, by his presence and conduct at it, and by his conduct afterwards. Once, twice or thrice prior to the sale, he requested the commissioner not to make it in his absence. He attended the sale, and was the highest bidder for the property next to Carrington—having bid within four dollars of the price of \$9,245, at which it was sold to Carrington. He made no objection at or before the time of sale to the manner in which that sale was decreed to be made. Indeed, it would seem to have been at his suggestion that the sale was made in that manner. At all events, his statement to

the commissioner, referred to in the 97 *latter's report, was the occasion of so making the sale. He doubtless expected to become the purchaser at the sale, and to acquire a perfect title to the property in that way. But he was probably as much surprised as was the commissioner at the high price which was bid for it, and was thus deterred from becoming the purchaser. He set up no claim against the purchaser for rent or otherwise after the sale, until the institution of his suit in 1846, a period of thirteen years; and then it was quite too late to make the objection, even if it could ever have been made.

Then, Carrington became entitled by the sale and conveyance made to him, as aforesaid, to all the interest described in the conveyance, as has been before mentioned. The leasehold interest of Winston in the sandy bar, the debt due by Coutts to Winston secured by deed of trust on the former's interest in the sandy bar, and the right of set off against the rent as it accrued, of so much of the said debt as was necessary for the payment of the said rent, as set forth in the conveyance, thereby became the interest and property of George M. Carrington. He had a right, at his election, to continue to hold the property until the termination of the lease thereon, setting off so much of the said debt as was necessary for the payment of the rent as it accrued, or to enforce the execution of the deed of trust on the interest of Patrick Coutts in said property for the security of the said debt, provided the balance due thereon could be ascertained.

But can that balance now be ascertained; and if not, what then is the right of Carrington's representatives?

We think that the balance cannot now be ascertained. There is no question in this cause about which there has been more controversy than this question, What was the amount of the debt due by Coutts to Winston,

98 secured by the deed of the 8th of November 1819 to *Coleman and Otis and conveyed by the deed of the 21st of

November 1820 to Macmurdo and Winston? That matter might have been easily ascertained about the time of the date of the last mentioned deed or in a reasonable time thereafter. Probably it might have been easily ascertained on, or in a reasonable time after, the 1st of December 1823, the date of the deed to Mayo. But no person took any step to have the account settled (although it was known to all concerned that the amount of the debt was unascertained, and that Winston claimed and was exercising the right of paying his rent as it accrued by setting off against it so much of the said debt as was sufficient for the purpose), until the 26th of October 1829, when Edward Henshaw, who had just been appointed trustee to execute the trusts of the marriage settlement of September 10, 1799, brought a suit in the late Superior Court of Chancery holden in Richmond, against Winston and others, for an account of rents due by him for the sandy bar, &c. On the 25th of June 1830, a decree was made for the settlement of an account

of said rents before a commissioner of the court. Accordingly, during the same year, commissioner Baker proceeded to settle the account, both parties appearing before him and furnishing materials for the settlement. In August 1835, he returned a report showing that on the 1st of December 1823, the date of the deed to Mayo, there was due by P. Coutts to Winston, after crediting all the rents which had accrued previously to that day, a balance of \$13,425 61, with interest on \$11,804 69, part thereof, from that day until paid. There was an exception to the report by Samuel Taylor, Esq., counsel for the plaintiff, and a special statement was made by the commissioners in conformity with the views taken in the exceptions, according to which the balance due was only \$45 91. In

June 1841 the death of the plaintiff was 99 suggested. In August 1843, on the *motion of the defendants a scire facias was awarded to revive the suit against the plaintiff's representatives, and it was afterwards revived accordingly. In March 1845, Carrington presented a petition in the case and prayed to be made a defendant. In March 1846 the petition was allowed to be filed, and was filed accordingly, and it was ordered that unless the plaintiff should, within 60 days, amend his bill, and make Carrington a defendant, it should stand dismissed with costs. The time for amending the bill was afterwards enlarged on the motion of the plaintiff; but he still failing to make the amendment, on the 23d of February 1848 the order of dismissal was made absolute. And thus ended in 1848, this effort, commenced in 1829, to ascertain the true state of accounts between Winston and Coutts. The effort was no doubt abandoned, because while the precise balance due on account of the debt to Winston was not ascertained, it was yet ascertained to the satisfaction of the plaintiff and his able counsel that there was at least a sufficient balance due to absorb the rent which would accrue during the term. The attempt made to obtain a settlement in that suit was made under much more favorable circumstances than now exist for that purpose. The suit was brought just nine years after the date of the deed to Macmurdo and Winston, and just six years after the date of the deed to Mayo, when the transactions were comparatively recent, when Winston and Mayo were living, and when Winston and the trustee Henshaw, who was represented by able counsel, attended before a skillful commissioner and furnished materials for settling the account. It was during the pendency of that suit, and probably after the commissioner had stated the account, though before he returned his report, to wit, on the 15th of August 1833, that the sale was made in Pugh v. Winston, at which Carrington became the purchaser as aforesaid.

100 It is probable that both Mayo *and Carrington, who were bidders at that sale, were then fully aware of the proceedings which had taken place in Henshaw v. Winston, and believed that the balance due on the debt of Coutts to Winston would be more than sufficient to absorb all the rent that

would accrue on the lease during the term. Under these circumstances the sale was made, and Carrington outbidding Mayo became the purchaser. If Carrington was not satisfied to retain the rents which were to accrue during the term in satisfaction of the debt to Winston, but intended to endeavor to ascertain the balance due on that debt, and enforce the execution of the deed of trust to Coleman and Otis for its payment, it was his duty immediately after his purchase to make an effort to have a settlement. The effort even then would doubtless have been abortive. But if it would have been successful, he has lost the benefit of it by his laches in not having made it; and the most he or his representatives can now claim on account of the said debt, is the right to retain the rents in satisfaction thereof as aforesaid.

In July 1853, Jane New Coutts, only child and heir at law of Patrick Coutts, filed her answer in the case of Mayo v. Carrington, and filed therewith as exhibit E, a paper stated to be in the handwriting of Edward Henshaw, and to have been found among papers which he in his lifetime had placed in the hands of his counsel, who had handed them over to the respondents' counsel a few weeks before he prepared the said answer; and also stated to be a copy of an original in the handwriting of James Winston, and then in the possession of the plaintiff Mayo, who was required in the answer to produce the said original, and accordingly did produce it. This is the first appearance which that document, or any reference to it, makes in the record. It purports, and was afterwards proved to be, a proposition made by Winston to Samuel McCraw, P.

101 *Coutts and Mrs. Jane Coutts in regard to the debt and the items thereof due by Coutts to Winston at the time of making said proposition. If the debt stated in that proposition was all the debt due by Coutts to Winston secured by the said deed of trust to Coleman and Otis, then it was greatly less than what was claimed to be due by Winston, and shown to be due by Baker's report in Henshaw's suit as aforesaid. But the proposition is not dated, nor is there any date to any of the items therein contained. There was much contrariety of speculation in the argument as to the time when this proposition was made. Winston himself, who was twice examined as a witness, was unable to fix the time certainly, though he thought it was before the execution of a deed by him to Coutts, dated November 6, 1817. The Circuit court was of opinion by inference, from circumstances stated, that the said proposition was made about the middle of the year 1821, and that it ascertained the true amount of the principal of the debt secured by the said deed of trust. The court decreed a settlement of the account according to that view. To the report of the commissioner made under that decree, Carrington's administrator excepted, and his counsel maintained the exception by a forcible argument tending to show that the said proposition did not

embrace the entire debt secured by said deed, and he concluded his argument by insisting that "the account settled by commissioner Baker in the suit of Henshaw v. Winston, which was commenced when the transactions were comparatively recent, and the evidence in the possession of the parties and not lost, as it now is, by the lapse of time, should be regarded and treated as the nearest approximation to justice between the parties now attainable." Perhaps, if it were necessary or proper now to undertake to ascertain the balance due on account of the said debt,

we would take the same view which 102 was *taken by the Circuit court. But

we think that under the circumstances a correct account cannot now be settled, and it is therefore not proper to attempt such a settlement. It seems, however, that if one were made according to the view of the Circuit court, it would not materially affect the result to which our views of the case will conduct us.

Then it only remains on this branch of the case to state the result to which our views conduct us in regard to the right of Carrington's representatives in and to the sandy bar.

We think they are entitled to hold the property, with all the improvements thereon, for their own use until the expiration of the terms created by said leases, to wit, until the 10th day of February 1876, and no longer; they paying all the taxes assessed on the said property and its improvements during that period, and retaining the annual rent, after deducting therefrom such portion of the annual taxes as may be properly chargeable to the landlord or owner of the reversion, on account and in payment of the said debts of Coutts to Winston, the benefit of which was included in the sale and conveyance to Carrington, as aforesaid. But the said Carrington's representatives can receive the benefit of only so much of the said debt as may be sufficient to pay and satisfy all the rents until the end of the term as aforesaid (the amount due upon said debt being in our opinion amply sufficient for the purpose), and cannot recover any balance which may possibly be due on account of said debt, it being now impossible to ascertain such balance. In regard to the taxes which have accrued, or may accrue upon the property, only a small portion of them, if any, would be properly chargeable to the owner of the reversion. At the time of Carrington's purchase, and for several years thereafter, the annual tax on the property was very trifling—only a few cents; but afterwards

103 it *gradually increased, and became at length considerable, in consequence, chiefly if not entirely, of improvements put upon the property by Carrington, the increased rent produced by which he and his assigns have been receiving, and for the tax on which improvements he and they would at any rate be chargeable. The small portion of the tax for which the owner of the reversion may be chargeable ought to be deducted from the annual rent before said rent is retained and applied as aforesaid. It is the right and duty

of a tenant to pay the taxes on the demised premises, and he may deduct the amount from the rent when the landlord is chargeable with them. In this case Carrington purchased the property "with a right of setting off against the rent," &c.; that is, against so much of the rent as he would otherwise have to pay to the landlord, being the amount of the rent after deducting the amount of the tax which might be chargeable to the landlord. To the extent of that tax, it was itself a set-off, and he required no other except as to the balance of the rent.

Having considered and disposed of the claims of the representatives of George M. Carrington, and ascertained that they are entitled to hold the subject in controversy for their use until the 10th day of February 1876, we come next to enquire, to whom will it belong from and after that day—which brings us to the consideration of the claims of the three remaining conflicting claimants. We will have to consider them very much together, as the grounds on which they severally rest are closely connected with each other, and were attended, in some respects, with the same circumstances. These are,

Secondly. The claim of the representatives of Edward C. Mayo. This claim is founded on a deed dated and duly recorded on the 1st of December 1823, from Patrick

Coutts to said Mayo, conveying in fee

104 simple *the sandy bar, described as lot No. 341 in the plan of said city; also the ferry called Coutts's ferry, with the ferry lot on the south side of James river, known in the plan of the town of Manchester by the No. 312; also four other lots in said town known as numbers 306, 307, 308 and 309.

The sandy bar was conveyed expressly, subject to the deed of trust of "the 8th day of November 1819, to Benjamin W. Coleman and Asa Otis, for the benefit of James Winston." The deed contains a covenant of general warranty. The only consideration mentioned in the deed is, "the sum of one dollar." But Mayo claimed in his bill that the real consideration of the deed was the sum of \$3,906 96, the amount of the three negotiable notes secured by the said deed of trust, which amount was paid by his checks on the 5th of December 1823. The acquittance was given to Coutts as if he had paid the money, but has ever since been held by Mayo, who actually paid it. Under this deed Mayo claimed to be entitled to the sandy bar, subject only to the rights which still existed, if any, under the leases aforesaid, and instituted the suit of "Mayo v. Carrington," on the 15th day of August 1846, for the purpose of asserting and enforcing his claim. And his representatives would be entitled under the said deed to the said property from and after the said 10th day of February 1876, but for the conflicting claims of the representatives of Jane and Patrick Coutts respectively. We must now therefore proceed to state those claims, and enquire whether, and to what extent, they or either of them are well founded, and will defeat or affect the claim of Mayo.

Thirdly. The claim of the representative

of Jane Coutts. She claimed that the deed of the 1st of December 1823, from Patrick Coutts to Mayo, was executed in consideration of the sum of ten thousand dollars, payable by installments, according to a con-
105 tract *in writing made between the parties about the time of the execution of said deed, the benefit of which contract was assigned to her by Patrick Coutts a few days after it was made, to wit, on the 12th of December 1823. And she brought the suit, the present style of which is "Coutts' adm'r v. Mayo," for the purpose of recovering her claim by enforcing the "vendor's lien" upon the property for the payment of the purchase money. The period of the institution of her said suit is not certainly known, as the papers in it have been lost; but it was probably some time in the year 1826. She exhibited with her bill the contract aforesaid, which is in the form of a proposition by Mayo to Patrick Coutts, accepted by the latter, and assigned by him to her, and is in the following words and figures:

"I will pay P. C., his ex'or, adm'r, or assigns, for his reversionary right in the sandy bar, ferry and ferry lot, and lots Nos. 306, 307, 308, and 309, the sum of \$10,000, as follows, to wit, \$500 on executing the deed, \$500 in six months thereafter, and \$1,000 per annum for 9 years thereafter.

E. C. M."

Endorsed.—"I will take for the reversionary right the within sum of ten thousand dollars, as per statement within.

Pat. Coutts.

Dec'r 6th, 1823.

Handed me by Samuel Carlisle.

I assign the within proposal to Jane Coutts, of E. C. M.

Pat. Coutts."

Dec'r 12th, 1823.

The representative of Jane Coutts claims that the whole amount of the said sum
106 of ten thousand dollars, *with interest, yet remains due and unpaid. But before we say any thing more about this claim, we will state and consider the only remaining one, which is,

Fourthly. The claim of the representatives of Patrick Coutts, who are his only child and heir at law, Jane New Coutts, and his widow Sophia Coutts, he having died intestate in 1829. They claim that the deed from P. Coutts to E. C. Mayo, of the 23d of December 1823, is fraudulent and void; that it was executed without any consideration, or for a consideration grossly inadequate, at a time when P. Coutts was greatly embarrassed, and known to be so by the said Mayo; that if the said Mayo did, as he pretended, pay the said sum of \$3,906 66 for the property, yet that was a price grossly inadequate, and so known to be by said Mayo at the time; and that the utmost which the said Mayo or his representatives can claim, under his said deed, is to be reimbursed the money which he paid, with interest, after accounting for any rent due by him on his lease of the 12th of November 1823 aforesaid. This claim was asserted, for the first time, in the answer of Jane New Coutts, sworn to on 24th March

1851, (she not having, as she says, attained the age of 21 years until December 1850,) but not filed until July 2d, 1853, in the suit of "Mayo v. Carrington." It was also asserted in a bill filed by her in March 1854, which was the commencement of the suit, the present style of which is "Coutts v. Mayo," as aforesaid.

While we think that the views of the learned counsel who argued before us in support of this claim were very strongly presented, we are yet of opinion that according to the authorities, it cannot be said that the deed of the 1st of December 1823 aforesaid, is void for inadequacy of consideration; and that, whether the consideration was as represented by Mayo, or as claimed by the representative of Jane Coutts as aforesaid.

There is no evidence whatever of any
107 actual *fraud in obtaining the deed.

There was no confidential relation existing between the parties. Coutts was not under the power of Mayo. They dealt at arm's length, so far as the record shows. True, Coutts was in very embarrassed circumstances, and had taken the oath of insolvency. But that circumstance, even in connection with mere inadequacy of price, has never been held sufficient to avoid a deed. Inadequacy of price, to have that effect by itself, must be so great as to shock the moral sense. It is upon the ground of fraud—actual fraud—that the deed is avoided in such cases; and the evidence must be sufficient to prove the fraud. Inadequacy of price is always the badge of fraud. But to be in itself sufficient evidence of fraud, it must of necessity be very great. In this case it was said the sale was of a reversionary or expectant interest, and that in such cases the purchaser must make good the bargain, by proving that the consideration was adequate. And the later English authorities on this subject are relied on. But the case of *Cribbins v. Markwood*, 13 Gratt. 495, has settled the law on this subject in this State. It was there held that the English doctrine in relation to the sale of expectant interests, so far as it relates to vested interests, is not law in this State. Here the sale was not of a mere expectancy, but of a vested, through a reversionary interest. The authorities on this subject, English and American, are collected in 1 *Leading Cases in Equity* 428, and seq. marg., being the leading case of *Chesterfield v. Jansen*, and the cases collected in the notes. It would be difficult at this late day to ascertain what would have been an adequate price for the property conveyed by the deed at the time of its date. But it cannot be said that the price given, or agreed to be given, was so grossly inadequate as to be in itself sufficient evidence of fraud to make the deed void. There is greater

force, however, in the argument of the
108 *counsel for Jane New Coutts, that if

the payment of the sum of \$3,906 96 in discharge of the "Micks' debt," was the only consideration for the execution of the deed as alleged by Mayo in his bill, then the said deed must have been intended, and ought only to operate, as a security for the repayment

of that sum. Indeed it would be difficult, if not impossible, for Mayo's representatives, under all circumstances of the case, to escape that result, if it should be held that he did contract to purchase the property on the terms mentioned in the proposition aforesaid. With these remarks, the claim of the representatives of Patrick Coutts may be dismissed from further consideration, and we will now recur to the claim of the representative of Jane Coutts, who is the only remaining competitor with the representative of Mayo.

To the claim of the representative of Jane Coutts several objections were taken in argument by the counsel of the representatives of Mayo, which we will now proceed to notice.

1st. It is objected that the subject of controversy in her suit is different from the subject of controversy in Mayo v. Carrington: the two suits have no just connection, and they ought not to have been heard together.

The suits were not consolidated, but only heard together. The object of Mayo's suit was to have his right to the sandy bar, under the said deed of the 1st of December 1823, and the state of facts set out in his bill, declared and established; to have the deed from Patrick Coutts to Bouldin and Roper for the benefit of Jane Coutts, dated on the 28th of February 1821, and conveying the sandy bar and other property, set aside on the ground of fraud; to obtain a conveyance of the title to sandy bar from Otis, surviving trustee in the deed from Patrick Coutts to Coleman and Otis of the 8th of November

1819; and other specific relief, and
109 *for general relief. The object of Jane

Coutts' suit was, to set up the contract aforesaid between Patrick Coutts and Mayo for the sale and purchase of the sandy bar; to assert her claim for the purchase money as assignee of the said Patrick Coutts; and to establish and enforce the vendors' lien upon the said property or interest of Mayo therein, under the said deed of the 1st of December 1823, for the payment of the said purchase money and interest. We think the subjects of controversy in the two suits were connected, and that they were properly heard together.

2dly. It is objected that all the papers in her suit have been destroyed, most of them long since; and that when the decree appealed from was pronounced, there was no record upon which a decree could be made in that suit, or upon the subject of controversy therein.

It seems singularly to have happened, that the papers in that suit have twice been lost or destroyed, so that when the said decree was pronounced, there was not a single paper in the record of the three suits which belonged particularly to Jane Coutts's suit. There is in the record an official copy of only one of the papers which so belonged to that suit; though that paper was certainly a very important one, being the original contract under which she claimed, and which has already been set out in this opinion. We were at first inclined to think that the difficulty of making a decree upon the subject of contro-

versy in that suit, arising from the destruction of papers, was insuperable; but on further consideration we think otherwise. The original bill in Jane Coutts' suit seems to have been filed about the 6th of October 1826, that being the date of an item in Robert G. Scott's account as trustee for Jane Coutts charging a fee in that suit. She died in 1831. She had several successive adm'rs, and in 1857,

110 the papers in her suit having been lost, Allen, her adm'r de bonis *non, pursuant to the statute in such case provided, filed an amended and supplemental bill to have the benefit of the said suit, and asking that the same might be proceeded in to a final decree against the ex'or and heirs at law, or devisees, of Mayo; and filed with the said bill an affidavit of the loss of said original papers. Shortly thereafter, and in the same year, Allen, adm'r as aforesaid, filed a further answer in the suit of Mayo v. Carrington, referring to the fact of his having filed the said bill, exhibiting a copy thereof as part of the answer (though no such copy is now in the record), and setting up the same claim which was asserted in the said bill as matter of defence in the said answer, and praying that the two suits might be heard together. On the 16th of July 1858, the said two suits, and the suit of Jane New Coutts, were accordingly heard together, and a decree was made therein. The decree recites that the suit of Jane Coutts's adm'r came "on to be heard on the statement of proceedings filed with the supplemental and amended bill of Joseph Allen, adm'r as aforesaid, and the said bill of the said Allen, the answer of the defendant James Winston to the original bill in the said cause, and the answer of" the executor, and legatees, and devisees, of said Mayo, to the said supplemental and amended bill, replications to said answers, upon the bill taken for confessed as to the other defendants, "and upon the depositions and exhibits filed;" and among other things it was decreed, "that it be referred to a commissioner of the court to enquire, what were the true terms of the purchase by the said Edward C. Mayo from Patrick Coutts of the property conveyed by the said Coutts to the said Mayo by his deed of the 1st of December 1823, and when and in what manner the said Mayo has complied with the terms of his said purchase."

Commissioner Cary executed this order of reference upon notice to all the parties, 111 and in the presence of *their counsel, who argued the case before him; and upon full consideration he was of opinion, and accordingly reported to the court, "that the true terms of the purchase aforesaid were that Mayo was to pay Coutts the sum of \$10,000; \$500 in cash, \$500 in six months, and the balance in installments of \$1,000 per annum for nine years thereafter, and that Mayo, in part compliance with the terms of sale, advanced or paid the sum of \$3,906 96 as of the 5th of December 1823, for which he should be credited." To this report both parties, that is, the representative of Jane Coutts and the representatives of E. C. Mayo, by counsel excepted, setting

out fully the grounds of exception. On the 18th of February 1860, the three suits were again heard together, and another decree was made therein. This decree recites that the causes came on to be again heard upon the papers formerly read, upon the report of commissioner Cary and the exceptions thereto, "and also upon such of the original papers of the suit instituted by Jane Coutts in her lifetime against the administrator of Patrick Coutts, E. C. Mayo and others, as have been found since the former hearing." And the report and exceptions were recommitted to the commissioner, who was directed to re-examine the said report in reference to the matters excepted to, and especially in reference to the enquiry aforesaid as to what were the true terms of the purchase by E. C. Mayo from Patrick Coutts. On the 26th of November 1861, commissioner Evans was substituted for commissioner Cary to execute the last mentioned decree. Commissioner Evans promptly commenced that duty, but soon had to suspend it, in consequence of the disturbed condition of the country, until the end of the war, when he resumed and completed it, and returned his report, dated September 2, 1867. In this report he says: "No additional evidence in regard to the terms of

112 the purchase by Mayo from Pat. Coutts, or in *regard to the manner the said Mayo complied with the terms of said purchase, has been produced before me; and while the conclusion to which I have come is not entirely satisfactory to my own mind, after a most thorough examination of all the papers in those causes, including the various reports of commissioners, the exceptions thereto and the arguments of counsel upon said exceptions, the best opinion to which I have arrived is, that the true terms of the purchase by the said E. C. Mayo from P. Coutts of the property conveyed by said Coutts to said Mayo by the deed of December 1, 1823, were that Mayo was to pay Coutts \$10,000," &c. as stated in the report of commissioner Cary. And he also agreed with that commissioner in opinion, that Mayo should be credited on account of said purchase money with \$3,906 96 as of the 5th of December 1823. To this report exceptions were filed by the parties by counsel, which state and argue fully their respective grounds of objection to the report. On the 26th of February 1868, the three suits were again heard together, and the decree was pronounced from which this appeal was taken. This decree recites that the causes came on to be further heard together, "upon such of the papers formerly read as have been preserved from the destruction of the fire of the 3d of April 1865, and upon the report of commissioner" Evans, and the exceptions thereto, and documents returned therewith. The court was of opinion that the true consideration for the conveyance from Patrick Coutts to Edward C. Mayo of the 1st of December 1823, was the sum of \$10,000, payable as aforesaid; and that the sum of \$3,906 96 shown to have been paid by the said Mayo, on the 5th of December 1823, ought to have been regarded as having been paid by him

in part discharge of said sum of \$10,000; and that the residue of the said purchase money, with interest, after applying the said
 113 credit, is due to the *personal representative of Jane Coutts by virtue of the assignment from Patrick Coutts to her which was filed as an exhibit in the suit instituted by her for the recovery thereof. And accordingly, the commissioner was directed to state an account showing what amount of purchase money and interest was due according to the principles aforesaid.

The foregoing is a statement of the material proceedings which have occurred in the case on this subject since the filing of the supplemental and amended bill by the personal representative of Jane Coutts as aforesaid; and it is made thus full as being the best means of showing whether there was a sufficient foundation in the record for pronouncing a decree on the subject of controversy in that suit when the decree appealed from was rendered.

The only difficulty in the question arises from the fact, that not only were the original papers in the suit lost as aforesaid, but all the papers which were before the court when the decree of the 16th of July 1858 was rendered, and such of the original papers of the suit as were afterwards found and were also before the court when the decree of the 18th of February 1860 was rendered, have since also been lost or destroyed, but when or how, does not appear, unless they were destroyed "by the fire of the 3rd of April 1865," referred to in the decree of the 26th of February 1868. At all events, none of them were before the court when that decree was rendered, which recites, as before stated, that the said three causes then came on to be heard upon such of the papers formerly read as had been preserved from the destruction of the said fire.

There can be little doubt but that there were sufficient pleadings and proofs in the said suit before the court when the decree of the 16th of July 1858 was rendered, to warrant the court in making that decree.

114 *An inquiry was then directed to be made by a commissioner of the court, who accordingly made the enquiry in the presence and upon the argument of the counsel of the parties, and returned to the court a full report, to which all the parties excepted, setting out fully all the objections they then had to the report. This report and these exceptions, together with all the pleadings and proofs aforesaid, were before the court when the decree of the 18th of February 1860 was rendered, and also some of the original papers of the suit, which had been found since the former hearing. And they certainly warranted the court in making that decree; whereby the said report, with the exceptions, was recommitted to the commissioner, with directions to re-examine the report in reference to the matters excepted to, and especially in reference to the enquiry aforesaid. Commissioner Evans, who executed the last mentioned decree, and who on the 26th of November 1861 was substituted for that purpose to the place of commissioner

Cary, who had executed the former decree, promptly proceeded in the same year, to wit, on the 14th of December 1861, to the performance of his duties, when all the papers in the three causes were laid before him, and the parties attended by counsel. The said counsel also attended several other days, till the disturbed condition of the country suspended further proceedings till the end of the war, when he resumed his duties and made his report as aforesaid, "after a most thorough examination of all the papers in these causes, including the various reports of commissioners, the exceptions thereto, and the arguments of counsel upon said exceptions." It is probable that none of the papers which were before the court when the decrees of the 16th of July 1858, and the 18th of February 1860, were rendered, had been lost when commissioner Evans commenced the performance of his duties, but that all were
 115 before him *and were fully examined by him. He says in his report that "all the papers" were before him and were thoroughly examined by him, and does not speak of the loss of any paper, much less of any inconvenience or difficulty which he felt in consequence of such loss.

The loss had occurred when the decree of the 26th of February 1868, being the decree appealed from, was rendered. But there were then before the court, the decrees of the 16th of July 1858, and the 18th of February 1860, made before the said loss and with all the papers before the court; also the reports of commissioner Cary and commissioner Evans, who thoroughly examined all the papers; also the exceptions of the parties by counsel to these reports; all these proceedings thus before the court when the decree appealed from was rendered, were parts of the record of the suit of James Coutts's representative, and were the most material, if not the only material parts of that record. If not a paper had been lost, it is not probable that any other part of the record would have been used or referred to on the last hearing of the causes except what was actually before the court. At least it is not probable that there would have been any necessity for such use or reference. All that was material was no doubt embodied in the decrees, reports and exceptions aforesaid. We are therefore of opinion, that notwithstanding the loss of papers as aforesaid, there was enough left in the record of the suit of Coutts's adm'r v. Mayo, when the decree appealed from was rendered, to enable the court then to make a decree upon the subject of controversy therein. But if there was,

3dly. It is objected that there was no such contract between Mayo and Patrick Coutts as is contended for in the suit of Coutts's adm'r v. Mayo.

The sandy bar with other property was, as we have seen, conveyed by P. Coutts
 116 to E. C. Mayo, by deed *dated and recorded December 1, 1823, for the nominal consideration of one dollar. Mayo claimed in his bill, filed in 1846, that the true and only consideration was the sum of \$3,906 96, paid by his check on the 5th of December

1823 in discharge of the "Micks' debts" due by P. Coutts and secured by the deed of trust to Coleman and Otis. On the other hand Jane Coutts claimed in her bill, filed probably in 1826, that the true consideration was the sum of \$10,000 payable by installments as mentioned in a written proposition made by E. C. Mayo to P. Coutts and accepted by the latter, to whom it was handed on the 6th of December 1823 by Samuel Carlisle, a witness to the deed from Coutts to Mayo, and assigned on the 12th of December 1823 by the said Patrick to the said Jane Coutts. These are the conflicting pretensions of these two claimants, and the question is, Which of them is well founded?

It is a well ascertained fact in the cause that the said proposition was made by E. C. Mayo to P. Coutts and was accepted by the latter on or about the 1st of December 1823. Mayo admitted in his answer to a bill filed by Diddep, a creditor of Coutts, that the initial signature, E. C. M., to the proposition, was his signature; though he further stated in the said answer that he had no recollection of such a proposal, and denied that he made it as the consideration of the deed. He also asserted that no acceptance of it was ever signified to him so as to make it obligatory. This admission, at least establishes, beyond all cavil, the fact, that he made the proposition. And we are not obliged, in order to give it that effect, to concede the truth of the statements made by Mayo as aforesaid in connection with that admission. The whole answer is evidence to be sure, but not conclusive, and we may believe one part and disbelieve another. We cannot but believe him when he says, in effect, that he made the proposition; in other words that the signature thereto is his.

117 *This is an all-important fact, if it be not in itself conclusive of the present enquiry. It is incredible that P. Coutts would have sold the property for \$3906 96, to be paid to a creditor in discharge of an incumbrance upon it, when at the same time the vendee offered to pay him \$10,000 for the same property! The conclusion therefore, is irresistible, that the sum of \$10,000 and not the sum of \$3906 96, was the true consideration of the said conveyance. The only plausible alternative to this conclusion seems to be that the conveyance was intended to operate only as a security for the repayment of the said sum of \$3906 96, with interest thereon.

What inducement had P. Coutts to sell the property in consideration only of the payment of one of the incumbrances upon it? What was he to gain by that operation? He was utterly insolvent, and had the year before taken the oath of insolvency. His property was incumbered by deeds of trust and judgments far beyond its value. He was in want of money, and was willing to resort to almost any shift to get it. We can see the strongest motive for his selling his interest for \$10,000, to be paid to his mother, who had a deed of trust on the property, while we can see none whatever in his selling his interest in consideration of the payment of one of the incumbrances. It is said that the deed of

trust to Coleman and Otis, under which the sandy bar was advertised for sale, included other property, viz: a vessel and four slaves, and that P. Coutts wished to retain possession of this latter property. But there is no evidence, and it is extremely improbable, that any of that property remained in his possession at that time—four years after the date of the deed. His necessities and the pressure of his creditors had doubtless long before deprived him of it. If it had remained in his possession it would doubtless have been advertised for sale under the deed of trust instead of *the uncertain, and at that time unsaleable interest in the sandy bar. The slaves, at least, would have been much more saleable.

There are, certainly apparent difficulties in the way of this conclusion which cannot be well explained at this remote period from the date of the transactions; and conflicting theories have been conjectured on the subject. Why was not the consideration expressed in the deed if it was \$10,000, is one of the questions that have been asked. Because it was not desired to make public the amount for which the interest was sold, is a plausible answer. P. Coutts was heavily involved in debt, and his creditors were on the alert. After Jane Coutts filed her bill in 1826 to enforce the execution of the contract, Diddep, a judgment creditor of Patrick Coutts, filed his bill, in which he sought to recover his judgment out of the purchase money. But the same question may be put in reference to the sum of \$3906 96 if that were the true consideration. Why was not that consideration expressed in the deed? There could have been no reason for suppressing that as being paid to creditors secured by deed of trust; the publication of the fact of payment could give him no trouble. Why was the contract left to stand upon the mere proposition and acceptance if it was a concluded contract, is another question that has been asked. Why were not notes or bonds executed for the different installments of the purchase money? Why was not the cash payment, which was to have been made on the execution of the deed, in fact made? These are plausible questions, but they present no real difficulty. P. Coutts was not a man of business, and conducted his affairs very loosely. He seems to have regarded the written proposition of Mayo accepted by himself and handed to him by Carlisle, a subscribing witness to the deed, as binding an obligation on Mayo as he could possibly have; and he therefore, in a few days, *assigned it to his mother, who had a deed of trust on the property, then no doubt supposing that the matter was all arranged, and that nothing remained to be done but to receive the money as it fell due. The proposition, it will be observed, is very formal and specific, and must have been drawn by a master hand. Though it deals in contractions and initials, it yet contains all the terms of a perfect contract. The acceptance, too, is very formally drawn, and could hardly have been drawn by P. Coutts. Mayo was a man of business, and one would suppose must have known that

it would have been more regular and business like to have executed bonds or notes for the purchase money. But he had no special interest in that matter, having a recorded deed for the property. That the cash payment of the purchase money was not made, may be accounted for by the fact that the deed to Bouldin and Roper was an incumbrance on the property, which was also otherwise incumbered, and Mayo did not wish to make a payment without being secured. He was extremely anxious to get the title and have control of the property, especially the ferry, but not so anxious to run any risk in the payment of the purchase money. If the sum of \$3906 96 paid by him was a part payment of the purchase money, then the cash payment was in fact made, and several of the other installments were paid in advance.

It is said that Mayo had no notice of the acceptance of his proposition by P. Coutts, and that without such notice there could have been no contract between them. The legal proposition is true, but is the fact true on which it is founded? We think not. Can it be possible that Mayo was not informed of the acceptance of his proposition, either by P. Coutts, or by Carlisle, who handed it to P. Coutts? Would Mayo have been content to remain in ignorance upon so important a question? He sent the proposition to

120 P. Coutts, *it was never returned to him; he received the full benefit of the contract, and neither P. Coutts nor his mother, to whom he assigned it, has ever set up any claim to purchase money under any other contract. If, therefore, the contract was not perfected merely because Mayo was not informed of the acceptance of his proposition, it would follow that he made no purchase, and that his deed can operate only as a security of the money paid him in discharge of the three notes aforesaid, with interest.

We therefore think there was a valid contract between the parties, such as the proposition and acceptance aforesaid import. But if there was.

4thly. It is objected, that there is no proof in the record of the assignment of the contract by Patrick to Jane Coutts. We think there is sufficient proof of such assignment in the deposition of R. G. Scott; and at all events, it has never been denied by P. Coutts or his representative, who has been a party to all the suits in which the subject has been involved. But supposing the assignment to be proved,

5thly. It is objected, that such assignment was a discharge of the equitable lien of the vendor for the purchase money, which, therefore, cannot be set up by the assignee. Upon the question, whether the vendor's implied equitable lien for purchase money would pass by an assignment of the debt, the authorities are conflicting. Some of the cases decide that an assignment of the debt, even without recourse, carries with it this lien, like any other lien; but the majority of the cases, if not the weight of authority, seems to be decidedly the other way; at least unless it appears that the assignor intended to assign the lien as well as the debt; in which case it

seems that both would pass to the assignee, even though the assignment were without recourse to the assignor. When, however, the assignment is not without recourse, 121 the weight of *authority is that the lien continues in full force notwithstanding the assignment, and passes thereby to the assignee. Without citing the numerous cases on this subject, it is sufficient to refer to the case of *Mackreth v. Symmons*, 1 *Leading Cases in Equity* 235 marg., and the notes of the English and American editors, where all the cases down to a very late period are collected. In this case the assignment was not without recourse, and there can be no doubt but that the assignor intended to pass to the assignee all the lien which he had for the security of the debt. We therefore think that the assignment in this case did not discharge the equitable lien of the vendor, and that the same may be set up by the assignee, if indeed there be any occasion for setting it up. At the time of the sale to Mayo, the property was incumbered by a deed of trust from P. Coutts to Bouldin and Roper for the benefit of Jane Coutts and Samuel McCraw, dated on the 28th of February 1821; and duly recorded. The first object of this deed was, to secure the payment of a large debt specially mentioned, for which Jane Coutts had become bound for P. Coutts. The next object was to secure the payment of all sums of money for which she might ultimately become liable in consequence of any engagement theretofore made by her as security of P. Coutts, by becoming his bail or otherwise. And after providing fully for her indemnity, the deed next provides for the payment of any balance which might be found due to McCraw on his account as trustee in the marriage settlement aforesaid. McCraw was dead at the time of the sale to Mayo, and it does not appear that he or his representatives ever set up any claim under the deed. It was then an incumbrance exclusively or nearly so, for the benefit of J. Coutts, and must have been so regarded by Mayo, who no doubt had actual notice of it. It is not to be presumed that he would have made so heavy a purchase, 122 of a man so much *embarrassed, without referring to the records to see what liens were upon his property. He does not pretend in his bill, filed in 1846, that he had not such notice, although he impeaches that deed as having been executed to defraud creditors, and therefore void; and although he expressly denies notice of the fact that P. Coutts had taken the oath of insolvency in 1822. There can be no doubt but that Mayo did not intend to pay the purchase money which he proposed to pay as aforesaid, without being protected against that deed. It is probable, therefore, that it was well understood between him and P. Coutts, that the contract for the purchase money should be assigned to Jane Coutts, and that the assignment which was actually made to her on the 12th of December 1823, just six days after the proposition was handed by Carlisle to P. Coutts, was made with the knowledge of Mayo. In this view of the case, Jane Coutts

was in effect the vendor to Mayo, and at all events was entitled to the vendor's lien for the purchase money, if indeed she had not a still higher and firmer lien by virtue of the deed of trust to Bouldin and Roper. There is no evidence before the court to impeach that deed, and if there were, Mayo cannot thereby be released from his obligation to pay the purchase money according to his contract. The deed to him has never been set aside or avoided in whole or in part at the suit of any creditor of P. Coutts; nor has he ever been compelled to pay to any such creditor one cent of the purchase money. But supposing that the vendor's lien was not discharged by the assignment,

6thly. It is objected, that such a lien, or indeed any equitable lien or claim, cannot be set up and enforced by a voluntary assignee, and that Jane Coutts is such an assignee. In the first place we think that in this case she cannot be regarded as a voluntary assignee.

123 She had many pecuniary transactions with P. Coutts *and became bound as his security in many cases. She had a deed of trust on his property for her indemnity. In this state of things the property or a portion of it included in her deed is sold to Mayo, and the contract for the purchase money assigned to her, no doubt with the knowledge of Mayo, and for the purpose of obtaining her assent to the sale.

But suppose the assignment to have been voluntary, is it true that she cannot enforce the vendor's lien, or any equitable claim on that account? We think it is not. An executory or imperfect gift will not be enforced either at law or in equity unless a trust be created, which a court of equity will always enforce, though that court will never aid in creating a voluntary trust. But if the gift be perfect and executed, the title passes from the donor to the donee, whether the property be legal or equitable, in possession or in action. This subject was fully considered by this court in *Henry v. Graves*, 16 Gratt. 244, where many authorities are referred to, and especially the more recent cases. After reviewing them the court arrived at the following conclusion: "It may be stated as the result of all the authorities; that a voluntary gift valid in law or equity may be made of any property, real or personal, legal or equitable, in possession, reversion or remainder, vested or contingent, and including choses in action, unless they be of such a nature as that an assignment of them would be a violation of the law against maintenance and champerty; that such a gift to be valid must be complete, and not executory; that what is necessary to the completion of a gift, depends on the nature of the subject and the circumstances of the case; and that it is always sufficient, though not always necessary, to the completion of a gift, at least between the parties, that the donor do everything in his power, or which the nature of the case will admit of to make it complete."

124 Id. 254. The case of *Meek v. Kettlewell*, 1 Hare's R. 464, *23 Eng. Ch. R., decided by Vice Chancellor Wigram, in 1842, affirmed by the Lord Chancellor, and

relied on by the learned counsel for the appellants in this case, is fully stated in the opinion of this court in *Henry v. Graves*, supra; as also are the subsequent cases of *Kehewich v. Manning*, 12 Eng. L. & Eq. R. 120, decided in 1852, and *Voyles v. Hughes*, 23 Id. 271, decided in 1853-4; in which subsequent cases that of *Meek v. Kettlewell* is very much shaken if not overruled, and is left to stand, if at all, only on the ground that in that case the interest conveyed was a mere expectancy. The language of Knight Bruce, Lord Justice, in *Kehewich v. Manning*, is very strong. In a very recent case, *Richardson v. Richardson*, 3 Law Rep. Eq. Cases 686, decided by Wood, V. C. in 1867, the doctrine of the case of *Kehewich v. Manning* was followed and fully approved. The good sense of that decision, says the V. C., "lies in this, that the real distinction should be made between an agreement to do something when called upon, something distinctly expressed to be future in the instrument, and an instrument which affects to pass everything independently of the legal estate. It was held in *Kehewich v. Manning* that such an instrument operates as an out and out assignment, disposing of the whole of the assignor's equitable interest, and that such a declaration of trust is as good a form as any that can be devised. The expression used by the Lords Justices is this: A declaration of trust is not confined to any express form of words, but may be indicated by the character of the instrument." According to these authorities it seems perfectly clear that even if Jane Coutts was a purely voluntary assignee of the contract between Mayo and P. Coutts, she had a right to bring a suit in equity thereon in her own name. The assignment to her was perfect, nothing remained to be done by P. Coutts to give it validity, and her suit was not against

125 him but against Mayo the debtor. But, *7thly. It is objected, that her claim is barred by laches, lapse of time and the statute of limitations. It is not barred by the statute of limitations. It seems that the suit was brought in 1826, though it was said in the argument that it was brought in 1829; but there appears to be nothing in the record to support that statement. In either case, it was brought before all the installments had become payable, and in the former case it was brought within five years after the first installment had become payable. If the sum of \$3,906 96 cts. paid by Mayo in discharge of the three negotiable notes aforesaid be a proper credit on account of the purchase money, then several of the earlier installments were paid in advance, and little or nothing was due when the suit was brought. So that, regarding the suit as analogous to an action at law for the money, the statute would not be a bar to any part of the claim. But the suit cannot be so regarded. It is a suit for the specific execution of a contract, or to enforce an equitable lien, and the statute does not apply to it. Then is it barred by laches and lapse of time? It was brought in due time—indeed, very promptly. But it is objected that there has been great laches

in its prosecution. and that equity requires diligence, not only in bringing, but in prosecuting suits. This is certainly true, as a general rule, and there is no more favored rule of a court of chancery than that which exacts diligence of its suitors. But there are many extenuating circumstances in this case in regard to this suitor. She had a suit of great difficulty to prosecute, and had to encounter not only the strenuous resistance of her alleged debtor, but the conflicting claims of judgment creditors of Patrick Coutts; at least one of whom, Diddep, brought a suit in chancery to set aside the deed of trust to Bouldin and Roper for her benefit, or to recover the amount of his judgment out of the purchase money due to

126 her by Mayo, upon the ground *that the said deed was fraudulent and void as to creditors. She died in 1831, a few years only after her suit was brought. She has been represented by several successive administrators, but it does not appear what steps were taken by them to carry on the suit. The unaccountable loss of papers, which has twice happened in the suit, has left us no trace of its prosecution from the period of her death until 1857, when an amended and supplemental bill was filed in the case by Joseph Allen her adm'r de bonis non with the will annexed. Her prior adm'rs in succession may, for aught we know, have prosecuted the suit with reasonable diligence, under the circumstances, though it would seem from the great lapse of time that they probably did not. Mayo was the principal defendant to that suit, and no doubt answered the bill. Diddep's suit involved the same controversy, and Mayo answered the bill in that suit. Possibly it was considered sufficient to prosecute one only of these suits, and let the other await the result. And as Diddep claimed both against Mayo and Jane Coutts, it may have been thought best to fight the battle in that suit. We do not know what has become of Diddep's suit, which seems to have disappeared from the docket. Mrs. Coutts' suit still remains, notwithstanding the accidents which have occurred by death and loss of papers as aforesaid. Mayo might at any time have had a rule to speed in that case, if he desired to speed it, but it does not appear that he ever obtained such a rule. At all events he never had the case dismissed, although he long survived Jane Coutts, and did not die until a recent period. In his bill, filed in 1846, he strangely ignores her suit, while he assaults, totis viribus, the deed of trust to Bouldin and Roper for her benefit—a deed which he might easily have gotten out of his way by paying the money due her, according to his contract. But this

127 objection of laches comes with *an ill grace from Mayo, who slept so long upon his own rights. Perhaps no party in these causes has been guilty of greater laches than Mayo, and it would be difficult for him to maintain his suit against such an objection without the aid which he derives from the claim of Jane Coutts. Under all the circumstances of the case we think the objection to her suit on the ground of laches and lapse of time ought not to be sustained.

And now there is but one remaining question to be considered, and that is raised by Jane Coutts' representative, who contends that the Circuit court erred in allowing credit to Mayo for the sum of \$3906 96, paid by him on the 5th of December 1823, in discharge of the three negotiable notes secured by the deed of trust to Coleman and Otis, and insists that a decree should have been rendered for the whole amount of the ten thousand dollars with interest. Upon this question we have had great difficulty, and there is certainly great force in the argument against the propriety of allowing the credit. But our conclusion on the subject after the best consideration we have been able to give it is, that the credit ought to be allowed. We cannot account for the delay in claiming any installments of the purchase money, even the \$500 which were to be paid on the execution of the deed, except upon the hypothesis that the said sum of \$3606 96 was an advance payment on account of the purchase money. That well accounts for the delay of several years which occurred before the institution of the suit of Jane Coutts. There is a difficulty, on the other hand, in this; that the deed to Mayo conveys the property subject to the deed of trust to Coleman and Otis, and it is plausibly insisted that the conveyance was subject to both debts secured by the deed; that is, the three negotiable notes called

128 the Mick's debt and the debt to Winston. But a sufficient answer to this *seems to be that the Mick's debt must be considered as having been paid eo instanti with the execution of the deed to Mayo. The first step contemplated to be taken in the arrangement between Patrick Coutts and Mayo was, the payment of that debt, which was necessary to stop the sale. The execution of the deed and the delivery of the check to Coutts by Mayo were probably contemporaneous acts, or intended to be so. It is not probable therefore that the property would have been conveyed subject to a debt which was discharged at the very instant of the conveyance. It is more probable that in executing the conveyance that debt was regarded as paid, and the debt to Winston was the only debt referred to in making the conveyance subject to the deed of trust to Coleman and Otis. The Mick's debt, and the deed of trust so far as it secured that debt, were released by the attorney of the creditor on the 5th of December, when the debt was paid by Mayo's check. All these acts were no doubt regarded as contemporaneous, and the parties could hardly have intended to recognize the continued existence of that debt.

In regard to the four lots in Manchester, Nos. 306, 307, 308, and 309, for which credit is claimed by Mayo's representatives, upon the ground that they had been sold under a deed of trust from P. Coutts to Coleman and Woolfolk before they were included in the deed to Mayo of the 1st of December 1823, it is probable that they were of little or no value, as they were sold only at five dollars each at the said sale, and there is no evidence of their value in the record. No further notice, therefore, will be taken of them. If the sale by P. Coutts to Mayo was with the un-

derstanding between them, as seems to have been the case, that the contract for the purchase money, subject only to the credit aforesaid, should be assigned to Jane Coutts, to prevent any claim by her against the property *under the deed of trust to Bouldin and Roper; then Mayo would have no claim against her, or the balance of the purchase money assigned to her, on account of any defect in the title to the said lots, but his only remedy would be against P. Coutts on the covenant of warranty.

We therefore concur in opinion with commissioners Cary and Evans and the Circuit court, that the true consideration of the said deed to Mayo of the 1st of December 1823, was the said sum of ten thousand dollars, with interest on the several installments aforesaid as they became due as aforesaid, and that the said sum of \$3906 96 should be applied as a credit thereon as of the 5th day of December 1823. We are of opinion that the amount of said purchase money and interest, subject only to the said credit, is still due and payable to the present representative of Jane Coutts, who was assignee of Patrick Coutts as aforesaid, and there is a lien therefor on the reversionary interest of said Mayo in said property; and there ought to be a decree for an account to ascertain the balance due of said purchase money after applying said credit, and for the payment of the same with interest by the personal representative of said Mayo, and if not paid in a reasonable time thereafter, then there ought to be a decree for the sale of the said reversionary interest, or so much thereof as may be necessary for the payment of said balance and interest.

The result is, that so much of the decrees in the said three suits as is in conflict with the foregoing opinion, must be reversed, and the residue affirmed, and the causes remanded to the Circuit court for further proceedings therein in conformity with the said opinion.

The other judges concurred in the opinion of Moncure, P.

Reversed in part and affirmed in part.

130 *Moon & Wife v. Stone's Ex'or & als.

January Term, 1869, Richmond.

1. **Wills—Interpretation—Devises.**—S. by § 10 of his will says—I lend to my daughter S. 140 acres of land to be possessed by her during her natural life and the natural life or widowhood of any husband she may have; and at her death and the death or after marriage of her husband, then to be equally divided among her children if she has any; and if she has none then to be divided among all my children. He gives to S. a female slave and her future increase on the same terms and conditions. S. died without having married, and by her will gave her estate to C. **HELD:**

***Wills—Construction.**—See *Stone v. Nicholson*, 27 Gratt. 1, and *note*; *Robinson v. Robinson*, 89 Va. 916, 14 S. E. Rep. 916; *Chapman v. Chapman*, 90 Va. 409, 18 S. E. Rep. 918; *Walker v. Lewis*, 90 Va. 578, 19 S. E. Rep. 238; *Vaughan v. Vaughan*, 97 Va. 328, 33 S. E. Rep. 603.

1. **Same—Same—Same—Life Estate.**—S. took an estate but for her life, with a contingent estate for the life or widowhood of any husband she might have.
2. **Same—Same—Same—Children—Word of Purchase.**—The word children as used in this devise is a word of purchase and not of limitation.
3. **Same—Same—Same—Same—First Degree.**—The word children in a bequest can generally have no other meaning than that of issue in the first degree, unless there be other words in the will to give it another meaning; except when the rule in *Wild's* case, 6 Coke 16, applies, which is founded on peculiar reasons.

In January 1807, Caleb Stone made his will, which was admitted to probate in the County court of Fluvanna county, in April 1810. He left a widow and six sons and five daughters. After providing for his widow and sons, he in the sixth clause of his will says,—“I lend to my daughter Nancy Perry one hundred and forty acres of land, it being the lower lot of my road tract of land as laid off and surveyed, to be possessed by her during her natural life, and the natural life or widowhood of her present or future husband; and at her death and the death or after marriage of her husband, then to be equally divided *among her children, if she has any, and if she has none, then to be divided among all my children.”

The tenth clause of the will is—“I lend to my daughter Sally one hundred and forty acres of land, it being the lot laid off next above her sister Lucy's and below the lot devised to my son Thomas, to be possessed by her and any husband she may have upon the same terms and conditions as Nancy Perry's.” And in the eleventh clause he says—I lend to my five daughters, each one slave to be possessed by them, and upon the same terms and conditions as they will hold their lands. And he specifies the slave which each daughter is to have; Phoebe being the name of the one given to Sally. By the 14th clause he gave the residue of his estate to his wife for her life or widowhood; and then to all his children.

It appears that Sally Stone received the land and the slave Phoebe, and that the living descendants of Phoebe, numbered twenty-five in 1857, when Sally Stone died never having married, and being then as the bill states, about sixty-one years of age. By her will, which was duly admitted to probate in the County court of Fluvanna, after some bequests to other persons, she gave the remainder of her estate to her niece Christian Stone, who afterwards married Schuyler R. Moon.

After the death of Sally Stone, in a suit in the County court of Fluvanna, by the surviving children of Caleb Stone, and the personal representatives of such as were dead, for the purpose of having a sale of the said slaves, commissioners were appointed to sell them, and they were sold on a credit of six months; the executor of Sally Stone not claiming them as a part of her estate. There was also another suit in the same court by the same parties, for the sale of the land.

Whilst these suits were thus pending Schuy-

ler R. Moon and Christian his wife,
 132 filed their bill in the Circuit *court of Fluvanna county, against the executor of Sally Stone, deceased, and the other parties in said suits, in which they set out the will of Caleb and Sally Stone. They insisted that by the will of Caleb Stone, Sally took an estate tail in the land and an absolute interest in the slave Phoebe; and that by her will the land and the slaves passed to the plaintiff Christian. They referred to the suits which had been brought for the sale of the slaves and the land; expressed themselves willing that the sale of the slaves should stand, and to take the purchase money in their stead. Asked that the parties might be restrained from proceeding in said suits; that the commissioners be restrained from paying over the purchase money of the slaves, until the further order of the court; and that the rights of the plaintiffs and the defendants in the said real and personal estate, might be ascertained and declared by the court; and for general relief.

The defendants demurred to the bill and answered, contesting the construction put upon the will of Caleb Stone by the plaintiffs; insisting that Sally Stone took but a life estate in the property; and that upon her death, unmarried and without children, the bequest over to the children of Caleb Stone was valid.

On the 16th of September 1859, the cause came on to be heard, when the court was of opinion that Sally Stone took but a life estate in the slaves, under the will of Caleb Stone; and that upon her death, unmarried and without children, they either passed over under the 14th clause of the will, to the testator's wife and children, or that both the land and slaves given to Sally Stone passed over to the testator's children by virtue of the sixth, tenth and eleventh clauses of the will; that the words of these clauses created neither an estate tail in the land nor a perpetuity in the slaves; and the limitations over was therefore good. And the court sustained the demurrer and dismissed
 133 the bill with *costs. Whereupon the plaintiffs obtained an appeal to this court.

Petit, with whom were Nance & Williams, for the appellants.

The question here is, what estate Sally, the daughter of Caleb Stone, acquired under his will in the land and slaves devised and bequeathed to her; and I shall first treat it as if in making the devise to her, the testator had used the same words employed in the clause making a similar devise to his daughter Nancy Perry. That clause is,

"6th. I lend to my daughter Nancy Perry 140 acres of land, to be possessed by her during her natural life, and the natural life or widowerhood of her present or future husband, and at her death and the death or after marriage of her husband, then to be equally divided among her children if she has any; and if she has none, then to be divided among all my children."

The 10th is, "I lend to my daughter Sally, 140 acres of land, to be possessed by her and any husband she may have, upon the same terms and conditions as Nancy Perry's."

The 11th is, "I lend to my five daughters each one slave and her future increase, to be possessed by them, and upon the same terms and conditions as they will hold their lands; that is to say," proceeding to name the slave given to each.

Nancy had a husband and children at the date of will and death of testator. Sally was then of tender years, and never married. The will is dated in 1807, and was probated in 1810. Sally died in 1857, leaving the land and twenty odd valuable slaves the progeny of the woman bequeathed to her, and a will by which this property was given to the female appellant, if hers to dispose of.

The construction cannot be affected
 134 by the use of *the word "lend." There is no difference in reason or authority between a loan for life and a gift for life. Parker & wife v. Wasley's ex'or, 9 Gratt. 477; London v. Turner, 11 Leigh 403.

If the word children, where it first occurs in the 6th clause, is held to be a word of purchase and not a word of limitation, then the effect of this clause is to create in Nancy Perry an estate in the land for her own life, and the life or widowerhood of any husband she might have, with a contingent remainder for life to any children she might have, and who should be living at her death, if she survived her husband, or at his marriage or death if he should survive her; or if she should have no child living at that one of these events which should occur last, then with a substitutional contingent remainder for life to such of the testator's children as should be living at the date of such event; and the fee would be undisposed of by this clause. Of course I am throwing out of view now the statutes abolishing estates tail, or rather converting them into fees absolute, and the statute dispensing with words of inheritance in order to create a fee, which statutes I shall presently show should have no effect upon the construction in such a case as this, and I am considering now this clause in the light of the common law, "the law as it aforesaid was." According to that law it is clear that if land be devised to A. for life, and at his death to B. and D. if then living, and if not, then to C. and E.; B. and D., and C. and E. would take contingent remainders for life, B. and D.'s being contingent upon the event of their surviving A., and C. and E.'s being contingent upon their surviving A., and B. and D.'s not surviving him; and the fee would descend to the heir.

This then is the result of the construction contended for by the appellees, and it involves the imputation to the testator of the following absurd, unreasonable
 135 *and inconvenient testamentary disposition. If his daughter should die leaving one child and a dozen grandchildren, the children of deceased children, the surviving child would take all and the grandchildren nothing. If she should leave no child, but a dozen grandchildren, the grand-

children could still take nothing, for the land is directed to be divided among his children if she has no children. And if all her children should survive her, they could at the common law take only life estates.

And yet no one can doubt that the testator intended that that portion of his property which he set apart for his daughter should remain to her issue forever, and should never go over to his other children until her issue was extinct. If this intent be manifest then the word children is synonymous with the word issue, is used as a nomen collectivum, and not as a designatio personæ, and is a word of limitation and not a word of purchase. Indeed, this word in a will is to be construed a word of limitation or of purchase, as will best effectuate the intention of the testator; and is most generally in a will a word of limitation, unless there are children living at the date of the will or death of testator, or unless words of inheritance are superadded to the gift to children.

In the great case of *Jesson v. Wright*, 2 Bligh. 1, decided in 1820, the court of King's Bench adopted such a construction as is contended for by the appellees here, but after the most elaborate argument by the most distinguished counsel, this decision was reversed in the House of Lords; the Lord Chancellor, on moving judgment, remarking, that the court below had decided that "Wm. Wright took only a life estate under the will, with remainder to his children for life," and that the appellants alleged "for error that the testator intended to embrace all the issue of the said Wm. Wright, which intention can 136 only be effected by giving *to the said Wm. Wright an estate tail," proceeded thus: "I will not trouble the house by going through all the cases in which the rule has been established, that where there is a particular and a general intent, the particular is to be sacrificed to the general intent. A great many certainly, and almost all of them, coincide and concur in the establishment of that rule." "It is definitely settled as a rule of law that where there is a particular and a general or paramount intent, the latter shall prevail, and the courts are bound to give effect to the paramount intent."

The words of the devise in that case were as follows: "I give unto William, one of the sons of my sister Ann Wright, all that messuage," &c., "to hold the same premises unto the said William for and during the term of his natural life, and from and after his decease, I give and devise all," &c., "unto the heirs of the body of the said William, lawfully issuing, in such shares and proportions as he the said William, in and by deed or writing or last will shall give, direct, limit or appoint; and for want of such appointment, then to the heirs of the body of said William, lawfully issuing, share and share alike, as tenants in common, and if but one child, the whole to such only child. And for want of such issue I give and devise all," &c., "to my right heirs forever, charged," &c.

The intention of testator to confine William to a life estate could not be more plainly

expressed, and notwithstanding the use of the words heirs of the body, it is equally obvious that, "from and after William's decease," the testator intended the messuage, &c., to go to William's children equally, if he had more than one, and if one child only, the whole to that child. William could not appoint to any but children, if there was any child living; and heirs of the body, in the technical sense of the term, could not take together share and share alike as tenants in common. They *could only 137 take successively one after another. It is equally obvious that the testator intended the children to take as purchasers under his will.

But, say Mr. Jervis and Sir Edward Sugden, counsel for the appellants, "it was the intention of the testator to include all William's issue, and sufficient appears on the face of the will, to enable a court of law to effectuate that intention. The decision in the court below attributes this meaning to the testator, that if William had only one child born who survived him, such child should take the whole estate for life; but if he had twelve (for example), and eleven died in his lifetime, the surviving child should have only a twelfth of the estate for his life. Is this a probable intention? Again, if he had twelve children, and they all died in his lifetime, leaving issue, according to this decision none of the issue could take. If their parents indeed had lived, they might have been supported out of the estate, but if their parents chanced to die in William's lifetime, they could derive no benefit from the estate. If we consider the probable duration of their lives, it is not likely that the testator intended to stop there, with all the risks attending such a limited bounty, and then to give the estate to his heir at law. What is the value of such a gift? To the devisees it is highly important that the estate should not go over until a total failure of their issue; but to the heir the value of a reversion in fee after a life estate to a young person, with remainders for life to all his children, is trifling. Suppose that twelve children had survived William, is it a probable intention that upon the death of each a share should fall to the heir, who would thus perhaps be a long series of years acquiring all the shares in the property? The testator intended William to take for life, and he intended all his issue to take. But he intended his children to take as purchasers, and it is 138 manifest that he considered, although erroneously in point of *law, that his intention to include all William's possible issue, would be effectuated, if the children did take as purchasers. The argument assumes this shape, that, because he intended the children to take as purchasers, and has not repeated words of inheritance, they can only take for life as tenants in common."

Sir Edward, after referring to some cases, continued: "The inconvenience of the supposed intention has been already stated. If only one child should be born, they imagine the testator meant he should take the lands for life. If twelve children, and eleven die

infants, according to one construction, the survivor would take the whole; according to another construction, he would take only a twelfth part. If the eleven died leaving families, the families would take nothing. If, according to the argument, the children would take estates only for life, the necessary consequence is, that the parent must take an estate tail; otherwise the intention of the testator is frustrated. He intended to provide for the issue, and they would have no provision. If the gift had been to "children," instead of "heirs of the body," the same argument would have arisen. The word children, when used as a class, gives the same interest." It is argued that he meant the children to take, if more than one, because he gives to one child, if there should be but one. No doubt that was his intention, and that they should take as purchasers, but he also intended that children's children to the last generation should inherit, before the estate should go to the remainderman. In the case of one child, he meant that the one child should take the inheritance, and a limitation to children or a child as a class, is sufficient to give such interest. In *Hodges v. Middleton*, the words child or children are used throughout the will; the limitation over is on failure of children, not issue. The court collects the intention to give the parent the inheritance from the use of

139 *these words as a class. So in *Jones v. Morgan*, Lord Thurlow held, that where children are to take as a class, they must take as heirs. Some stress was laid upon the circumstance that the estate was expressly devised to William for life. But that circumstance has been disregarded in similar cases, even where the strong negative words, only, and no longer, have been superadded. But it is material in this view, that it shows by opposition, that he did not intend the children to take life estate only. To William for life, and after his decease to his children. Had he intended them also to take for life only, he would of course have said so. Lord Mansfield often truly observed, that when a man gives a house to one, he always means to give the entire interest in it, the same as if he had given him a horse. To effect this intention the courts have gone great lengths to supply, by other words and implications, the want of express words of inheritance."—"It is said the provision and devise, if one child, to that one, includes the other case, viz: of there being more than one, in which case they were all to take; granted. But still it remains to show, that because the children were to take, they were to take life estates only. If but one child, the whole to that one child, i. e. the whole estate, and also the testator's interest in it. This is what the testator meant, although his meaning cannot, in this way, be effectuated. The gift over, "for want of such issue," afforded irresistible evidence of the testator's intention that the estate should not go over until a general failure of William's issue."

So, here, the provision that the land should be "divided among the children" of Nancy

Perry, "if she has any," includes the other case, that if she has only one, then that one to take all; and the words of the gift over, "if she has none, then" over, furnish evidence equally irresistible that the testator did not intend *to confine the children to life estates. He gives the land over "if she has none," and must have intended that it should remain with the children and their issue, if she had any. If he had intended it should go over upon the death of Nancy's children, he would have used very different or additional words.

Mr. Sugden goes on: "It is immaterial whether the words were heirs of the body or children; in either case the intention would be equally apparent to pass the inheritance. A tenancy in common is incompatible with an estate tail in the parent, but that does not prove that the testator intended the children to take for life only. The following rules may be safely laid down:

"I. That a devise may, in favor of the intention, include all a man's possible issue, although in terms only a particular class is included."

"II. That if words are used which denote an intention to give the estate to the children by purchase, they shall take in that character where they can take by force of the will such an estate as will include all the issue, so that the estate may not go over before a total failure of issue."

"III. That although such an intention is apparent, yet when the general intention, viz: to include all the issue, can only be effectuated by vesting an estate tail in the parent, he shall take that quantity of interest in opposition to the words of the will. The particular intent of the testator shall be sacrificed in favor of his general intent."

In support of these principles, Sir Edward Sugden referred to *Robinson v. Robinson*, 1 Burr. R. 38, decided in 1756, where the devise was of "all my real estate (except my estate in the parish of Endellyon) to Lancelot Hicks, for and during the term of his natural life, and no longer; provided that he alter his name and take that of Robinson, and live at my house at Bochym; and after his decease

141 *to such son as he shall have, lawfully *to be begotten, taking the name of Robinson; and for default of such issue, then I bequeath the same to my cousin Wm. Robinson and his heirs forever."

The testator died 30th September 1728, and Lancelot took the name of Robinson, and afterwards had two sons, the elder of whom died, and then Lancelot died, leaving his younger son an infant. Both sons took the name of Robinson, and the question was, "Whether any and what estate or interest is vested in the said infant and second son of Lancelot by virtue of the said will."

This case was thrice argued in the King's Bench.

Many cases were cited on both sides, and the judges of the King's Bench unanimously certified in these words: "We are of opinion, that upon the true construction of the said will of the testator George Robinson, the said Lancelot Hicks must, by necessary implica-

tion, to effectuate the manifest general intent of the said testator, be construed to take an estate in tail male, he and the heirs of his body taking the name of Robinson;" notwithstanding the express estate devised to the said Lancelot Hicks, "for his life and no longer."

A decree was entered in accordance with the certificate, and on appeal to the House of Lords, the opinion of all the judges was taken, and they unanimously agreed with this certificate.

Now here is a case in which the particular intent of the testator to confine the first taker to a life estate, is expressed in the strongest terms, and in which nevertheless, the court, after the most thorough consideration, determined that in order to effectuate the general intent in favor of the issue, he should, by necessary implication, take an estate tail. The word "son" is certainly no more a word of limitation than the word "children;" and certainly there is nothing in

the language employed, more strongly
142 manifesting the testator's *intent, in favor of Lancelot Hick's issue, than there is in the language employed by the testator in our case. The general intent in favor of the issue in that case, was manifested and implied from the gift, after the first taker's decease, "to such son as he should have, lawfully to be begotten," without the addition of words of inheritance, "and for default of such issue then" over, showing that notwithstanding the omission of words of inheritance in the gift "to such son as he should have," yet the testator manifestly intended "such son," if Lancelot should have such, to take the whole estate, for he only gives it over in the event he should have none.

So in our case it is evident the testator intended the property he gave to his daughter for life, should after, or at her death, go to her children forever, if she had any, for he only gives it over, "if she has none." Yet as there is an omission of words of inheritance in the gift to the children here, as in the gift to the son above, and as the effect of holding the word "son" and the word "children," to be words of purchase, would be to confine the "son" and the "children" to life estates, and to disinherit their issue, and as the general intent in favor of the issue, can only be effectuated in either case, consistently with the rules of law, "as it aforetime was," by giving the parent an estate tail, "he shall," in accordance with Sir Edward's iii rule, and the certificate of all the judges above, "take that quantity of interest in opposition" even "to the words of the will."—"The particular intent shall be sacrificed to the general intent."

Wild's case, 6 Coke R. 16, is a strong authority for an estate tail here. The devise there was to "Rowland Wild and his wife for their lives, and after their death, to their children; they then at the date of the will having two children. And it was held that

Rowland and wife took joint estates for
143 life with remainder to *their children for life; and the reasons assigned accord-

ing to Coke were 1st. that there were children living at the date of the will; and 2ndly, that there did not appear any general intent in favor of an inheritance to the children; and says the report, "as the heir is to sit in the place of the ancestor and in his stead to do and perform all proper services for the King and commonwealth, and is favored by the law, he shall not be disinherited except by express words or necessary implication." These reasons imply that if there had been no child living, or if there had appeared any general intent in favor of an inheritance in the children, then in either case an estate tail would have been given to the parents. There was not in that case any limitation over in default of children as there is in ours.

But it was at the same time resolved, that if a devise be to A., and his children, and there is no child living at the time, A. shall have an estate tail, and in support of this, a case in Sergeant Bendloe's R. 4 Eliz. is referred to. And while toward the end of the report it is asserted that if a devise be to A. for life, and after his death to his children, then, even though A. has no child at the time, he shall only take a life estate, with remainder for life to his children, yet no case is referred to in support of this proposition, and it is therefore, a mere obiter dictum. Besides, the case supposed is unlike ours, because there is no limitation over in default of children.

By the report of this case contained in Moore 397, under the name of Richardson v. Yardley, according to Lord C. J. Alvanley, in Seale v. Barter, 2 Bos. & Pull. 485, and Sir Edward Sugden in Jesson v. Wright, 2 Bligh 38, it appears that Popham and Gawdy, Js., held that Wild took an estate tail, notwithstanding that he had children living at the time of the devise, though Fenner and

Clench thought it was only an estate
144 for *life, and they all agreed that if no children had been born it would have been an estate tail.

So, at same page, Sir Edward gives the following case: "A devise to William for the term of his life, and after his decease to the men children of his body; and if he dies without man child," or according to counsel in Seale v. Barter, 2 Bos. & Pull. 485, "without men children of his body, then" over; and it was held that William took an estate tail. 1 Anderson R. 43. This case is referred to by Lord Alvanley in Seale v. Barter, having been stated by the counsel just as it is by Sir Edward, except as above noted, and except that he refers it to 1 And. Pl. 110; and it was referred to in argument before Lord Mansfield, in Hodges v. Middleton, Doug. 431; and not a word escaped either bar or bench, hinting even a doubt as to its correctness and authority.

Hodges v. Middleton, ubi supra, decided in 1780, is another strong case for the appellants. There the devise was, "I gave to my kinswoman Mrs. Anne Middleton, my house and lands at Arlborough Hatch, and all my real estate in the parish of Barking, during her life; and at her death to her children, upon condition that she or they constantly

pay £30 a year for a clergyman to officiate in my chapel, &c.; and on failure of these conditions here mentioned, then I give the said house and lands to my own next heirs, to be enjoyed by them on the same conditions; and in case of failure of children of my said kinswoman Mrs. Anne Middleton, then I give the house and lands aforesaid to her brother Mr. George Hodges and his children, on the same conditions; and in case of failure of his children, then I give the said house and lands to the sisters or sister of the said Anne Middleton and George Hodges, to be equally divided between them or their children that are living at that time." Anne Middleton had seven children living at

145 the death of the testatrix, the testatrix *having died only a year after the date of her will, and she had six living at her own death. Joseph Hodges, son and heir at law of George Hodges, who was heir at law of the testatrix, "brought his bill to have his right to the freehold and inheritance of the said premises, subject to the life estates of the surviving children of Anne Middleton, and for an injunction against waste."

Hill, sergeant, for the plaintiff, contended that Anne Middleton only took an estate for life, and that her children being in esse at the date of the will and death of the testatrix, took an estate for life by purchase, in joint tenancy. That it is laid down in Lord Coke's Comm. upon Littleton, that if B. have divers sons and daughters, and A. give lands to B., and liberis suis, the father and all the children take jointly. So in Cook v. Cook, 2 Vern. 545, it is said that if there is a devise to J. S. and his children, if he hath children, they take with their father; but if he hath no child, it is an estate tail. And in Wild's case this distinction is made between children being in esse and not in esse, it being there determined that if land be devised to A. and his wife, and after their decease to their children, they then having issue a son and daughter, A. and his wife had but an estate for life, with remainder for life to their children." To which it was replied: "It is admitted that there are cases where the word children in a will is a word of limitation, and creates an estate tail; that Lord Hale in King v. Melling, 1 Ventr. 225-31, seems to think it may be nomen collectivum, although there be children then in esse; and that in the case from 1 And. above referred to, though Lord Coke said it was determined to be an estate tail, because it did not appear in the case that there were issue male at the time of the devise, yet in this he must be mistaken, as neither of the two other reporters mention that circumstance; and if the determination had proceeded upon such

146 a *distinction, the fact would certainly have been enquired into and ascertained.

The court of King's Bench, Lord Mansfield presiding, returned a certificate in these words:

"We are inclined to think that under the will of Frances Bladen, the testatrix, Anne Middleton took an estate tail, but if she took an estate for life only, we are of opinion,

that her children would take an estate tail, and in either case the limitation to George Hodges, the heir at law, was barred by recovery, and the plaintiff has no title."

It will have been noticed that the plaintiff's counsel conceded there would have been no question as to Anne Middleton's taking an estate tail, if she had not had children in esse at the date of the will, and that the defendant's counsel argued to show that this fact should make no difference in the construction; and it is impossible to doubt that the court, but for this fact, would unhesitatingly have declared its opinion to the same effect. This fact does not exist in our case, and this decision is therefore most persuasive. The only circumstance to distinguish this case from ours, is the sole circumstance relied on to confine Anne Middleton to a life estate; and that circumstance was held insufficient for that purpose, and being absent from our case, the testator's daughter, Sally Stone, must, according to this decision, be held to take an estate tail.

Seale v. Barter, 2 Bos. & Pull. 485, decided in 1801, is another most persuasive authority. The devise was, "It is likewise my will that all my lands and estates shall, after my decease, come to my son John Seale and his children, lawfully to be begotten, with full power for him to settle the same, or any part or parts thereof, by will or otherwise, on them, or any of them, as he shall think proper; and for default of such issue, then that all my lands and estates come to my daughter

147 Elizabeth Seale and her children, lawfully to be begotten, *with full power for her to settle the same, or any part or parts thereof, by will or otherwise, on them, or such of them as she shall think proper; and in default of such issue, it is my will and meaning that all my estates and lands shall belong to my said son and daughter equally between them, to whom in such case I do hereby give, devise and bequeath the same." The testator died in 1777, leaving his said son and daughter his only children. His son was married at the date of the devise, but then had no child; afterward he had one in testator's lifetime, and several since, and the question was what estate he took under this devise. The case was twice argued, and the authorities reviewed and commented on. I beg to quote a sentence or two: "In the present case the devise is to J. S. and his children, and in default of such issue, then only is it to go over, which shows that the children were intended to take an estate of inheritance, which they could not do but through their father, nor through him unless he took an estate tail. In Davis v. Stevens, Douglas 320, there was a devise of the fee simple and inheritance to William and his child or children forever, and it was held to be an estate tail in William, Lord Mansfield saying the meaning is the same as if the expression had been to William and his heirs, that is to say, his children or his issue. Now if in that case the word children was held synonymous with issue, in order to restrain the devise to an estate tail, there is no reason why in this

case it may not be held to bear the same sense, in order to enlarge the devise to an estate tail. The general intention was that the estate should not go over to E. S. until after an indefinite failure of the issue of J. S. ; but if the word children is to be held to be *designatio personæ*, though there was no child in esse at that time, what is there to give to the children anything more than estates for life?" Lord C. J. Alvanley, after

148 reviewing the cases, and amongst others, Wild's case, *as reported by Coke and by Moor, and *King v. Mel-ling*, *Robinson v. Robinson*, and *Hodges v. Middleton*, and combating the argument that the power to appoint among the children should vary the construction, expressed himself in conclusion thus: "The true question to be considered is, whether the testator meant to give the estate to John Seale and his posterity? Probably, if the testator had been asked, whether he meant that his son should have the power to defeat the limitation, he would have answered that he did not understand the effect of an estate tail, but that he wished the estate to go to his son and his posterity. If he meant to give the estate to his son and his posterity generally, it is an estate tail." Now we are of opinion, upon all the authorities, that the words "children lawfully to be begotten," in this case, are not to be considered as words of purchase, but that the intention of the testator was to give his estate to his son and the issue of his body generally." And it was accordingly decreed that John Seale took an express estate tail, with a power of appointment annexed.

Mellish v. Mellish, 2 Barn. & Cress. 527, decided in 1821, is another strong case for the plaintiffs. John Mellish being seized in fee, subject to a mortgage for years, of a messuage, &c., known as Hamel's, made his will, containing the following clause: "The mortgage on Hamel's to be paid off as soon as William Mellish can do it without prejudice to the business. Hamel's to go to my daughter Catharine Mellish as follows: in case she marries and has a son, to go to that son; in case she has more than one daughter at her husband's or her death, and no son, to go to the eldest daughter; but in case she has but one daughter, or no child at that time, I desire it may go to my brother William Mellish." And it was held that C. M. took an estate tail male, the word son being "construed to mean any son, whether immediate or remote, such as grandson,"

149 and *therefore a word of limitation, because the effect of holding it to be a *designatio personæ* or word of purchase, "would be that if the son died leaving sons, the estate would go over to the daughters," and the grandsons would be unprovided for.

Wollen v. Andrews, 2 Bingh. 126, 9 E. C. L. Rep. 342, decided in 1824, is another strong authority. The devise was to trustees, "upon trust to permit the testator's six children A., B., C., D., E. and F., to have and receive one-sixth part or share each of the net rents and profits thereof, for and during the terms of their natural life and lives; and from

and immediately after their respective deceases, then upon further trust to permit and suffer all and singular the child or children of such of his sons or daughters so dying, to have, receive and take the rents, issues and profits of such share or shares of him, her or them, so dying, of and in the said estate before devised, in equal parts, shares and proportions, and so on in like manner from children to children. His will further was, that in case any or either of his said children should happen to die without leaving any lawful issue, then the rents, issues and profits belonging to such of his sons or daughter so dying, should go to and be received by the survivor or survivors." It was decided that each of the testator's six children took an estate tail in one-sixth of the property. This case is almost exactly like the case at bar, it being in short a devise to A. for life, and from and immediately after his decease to his child or children, in equal parts and shares; and if either should happen to die without leaving any lawful issue, then to his surviving brothers.

In *Pierson v. Vickers*, 5 East R. 518, the limitations were to the testator's daughter, Ann, and to the heirs of her body, lawfully to be begotten, whether sons or daughters, as tenants in common, and not as joint tenants; and in default of such issue, to 150 her sister for *their joint lives; remainder to a trustee to preserve contingent remainders; and after the decease of either of them, to all and every the child and children of, &c., whether sons or daughters; and it was held that Ann took an estate tail.

In *Doe d. Cock v. Cooper*, 1 East R. 229, decided in 1801, the devise was of a messuage and lands to Richard Cock, "for the term only of his natural life; and after his decease unto the lawful issue of the said Richard Cock as tenants in common; but in case the said Richard Cock shall die, without leaving lawful issue, then and in such case, after his decease unto Elizabeth Harding and her heirs and assigns." Richard Cock died in 1800, without issue, having first suffered a recovery, and conveyed the messuage, &c. in fee. And the heir at law of Elizabeth Harding and of the testator brought an action to recover the messuage, &c. After listening to argument for plaintiff, and stopping counsel on the other side, Lord C. J. Kenyon proceeded thus: "Cases of this kind have been so much agitated of late, that all the arguments occur readily to one's mind, and after the decisions we have made, we should not be consistent with ourselves, if we were not to hold, that the first taker took an estate tail in this case. It has been the settled doctrine of Westminster Hall for the last forty or fifty years, that there may be a general and a particular intent in a will, and that the latter must give way, when the former cannot otherwise be carried into effect. I remember that point was much discussed in the case of *Robinson v. Robinson*. I heard it argued the first time before a very great lawyer, Sir Dudley Ryder, who then presided in this court. A second argument

was directed, but he died before it came on. It was argued a second time before Lord Mansfield, and the certificate, which was afterwards returned upon the greatest deliberation is in print. Nothing could be more positive

151 than the words of the *will in that case, to show the particular intent, that the first taker should take an estate for his life, and no longer. But there was a general intent apparent, which could not be effected but by giving him an estate tail, and on that the decision was founded. The case was carried up to the House of Lords, while Lord Hardwicke sat there, and was much considered by him; and questions were put to the judges upon it, framed by him in every possible shape; and Lord Ch. B. Parker, who is known to have been a very strict lawyer, delivered their opinions, agreeing with the judgment of this court. The same question came on again to be considered in *Roe d. Dodson v. Grew*, 2 Willes R. 323, in the court of Common Pleas, and was there much canvassed, and underwent the same determination. Then came on the case of *Doe d. Candler v. Smith*, 7 Term. R. 531, in which I thought I could not make the matter more clear, than by reading the words of Lord C. J. Willes in *Roe d. Dodson v. Grew*. Perhaps we should best fulfill the particular intent of the testator in this case, by giving Richard Cock only an estate for life; but the general intent was, that all his issue should inherit the entire estate, before it went over; and that intent can only be answered by giving him an estate tail by implication, from the subsequent words 'in default of his leaving issue.' It is suggested that it would answer the same purpose, if we were to raise cross remainders by implication between the children of R. C. But to do this between more than two, without any thing further than what appears here, would be directly contrary to former authorities."

Grose, J., said: "The only question is, what, upon the whole of the will appears to have been the intent of the testator? and this has been truly stated to be, that Rich. Cock should first take the estate, and after him his children, and that the remainder over should

152 not take effect so long as any of his descendants remained. *Then this general

intent can only be carried into effect by giving the first taker an estate tail." Lawrence, J., remarked, that cross remainders could not be given to the issue of R. C., because it was a settled rule of law that they should not be implied between more than two; and said that it was very clear here, as in *Candler v. Smith*, that the testator's particular intent was, only to give R. C. an estate for life, because the issue were to take as tenants in common, and therefore could not take by descent; yet in order to effectuate the general intent the estate of inheritance implied from the subsequent words must be annexed to the prior estate for life, given to the first taker.

Wood v. Baron, 1 East R. 258, decided in 1801, is another case in which the word children has been held to be a word of limitation, although there was a child living at date of

devise. The words were, "I give and bequeath to my daughter Ann, the wife of Jos. Wood, all my whole estate, real and personal; also my household goods, &c., who shall hold the same as a place of inheritance to her and her children or issue forever. And if it should so happen that my daughter Ann should die leaving no child or children, or if it so happen my daughter Ann's children should die without issue, then I order and direct that all my houses and lands, &c. shall be sold and the money arising therefrom divided," &c.; and he appointed his wife, to whom he had given his whole estate for life, before giving his daughter anything, and John Bithel one of the legatees of the money arising from the sale directed if his daughter should die without leaving any child or children, and another, his executors. His daughter had one child at date of will and several afterwards, and it was contended that according to Wild's case a child being in esse, mother and child must be held to take joint estates; but it was determined unanimously, Lord Kenyon presiding, that Ann Wood took an estate tail.

153 *This is a much weaker case for an estate tail than the case at bar, for the inheritance being first given to the mother, and the limitation over being to take effect only upon her dying leaving no child or children, or issue of any child or children, there was no danger of disinheriting any of her issue, while in the case at bar the words of the limitation over extending expressly only to children, there is danger, if a literal and strict construction were adopted, of the grandchildren or issue of children being utterly disinherited. It would be vain to argue for any difference in the intention respectively, of the testators in these two cases. The intention of each was obviously the same, and is only more liberally and fully expressed by the one than the other. It is certain that Mr. Stone intended that part of his land which he carefully laid off and assigned to his daughter, should be a place of inheritance for her and her children; and it was only for the purpose of more certainly assuring it to her and her children as a place of inheritance, that he determined to confine her to a life estate. And it is just as certain that he did not intend that it should go over so long as his daughter had any children or the issue of any children to enjoy it. That the devise in our case is expressly to Nancy Perry for life can make no difference, as is shown by many cases. "It is immaterial," Lord Thurlow observes, in *Jones v. Morgan*, "that the testator meant the first estate to be an estate for life. I rest it upon what he meant afterwards."

And how aptly do the words of Grose, J., in *Cock v. Cooper*, supra, apply to this case. "The only question is, what upon the whole will appears to have been the intent of the testator? And this has been truly stated to be that Richard Cock (Nancy Perry or Sally Stone), should first take the estate, and after him, his (her and her husband, her) children, and that the remainder over should

not take effect so long as any of his 154 (her) *descendants remained. Then

this general intent can only be carried into effect by giving the first taker an estate tail." You cannot confine the first taker to a life estate, and say that the remainder in fee shall vest in the first child that is born, subject to be divested in part on the birth of each subsequent child, who will take undivided shares likewise in fee, because, first, of the want of words of inheritance in the gift to the children; and secondly, supposing the statute dispensing with words of inheritance could apply, because if either of the children should die without issue, his share would pass from the family and could not go to the surviving children, as cross remainders could not be implied between them. *Jesson v. Wright*, *Cock v. Cooper*, and other cases cited, *supra*.

It is respectfully submitted that these decisions of the highest judicial tribunals in England, embracing some of the most important earlier and later cases on this vexed subject, show that according to the law, "as it aforesaid was," the testator's daughter Nancy acquired an estate tail in the realty, and the absolute property in the personalty, given to her by the will. It is true some English cases may be found in conflict with these. But they are mostly the decisions of a single judge, and they will be found on examination to have proceeded on principles at war with those which prevailed in the earlier and in the later cases decided by the highest English tribunals, and to be therefore not entitled to respect even though they may not have been expressly overruled by the latter decisions. The most distinguished of these cases, and the latest in point of time, is *Forth v. Chapman*, 1 P. Wms. 664, decided by Lord C. Parker in 1720. There the devise was to two nephews, "and if either of them should depart this life and leave no issue of their respective bodies, then he gave the leasehold to the daughter of his

brother Wm. Gore, and the children
155 *of his sister Sibly Price." Question, whether the limitation over was void as too remote? The court below was of opinion devise over was void, but Lord Parker, on appeal, reversed the decree and said, "that if I devise a term to A., and if A. die without leaving issue, remainder over, in the vulgar and natural sense this must be intended if A die without leaving issue at his death, and then the devise over is good." And further on he said: "If the words of a will can bear two senses, one whereof is more common and natural than the other, it is hard to say a court should take the will in the most uncommon meaning. To do what? to destroy the will?" And further he said: "It might be reasonable enough to take the same words as to different estates in different senses." As if a testator could intend to use the same words in their natural or more common sense as to personalty, and in a different or artificial sense as to realty. And he held, without any better reasoning or authority, that as to freehold an estate tail arose, but as to leasehold a life estate only.

This judge had previously decided the cases of *Nichols v. Hooper*, 1 P. Wms. R. 198; *Tar-*

get v. Gaunt, Id. 432; *Pinbury v. Elkin*, Id. 564; and *Hughes v. Sayer*, Id. 534, upon the same principles.

In all these cases, in which a restricted construction was adopted, it is a pregnant circumstance that the first taker took the fee or absolute property by virtue of the devise or bequest to him, that is, such an interest as would have carried it to his issue, if he had any, except in the case of *Target v. Gaunt*, where the bequest was to first taker expressly for life and no longer.

Just about 100 years after these cases were decided in England, and when they had ceased to be of any authority there, or at least when the principles on which they proceeded had been disregarded in various subsequent cases, and very general
156 disapprobation expressed *of them, the case of *Timberlake v. Graves*, 6 Munf. 174, was decided, apparently upon these much questioned and disregarded if not utterly exploded principles. And this case was followed in rapid succession by *Gresham v. Gresham*, Id. 187; *James v. McWilliams*, Id. 301; *Cordle's adm'r v. Cordle's ex'or*, Id. 455; and *Didlake v. Hooper*, *Gilmer* 194.

These cases have been overruled by the cases of *Griffith v. Thompson*, 1 Leigh 321; *Deane v. Hansford*, 9 Id. 253; *Callava v. Pope*, 3 Id. 103; *Moore v. Brooks*, 12 Gratt. 135.

The case of *Smith v. Chapman*, 1 Hen. & Mun. 240, is the only one to be found in the books, English or American, that tends to sustain the proposition that the testator's daughters take under the will here only estates for life and not fee tails, and that case we humbly submit was wrongly decided, is in conflict with prior and subsequent decisions in our courts, and has been overruled by many later decisions. It never could have been decided as it was in England, and never would have been so decided in this State, but for the controlling influence which the statute of 1776, abolishing entails, and that provision of the statute of 1785, which dispenses with words of inheritance in order to create a fee, had upon the minds of the judges who sat in it. An examination of the separate opinions of those judges will render this perfectly obvious.

This use of these statutes was contended for by Judges Coalter, the later Tucker and others, in many cases. In *Thomas v. Andersons*, 4 Leigh 118, the latter contended for it and showed that in his opinion the decision in *Smith v. Chapman* was based upon it. He said, in arguing against the creation of an estate tail in that case, p. 126: "And his children, had the estate ever vested in them, would have taken a fee as I think by the operation of the statute of 1785, dispensing
157 with words of inheritance in the creation of estates in fee *simple. *Smith v. Chapman*, 1 Hen. & Mun. 240." In *Bells v. Gillespie*, 5 Rand. 273, 302, Judge Coalter claims *Smith v. Chapman* to be a decision in favor of this use of the act, and asks, "Has this case been overruled? It may be said that it has, because in many cases we have recognized the British doctrine in

a search after the intention." At page 303, after alluding to the departure from the doctrine of *Smith v. Chapman* in several later cases, and to the consequent passage of the act of 1819, restricting the meaning of a limitation over upon the death of the ancestor without heirs, or heirs of the body, or issue, or children, to a dying without such living at the time of the death, he said: "Suppose the course of decision now indicated by the legislature had taken place soon after 1787; or had been considered as settled by the case of *Smith v. Chapman*, as it ought to have been, and persevered in since; could any one have complained? So far from it, the act of 1819 would have been unnecessary." And on next page he said: "The only question now remaining for us to consider is, whether we can now throw off the wrong and take up the right rule?—If we cannot go back, cannot we now re-assert and establish the doctrine laid down in *Smith v. Chapman*," &c.?

But the court pronounced against the use of these statutes in *Bells v. Gillespie*, notwithstanding the argument of Judge Coalter and the decision in *Smith v. Chapman*, and continued so to pronounce until in *See v. Craigen*, 8 Leigh 449, Judge Tucker, the last advocate for this use of them, surrendered and gave up the point. At page 452, he said: "This use of the statute has been attempted in many cases, but has been as repeatedly overruled. I have struggled for it in many cases, but have found myself in the woful minority of one. I must therefore surrender, and in doing so I must pronounce against the effect of the statute in this case." Since

the case of *Smith v. Chapman*, the 158 *true doctrine has been in repeated cases held to be, in the language of Judge Brooke in *See v. Craigen*, "that these acts can only apply in cases where the rules of construction, 'as the law aforesaid was,' in respect to estates tail and executory devises, applied to the words in the deed or will, will not be affected." The principles and grounds of the decision in *Smith v. Chapman* having been thus discarded, the case itself has been overruled, as is clearly indicated in the remarks of Judge Coalter above quoted, and cannot now be regarded as an authority against us, even if that and our case were exactly alike, which we have shown is not the fact.

The Virginia cases, both prior and subsequent to those above commented on, which have met with almost universal favor, above which there has been scarcely any dissatisfaction expressed, and which must now be taken to furnish the law upon the questions here involved, are very numerous; and commencing with *Roy v. Garnett*, 2 Wash. 9, come down to *Tinsley v. Jones*, 13 Gratt. 284. Most of these earlier cases are brought in review by Judge Carr in *Bells v. Gillespie*, 5 Rand. 273-280, et seq.; and I will not stop to state or comment on them.

Bells v. Gillespie is an important case. It was thoroughly argued by bench and bar. After giving each of five sons a fee simple in different tracts of land, the testator says,

"My will is, if either of my sons should die without lawful issue, that the part allotted them be equally divided among the surviving brothers, children of my last wife." Judge Carr, p. 277, asks, "what did he mean? Did he look to a definite or indefinite failure of issue in the first takers? It seems to me clear that the land given to each son should be enjoyed by the family of that son so long as any branch of it remained; and that whenever it failed the land should go over. Each

son and his family were the first objects 159 *of his bounty, as to that part of his land given to each; his other sons and their families the second. Suppose P. Bell had left a child at his death, and that child had died the day or the hour after him. Did the testator mean in such case that his other sons should have no part of or interest in P. Bell's land? Why he should postpone their interests to the failure of the issue of P. Bell, I can clearly see, but I cannot perceive why time should be so important with him as that he should say to his other sons, 'though it is my will that you have the land of P. Bell if he has no child at his death, yet if he leave a child you shall not have it, though that child die the next hour.' If he had had this idea in his mind would it not have been more natural and direct to have said, 'it is my will that if either of my sons die without issue living at his death his part shall be equally divided among his surviving brothers?'"

How strong, pertinent and apposite are these observations to the case now in hand. It is impossible to read Caleb Stone's will without being impressed with the conviction that as to the land he gave to each of his daughters, he intended it should be enjoyed by each daughter and her immediate family so long as any branch of it remained; and that it should never go over to the other children, while any issue of that daughter was in being, whether that issue were children, grandchildren or great grandchildren. Indeed in one aspect our case is a stronger case for an estate tail than *Bells v. Gillespie*, for in the latter, the fee being first given to each son, if he had any issue at his death, that issue, whether children or remote descendants, could take the whole estate, whereas here a life estate only being given expressly to each daughter, and the limitation over being on failure of children, and not issue, unless the daughter take an estate tail, none but children could take at her death, and they only for life, there being no words of inheritance superadded to the devise to them.

160 *In *Bells v. Gillespie*, great reliance was placed on the words "that the part of the land of any son dying without issue should be equally divided among the surviving brothers," to tie up the failure of issue to the death, and Judge Carr referred to several cases, English and Virginian, to show that these words could not properly have this effect. Among others, to *Barlow v. Salter*, 17 Ves. R. 479, in which the devise was in these words, "all my estate, real and personal, to my daughter M. V., to her and her heirs; and half the navigation money for

her natural life; and in case she dies without issue, all to be divided between my four nephews and nieces, N., W., C. and E.; C.'s part only for life, and her part to be divided between the survivors." The bill was filed by one of the nephews against the daughter, praying that the nephews and nieces might be declared entitled in the event of the daughter's dying without issue living at her death; and praying an account accordingly. It was admitted that there was no real estate, and this makes the case stronger, for it is well known that slighter words will be taken to tie up the failure of issue to the death in personal than in real property. The master of the rolls went into the consideration of the words, in case she dies without issue. The judges in some of the early cases, he said, had inclined to hold these words to mean issue at the death of the person named, but he thought that ever since the case of *Beauclerk v. Dormer*, a different rule had prevailed. The single circumstance relied on in this case in favor of the restrictive construction is, that one of the four persons to whom the bequest over is made, is to take a life interest in her part, which is to be divided equally among the survivors. But in the case at bar it is not even survivors; it is that the land shall be divided among all my children.

The cases of *Carter v. Tyler*, 1 Call 165; *Broaddus v. Turner*, 5 Rand. 308; *Ball v. Payne*, 6 Id. 73, are to *the same effect, and are strong and pertinent authority for the construction for which we contend.

The case of *Bramble v. Billups*, 4 Leigh 90, runs on all fours with the case at bar. There is no substantial difference between the limitations in the two cases. Children is certainly as much a word of limitation in a will technically as offspring is, and there is nothing in our case, not a single circumstance, which is not present in this case, to show that Caleb Stone, rather than Matthias Christian, meant by the word children, only such children as should be living at his daughter's death. The intention of Christian to provide for the issue of his daughter generally, and that the issue, if any, should take the whole estate, is manifested by the fact that he only limits it over in the event of her having none. The same intention on the part of Caleb Stone is evinced by the same circumstance. But the offspring could not take the whole estate, if the term offspring were held to be a word of purchase, because of the absence of words of inheritance in the gift to them. The life estate of the parents was therefore raised into a fee tail. The same reason and necessity for the same thing exists here; and shall a different result be arrived at.

The power of appointment given to Bramble and wife, it was insisted, tied down the failure of issue to the death of the survivor of them, because it must be intended such issue as they could appoint to; and it seems that such a power has been permitted, in some cases, to have a controlling influence in this respect. But in many others such in-

fluence has been denied to it. Yet it cannot be denied that it is a circumstance tending to show that the testator intended only such issue as should be living at the death. That indicium of such an intent is absent from the case at bar. It is not in the power of any ingenuity to distinguish between these cases with the view of showing that the 162 *testator Christian intended to provide for all the issue of his daughter, and that the testator, Stone, did not intend to provide for all the issue of his daughter. That the word offspring is used in one case and children in the other, can make no difference against us here, as many cases to which I have referred, and the next case to which I shall refer, *Thomason v. Andersons*, 4 Leigh 118, abundantly show. Indeed the necessity for giving an estate tail, in order to effectuate the general intent of the testator, is greater, because of the use of the word children; for used as a designatio personæ the word offspring would embrace children and other descendants, however remote, while children, construed to be a word of purchase, would not; and thus the chances of defeating the intention in favor of all the issue, would be greater in the latter case than the former.

The whole opinion of Judge Carr in this case is a forcible argument in favor of the appellants here. I beg to refer the court to his exposition of the force or effect of the expressions, "if any by my daughter Lydia," and "if they have any," &c., and "if they have none," on p. 94, which are almost identical with the terms employed by the testator here, in the devise to Nancy Perry. On p. 95 he refers to and approves the decision in *Doe v. Goldsmith*, 7 Taunt. 209, "where the devise was to F. G. for life, and immediately after his decease to the heirs of his body lawfully begotten, in such parts and shares as F. G. should by deed or will appoint, and in default of such heirs of the body of F. G., then immediately after his decease, over to J. G.;" and the question was whether F. G. took an estate tail.

Chief Justice Gibbs in delivering the opinion of the court, thus states the argument of the counsel, who contended that F. G. took an estate for life only: "That the words heirs of the body mean children of F. G., for when he devises to the heirs of the body 163 of F. *G. in such shares as the tenant for life shall appoint, that is a gift to persons who must be in esse when F. G. was to appoint to them; that the default of such issue must therefore be a default of such persons, who can only be children, and that the testator by this expression, therefore manifestly means to refer to the same persons who were to take as tenants in common under the appointment, not to the heirs of the body of the first taker in the ordinary legal sense." But the court, admitting all this it would seem, "said, 'it is an established rule, that where a general intent appears, any particular intent which appears, however clearly expressed, shall never take effect when it is inconsistent with the general intent; and it was clearly the testator's general intent that the estate should never go over to J. G. till

all of the heirs of the body of F. G. were extinct,' and therefore it was an estate tail in F. G."

Judge Tucker, who dissented, after arguing that the word offspring was a word of purchase, as shown by the power of appointment, proceeded, p. 105, to examine the terms of the limitation to Bramble and wife, and to their offspring, for the purpose of showing that only such offspring could take as should be living at the death of the survivor. He said, "the devise is to them and the longest liver of them, and then to their offspring if any. If any, when? The answer seems to be echoed by the clause, if any then, at that time. To what could he be considered as so naturally referring as to that time of which he had just spoken, namely, the termination of the particular estate? Can he be supposed to have intended no definite period, to have meant if any in the long succession of generations? I think not." Yet in next p. 107, he said, "It is said that the testator did not design the estate to go over to the offspring of Mollie Baynes and Nancy Ashley as long as there were any descendants of his daughter

Lydia by John Bramble; this cannot
164 be denied. It is then *said that, if the words are not construed to give an estate tail, the descendants of Lydia after the first generation would be cut off, since the offspring, if they took as purchasers, would only take estates for life, there being no inheritable words in the bequest to them. This position cannot be admitted." He then referred to several cases which were relied on to sustain this position. "In Doe v. Applin, 4 T. R. 82," he proceeded, "the devise was to A. for life, and after his decease to and amongst his issue, and in default of issue, then over: A. took a fee tail, and for this obvious reason, that as the issue could not take more than an estate for life, for want of words of inheritance, the estate would go over from the grandchildren, notwithstanding the clear intent to postpone the remainder so long as there should be issue or descendants of A. In Doe v. Smith, 7 T. R. 531, the devise was to A. and the heirs of her body forever, as tenants in common, and not as joint tenants, and in case she died before twenty-one or (and) without leaving issue of her body, then to B. Held, A. took an estate tail avowedly upon the necessity to effectuate the general intent. And Lord Kenyon said there are no words of limitation added to the estate given to the children (supposing they took as purchasers), and yet the remainder over is not to take effect until there is a general failure on her issue, so that there must be an estate to comprehend all her children forever." And having referred to Doe v. Goldsmith and Doe v. Cooper, 1 East R. 229, he continued, "In all of these cases, then, the want of superadded words of inheritance upon the devise to the issue, so as to give them heritable estate instead of estates for life, was the obvious, and in some of them the avowed principle of decision. For if we attend to the course of argument in all of them, both of the bar and bench, it is very manifest that the power of appoint-

ment, the direction to divide the estate amongst them, and the provision that

165 *they should hold as tenants in common, would in these cases, as in Doe v. Laming, have prevented the implication of an estate tail, if there had been superadded words of inheritance. Thus in Doe v. Cooper, Lord Kenyon, speaking of Atherton v. Pye, said, 'in that case that there were words of limitation added to the devise to the daughters, and this forms a principal ground of distinction;' and in Doe v. Smith, in speaking of Doe v. Laming, which had been cited, he said, 'that case is distinguishable from this, for there were words of limitation superadded.' If then the existence of an inheritable estate in the issue or offspring is the point upon which those cases turn in which there is a limitation to the issue to take in a manner different from the law of descents, then, I say, that that is furnished in the case before us by the statute of 1785, which declares that a fee shall be construed to be conveyed where there is no restriction either by express words or by construction of law." And the distinguished judge proceeded to argue, p. 110, that by operation of that statute the offspring of Bramble and wife, living at the death of the survivor of them, would take a fee simple estate; "and thus the whole generation of the testator's daughter would, in succession, come to the estate, unless it should be aliened by those in whom it might rest. And thus there would be no ground for implying an estate tail by forcibly converting a designation of the persons to take into words of limitation." And thus his honor shows the utter impracticability of confining the first taker in the case at bar to a life estate, and holding the word children to be a word of purchase, consistently with the well established principles upon which similar cases have proceeded; for it is now well established that the statute of 1785 cannot be invoked to give the children the fee. In the language of Judge Brooke in this very case, 101, that statute can
166 *construction, "as the law aforesaid was," in respect to estates tail and executory devises applied to the words in the deed or will, will not be affected. And thus this argument of Judge Tucker becomes a powerful and impregnable one, in favor of the implication of an estate tail in the case at bar; for holding throughout that it was the true intent and meaning of the testator, and the true construction of his will, that the offspring, if any, living at the death, should take the land, and if none, in default of such offspring, that is, offspring living at the death, then, and then only, the land should go over; he admits and shows, that if such offspring could not take by purchase an estate in fee; that if, taking by purchase, they would be confined to estates for life, and the daughter's grandchildren would be unprovided for, that then, in order to effectuate the general intent, such an estate must be given to the mother "as would comprehend all her children forever;" although it was the obvious intention of testator that she should take only an estate for

life, and that her offspring, if any, living at her death, should take by purchase. This is as strong a statement of the case for the appellees in the case at bar as can possibly be made for them. The extremest extent of their pretensions can only be, that the word children must be taken to be a word of purchase, and to embrace and refer to children living at the death; and yet, even then, this distinguished judge, who was an advocate for the restricted construction, admits that unless the statute of 1785 could be used to give the children the fee, then a fee tail must be given to the mother. That this statute cannot be so used, has been for many years authoritatively decided. The judge (Tucker) was the last advocate for this use of the act, on the bench, and he, in *See v. Craigen*, 8 Leigh 449, conceding that it had been pronounced against in several cases, gracefully surrendered the point, and in doing so pronounced for an estate tail in that case.

167 *That case differed from *Bramble v.*

Billups, in this, that the devise was, "I give and bequeath to my daughter Phoebe Couchman the upper half of my plantation, to be equally divided between her and John Craigen as to quality and quantity; but should my said daughter die without heirs of her own body, it is then my will and desire that said half of my plantation should be divided between my son-in-law John Craigen and my son Adam See." The devise being to P. C. indefinitely, and therefore, by the rules of the common law, only for life, Judge Tucker said, "if under our law you consider P. C. as taking a fee by the operation of the act of 1785, then there is a good devise to her of the fee with a limitation over upon her dying without heirs of the body, by way of executory devise, and thus the whole line of her descendants will take, according to the manifest general intent, without the necessity of creating an estate tail." But the court again decided, and now unanimously, that that act could only be applied in cases in which by its application the rules of construction "as the law aforesaid was," in respect to estates tail and executory devises, applied to the words in the deed or will, will not be affected. In this case the proposition was to add words of inheritance to the devise to the first taker P. C. In *Bramble v. Billups*, and in the case at bar, it was and is proposed to add them to the devise to the offspring or children. The effort failed in those cases, and they control this.

In *Thomason v. Andersons*, 4 Leigh 118, the devise was, "I give to P. A., my natural daughter, 100 acres of land, two negroes, one feather bed, &c., to her and her heirs forever. My further will and desire is that if she should die leaving no child, the estate before given should return into my estate and be divided amongst all my children; but should she leave a living child or children, then the

estate shall be heired by him, her or

168 them, as *the case may be." By a slight transposition of the clauses of the ulterior limitations here they are made substantially identical with those in the case at bar, as most strongly interpreted for the

appellees. Thus: "My further will is, that should she leave a living child or children, then the estate before given shall be heired by him, her or them, as the case may be; but should she die leaving no child, then the estate shall return into my estate, and be divided amongst all my children." This transposition improves the grammatical construction, does not alter the sense, and presents more strikingly the similarity between the limitations in the two cases. But to make the limitations here precisely identical with those in our case, it is only necessary to omit certain words which are in fact absent from our case, and on which great reliance has in some cases been placed to tie down the failure of issue to the death, and then it will read thus: "My further will is, that should she leave (have at her death) any children, then the estate shall be heired by them (shall be equally divided between them); but should she die without any (should she have none), then the estate (land) shall be equally divided among all my children." In this statement of our case all is conceded that is or can be asked for by the appellees, and yet it is at once apparent, that it is a much stronger case for an estate tail than the case under consideration. The very important—so held in some cases—restrictive phrases, "should she leave a living child or children;"—"should she die leaving no child;"—"should return into my estate," are wanting in our case, and besides the fee was first given to the daughter P. A., and there was therefore less necessity for creating an estate tail in her, in order to provide for all her issue. See the remarks of Judge Tucker in this case and in *See v. Craigen*. Yet the court without hesitation, Judge Carr delivering a most emphatic opinion, in which Judges Cabell and Brooke concurred,

169 *pronounced in favor of an estate tail in the daughter.

Judge Carr, p. 122, said, "Did the testator mean to provide for his daughter and her issue indefinitely? If so, this is an estate tail, no matter how he may have expressed himself, or with what condition or limitations he may have attempted to clog it." After quoting the clause he continued, "Can any one look upon it and not perceive that it was the intention of the testator to provide for the daughter and her whole line of descendants? When this intent is clear, the word child or children are taken to mean issue." Judge Tucker, upon these points said, "As to that portion of his estate set apart for that branch of his family, it is natural that the testator should have preferred her children to his own legitimate children (the daughter was an illegitimate child), and that he should have designed what he bequeathed to her to go to her posterity instead of coming back to the posterity of his other children, who had their shares of his bounty provided by other parts of his will." But he contended that the daughter took the fee subject to be defeated upon her death without a child or grandchild, and not a fee tail, remarking "the word child or children is indeed construed to mean issue or heirs of the body, when such a construction

is absolutely necessary, but not otherwise. But I know of no case in which the words child or children living at the death, &c., have been so construed, where the parent herself has an express estate in fee limited to her by a prior clause of the will." And it is thus apparent that he would have concurred with the other judges but for the fact that the fee was first given to the daughter, coupled with the use of the restrictive phrase above referred to, all of which are absent from the case at bar. The only circumstances in which that case differs from ours, are

the circumstances upon which the dis-
170 senting judge relied, *to rebut the im-
plication of an estate tail. That case

then must rule this, unless it has been itself overruled. But so far from having been overruled, the principles upon which it proceeded have been over and over affirmed, and no word of disapprobation of it has ever escaped bench or bar. Judge Carr made, pp. 123, 4, some further remarks, which I cannot forbear quoting, as they contain a most powerful argument in favor of an estate tail here, an argument which is indeed entitled to more weight in our case than that, because of the greater risks of disinheriting the issue in our case than in that; indeed because of the absolute certainty of disinheriting all of the issue in our case after the first generation, should it be held that the mother took only an estate for life.

Said he: "If I considered it doubtful, upon the face of the will, whether this were a fee tail or a fee with an executory devise over, I should feel inclined, on several grounds, to lean against the executory devise." And advertng to the rule laid down by Lord Hale in *Purefoy v. Rogers*, "that where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only;" and to the fact that an executory devise establishes a perpetuity, to its extent putting fetters upon the estate which may often last for a century, he continued, "but I do not think it at all doubtful. The testator was making provision for his daughter and her issue; would he make such a disposition of his property as, in certain events, not at all improbable, would carry it over to others, though there were descendants of his daughter in being or just coming into life? Yet such might be the case if this were taken as an executory devise, which we know is a limitation of a future interest, not to take effect at the testator's death, but limited

171 to arise and vest on some future *con-
tingency. The contingency here would be the death of the daughter without a child living. The moment this happened the executory devise would take effect, and the estate vest in the legitimate children of the testator, and no subsequent event could divest it. Suppose the daughter had had six children who had all died in her lifetime, each leaving five children, and then the daughter died, she would die without leaving any child living, and the estate would be taken from her family though she left thirty

grandchildren. It may be said the word children sometimes comprehends grandchildren, and under that meaning these would be taken in. But if grandchildren were comprehended, no one would contend that great grandchildren were, and it might well happen that the daughter might die leaving only such." And as shown by Sir Edward Sugden in *Jesson v. Wright*, and by Judge Carr in *Bramble v. Billups*, it might well happen that the daughter should die leaving only one child, and thirty grandchildren, the issue of deceased children, and in this event, in the case at bar, the grandchildren could take nothing. But for still another reason in our case the grandchildren could in no event take anything, and even children could take only an estate for life, viz: because of the absence of words of inheritance. Could this testator have designed such a result? Would he not have disclaimed the use of the word children in its natural sense, if these consequences, unnatural and revolting to his heart, had been pointed out to him? And are not the courts well justified in adopting that construction of the testator's language which will best effectuate his main design, even though his particular design may be frustrated?

The principles of these cases have been applied and the cases approved in various subsequent cases. *Nowlin v. Winfree*, 8 Gratt. 356; *Callis v. Kemp*, 11 Gratt. 78; *Moore v.*

172 *Brooks*, 12 Gratt. 135, in which the tes-
tator *said, "and it is my express desire that the parts of my estate which shall go to my daughters M. M. and C. B. shall be held by them during their natural lives and no longer, and then equally divided between their heirs lawfully begotten;" and in which Judge Allen delivered an able opinion, concurred in by Judges Moncure and Lee, wherein he referred to and approved *Jesson v. Wright*, and showed, p. 150, that the authority of the cases, *Self v. Tune*, *Timberlake v. Graves*, &c., had been shaken, if not overruled, by *Bells v. Gillespie*, &c.; *Tinsley v. Jones*, 13 Gratt. 289, in which, in the course of an able opinion delivered by Judge Moncure, in which all the judges concurred, he referred with approval to *Waller v. Greer*, *Doe v. Cooper*, and *Doe v. Goldsmith*, and *Donn v. Penney*, and quoted, p. 294, and approved, the remark made by *Jarman*, 2 vol. 446, closing his comments on the case of *Pinbury v. Elkin*, in which "petty distinctions" had been made, "that no judge of later times would have departed from the legal sense of the words upon such an expression as that in *Pinbury v. Elkin* admits of little doubt."—"But," continued the judge, "*Jarman* thinks that followed as that case has been by the other cases mentioned, it is too late to question its authority. We are taught, however, by the decision of Sir W. Grant, in *Donn v. Penney*, that the doctrine of the case of *Pinbury v. Elkin* will not be applied to any case in which the variation of phrase is such as fairly to take it out of the reach of its authority." And then in the same and next pages, the learned judge shows that stronger manifestation of intention to use the words of the limitation over in a restricted sense will be

required in a case in which a life estate only is given to the ancestor, than in a case in which a fee simple is given to him. "In the latter case the issue may inherit from him or his heirs at law or derive it from him by deed or will; whereas in the former they cannot get it at all" (or in *our case but for life), "if the words be construed in a restricted sense; and it is therefore necessary to construe them in a technical sense to effectuate the manifest intention of the testator. There can be no conceivable motive for limiting the estate over only in the event of the ancestor's dying without issue, but that the issue, if any, may have the estate" (or in our case "only in the event of the ancestor's dying without children, but that the children, if any, should take it to them and their heirs forever"). The restrictive words should therefore be extremely strong to require such a construction as would deprive the issue of any possible means of succeeding to the whole "estate."

He then shows that the statute of 1785 could not be used to give the ancestor in that case an estate of inheritance; and by the same reasoning, and by the definite determination of the whole court in *See v. Craigen*, it cannot be used to give the children here an estate of inheritance, and the result in either case must equally be, that the ancestor must take an estate tail in order that the intention in favor of all the issue may be effectuated.

The learned judge then, p. 297, referred to the case of *Lucas v. Duffield*, 6 Gratt. 456, which had been relied on by counsel to show that the words "die without issue" were used in a restricted sense, and manifestly disapproving and "without undertaking to reconcile that case with others on the same subject," an undertaking which, it must be confessed, it would be very difficult successfully to accomplish, he said, "it is plainly distinguishable from *See v. Craigen* and other cases therein referred to, in this, that the land there was devised to W. D. to him and his heirs."—"The decision, I imagine, would have been different if a life estate only had been given by the will to W. D., and the manifest general intent in favor of the issue could only have been effected by enlarg-

174 ing that life estate *into an estate in tail." The phraseology in *Tinsley v. Jones*, is evidently more restrictive than in the case at bar. A glance at it is sufficient to show this. "It is my will if my said son J. F. B. die without issue, that the property heretofore given him shall go to his brother F. B., who in that case will lose the land heretofore given him. It being my will and desire then, and in that case, and upon the happening of the event of my son J. F. B.'s death, that the land near W., which would otherwise be F. B.'s share, be sold, and the money equally divided between my surviving children." Here is present a circumstance too which in some cases has been held to tie up the failure of issue to the death, to wit, the limitation over is first to the surviving brother, without words of inheritance, and then to the testator's surviving children, without words of inheritance. Yet his honor,

without hesitation, pronounced in favor of an estate tail in J. F. B., who died without ever having had any issue, adding, "it is not material to enquire whether the remainder to F. B. is to take effect on the death of J. F. B. without issue indefinitely, or without issue living at his death; as, by the act for docking entails, all remainders, whether contingent or vested, depending on an estate tail, are utterly barred; and as the case occurred before the act of 1819, giving effect to every limitation upon such an estate, which would be valid when limited upon an estate in fee simple created by technical language." And he referred to a long line of cases, commencing with *Carter v. Tyler*, and ending with *Moore v. Brooks*, *ubi supra*, to sustain the principles on which his opinion was based. 2 Jarman 440-1 marg., 315-16 top, 312 top, 435 marg., 315 top, 440 marg.

Treating the question as I have hitherto, as if the testator had employed the same words in making the devise to his daughter Sally that are employed in the clause making

a similar devise to his daughter Nancy 175 *Perry, I submit with confidence that upon principle and authority, Sally must take a fee tail in the land. "And if as applied to real estate the clause created an estate tail in the daughters, in such case the full and entire interest in personalty will pass to them; as an estate tail in personal property gives the absolute dominion." Allen, P., in *Moore v. Brooks*, 12 Gratt. 135, 144. Mr. Jarman (2 Jarman 300 top, 418 marg.) says, "the established legal construction of the several expressions, 'if he die without issue,' 'if he have no issue,' or 'if he have no issue,' or 'if he die before he has any issue,' or 'for want or in default of issue,' unexplained by the context, and whether applied to real or personal estate, notwithstanding the distinction taken between these two species of property in some of the early cases,—*Target v. Gaunt*, *Pleydell v. Pleydell*, *Nichols v. Hooper*, 1 P. W., is that they import a general indefinite failure of issue." He adds, "this rule, however, admits of two exceptions, the first where the phrase is, 'leaving no issue,' with respect to which the settled doctrine is, that applied to real estate it means an indefinite failure of issue, but in reference to personal estate it imports a failure of issue at the death. *Forth v. Chapman* is the leading authority for this distinction, but it has been confirmed by a long line of subsequent decisions;" and he refers to many cases which on examination will be found not to support the proposition. Amongst them is *Walter v. Drew*, *Agar v. Agar*, *Wollen v. Andrews*, and others, which show that "leaving" makes no difference. Lord Kenyon, in *Porter v. Bradley*, denied the soundness of this distinction, as did Lord Thurlow in *Boggs v. Beasley*, and Mr. Jarman, though an advocate for the distinction, admits, at p. 307 top, 427 marg., that the difference has been much narrowed by the later decisions. The decisions which proceeded upon this distinction in England and in Virginia were never received with fa- 176 vor *by the profession, and it is not a little remarkable that the earlier and

later cases, in both countries, either ignore or deny the soundness of the distinction. Judge Lomax, 3 Lomax Dig. 434 top, 308 marg., says of it: "The rule of decision first intimated by Roane, J., in Higginbotham v. Rucker, in 1800, and repeated in several cases following in rapid succession down to Didlake v. Hooper, in 1820, was brought under reconsideration in Griffith v. Thompson, in 1829, and was entirely overruled." Carr and Green, Js., in Griffith v. Thompson, expressly disapproving Timberlake v. Graves, &c., held that the principles governing the decisions in Bells v. Gillespie, &c., applied to that case, where the subject was personalty, and Coalter, J., used this pointed language: "As the executory bequest of the personal estate, was limited over in the same words with the executory devise of the real, and was intended to take effect at the same contingency, upon the same failure of issue, the executory bequest of the personal subject was also ineffectual." The rule re-established in Griffith v. Thompson has been followed in Callava v. Pope, 3 Leigh 103; Deane v. Hansford, Nowlin v. Winfree, and Moore v. Brooks, ubi supra, all cases of personalty.

That the use of the word *lend* makes no difference in the construction is shown by various cases. A loan for life and a gift for life amount to the same thing. Williamson v. Ledbetter, Deane v. Hansford, Callis v. Kemp, and others, ubi supra.

In addition to the various cases above referred to, showing that the use of the word "children" makes no difference in the construction, where it is necessary to give the ancestor an estate tail in order to give effect to the paramount intent of admitting all the issue, I beg to refer to 2 Fearne 268, and Jones v. Davies, 4 Bar. and Adol. 43, there stated,

which is very much like the case at 177 bar; 2 Fearne 219, § 436, and remarks *of Green, J., in Bells v. Gillespie, 5 Rand. 273, 287, and Lord Mansfield, Davie v. Stevens, 1 Doug. 321-4.

There is still another view which makes it imperative that the construction for which we contend should be placed on this will. "All limitations and executory interests, except those in remainder after, or engrafted on an estate tail, must be so limited that from the very first moment of their limitation, it may be said that they will necessarily vest, in right, if at all, within the period occupied by the life or lives of a person or persons in being, and twenty-one years and ten months thereafter. And it is not enough that the limitation may take effect, within a life or lives in being, and twenty-one years afterwards; or that in the events which have happened, it would take effect within that period, though under other circumstances it might not; it must have been so limited that from the first moment of its creation, it could be said, that it must necessarily vest, if at all, within one of the periods mentioned. And hence it follows that real or personal estate cannot be limited to the children of a person who is not in esse at the date of the will, so as to enable such children to take as purchasers, even though their parents may

happen to be born before the death of the testator, unless the testator expressly limits the property to the children of a person who shall be born in his life, the testator's, lifetime." 2 Fearne; Smith's Original View, part III, ch. 4, § 1 and 2, pp. 391-2; 1 Jarman 254 top, 220 marg.; 1 Leigh 362 top, 329 marg.; Carr, J., Griffith v. Thompson. And this rule applies, not only to executory devises and bequests, but to all contingent remainders, except those engrafted on an estate tail. 1 Jarm. 258 top, 225-6 marg., 2 Jarm. 515 top, 728 marg., 519 top, 734 marg. And it is thus seen that the bare possibility, *potentia remotissima* (no matter how great the improbability), of the occurrence of events,

subsequent to the date of the will, 178 *which would have let in objects beyond the perpetuity line, or would have postponed the vesting, in interest, beyond the period mentioned, is sufficient to defeat the limitations. 1 Jarman 263 top, where he says, "in applying this rule regard is had to possible not actual events."

Now the land given to the testator's daughter Sally, is "to be possessed by her and any husband she may have, on the same terms and conditions as Nancy Perry's." Putting out of view all ideas of an estate tail, and conceding that the devise to Sally is to be construed as if the testator had used in making it the same language employed in making the devise to Nancy and her children, &c., and it must then be conceded that Sally's husband, had she married, would have acquired a contingent life estate in the land; contingent upon his surviving her, and remaining her widower till his death. She was at the date of the will quite a young girl; not more than 10 or 11 years old. The will is dated in 1807, and was probated in 1810. Sally died in 1857, being about 61 years old, fifty years after the making of the will, and forty-seven after the testator's death. It was, therefore, at the date of the devise, and even at the death of the testator, if not very probable, yet by no means impossible, that Sally should marry a man, who was not in esse, at the date of the will or death of testator. It was not impossible that she should have children by such marriage. It was not impossible that she should die leaving such husband and children behind her; and that he should remain single for the balance of his life, and after surviving her for a period longer than twenty-one years, that he should die leaving the children surviving him. It will not do to argue from the events that have occurred, nor to say that the occurrence of those supposed was extremely improbable.

The first would be, in the words of Lord 179 Brougham in construing Lord Vere's will, quoted by Jarman, vol. 1, 266 top, 239 marg., "to rely upon an accident," and the second assumes that the application of the rule depends upon the probability or improbability of the occurrence or the hypothecated events. The same argument was attempted in Jee v. Audley, stated 1 Jarman 276-7 top, 254-5-6 marg., where the validity of the limitation depended on the question, whether John Jee and Elizabeth his wife

would have any daughters after the date of the will, or death of testator; and it was contended, "that there was no real possibility of their having children after testator's death, as they were then seventy years old." But Sir Lloyd Kenyon said, "the general principles which apply to this case are not disputed; limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being and twenty-one years and nine or ten months afterwards. This has been sanctioned by the opinions of judges of all times, from the time of the Duke of Norfolk's case to the present; it is grown reverend by age and is not now to be broken in upon. I am desired to do in this case something which I do not feel myself at liberty to do, namely, to suppose it impossible for persons at so advanced an age as John and Elizabeth Jee to have children; but if this can be done in one case, it may in another, and it is a very dangerous experiment, and introductive of the greatest inconvenience, to give a latitude to such sort of conjecture. Another thing pressed on me is, to decide upon the events which have happened; but I cannot do this without overturning very many cases. The single question before me is, not whether the limitation is good in the events which have happened, but whether it was good in its creation; and if it was not I cannot make it so. Then must the limitation, if at all, necessarily take place within the limits prescribed by law?" And after stat-

180 ing the case he answered, "most certainly not; because John and Elizabeth Jee might have children born ten years after the testator's death, and then Mary Hall might die without issue fifty years afterwards; in which case it would transgress the rule prescribed." And so in our case the question propounded by Sir Lloyd must receive the same answer. If Sally is to be confined to a life estate; if the devise gave her an estate for life, with contingent remainder for life to any husband she might have, with contingent remainder for life, or in fee, to her children who should survive her husband, as in the case above hypothecated; and with a substitutional or alternative remainder for life or in fee to testator's children, then all these remainders are void; because in the events supposed the vesting in interest would be postponed beyond the limits prescribed by law.

It will not do to say that in the case supposed the children of Sally living at her death would then be ascertained; for some of them might die in the lifetime of the surviving husband, and those only could take who were living at his death. If none were living then, then the remainder to the testator's children would, if not void, take effect. Both the remainders continue contingent up to death of the husband. Then, and not till then, could it be ascertained who should take. Nor will it do to argue, that as the limitation to the testator's children is to them simply without words of inheritance, that therefore such only of them as should survive the husband could take; and as they were all in esse at the testator's death or in ten months afterwards, it may be

said that the remainder to them must vest, if at all, within the prescribed period. The case of Griffith v. Thompson, *ubi supra*, furnishes a complete answer to this argument. Said Green, J. in that case, p. 372 top, "when a preceding limitation is too remote, all that succeed it, even although limited to take effect in good time, are defeated."

181 *Thus in Proctor v. Bishop of Bath and Wells, 2 H. Blacks. R. 358, a devise to the first or other son of T. P. (he having none), that should be bred a clergyman and be in holy orders, and to his heirs and assigns; but if T. P. shall have no such son, then to his grandson T. M. and his heirs. T. P. died without ever having had a son; and it was held that the first limitation over to that son if he had one was too remote, as none could take holy orders until the age of twenty-four, and as T. P. might have a son born in a short time before his death, who might take holy orders at the age of twenty-four, which would be beyond the fixed limits of executory devises; that the devise over was, consequently, void also. The same principle is affirmed in Chatham v. Tothill, 7 Bro. P. C. 453, Tomlin's edi." The limitation to Sally's children in the case supposed is too remote, because her husband, born after testator's death, might have survived her twenty-two years; and that limitation being void, the limitation to testator's children is void also. 1 Jarm. 268 top, 242 marg., 2 Fearne 414.

If those children of Sally could take the land in no other way than by purchase under their grandfather's will, they could not therefore take it at all, but would be disinherited, notwithstanding the clear intent of their grandfather in their favor. How then? Are the intentions of the testator in favor of his daughter's issue to be altogether frustrated? By no means; but the court "will sacrifice his minor intent that the grandchildren should take by purchase, because it is contrary to the rule against perpetuities, but will, nevertheless, under the doctrine of approximation, or cypres, give effect to his paramount intent, that all the issue of his daughter should take, by giving an estate tail to such daughter; so as to enable the grandchildren to take derivatively through the daughter, though they cannot be allowed to take in the particular mode

182 *pointed out by the testator." For the word children will be construed a word of limitation, in cases where, but for the rule against perpetuities, it would be construed a word of purchase. 2 Fearne; Smith's Orig. View, p. 264, part II, ch. 14, and rule 6, on preceding page; 1 Fearne 203-8, notes; 1 Jarman 280-1 top, 261-2 marg.

If the cypres doctrine cannot avail to give Sally an estate tail in the land, the principles and authorities last adverted to show that she acquired absolute property in the personality. At common law no remainder could be limited after a life estate given in personality. "As to it," to use the language of Judge Carr in Griffith v. Thompson, 1 Leigh 362, "a gift for an hour was a gift forever; but this has long been changed; and is laid down by Mr. Fearne, as settled by numerous

decisions, that there may be as well an executory bequest of personal as an executory devise of real estate. They are governed, too, by the same general rules. Thus in either case, the devise must be such, that in the very nature of the limitation it must vest within twenty-one years after a life or lives in being; if more remote, it is void in its creation. And the question whether the contingency be too remote, depends on the construction of the will at the time of making, and cannot be influenced by after events. The possibility, at the creation of an executory devise, that the event on which its existence depends, may exceed the prescribed limits, vitiates it from the very beginning." But if the remainder limited be not good, if it be void for remoteness or other cause, the original rule still prevails, and the estate of the first taker becomes absolute. 4 Bacon's Abridg., title Remainder and Reversion, p. 294 old edition; 11 Leigh 403, London v. Turner; 1 Fearn 487. Fearn says, "for though it seems, that whenever a term is devised to one for a day, or an hour, it is

held to be a devise of the whole term, 183 if *the devise over be void, and it appears to be the intention of the testator to dispose of the whole from his executors; yet, if such intention does not appear, then it has been held, that a limitation of a term to one for life does not vest the whole so absolutely in him as to be at his disposal, but leaves a possibility of reversion in the executors of the testator." Taking Fearn's statement of the law to be correct, and it is stated more strongly for the appellants in the other authorities cited, and still Sally acquired the absolute property in the slaves; for she is not expressly confined to a life estate, and if she was, still nothing can be more manifest in the whole will, than that the testator intended to dispose of the whole property from his executors.

It would be conceded, I apprehend, that if the limitation to Sally's husband for life, had been to a person ascertained not to be in esse at the date of the will, or death of the testator, or in other words, if her prospective husband were, at the time, ascertained to be a person not then in being, then the limitation to her children after the death of such husband would be too remote; for he might survive her more than twenty-one years, and the prescribed limits for the vesting in her children be thus transcended. But there is no difference in principle and authority between the case where the person to whom the prior limitation for life is made is ascertained not to be in esse, and the case where it can only be said that he may not be in esse at the death of the testator. It is sufficient if by possibility he may not be in esse at the death of the testator; and the rule applies if it cannot at the date of the will be asserted that he will ex necessitate be in esse at the death of the testator. Thus in the case of Proctor v. Bishop of Bath and Wells, it was not certain that the first son of Thomas Proctor would

and be bred a clergyman; but it was 184 possible that he might not be so *born, and if so born, that he might not be bred

a clergyman; and so as to the second or other son. If indeed the first son had been living at the date of the will and death of the testator, and had lived to be bred a clergyman and take holy orders, yet as he might not be bred a clergyman and take holy orders, and thus acquire the qualification necessary to entitle him to the gift, and as in such case, the "other son," who might acquire that qualification, might be born after the testator's death, therefore the devise was held to be void. And the limitation over to T. M., his heirs and assigns, was adjudged to be void also, the court observing, "that there was no instance of a limitation after a prior devise, which was void for the contingency's being too remote, being let in to take effect." 1 Jarman 269 top, 243-4 marg. In a note to Jarman, Perkins, his annotator, says, in this case "there was only a possibility of the rule of law being transgressed, as T. P. might have had a son who took orders in his own lifetime, or even in the lifetime of the testator." And thus if Sally had actually married in the lifetime of the testator, yet as the gift is to any husband she may have, and her first husband might have died, and she taken another, who was not in esse at the testator's death, the limitations would still be void. In the case upon Lord Vere's will the bequest was to testator's wife and son A. B. for life, and upon the decease of survivor, to such "person as should from time to time be Lord Vere;" and at the death of Lord Vere the title descended to his son, the legatee for life, upon whose decease it descended to his son, the testator's grandson, who was also living at the testator's death, and upon the death of the grandson it descended to testator's great grandson, who was born after testator's death. The chief struggle was between the personal representatives of the grandson and those of the great grandson. As the

first was born in testator's lifetime, 185 it was *clear, he might have been made legatee for life with remainder absolutely to the person next in succession, and the question therefore was, whether the will authorized such a construction. Sir J. Leach, V. C., decided in the affirmative. But this decision was reversed in the House of Lords, Lord Brougham remarking inter alia, "that the person who secondly after the death of testator became Lord Vere, the grandson, was in esse at the date of the will; but whether he would take, or whether he would be Lord Vere, was at the time uncertain. The next life estate, after those named in the will, was not to the person by name, but to the Lord Vere, whoever he might be. To argue from the fact that the person was in esse at the date of the will who became Lord Vere, is to rely upon an accident. The event might have been otherwise. He would not ex necessitate answer the description within the allowed period. A limitation, to be supported, must be definite and certain to the man or to the peer as an individual." And so even the second limitation to the grandson, after the first to the son, was not supported, though both were in esse at date of will; it not being certain that the grandson would

ever become Lord Vere, and it being uncertain whether the person who should next become Lord Vere, would be capable of taking at the death of the son, or within twenty-one years and a fraction thereafter.

Suppose the limitation here had been to Sally for her life, remainder to such son of A. B. as should become her husband, for life, and at the death of survivor, to be divided among their children then living, if any; and if none, then to be equally divided among all testator's children; and suppose that A. B. had a son living at the date of will and death of testator, but that son did not marry Sally; and he had another son born after testator's death who did marry her, and had children

by her; and Sally then died, leaving
186 that husband and *those children surviving her; and he having survived her more than twenty-one years died, leaving them surviving him; could there be a doubt, in the face of the authorities cited, that those children could not take as purchasers, the vesting being postponed beyond the prescribed period? And is there any difference, in substance, between the limitations supposed and the limitations in the testator's will?

That it makes no difference that the object of the prior devise, held to be void for remoteness, never came into existence, with reference to its effect on any ulterior devise, is shown by authorities already cited; and Jarman, 1 vol., p. 268 top; 242 marg., lays it down as a rule not to be questioned, "that where a devise is void for remoteness, all limitations ulterior to or expectant on such remote devise, are void also, though the object of the prior devise should never come into existence." And Mr. Smith, in his *Original View*, 2 *Fearne*, p. 414, part III, ch. 4, § iii, lays down certain propositions connected with the doctrine of remoteness, the 2nd of which is: "Where a limitation is void for remoteness, a limitation in remainder, after it, is not accelerated, but is also void." *Proctor v. Bishop of Bath and Wells*, is a conclusive authority for this proposition.

Mr. Smith, at same page, lays down another proposition which is peculiarly applicable to the bequest of the slave and future increase, if the effect of that bequest is to be governed by the construction presently suggested; which proposition is in these words: "Where a testator first makes a gift in terms which would carry the absolute interest in chattels, and then proceeds to restrict it to an estate for life, adding a limitation over which is void for remoteness; the entire interest, as conferred by the original gift, remains unaffected by the subsequent attempt at restriction." Now the bequest of the

slave Phoebe and her future increase,
187 *under the 11th clause, is at first made in such terms as would carry the absolute interest. The testator certainly designed, by this clause, to dispose of his whole interest not only in Phoebe, but in her future increase. He first lends her and her future increase to his daughter Sally, and then proceeds in the same clause, to add a phrase: "to be possessed by her, and upon the same terms and conditions as she will hold her land."

And it is said that this modifying phrase confined her to a life estate only, because it is necessary in order to ascertain the quantity of interest intended to be given to her, and to others besides her, to look to the devise of the land, and to read this clause in the same way, and give it the same construction, as if the testator had, in making the bequest, used the same language, and made the same limitations, in express terms, that are found in the clause making the devise of the land to her and to Nancy Perry. Concede this to be proper, and, I submit, it has been shown, that the limitation attempted to be made, being void for remoteness, the interest and estate of Sally became absolute.

But suppose it be impracticable, under rules of construction, to imply, from the phrase "to be possessed by her, and upon the same terms and conditions as she will hold her land," limitations not only to her for life, but to any husband she may have for his life, and at the death of survivor, then to her children, if she has any; and if none, then to all testator's children. Suppose, I say, it be impracticable, under the rules of law, to imply and supply all (and if not all then certainly not any) of these limitations, then what is the consequence? It is, I emphatically answer this, that the attempted modification or restriction upon the interest or estate, first limited to Sally Stone, must fail and be of no effect, and that interest and estate remains absolute and unrestricted.

188 *Can these limitations be implied and supplied by force of the aforesaid phrase? Is not the effect of that phrase rather to annex to the gift to Sally conditions, than to superadd limitations?

But in any and every aspect of it, can this phrase make so strong a case for confining Sally to a life estate, as was furnished by the express language in many of the cases above stated. Take the case of *Mellish v. Mellish*: "Hamil's to go to my daughter Catharine as follows: in case she marries and has a son to go to that son; in case she has more than one daughter at her husband's or her death, and no son, to go to the eldest daughter; but in case she has but one daughter, or no child at that time, I desire it may go to my brother Wm. Mellish." So here: "Phoebe and her future increase to go to my daughter Sally, to be possessed by her upon the same terms and conditions as she will hold her land, viz: in case she marries, to go to her husband for life; in case she has more than one child at her husband's or her death, to be equally divided between her children; but in case she has no child at that time, I desire Phoebe and her increase may go to my children to be equally divided among them." Hamil's was real estate, and the bequest now under consideration is of personalty. But still as to this the objection because of remoteness applies in all its force. The vesting may be postponed till the death of the husband, and that may be more than twenty-one years after a life in being. But as to the land the same considerations apply. Can the devise to Sally and any husband she may have, of land, to be possessed upon the same

terms and conditions as Nancy Perry's land is to be possessed by her, amount to a devise to her children, if she has any, and if none, then to all the testator's children? Can a devise to A. of land, to be possessed as B. by a precedent clause will possess certain other land devised to him, be held to give the property to *C. and D., who are not named at all? Can the court, by force of the expression, "to be possessed," &c. be authorized to imply or interpolate limitations to Sally's children, if any, and if none, to the testator's children? Will not this be going further in supplying words than is admissible? Is not the rule on this subject well laid down in *Lynch v. Hill*, 6 Munf. 114, where it is held, "that in supplying words in a will, it is the most correct course to supply only such as it is evident the testator intended to use, and not such also as would be necessary to effectuate the supposed intention of the testator?" And is it not evident here that the testator intended to use only the words which he did use? The others were omitted, not by inadvertence, but from design. Yet it is equally evident from the whole will that the testator intended the issue of Sally, if any, to take the land set apart for her, forever, and intended by the clause making the devise to her, to dispose of his whole interest in the land.

Yet no estate is, in express terms, given to her issue, and they cannot, as purchasers, take even for life. Is not the case then brought still more strongly within the influence of the doctrine of approximation or cypres, and of that general principle so often adverted to, that in the construction of wills the paramount intent of the testator shall prevail? This principle, with reference to this subject, is tersely stated by Judge Green, 5 Rand. 287. Says he: "Estates tail were unknown to the common law. They were created by the statute *de donis conditionalibus*. In executing this law it was the duty of the court to ascertain from the whole will taken together, whether the intent of the testator was to provide for the issue of the first taker; and if so, without regard to the particular estates given in terms by the will, to hold that the first taker had an estate tail, if the issue could not otherwise be provided for according to the intention of the

190 testator." Or as expressed *by Judge

Carr in *Thomason v. Andersons*: "Did the testator mean to provide for his daughter and her issue indefinitely? If so, this is an estate tail, no matter how he may have expressed himself, or with what conditions or limitations he may have attempted to clog it." The testator intended that the daughter should take such an estate in the property given her by the will, as would be transmissible to her issue, and this must be an estate tail or a fee. But what more, at most, can be implied from the expression, "same terms and conditions as Nancy Perry's," than such gifts as were expressly made in *Mellish v. Mellish*? In case she marries, and has children, to such children, if any living at her death; in case she has none, then over.

These considerations apply with still

greater force to the bequest of the slave and future increase under the 11th clause. The daughters are not expressly confined to life estates. The remainders intended to be limited by the phrase, to be possessed by them upon the same terms and conditions as they will hold their lands, are ineffectual, because of the want of sufficient words. Being ineffectual, the interest of the daughters become absolute.

If the daughter Sally did not take an estate tail in the land, and the absolute property in the slaves, what was their proper destination upon her death? The court below inclined to the opinion that they passed to the testator's wife and children, under the 14th clause of the will. Did the testator intend to embrace the land and slaves given to his daughters for life, in the 14th clause? The fact that he gives the property, intended to be embraced by that clause, to his wife for life or widowhood, is sufficient to show that he did not intend the property before given to his daughters for life, to pass under it. But if the further opinion

of that court be correct, "that the land 191 and slaves given *to Sally Stone for life, passed over to the testator's children under the 6th, 10th and 11th clauses of his will," which of his children are to take? Those living at the testator's death, and their representatives, or those only who were living at Sally's death? Unless the statute of 1785 can be used to give the testator's children the fee, they would take only for life, and the testator would be intestate as to the reversion in fee. If all the testator's children living at his death are held to take under the 6th, 10th and 11th clauses, and to take the fee, and absolute property, then the representatives of Sally, the life tenant, are entitled to her due share.

A child who is made a legatee for life, is not thereby incapacitated from claiming under a bequest of the ulterior interest to the testator's children, living at his decease. 2 Jarman, 55 top, 74 marg., and note (f), referring to *Jennings v. Newman*, 3 Jar. 748. If the testator died intestate as to the reversion, Sally's representatives are still entitled to her share. But several of the testator's children having survived him, afterwards, and in Sally's lifetime, died without issue and intestate. Sally's representatives are entitled to her share of their shares. In the view taken of the questions by the court below, itself, then, the plaintiffs have an interest in the proceeds of the land and slaves, and their bill should not have been dismissed.

But I confidently and respectfully conclude that Sally Stone acquired the absolute interest in the personalty and an estate tail in the land. An examination of the statute of 1819, abolishing the rule in *Shelly's case*, 1 Rev. C. 369, § 26, will show that in the opinion of the legislature, where a contingent limitation was made dependent upon the dying of any person without children, the word children was regularly held by the courts to be a word of limitation and not of purchase; and Lord

192 Mansfield, one of the most, *if not the most, distinguished ornament of the English bench, frequently and most emphati-

cally in some cases, held "children" in a will, where none were in existence at the date of it, to be synonymous with "issue" and "heirs of the body." Witness his remarks in *Hodges v. Middleton*, and in *Davie v. Stevens*, 1 Douglas 321-4. In the latter case the devise was, "I give and bequeath to my son Wm. Stevens, when he shall accomplish the full age of twenty-one years, the fee simple and inheritance of Lower Shelstone, to him and his child or children forever." William was about fifteen and lived to twenty-one, and died leaving several children. The question was, whether the devise conferred on William a fee or fee tail. Lord Mansfield, after argument said, "I had a mind to see whether ingenuity could raise a doubt on one side, or supply an argument on the other, to make the case plainer than it is on the face of it. If the testator had used the words, "all his estate," "inheritance" or "forever," and had stopped there, the fee simple would have passed. But the words "child" or "children" are to the full as restrictive, as if he had said, "and if my son die without heirs of his body;" and the court unanimously held that William acquired an estate tail and not the fee simple.

Now it cannot be denied that any word which will have the effect of cutting down a fee to a fee tail, will have the effect of enlarging a life estate to a fee tail, where the intention to provide for all the issue of the first taker may be collected from the whole will. Indeed it is shown by many authorities, above cited, that the courts more readily yield to the restricted construction when the fee is given to the ancestor, than when a life estate only is in express terms given to him; the danger of disinheriting some of the issue, being much greater in the latter case, if a restricted construction be adopted.

193 *Royall, for the appellees.

The court cannot enquire whether this would have been an estate tail at common law or not. It has been settled by repeated decisions of this court, that these particular words in a will give only an estate for life, so that it is no longer open to question in Virginia. *Smith v. Chapman*, 1 Hen. & Munf. 240; *Warners v. Mason and wife*, 5 Munf. 242; *Henderson v. Saunders*, Sand's Quar. Law Review for April 1860.

But this will would not have made an estate tail by the common law. The argument on the other side is, that it was Caleb Stone's intention to provide for Sally's descendants as long as she should have any. But where is this intention to be found expressed in the will? It may be conjectured that Caleb did not wish his property to leave Sally's family while she should have progeny. She was his daughter, and from the influences which are known to operate upon the minds of men, it would seem eminently probable that he wished that daughter and her descendants to enjoy the provision he was making for her, as long as her descendants continued, rather than any other persons. But he has not said so. Cer-

tain terms in the law have fixed meanings, and if testators use those terms, they must expect the law to fix that intention upon them which those terms indicate, irrespective of what may have been in their minds. Amongst those terms is the word "children," which the law conclusively presumes to mean children in the first degree, unless it be necessary to presume otherwise, to effect a plain, manifest and certain intent. The court must, therefore, read the will as it finds it written, without reference to theories, probabilities or conjecture, and in that it is nowhere said, either directly or by implication, that Sally's offspring, further than the first degree, is to be provided for.

194 *The intention which the law fixes upon this testator, as learned from the legal interpretation of the words that he has used, is to give it to Sally for life, and then, as he has not attached words of inheritance to the gift to her children, to them for life; making no further disposition, and leaving the property at the death of her children to be governed by whatever rules of law might apply. Such a disposition it was perfectly competent for him to make, and it has been decided as far back as the reign of Queen Elizabeth, that these particular words make that particular disposition, and no estate tail. In Wild's case, 6 Coke 16, it was resolved that, if land be devised to husband and wife, and after their decease to their children, or the remainder to their children, then, though they have no children at the time, the husband and wife shall take for life, and the children the remainder as purchasers. Some slurs have been thrown on this resolution, in Wild's case, which I pass by unnoticed, leaving it to the ample and complete vindication of my learned senior, Mr. Green. See also *Buffar v. Bradford*, 2 Atk. R. 220; *Merest v. James*, 1 Brod. & Bing. 484, 5 Eng. C. L. R. 156.

The line of distinction in reference to words which make an entail and those which do not, is drawn when it is determined whether there is a limitation over upon an indefinite failure of issue, or a like limitation upon a fixed and definite failure. If the former, it is at once settled that there is an entail, if the latter, it is clear there is not. Now, language could not make it clearer than it is, that the limitation over here to Caleb's children, is in case of Sally's death without children living at her death, or the death of children she might leave, before the death of her husband. And the appellants assume the whole case when they declare the limitation over to be upon an indefinite failure of issue.

This assumption is nothing but another
195 manifestation *of the mirage of intention which the testator's supposed kindness of feeling for his daughter has shaped itself into.

But, say the appellants, Sally's husband might have been unborn at the time of the devise, and as the remainder to her children is not to take effect till his death, which might have been more than twenty-one years after her death, it is void for remoteness, and this likewise destroys the remainder over to the

testator's children, because, one remainder being void, all subsequent ones are. So, on the construction *cy pres*, Sally must take an estate tail. This proposition will be discussed in two aspects: first, as to whether the remainder to Sally's children being void, she should take an estate tail; second, whether the remainder to her children being void, the remainder over to the testator's children is void also.

As to the construction *cy pres*: It is well settled that this construction is to be narrowed rather than enlarged, and will not be applied except in cases perfectly analogous to those where it has been already made. *Lewis on Perp. marg. 454*. What is the construction *cy pres*? This construction is made where the testator has manifestly two intents, which cannot possibly stand together. As where he devises to a person for life, remainder to his unborn son for life, as a purchaser, remainder to the issue of that unborn son, and their heirs indefinitely. Here it is plain, and cannot be doubted, that he wishes the descendants of the first taker to have the property in perpetuum, but they cannot have it in the way that he has designated, because its vesting in the children of the unborn son would be postponed for more than a life in being and twenty-one years. In such cases the courts, to effectuate the testator's manifest intent to provide for the issue, have sometimes given

the first taker an estate tail, the only way in which it could be done. *Lewis on Perp. 426 et seq.* But this case does not come within the construction, because the radical essential, the intention to provide for descendants indefinitely, does not appear. It is only conjectured from the near relationship of the parties.

The construction *cy pres* will certainly, however, never be applied to personal property. 1 *Fearne Con. Rem.* 205, 3rd Am. ed.; *Lewis on Perp. marg. 485*. But granting for the sake of the argument that the remainder to Sally's children is void for remoteness, why give Sally an estate tail? One argument of the appellants for an estate tail is, that Sally might have died with one child, and fifty grandchildren, children of other of her children deceased, and yet if children in this will is to be read as a word of purchase, that one child would take all to the exclusion of the others.

This, then, is exactly what would occur if Sally is given an estate tail. Instead of having fifty grandchildren excluded, we might then have a dozen children excluded; for if Sally should leave thirteen sons, the oldest would take all, and the other twelve would go begging. If anything is certain upon the face of the will, it is that all of Sally's children should have the property equally. It is perfectly certain that he did not wish one of her children to have it in exclusion of all the others. If the remainder is too remote, the property should rather revert to the testator's heirs.

It is argued that personal property will not revert; that a limitation over of personal property which is void for remoteness, gives

the entire interest to the first taker. This is not law. Personal property will revert under such circumstances, in like manner as real property. *Keyes on Chattels, sects. 276, 280*. Neither will the expression of an intention to dispose of it from executors prevent a reverter. There must be an effectual and valid disposition from them. *Id.*

197 *sects. 281, 282. But if the remainder to Sally's children be void, let that over to Caleb's take effect; though it is argued that one being void, all are, and the case of *Proctor v. Bishop of Bath & Wells*, 2 H. Bl. R. 358, is relied on for this. The cases are entirely different. The devise over in that case was only to take effect in case a single and particular event happened, which was too remote. In that case Mary Proctor devised unto the first or other son of Thos. Proctor that should be bred a clergyman, and be in holy orders; but in case Thos. Proctor should have no such son, then over. The devise to Thos. Proctor's son was void, because he might have had no son until the hour before his death, and that son could not take orders, by the canons of the church, until he should be twenty-three. It was then contended that the devise over should take effect. But it was held that it should not, because it was only to take effect in case Thos. Proctor had no such son; that is, a son in holy orders; and that could not be determined until twenty-three years after his death. The devise was not, in case Thos. Proctor have no son, but in case he have no such son. It is true that where one remainder succeeds another and is only to take effect after the first is expended, if the first be void, the second is likewise. But where one is created as a substitute for another, to take effect in case the first fails, then if the first be void for remoteness, the second will take effect, if limited upon an event not too remote. Further, if a remainder be substitutional, and limited to take place upon either of two events which shall first occur, one being good and the other bad, if the event which is good occur, the remainder will vest, and the court will not enquire whether the other event, which did not happen, was too remote or not. This was the case in *Longhead v. Phelps*, 2 W. Blacks. R. 704, which is the case that must govern this question. See also 198 *Goring v. Howard*, *16 Sim. R. 395; *Monypenny v. Dering*, 15 Law & Eq. R. 551.

Now it is plain that Caleb Stone intended the remainder to his own children to vest in interest, either upon his daughter leaving children who should subsequently die during the life of any husband who might survive her, or upon her dying without children living at time of her death. The first of these may have been too remote; the second was good. This must be so, otherwise his will would be absurd. What could prompt him to give the property over to his own children in case Sally should have children who should subsequently die during the life of her surviving husband, but to say that they should not have it in case Sally never had children?

His will must be read thus: I give the

property over to my children in case Sally has children who survive her, but die before her husband, or in case she never has children. In the latter event it is to vest in interest in them, at her death, to await enjoyment till the death of her surviving husband. The contingency not too remote having happened, the court will not enquire whether the other was too remote or not, as in *Longhead v. Phelps*, supra.

Nor is it necessary that it should be expressed in the will in words that the gift depends upon either of two contingencies. It is sufficient if it be necessarily implied from the nature of things. 1 Jarm. on Wills, 3d English ed. 268, 269, 270; 3 Atk. R. 315; *Fearne Con. Rem.* 513.

But the remainder to Sally's children is good, because limited to take effect within a life in being. *Norris v. Johnston*, 17 Gratt. 8. The language of the will makes it perfectly clear that it was to vest in interest in the children, at Sally's death, to await enjoyment till the death of her husband. A remainder need

not take effect in possession within a life in being *and twenty-one years.

It is sufficient if it vest in interest within that time. A remainder may be limited to one for life, remainder to his unborn son for life, remainder to the unborn son of that unborn son, provided the last remainder be limited to vest in interest within a life in being and twenty-one years, although it may have to wait for possession till the death of the unborn son. *Lewis on Perp.* 409, 420, § 3. At Sally's death it became certain what children were to take the remainder, and it would vest then, to await enjoyment till the death of the husband. The objection that Sally might have left grandchildren, but no children, and that these grandchildren could not take if children is to be read a word of purchase, is effectually disposed of by Judge Moncure in *Henderson v. Saunders*, ubi supra. He has so willed it, and so let it be.

Wm. Green, on the same side.

I. To support their pretensions, advanced in the bill, appellants must maintain that Sally Stone took, under her father's will, an interest devisable and bequeathable in the land and in the slaves it gave her. Accordingly this is attempted by counsel for them, under distinct heads, in divers aspects.

1. As to the land: First, on the supposition that she took therein an estate no way distinguishable from that which Nancy Perry took in the land given her under the same will.

Respecting this, it cannot be disputed that the testator intended to give her no more than an estate during her own life and, at most, in addition thereto, contingently, during the widowhood of one other person. Counsel opposite does not hesitate to concede this. But he strives to maintain that nevertheless the testator's will has, against his wish, a quite contrary effect; so as to give her an absolute fee simple; and yet not what may

be called a natural fee simple, which would *still permit his intention in favor of his other children in case this

daughter should have none, to prevail, by means of an executory limitation that, grafted upon such a fee simple, would be valid; but an artificial fee simple, the product of a legal metamorphosis from an artificial fee tail: the sole means, within the compass of possibility, whereby this utter frustration of the testator's unmistakeable intention could be brought about—and to what end? In order that appellants may get, under general words in Sally Stone's will, what she never dreamed it was in her power to give.

As a first step towards accomplishing this result, a great many reported decisions have been cited, to prove that, despite the plainest intention to give to the first taker no more than a life estate, nevertheless he may take estate tail: And certainly, wherever the law "aforetime" remains in this respect unaltered, no position is more indubitable. But then, even under that aforetime law, this never happened except where the testator had (or, what practically was equivalent, was held to have) another and a paramount intention, not legally compatible with the first taker's having a mere life estate; so that both his intentions, or (to speak perhaps more accurately) both parts of his one intention, could not by law stand together. Under such circumstances, that which he presumably considered the less important was displaced: in order that what, it was supposed, he had more at heart might take place. And all such cases, if I mistake not, may be ranged in two classes, both really depending upon this one principle: First, where, though there was an expressed intention to give to the first taker no more than a life estate, yet, upon the face of the will, or upon it coupled with admissible extraneous evidence, there

was an equally clear intention to give a remainder to the heirs of his *body or to some description of such heirs; so as to bring the total limitation within the despotic influence of the Rule in *Shelley's* case: Secondly, where, with such an expressed intention as to the first taker, there was, upon the face of the will, or upon it coupled with such evidence as aforesaid, an equally clear intention that what was given him, expressly for life only, should become another's whenever, in an indefinite future, the first taker's issue or some particular line of such issue should have failed, and not till then; it being thence inferred, that a benefit was intended preferably for such issue, which they could not take unless by vesting in their ancestor (the first taker) an estate tail; whether because there was no direct gift to them by way of remainder; or because, if such gift to them were implied, then the case would come within the range of the Rule in *Shelley's* case, in like manner as where such gift to them was express, and so this class of cases would become identical with the class first mentioned. Where that Rule still operates, as it does in cases governed by the same law which (as having been the *lex temporis*) is alleged by counsel opposite to govern ours, it makes no difference whether it is in the one, or in the other, of these modes that the result is effected.

If there be two such classes, really separate and distinct, then the case of *Jesson et al. v. Wright*, 2 Bligh. 1, which by counsel opposite is placed in the foreground of his argument, comes within both of them. The decision therein by the House of Lords, which house isthac vice consisted of only Lord Eldon and Lord Redesdale,—overruling the judgment of the King's Bench in the same case, and what Mr. Jarman calls a "long line" of other cases, (2 Jarm. Wills 286-297; see p. 295;)—has established in England, that where there is a devise to W. for life, and after his decease to the heirs of his body, in such shares and proportions as *he shall appoint, and, for want of such appointment, to the heirs of his body, share and share alike, as tenants in common, and, if but one child, the whole to such only child, and, for want of such issue, to the heirs of the devisor; there the first taker (W.) has an estate tail: The case being, let me repeat, within both of the classes aforesaid (if in realty there be two), by there being, first, a remainder to the heirs of the body of the first taker, not sufficiently shown, by the context or otherwise, to mean some other, less comprehensive, class of remaindermen, and, secondly, a limitation over upon an indefinite failure of his issue; Lord Redesdale insisting mainly upon the first of these grounds, Lord Eldon mainly upon the second. And, for the purposes of this discussion, it may be conceded that the decision in our Virginia case of *Moore v. Brooks*, 12 Gratt. 135, professedly following that of the Lords in *Jesson v. Wright*, has settled, though made only by three judges against two, that where in this state, there is a devise, in the will of a testator who died before 1 Jan. 1820, to his two daughters "to be held by them during their natural lives and no longer, and then equally divided between their heirs lawfully begotten," without any limitation over; there also the respective first takers have an estate tail.

Neither of these decisions has any bearing on our case; because in Caleb Stone's will there is no phrase having even the slightest resemblance (in meaning and effect) to the phrase "heirs of the body" or "heirs lawfully begotten,"—which latter has been for centuries held precisely tantamount to the former, (*Church v. Wyatt*, Moore 637; *Harrington v. Smith*, 2 Sid. 41, 42, 43, 74, 74; *Barrett v. Beckford*, 1 Ves. sen. 521; *Nanfan v. Legh*, 7 Taunt. 84, 2 Marsh. 107; *Mortimer v. Hartley*, 6 Welsb. H. & G. 59, 3 Engl. L. & E. Rep. 536; *Matthews v. Gardiner*, 17 Beav. 257; *Good v. Good*, 7 Ell. & B. 295, 40 Eng. L. & E. Rep. 212; *Com. Dig. *tit. Devise*, N. 5; *Hargr. Co. Litt.* 20b, note 2; *Fearn. Posth.* 171; 2 Jarm. Wills 233; *Hall's lessee v. Vandegrift*, 3 Binn. 374; *Pad-dison's lessee v. Flamer*, 1 Harr. & McH. 336; 3 Lom. Dig. 296 [197]; see also *Carter v. Tyler*, 1 Call 165;) and was taken in *Moore v. Brooks* to mean nothing else,—in Caleb Stone's will, I say, there is no such phrase, connected with any gift therein to any of his daughters; nor is there any limitation over upon an indefinite failure of issue of any first taker, as, at

a more appropriate place, it will be my particular business to prove: But both those cases are authorities in ours, of high grade, and in favour of appellees; for in each of them one ground, and in one the sole ground, of decision expressly was, that the words employed in the respective wills then sub-judice could not be taken as equipollent with the word "children," which in our case is the word used. In the former of them, when it was before the King's Bench, the judges who then sat therein concurred in holding, that the words "heirs of the body" were sufficiently shown by the context to mean only "children," and therefore that the first taker had but a life estate. *Doe d. Wright v. Jesson*, 5 Maule & S. 95. And although their judgment was reversed, yet that was not upon the ground that this consequence would not have legitimately followed, if the technical words "heirs of the body" could there have been read as "children," but on the contrary with a full admission on every hand that it would,—and all the argumentation of counsel in that case, reproduced by counsel in this, upon the deprecable consequences of reading the former words so as to give them the sense and effect of the latter word, proceeded, not upon a denial, but upon an assertion, that, if the will were so read, those consequences must ensue,—unless counteracted by there being superadded a limitation over upon an indefinite failure of issue of the first taker; which, indeed, would necessa-
204 rily *restore to the phrase used, or insuperably prevent its for a moment losing, in that connexion, its primary legal sense, its technical acceptation. And in the latter (*Moore v. Brooks*) the two dissenting judges, though the reasons of their dissent are not reported, must needs have held that, in the will before them, "heirs lawfully begotten" bore the restricted sense of "children," with the consequence of giving to the first takers no more than life estates respectively; which consequence, if the words were to be so read, was admitted distinctly,—not only so, but moreover urged as an argument in support of their refusal so to read them,—by the three judges who composed the majority. 12 Gratt. 144. The point, however, does not rest upon mere admissions or arguments of any counsel or any judges; but more securely reposes upon solemn decisions, both in England and in Virginia, which, subsequently to that of the Lords in *Jesson v. Wright*, have re-established,—if (contrary to what was always Mr. Jarman's opinion, 2 Pow. Dev. edit. Jarm. 488-492; 2 Jarm. Wills 300-305;) it had been at all shaken thereby—the rule that even "heirs of the body" may be read, under circumstances, so as to mean "children," and that when so read, those words will give, as this word, when not forced out of its natural signification, gives, to the first taker no more than a life estate. *Jordan v. Adams*, 6 Comm. Bench N. S. 748, 9 id. 483; *Pryor v. Duncan*, 6 Gratt. 27, explained 12 id. 149, *Moore v. Brooks*.

From these authorities, of all grades, a conclusion results, a fortiori, which numerous other authorities, level to the precise point,

have established; namely, that where, after an estate for life, or for lives,—expressly,—given to the first taker, a limitation, in the same will, to such first taker's "children" living at the termination of the particular estate so given him, purports to give each of them, in his or her distinct and *several shares, an estate descendable from him or her as the root of inheritance, whether to the respective heirs of their bodies, (Sm. Ex. Int. § 479-483; Webster v. Cooper, 14 How. 488; see also Hays v. Hays, 5 Richards. 31; Mandeville v. Carrick, 3 Ridgew. 352, 367-368, Ridgew. L. & S. 485; Hamilton v. West, 10 Ir. Eq. Rep. 75;) or, as in the sequel will appear more pertinent on the present occasion, to their respective heirs general, (Ginger v. White, Willes 348; North v. Martin, 6 Sim. 266; Lees v. Mosley, 1 Younge & Coll. Exch. R. 589; Greenwood v. Rothwell, 5 Man. & G. 628, 6 Scott's N. R. 670, 6 Beav. 492; Slater v. Dangerfield, 15 Mees. & W. 263; Blanchard v. Brooks, 12 Pick. 47; re Sanders, 4 Paige 293; Miller v. Lynn, 7 Penns. St. Rep. 443; Gernet v. Lynn, 31 id. 94; Guthrie's Appeal, 37 id. 9; Chew's Appeal, ibid. 23; Lantz v. Trusler, ibid. 482; Den v. Parker, 12 Ired. 123; Williams v. Beastey, 1 Winst. 102; Doe v. Jackman, 5 Ind. Rep. 288; see also Sisson v. Seabury, 1 Sumn. 235; Jones v. Ward, 5 Ired. Eq. Rep. 400; Birthright d. Hall v. Hall, 3 Munf. 536; Shackelford v. Newbill, 2 Patt. & H. 232;) there such limitation has not the effect of enlarging the first taker's estate, so as to make the children's remainder coalesce therewith, but they will take as purchasers: And this is not varied even where there follows an ultimate limitation over, in default, or for want of issue, shown by the context to mean "children," of the first taker, 2 Jarm. Wills 372-379; Hayes's Principles for Expounding Dispositions of Real Estate to Ancestor &c. 29-31; see also Tucker v. Baker, 11 Ir. Eq. Rep. 104; S. C. (Baker v. Tucker,) 3 H. L. C. 106, 2 Eng. L. & E. Rep. 1; Richards v. Davies, 13 Comm. Bench N. S. 69, 861; Wright v. Baury, 7 Cushing 105; Powell v. Board of Domestic Missions, 49 Penn. St. Rep. 46.

But it is insisted by counsel opposite that, if this be so, still, where the limitation after an express life estate *to the first taker is such, as would give his children, in the character of purchasers, no more than a life estate, there a different rule must obtain: The contention (if I rightly conceive it) being, that because of the defectiveness of such a limitation, to meet the presumed (certainly not declared or demonstrated) intention of the deviser in favour of all the posterity proceeding from the first taker, his life estate must be changed into fee tail, by construction, as a necessary means towards, in this respect, accomplishing the testator's intention. And, notwithstanding the devise in question was made long after the first of January 1787, when the statute of 1785, (12 Hen. Stat. 157,) dispensing with words of inheritance to create a fee simple, took effect, it is insisted further that the limitation therein to the first taker's children must be construed to give them, as purchasers, no

larger an estate than for their own lives; because such, before that statute, was the rule of construction, and the *lex temporis*, under which Caleb Stone both made his will and died, ordained that "every estate in lands which since [7 Oct. 1776] hath been limited, or hereafter shall be limited, so that, as the law aforetime was, such estate would have been an estate tail, shall be deemed to have been and to continue an estate in fee simple." V. L. 1803, 1814, c. 90, s. 9.—On the latter of these points I waive all contention, since the case of Doe d. See v. Craigen, 8 Leigh 449, wherein President Tucker explicitly succumbed to this court's decisions in the prior cases there (p. 452) cited by him. And I do this the more cheerfully, because, on the former point I conceive the law to be perfectly settled, that a limitation to one for life, with remainder to his children for life, never gave an estate tail to the first taker; does not now give such an estate, where the law still continues in force as it was here "aforetime."

For this I shall go no further back than Wild's case, *commonly so-called.

And, as there has been a marvellous amount of blundering (I can find no fitter word), about this leading case, even among persons so learned and intelligent as Lord Alvanley and Lord St. Leonards, whose errors are reproduced by counsel opposite, I propose, first of all, to remove out of our way those errors.

The book called Sir Francis Moore's Reports, containing cases which run through one hundred and thirty-five years, and which therefore, however they may have been of his collecting, out of other men's MSS., were certainly not all of his own reporting, was first published in 1663, long after his death, (which happened 20 Nov. 1621, Wallace's Reporters, 3rd edit. 36;) and more than sixty years after the case here in question had been decided; which is reported in that volume, p. 397, pl. 519, by the name of Richardson v. Yardley. So much of the report as is here material, literally translated from the norman-french, or rather the law-french, of that time, is as follows: "Hill. 37 Eliz. rot. 1030. In ejectione firmæ, the jury found a devise to wife for life, and after to son, and, if he should die without issue, to the child, which then was in utero matris, she being far gone with child, and its issues in tail. Item, my will is, if my wife die and my children, without issue of my children living, that then the land shall remain to Richard Wild and his wife, and after their death to their children. The deviser dies, his wife and all his children also die without issue, and Wild and his wife die, having issue: And the question was, whether Wild and his wife had an estate in tail, or that they had only for life, with a remainder by purchase for life to their children born at the time of the devise. And Popham and Gawdy, that it is an estate tail in them. And Clench and Fenner, that [it is] an estate only for life."—In reporting the same case,

6 Rep. 16b, under the caption "Wild's case, Hil. 41 Eliz. In the *King's

Bench," Coke says: "Hil. 37 Eliz. in ejectione firmæ between Richardson and Yardley, in the King's Bench, on not guilty pleaded, the jury gave a special verdict to this effect. Land was devised to A. for life, the remainder to B. and the heirs of his body, the remainder 'to Rowland Wild and his wife, and after their decease to their children,' Rowland and his wife then having issue a son and a daughter; and afterwards the deviser died, and after his decease A. died, B. died without issue, Rowland and his wife died, and the son had issue a daughter, and died: If this daughter should have the land or not, was the question; and it consisted only upon the consideration what estate Rowland and his wife had, viz. if they had an estate tail, or an estate for life with remainder to their children for life. And the case, for difficulty, was argued before all the judges of England; and it was resolved, that Rowland and his wife had but an estate for life, with remainder to their children for life, and no estate tail;" (so that the daughter of Rowland's son did not get the land, whatever intention of the testator might be presumed in favor of all the posterity of Rowland :) And then Coke relates, at considerable length, the reasons and resolutions of the judges. Which (it is, for our present purpose, worth noticing,) he published in 1607, the case having been decided only some five, or at most six, years before; almost every judge of England, that had been on the bench when, as he states, the case had been argued before them all, and moreover a large number of serjeants, and barristers, and law students (of that day, since come to the bar), who must have been at the time well informed, in the main, concerning a case of so much public expectation (in the profession) as this was, being still alive; who very frequently met one another in Westminster Hall and in the temples and inns of court, and elsewhere;

and must have been startled, and there-
 209 upon compared notes, at *any serious misreport of the case in a book of such commanding authority, such universal and immediate perusal among lawyers (in the then, not comparative only, but absolute, paucity of law books), as each Part of the Reports (published in Coke's lifetime) was from the beginning: Yet this report, though frequently cited, within a few years after its publication, as well as in times more distant, appears to have been never impeached, as incorrect or in any manner misleading, until since and very long after) the publication of Moore's report of the case (if it is his),—which publication assuredly Moore himself never would have permitted, without (at least) a correction of its manifest defectiveness, in not indicating what judgment was at last, or whether any was ever, rendered. But, of very late time, comparatively speaking, some sort of disparagement has been, in consequence of that publication, attempted to be cast on Coke's report, by the two modern law-lords before mentioned. Thus, in *Seale v. Barter*, 2 Bos. & P. 492-493, Lord. Alvanley said: "Wylde's [Wild's] case (which is the leading case upon this subject) was cited and relied

on. I will shortly state that case as it is reported in 6 Co. 16, and in Moore 397, under the name of Richardson v. Yardley; for though the titles of the cases are different and one is stated to have been in the 41 Eliz. and the other in the 37 Eliz., it is hardly possible to consider them as different cases, especially as the name of Wylde occurs in them both, and the circumstances are so nearly the same; and indeed in some books, where the report in Moore has been cited, it has been said that the same case was better reported in Coke." His lordship then states, with substantial accuracy, the principal case from Coke's account of it; after which he proceeds thus: "But a case was there put as good law, that if A. devise to B. and his children or issues and he hath not any issue at

the time of the devise, the same is an
 210 *estate tail; and a case is cited from Serjeant Bendloe's reports, which was a devise to husband and wife and the men children of their bodies begotten, and it did not appear in the case that they had any issue male at the time of the devise, and therefore it was adjudged that they had an estate tail to them and to the heirs [male] of their bodies. According to the report in Moore, Popham and Gawdy held that Wylde took an estate tail notwithstanding that he had children living at the time of the devise, though Fenner and Clench thought it was only an estate for life. It appears therefore that two of the judges were disposed to think that an estate tail would pass even in a case where children were in esse at the date of the will, and they all agreed that, if no children had been born, it would have been an estate tail." And on this criticism of Wild's case by Lord Alvanley, indorsed by Lord St. Leonards, (to be sure, in his character of counsel only,) Mr. Pettit relies for overthrowing the credit of Sir Edward Coke's report of that case.

Now, never in my whole reading have I met with any passage, emanating from a respectable source, more remarkable for oscitancy than this is. Besides mistakes in point of expression, not all of which are exhibited in my preceding extract, Lord Alvanley shows that he could not have read Coke's report, or Moore's, with any but the most drowsy sort of attention. He resorts to probable arguments for proving the case in both reports to be the same, notwithstanding the difference of names, though Coke expressly states it to have been between the same parties as Moore does; and notwithstanding the difference of times, though Coke expressly states it to have arisen at the same time and in the manner Moore does: And then, notwithstanding the real difference of dates, to which what is respectively reported by them in regard to judicial sentiment refers, he

takes it for granted that the opinions
 211 *of the four judges in the King's Bench, which alone Moore mentions, are the same which, delivered about four years later, Coke reports of all the judges of England; before whom, he tells us expressly, the case was debated propter difficultatem, meaning (no doubt) on account of that very division in the King's Bench mentioned by Moore,—in

conformity with what was a common practice in those days and long before and long after. Witness (besides the text-books, Co. Lit. 71 b-72 a; 4 Inst. 68, 110, 119; 3 Blackst. Comm. 56; 1 Wooddes. 122; 3 Steph. Comm. 418-419;) Capel's case, 1 Rep. 57 b-61 a, 62 a; Shelley's case, id. 92b-93 a, 105 b, 106 a; Chudleigh's case, id. 117 b-119 b, 121 a, 132 a; Lord Cromwell's case, 2 Rep. 72 b; Butler & Baker's case, 3 Rep. 25 b-26 a; Knight's case, 5 Rep. 55 a, 56 a;—Calvin's case, 7 Rep. 2 a-b, 28 b; Case of Sutton's Hospital, 10 Rep. 22 a-b, 23 a, 24 b; (these two were remarked upon by Coke himself, then chief justice of the King's Bench, in *Warrain v. Smith*, 3 Bulstr. 146, not quite accurately, supposing that report correct; compare *Slade's case*, 4 Rep. 92 a, 93 a;)—*Manby v. Scott*, 2 Sm. Lead. Cas. 248, 249, 1 Lew. 7, 1 Sid. 109, O. Bridgm. 229, 266; *Bainbridge v. Gardiner*, id. 402; *Collinwood v. Pace*, id. 410, 416; 1 Sid. 193, 194, 1 Ventr. 413; *Atkyns v. Clare*, id. 399, 412: Which cases, with numerous others in this respect similar, show that on such occasions, contrariwise to the practice upon writs of error, the case was considered as not, though the question was, removed; and when the latter had been decided by the judges of all the courts, including those of the court from which the question came, judgment, conformably to the decision of all, or of the major part of all, the judges so convened, was rendered in the court wherein the case was still pending unremoved, and as the judgment of the judges of that court; agreeably to what Coke reports to have been actually done in Hil. 41 Eliz. in *Wild's case*.

212 What is *still more remarkable, Lord Alvanley makes these very gross mistakes, although the sentence of his opinion immediately following what I have quoted is, "The next case to which I shall allude is that of *King v. Melling*;" which is always cited from the report of it in 1 Ventr. as incomparably the best; and there he was stared in the face with such expressions as these: by *Rainsford, J.*, pp. 225-6, "I rely mainly upon *Wild's case*, 6 Co., which was brought before all the judges of England;" by *Twisden, J.*, p. 227, "I rely mainly upon *Wild's case*, 6 Co., and the case quoted out of *Benloe* in the end of that case," giving it as it is given in 6 Rep. 17 b; "'tis true, that case is variously reported in the books, but I adhere to my Lord Coke, presuming that, that being brought before all the judges, in the argument of *Wild's case*, it was a true report;" and by *Hale, C. J.*, p. 231, "the court of King's Bench were at first divided; indeed it was afterwards adjudged an estate for life to *Wild* and his wife." But the most serious in point of importance, though not the sole remaining, nor the most remarkable, of his oversights (in this astounding collection of them) is exposed as follows by Mr. Jarman: "In *Seale v. Barter*, Lord Alvanley observed that according to the report of *Wild's case* in Moore, two of the judges thought it was an estate tail in him, though there were children at the time of the devise; but probably it did not occur to his lordship, that the devise in that case was to [*Wild*] and his wife and, after their death, to their chil-

dren; which, it is now admitted on all hands, gives an estate for life to the parents, with remainder to their children; so that," continues Mr. Jarman, "the notion as to its being an estate tail was clearly untenable;" (2 Jarm. Wills 315;) a remark repeated from Mr. Jarman's supplemental volume to Pow. Dev. 502; and again repeated in the third edition (p. 372,) doubtless also in the second, of his work on wills, by Wolstenholme 213 *and Vincent, his English editors, who by no means adopt implicitly all his views; and not quarrelled with by Mr. Perkins, his well-known American editor. Finally, the statement of Lord Alvanley, that "they all," meaning all the four judges of the King's Bench, "agreed that, if no children had been born, it would have been an estate tail,"—this most extraordinary statement,—has no warrant whatever in (even) Moore's report; nor in another report of what is doubtless the same case, in Gouldsb. 139, pl. 47, although given there without any name, and among cases of Hil. 43 Eliz.; while it is, in the most positive manner, contradicted by Coke's report, published very soon after he was made chief justice of the Common Pleas, when his intellectual powers were in their zenith, of a case which he doubtless had himself argued, and which his report of it shews him to have understood perfectly. No counsel is, indeed, named in any report I have seen of it; but, besides its being hardly possible that Coke, then at the head of the common-law bar, should not have been engaged in such a case, in 1 Ventr. 231, *King v. Melling*, it is said by *Hale, C. J.*, that Coke did argue the case in Moore 397, of *Richardson v. Yardley*; which fact may well have been known to him, from some yet unpublished MS. note of the case, or from tradition not then worn out in the profession, or from Sir Francis Moore's communication, whose grand-daughter was *Hale's* first wife. Life of *Hale* (prefixed to Runn. edit. Hal. Hist. Comm. Law, Dubl. 1792,) p. xxxiii; *Wallace's Reporters*, 3rd edit. 86.—Professor Hoffman, in his *Course of Legal Study*, gives a selection of leading cases from Coke's Reports; and his neat and at the same time accurate abstract of *Wild's case* is in these words: "Devise to baron and feme, and after their decease to their children, or, remainder to their children; whether they have or have not children at the time, this is but *an estate for life in baron and feme, remainder to their children. But if lands are devised to A. and his children or issue, he having none at the time, A. takes an estate tail; but if he have children at the time, he and his children take a joint estate for life." Hoffm. Leg. Stub. 2nd edit. 203.

214 Having said this much, I am content to leave to the court whether "*Wild's case* is a strong authority for an estate tail here," as counsel opposite insists it is; or even so much as the very slightest of all possible authorities for such a disposition. Misunderstood, as Lord Alvanley misunderstood and misstated it, perhaps it would countenance such a position; but, with the due corrective applied, it affords not any such countenance. While

if that be true which, as counsel opposite says, "towards the end of [Coke's] report is asserted," it manifestly tends contrariwise; namely, "that if a devise be to A. for life, and after his death to his children, then, even though A. has no child at the time, he shall only take a life estate with remainder for life to his children." Accordingly that gentleman manifestly feels an incumbent onus on him to give some answer to this (as he styles it) assertion; and his answer is, that it is "a mere obiter dictum." To me the propriety seems very questionable, of calling a solemn resolution by the twelve assembled judges, upon a point deliberately considered, a "mere" obiter dictum, even when it is not strictly necessary to the decision. I will not, however, consume time in remarking further upon that topic; but will at once advance three (more pertinent) propositions: First, that this resolution is an inevitable corollary from the precise point upon which the case was actually decided: Second, that if no such decision had been made, and the matter was now resting upon that resolution and the reasoning in support of it furnished, with admirable clearness, in Coke's report, with-

215 out a particle of influence in point of authority, *from either the judges that adopted it, or the great jurist who, with his own manifest approbation thereof, has reported it, still it would stand irrefragable; and these two propositions I simply submit to the court: Third, that the matter does not now rest there, but the "resolution" has been since confirmed in a vast multitude of cases, by solemn decision, until the doctrine has become, in the words of Mr. Jarman before quoted, "admitted on all hands,"—to such a degree that he did not think it worth while to quote authorities at all in support of it; and this proposition I shall proceed at once to maintain, by citing some out of that multitude of cases: *Goodwin v. Goodwin*, 3 Atk. 370, 1 Ves. sen. 226; *Denn v. Page*, 3 Dougl. 294, 1 Bos. & P. 261, n.; *Hay v. Coventry*, 3 Durnf. & E. 33; *Foster v. Romney*, 11 East 594; *Doe v. Vaughan*, 5 Barn. & Ald. 464, 1 Dowl. & R. 52; *Ashley v. Ashley*, 6 Sim. 358.

In the first of these six cases, a testator having given his estate in Norfolk, after the death of his wife, "to Joan Seaman for her life, and afterwards to her children, to be equally divided amongst them share and share alike; and, for want of such children," to the testator's right heir on the side of his father; Joan having one or more children born in the lifetime of the testator, and one or more born after his death; Lord Hardwicke held that each of her children took, by purchase, in remainder, an estate for life and no longer. In the last of them, a testator having devised an estate to A. for life, remainder to all the children of A. as tenants in common and not as joint-tenants; and, for want of such issue, to B. for life, remainder to all the children of B. as tenants in common and not as joint-tenants; and, for want of such issue, to C. in fee; Sir Lancelot Shadwell V. C. held that the children of A. took, as purchasers, in remainder, estates for

life, with cross-remainders between them for life, with remainder to B. for life, with remainder to her "children for life, with cross-remainder between them for life, with an ultimate remainder to C. in fee. And the whole half dozen have (out of a much larger number of English and American cases to the like effect) been selected for their possessing a remarkable property, namely, that of overthrowing, simultaneously, no less than three points of opposite counsel's argument. First, in all of them, subsequent to *Goodwin v. Goodwin*, it was manifestly considered, and in some of them it was decided, as it was in that case, to be no way material whether the children, or sons, or daughters, or any of them, were or were not born at the date of the will or in the lifetime of the testator: agreeably to what, in that earliest case of the six, Lord Hardwicke said: "Wherever there is a remainder to children, by a settlement or will, it is not material whether they are alive or not; for it will vest in different parts and proportions, as they come in esse. As to the interest these several children took under this devise, it clearly is as tenants in common for their lives only, remainder over to the heir [of the devisor] on the side of [his father]; and this according to *Wild's case*." 1 Ves. sen. 227.—Next, in all of them it was held, that the first taker had not an estate tail, but only an estate for life, although the remainder to his or her children or sons or daughters was for life only, without a provision for their descendants.—Lastly, there was in each of them, though there was not (as Mr. Pettit points out) in *Wild's case*, a limitation over in default of such issue.

Under this last head the fault of that gentleman's argument,—or rather its excellence, regarded as an effort in support of a bad cause,—consists in his not distinguishing between limitations over upon a definite, and such limitations upon an indefinite, failure of issue: Which distinction is well illustrated in one and the same case of *Curtis v. Longstreth*, 44 Penns. St. *Rep. 217 297. There a testator devised his dwelling-house to one "for his natural life, not to be sold or exchanged while he lives, and at his death to vest in his heirs as tenants in common; but should he die without issue, then the said property to descend to" the testator's "surviving heirs;" and he devised to the same person "also for and during his natural life" another messuage with its appurtenances, "and, after his decease, the same to go to his children, share and share alike; but should he die without issue, then the said property to be equally divided among" the testator's "surviving heirs." And, the first taker's interest in both properties having been sold by the sheriff; on a case stated for the court's opinion, it was held, 1. that the devisee took an estate tail in the dwelling-house, which estate, under the Pennsylvania statute of April 1859, became a fee simple; but 2. that he took no more than a life estate in the other messuage, the gift of it being, not to him and his children immediately, but to him and afterwards by way of remainder to them, and the words "should he die without

issue" being construed to mean "without such issue,"—that is, in the latter clause, "without children;" while in the former it meant "without heirs (issue) of his body."—Whether this was a correct interpretation of the phrase "die without issue," where it occurred in each or in either of the clauses of that will, I am, in the present case, no way concerned to inquire; since the decision, right or wrong, serves equally well the purpose of mere illustration; one branch of it proceeding upon the principle, that a limitation to the first taker for life, remainder to his children, remainder over in default of such issue, to wit, children, gives to the first taker no more than a life estate,—as in the six English cases last cited by me; the other branch of it proceeding upon the principle, not less thoroughly settled,

218 an indefinite failure of *heirs of the body (issue) of the first taker will make him tenant in tail,—subject to the distinctions I shall now state.

If land were devised, in Virginia, by the will of a testator who died before 1 Jan. 1820, to one and his heirs, or to one for his natural life, or to one (simply), with a limitation over upon his dying without issue, or without leaving issue, (these being in regard to real estate phrases of one and the same import, Sm. Ex. Int. § 538;) in each form of devise the first taker would have an immediate estate tail; but if, in such a will, land were devised to one for life, or to one (simply), with remainder to his children, or sons, or daughters, for life, or without definite expression of the quantum of their estate, remainder over in case the first taker should die without issue or without leaving issue, so expressed as to show by the context that an indefinite failure of issue was the contemplated event, the first taker would have an immediate estate for life only, with remainder to his children, or sons, or daughters, for life, remainder to the first taker himself in tail, (2 Jarm. Wills 380-397; Monypenny v. Dering, 9 Mann. Gr. & S. 793; Key v. Key, 19 Engl. L. & E. Rep. 617, 622, 627, 4 De Gex, M. & G. 73; Parker v. Tootal, 3 Herlst. & C. (Am. ed.) 1013, 1019-1020, 11 H. L. Cas. 143; Dennett v. Dennett, 40 New Hampsh. Rep. 493, 43 id. 499;) and so, were the limitation over upon an indefinite failure of any line of issue, male or female; the only difference being, that the first taker's estate tail, immediate, or mediate (in remainder), would be an estate tail male, or an estate tail female, general or special: Which estate tail, of any kind, in possession or in remainder, would, since 7 Oct. 1776, be converted, by force of legislative will, into fee simple pure and absolute; so as to cut off all limitations subsequent to such estate tail, but not any preceding it. And

219 upon this ground stands every case, not erroneously decided, *which opposite counsel has cited, or which can be found, wherein a first taker has been held to be tenant in tail, either in possession or in remainder, under a devise to such taker expressed to be either in fee simple, or for life, or left indefinite; save where, after a devise

to him, a remainder has been limited, in terms or in effect, to the heirs, or to the heirs male, or to the heirs female, of his body; so as to bring the total limitation within the grasp, "iron grasp" it may well be called, of the rule in Shelly's case: A rule so clearly not applicable in our case, that I propose to say nothing further concerning it; but, on the contrary, to confine attention (as far as practicable) to the class of authorities concerning estates tail implied from any source of implication suggested by Mr. Pettit.

The most (by far) of his authorities cited to support the position, that Nancy Perry would have taken an estate tail, under such a will as her father's, before 7 Oct. 1776, are cases in which there was, or (what is tantamount in estimating their effect as authorities) there was held to be, a limitation upon an indefinite failure of issue, general, or special (as either being of one sex, or being begotten of or on the body of some particularly described husband or wife, which last was the case of King v. Melling, 1 Vent. 225, better stated in Pollexf. 101-102;) sometimes with, sometimes without, aid from other features, in the context of the will, assisting such a construction. To this head are referable, of the cases on which he relies, (besides the case just mentioned,) the following long list, viz: Jesson v. Wright, 2 Bligh. 1; Doe v. Applin, 4 Durnf. & E. 82; Doe v. Smith, 7 id. 531; Wood v. Baron, 1 East 259; Crooke v. De Vandes, 9 Ves. 197; Pierson v. Vickers, 5 East 548, 2 Smith 160; Barlow v. Salter, 17 Ves. 479; Doe v. Goldsmith, 7 Taunt. 209, 2 Marsh. 517; Simmons v. Simmons, 8 Sim. 22; King v. Burchall, Ambl. 379, 1 Eden 424; Roe v. Grew, 2 Wils. 220 322, *Wilm. 272; Roy v. Garnett, 2 Wash. 9; Carter v. Tyler, 1 Call 165; Hill v. Burrow, 3 id. 342; Tate v. Tally, id. 354; Eldridge v. Fisher, 1 Hen. & M. 559; Sydnor v. Sydnor, 2 Munf. 263; McClintic v. Manns, 4 id. 328, 331; Kendall v. Eyre, 1 Rand. 288; Goodrich v. Harding, 3 id. 280; Bells v. Gillespie, 5 id. 273; Broadbuss v. Turner, id. 308; Ball v. Payne, 6 id. 73; Jiggetts v. Davis, 1 Leigh 368, 401-402; Callava v. Pope, 3 id. 103; Bramble v. Billups, 4 id. 90; Doe d. See v. Craigen, 8 id. 449; Nowlin v. Winfree, 8 Gratt. 346; Callis v. Kemp, 11 id. 73; Tinsley v. Jones, 13 id. 289. And under this head are properly ranged also Doe v. Cooper, 1 East 229; Dansey v. Griffiths, 4 Maule & S. 61; Wollen v. Andrewes, 2 Bingh. 126, 9 Moore 248; Tidball v. Lupton, 1 Rand. 194; and Doe d. Thomason v. Andersons, 4 Leigh 118; though the phrase in them was "die without leaving issue," or some similar expression, which difference is (as I have heretofore noticed) of no consequence whatever in devises of real estate; such phrase, so applied, being held to denote an indefinite failure of issue: This, in several of the cases last enumerated, the judges, who decided them, expressly pointed out; and see Forth v. Chapman, 1 P. Wms. 663, together with other cases hereafter cited in connexion with it.—The cases of Walter v. Drew, Comyns 372, and Jones v. Morgan, stated in Butl.

Fearne 597-610, from all the reports of it, (which cases bear, in truth, very little relation to this subject,) had, in each, this same feature of an indefinite failure of issue.—To this head also the case of *Robinson v. Robinson*, 1 Burr. 38, 1 Keny. 298, 3 Atk. 736, 2 Ves. sen. 225, 3 Bro. P. C. edit. Toml. 180, is in reality referable, though not at first blush so plainly; but if we will only bestow that attention upon the remarks appended to the certificate in 1 Burr. 51-52, which is due to the source of them, we cannot miss the principle of the decision; the principle in fact applied, whether

221 *justly applicable or not. Those remarks are ostensibly the reporter's;

but in truth they were dictated, if not actually written, by Lord Mansfield, who doubtless penned the certificate. In 3 Durnf. & E. 96, *Jones v. Roe*, Buller J., as a vindication of his right to rely upon remarks in like manner appended to another certificate in Burrow's Reports, said: "It has been openly acknowledged by Lord Mansfield, and I have had repeated opportunities of hearing the same from him in private, that he has given to Sir James Burrow his own note and opinion of a case, which he could not deliver publicly in court; for it was not at that time the practice of this court to give their opinions here in cases which came from the court of Chancery:" the "practice" in this respect, was altered by Lord Mansfield in 1774. *Wright v. Holford*, Cowp. 34; see Ram on Science of Legal Judgment 216-219. And Sugden, in his Law of Vend. & Purch. 2d ed. (1806), p. 560, n.; 3d ed. (1808), p. 618 n; and in his edition (1811) of Gill. Us. 41 [84], n., says: "The reasons at the end of the case of *Robinson v. Robinson* are well known to have been written by Lord Mansfield." The fact, indeed, even from internal evidence alone, cannot reasonably be doubted. And, as thus explained, most lucidly, by Lord Mansfield himself,—whatever may be thought of the soundness of the decision, (which directly contradicted decisions previously made by very great judges, Sir Joseph Jekyll M. R., and Lord Talbot C., on the same will; see 1 Burr. 46-47, 1 Keny. 306, 317, 3 Atk. 738, 2 Ves. sen. 225, 3 Bro. P. C. edit. Toml. 180-181;)--the case no way fights against my side in the present discussion; so far otherwise, its principle harmonizes perfectly with all the doctrine I have advanced, or shall advance, therein; it being only, that where the court holds (right or wrong) the limitation over to be dependent on an indefinite failure of issue

male of the first taker, there such first
222 taker *will have an implied estate tail male.—And substantially to the same head are referable a class of decisions, not numerous, whereof it has cost me much time and toil to discover a true statement.

The first of them is commonly cited as *Bifield's case*, Hil. 42 & 43 Eliz.; which is said in 1 Burr. 46, arg. *Robinson v. Robinson*, to be "mentioned only in Lord Chief Justice Hale's argument in 1 Ventr. 231, and in no other book." In like manner,

when that case of *Robinson v. Robinson* was before him, Lord Hardwicke said: "I can find no place where the word 'son' has been construed to give an estate tail in the first taker, but the case of *Byfield* in the time of Queen Elizabeth, cited by Lord C. J. Hale in the case of *King v. Melling*. I do not know what weight to give to this case, because, though I have looked into Cro. Eliz. and all the contemporary reporters, yet I cannot find it reported, and notwithstanding it was mentioned by Lord Chief Justice Eyre in the case of *Dubber v. Trollop*, yet he states it from the case of *King v. Melling*, and so does every one who cites it in any case subsequent to *King v. Melling*; and therefore it is probable Hale quoted it from a manuscript: And, upon such an authority as this is, I cannot justify it to myself to construe the word 'son' to give an estate tail in the case before me." 3 Atk. 737. (Nor, as we have seen, did the judges of the King's bench, who certified their opinion on that case, of *Robinson v. Robinson*, differ from him in this; their certificate having proceeded on quite other ground.) And in another case, about the same time, Lord Hardwicke said further: "I cannot help saying that it is a great misfortune to Westminster Hall, there is no report of Lord Chief Justice Hale himself of the case of *King v. Melling*, nor any copy of his argument, for it is very imperfect in Ventr. especially as to the cases said to have been cited by Hale;" or,

223 according to another report, "it is a great *misfortune there is no report of that case by Lord Hale himself, or of his own argument; for though the cases there cited are often mentioned by judges, yet there is no certainty of the correctness of the report." *Lethieullier v. Tracy*, 3 Atk. 746, Ambl. 223.—As to *Byfield's case* (so-called), in particular, I believe (and shall certainly render very probable, if I do not fully prove,) that there never was any such case of that name; that Hale did not cite any case by such designation in *King v. Melling*; that the case which Ventr. has miscalled so was cited, not from any manuscript, but from a report then in print; and that we possess means of ascertaining with reasonable certainty what the point was and how it had been disposed of. Let me premise, that there never was and never could have been any Hillary term in any two regnal years together of Queen Elizabeth, whose accession was on the 17th of November, whereas Hillary term has always, immemorially, begun in January and ended in February, till the commencement of the reign of William the Fourth, when it was fixed to terminate on the 31st of January or, if that were Sunday, then on the next day. Dugd. Orig. Jurid. 89-91; Tidd's Pract. 9th edit. 105-106; Tidd's New Pract. 41-44. But the 17th of November in the reign of Elizabeth, and long before and long after, always fell in the midst of Michaelmas term; which from the reign of Henry the Third at latest, probably from a time anterior to the Conquest, until the

year 1641, when the statute of 16 Car. 1. c. 6, "concerning the limitation and abbreviation of Michaelmas term," took effect, always (barring Sundays) began on the 9th of October and ended on the 28th of November, (Dugd. Orig. Jurid. ubi supra; Cow. Interp. edit. 1637, 1727, voc. Term;) so that any Michaelmas term in her reign, regularly holden, necessarily was in two regnal years, one ending, the other beginning, in it. And let me further premise, that

224 there is a case, to *which I would particularly call attention, of Mich. 42 & 43 Eliz. in Moore 682, pl. 939. This report, under the name of Milliner v. Robinson, begins with stating an exception taken to the declaration, in ejectment; which exception was held good, thus necessitating a judgment for the defendant on that ground, without any decision upon the merits, as we phrase it, or, as it was common in those days to say, the matter in law. The report then proceeds: "In the case between Biby and King, the demise [laid in the declaration, in ejectment,] was" in a form, which also was held bad, and with the like necessary result; but it was for a fault no way resembling the fault in the case of Milliner v. Robinson; which fact I particularly notice because it is a circumstance that tends to lead a reader, not upon his guard, into supposing what follows of the report to be part of the case last mentioned therein. And then, in immediate juxtaposition, comes the rest of the report in these words (literally translated): "The matter in law was, that Robinson devised to his brother John, and, if he should die having no son, that the land should remain to William for life, and, if he should die without issue having no son, it should remain to the right heirs of the devisor. The first brother has an estate in tail to his issues males; the second has but for life, or at any rate (saltem) to heirs females, because 'having no son' is merely contingent; per Popham." Now, we read as follows in Keble's report (3 Keb. 99) of Hale's argument in King v. Melling: "[Wild's case comes not] to this case, 'children' being only made *nomen collectivum* to serve the testator's intent, but the word 'issue' is, of its own nature; and Moore 682, pl. 939, cites King and Bibe, devise, if A. dieth, not having a son, then &c., which is made tail." And in Ventr's report of the corresponding part of the same argument (1 Ventr. 231) we read: "It [Wild's case] comes not to this case; for

225 though the word 'children' *may be made *nomen collectivum*, the word 'issue' is *nomen collectivum* itself. Hill. 42 & 43 Eliz. Bifield's case: A devise to A. and if he dies not having a son, then to remain to the heirs of the testator; 'son' was there taken to be used as *nomen collectivum*, and held an entail." Doubtless when Hale cited Moore 682, pl. 939, as Keble reports him to have done, he mentioned also the date in Moore, Mich. 42 & 43 Eliz., (agreeably to what we know, from his published writings, was very much his habit;) and both that

and the name Biby being caught imperfectly by Ventr's, as might happen in many ways, he wrote down the former Hillary and the latter Bifield, in his notes; from which, after his death, the publication was made of his reports. How easily this might happen is illustrated by an anecdote immediately connected with the present subject. According to Atkyns, in his report of Robinson v. Robinson, 3 Atk. 738, "Lord Hardwicke said, after mentioning the case of King v. Melling, in Ventr. Rep., that the argument of Lord Chief Justice Hale in Ventr's was not copied from his own argument, but the arguments in the case of the Seven Hundreds of Cirencester, and a case upon alienations were copied verbatim from a manuscript of Hale;" the two cases alluded to being, indubitably, Atkyns v. Clare, 1 Ventr. 399-412, and Collingwood v. Pace, id. 413-429; neither of which concerns alienations at all, but the latter is a very famous case concerning aliens;—perhaps Lord Hardwicke used the law-french phrase "alien-nees." One thing in Ventr's report is impossible to be true; the case cited could not have occurred in Hill. 42 & 43 Eliz., though the mistake in this respect has been followed, without correction, or (probably) detection, by Lord Chief Justice Eyre and his reporter, (Ambl. 454;) by Mr. Fazakerley and his reporter, (1 Atk. 433, West's Hardw. 309;) by Mr. Viner (8 Vin. Abr. 280, pl. 7, marg.) and by

226 Mr. *Preston (2 Prest. Est. 551;) and, when we consider the form of the devise, conspicuously uncommon, it seems hardly possible, and, without stronger proof, altogether incredible, that two cases were before the court or courts, upon it, at the same term, and that Hale cited them both, at once, and in the same connection, with the result of one reporter mentioning only one, and another reporter mentioning only the other, of them; especially when it was much easier to confound an unfamiliar name Biby with Bifield, than to confound (as Ventr's certainly did) the familiar name of Michaelmas with the no less familiar name of Hillary. For one, therefore, I do not doubt that Hale did not vouch any manuscript report for the case cited, which in consequence of Ventr's inaccurate hearing now passes, and probably forever will pass, under (what is a mere pseudonym) the name of Bifield; and that the report he did vouch, in Moore, gave him all of what information he professed to have concerning the case. According to which printed report, "the matter in law," respecting the construction of the will, neither was nor could have been, at that time, decided; and all that we can gather, even of extra judicial opinion upon it, is what Popham held. This was the view taken of it by Comyns, who says, in his Digest, tit. Devise N. 5: "A devise to A., and, if he dies not having a son, &c. A. takes in tail male. Per Poph. Mo. 682, 1 Ventr. 231." And from this manner of citation it is perhaps inferable, that the Lord Chief Baron considered, as, by this time, this court peradventure

considers, the case in Moore, and that cited in Ventris, to be one and the same. Circumstances, however, favour the belief, that the devise which missed receiving a judicial construction in the case, perhaps between Biby and King, but more probably between Milliner [Miller?] and Robinson, was a few years afterwards, once, perhaps twice, brought again sub judice, between Robinson *and Miller [Milliner?] and perhaps between parties not nominally the same; repeated actions of ejectment upon the same title and between substantially (though not nominally) the same parties having then already become common, as Coke mentions, and laments, in the preface to 8 Rep. xxv-xxviii. See Selw. N. P. 773, tit. Ejectment, xiv. In 3 Hugh. Abr. (published in 1662), p. 1917, pl. 16, it is said: "A man devised lands to his wife for life, the remainder to his son; and if his son died without a son, that then it should remain over; it seemed to the court, that this was a good estate tail; and it was adjudged accordingly. Trin. 7 Jac. in C. B. Robinson's case." And this account is repeated in 2 Shepp. Abr. 48, almost verbatim, in substance precisely. The close resemblance between it and what is said in 1 Ventr. 231 respecting Bifield's case, there so-called, cannot escape observation; but the report in these two books, of the terms of the devise in Robinson's case, is unquestionably not quite accurate. The same case had been noticed in Shepp. Touchst. (first published in 1641), p. 441, in a form little satisfactory to Mr. Atherley or Mr. Preston, in both of whose respective editions the devise is printed as being "to his wife for life, and after to his son, and if his son died without issue (or having no son), then that it shall go to another." But I suspect there is here a misprint, probably the work of some bungling editor; though from want of access to the several editions of the Touchstone prior to the two that have been specified, I am not able to give the court positive assurance of it as a fact. Yet the proof is very persuasive; for in another work of the same author, to wit, Shepp. Epit. (published in 1656), p. 504, the devise is set forth as being "to his wife for life, and after to his son, and if his son die without issue having [not or having] no son, then that the land shall go to another;" and *ibid.* 961, it is stated that "if one devise
228 *his land to his wife for life, and after to his son, and if his son die without issue having no son (or having no male), then that it shall go to another; by this devise the son hath an estate tail to him and the heirs males of his body. Adjudg. Tri. 7 Jac. C. B. Robinson's case." This latter statement, without indicating any source of information other than MSS. is repeated verbatim in God. Orph. Leg. (first published in 1674), p. 334, of the 4th edit.; and almost verbatim (exactly so respecting the terms of the devise, but concluding "by this the son hath an estate tail to him and the heirs [not saying males] of

his body," in 4 Shepp. Abr. (published in 1675), p. 45: And the substance of it is given, in a somewhat more perspicuous form *ibid.* vol. 2, p. 47, thus: "if one devise land to his wife for life, and after to his son, and if his son die without issue having no son, then that it shall go to another; this in an estate tail to him and the heirs males of his body. And so also it is, if the words be, if he die having no male;" which probably was delivered elliptically, meaning "if he die [without issue,] having no male." In 2 Brownl. (published in 1652), p. 271, Robinson's case, the whole report is: "A man devises lands to his wife for life, the remainder to his son, and if his son dies without issue, not having a son, that then it should remain over, and it seemed that this is a good estate tail, and it was adjudged accordingly." Lastly, the following is a literal translation from 1 Roll. Abr. (published in 1668, after Rolle's death,) p. 837, pl. 12: "If a man devise land to his wife for life, and after to his son, and, if his son die without issue having no son, then another shall have it; the son has an estate tail to the heirs males of his body by this devise. Trin. 7 Jac. B. between Robinson and Miller, per Curiam." Which, per incuriam, is represented in Danvers's translation, otherwise accurate, to have been in B. R., (3 Danv. Abr. 181, pl. 12;) but Viner adheres faithfully
229 to Rolle. 8 Vin. Abr. 212, pl. *12. Of these accounts,—which are all I can find of the case, unless some to be presently mentioned are of the same case, and which accounts I have taken pains to collate for the court's use, because the books containing them are for the most part difficult of access,—all agree concerning the decision which was made, and the term and the court in which it was made; Coke, the then recent reporter in print of Wild's case, being (let us remark) at the time chief justice of the Common Pleas, wherein the case was adjudicated.—In Littleton's Reports (published in 1683) of cases from the second to the seventh year of Charles the First, the following passages occur in reporting arguments of counsel; at p. 259, Beck's case, "Trin. 6 Jac. Robinson's case, Ban. Reg.; a Yorkshire case, Robinson, seized in fee, devised to one lands for life, and if he die without issue having no son, that they should remain to J. S. in fee; adjudged that it was an estate tail:" at p. 286, Beck's case, at another day, by counsel on the opposite side, "6 Jac. Banc. Reg. Robinson's case, Robinson devised to A. his wife, for life, et si il devy sans fits that then it should go over, this is an estate in fee," (I suspect some erratum, but there is no list of errata to the volume): and at p. 8, Kene v. Allen, "Trin. 6 Jac. Robinson, seized of land devisable, devised it to his son, and if he should die having no issue male, the remainder to another, this adjudged tail to the son." Which notices, all corresponding as to the time, one year before the decision in the Common Pleas, and two of them stating that it was in the

King's Bench, while the other is silent respecting the court, seem to show that the same judgment had been passed in the latter court as in the former, upon the same will, notwithstanding some discrepance of statement as to the terms of it, and notwithstanding in one of them it is said,—by palpable mistake,—that the wife (qu. son?) was held to take a fee [simple]. And per-

230 haps the case cited *by Hale, 1 Vent. 230, 3 Keb. 99, as Robinson's case, 4 Jac., may possibly be the same case, but, if the same, then of course misstated; for that is said to have been a devise to A. for life, and, if he died without issue, then over, as it is put in Ventris, or to J. S. and, if he should die without issue, as it is put in Keble.—Either of these two forms of devise would clearly be within a rule long since become familiar, which I have already mentioned, respecting limitations over upon an indefinite failure of issue. Upon all the other statements of the case, including that of Moore in his report of *Milliner v. Robinson*, if it be on the same will, and indeed though it should be not on the same will, but on another, resembling it, I remark: First, that while, where the limitation over is upon the first taker's dying without issue not having a son, or dying without issue having no son, or dying without issue having no male, or perhaps where it is upon his dying without issue or having no son, or upon his dying without a son, or, not having a son, or, having no male, or, having no issue male, there, if the preceding limitation to the first taker is indefinite as to duration, then such limitation over will made him tenant in tail male; yet in not one of all the books quoted is there even the least intimation of the ground of such a decision, except in the quotation I have before given from Ventris, namely, that in those circumstances "son" is a nomen collectivum; which, in truth, merely states what, in that case, "son" is, without even a suggestion of the cause why it is so. But I submit, that the true solution is the same as of the decisions in *Wyld v. Lewis*, 1 Atk. 432, West's Hardw. 308; *Tate v. Tally*, 3 Call 354, (according to the remark of Judge Lyons, p. 361;) and, as it would seem, of *Butt v. Thomas*, 32 Engl. L. & E. Rep. 575, 36 id. 571, 11 Exch. Rep. (2 Hurl. & Gord.) 235, 1 Hurl. & Norm. 109; to wit, the solution suggested by President

231 Tucker in his remarks (12 Leigh *376-377, *Wright v. Cohoon*;) upon the case of *Robinson v. Miller*, and which are in consonance with the doctrine delivered by himself in *Doe d. See v. Craigen*, 8 Leigh 449, cited with approbation by Judge Moncure, in *Tinsley v. Jones*, 13 Gratt. 295;—that, "there being no words of inheritance in the devise to the son," as the devise is stated in that case of *Robinson v. Miller*, or to the brother, as the devise is stated in *Milliner v. Robinson*, and no words of gift to any of his descendants, therefore none of them could ever "get the estate unless it was construed to be an estate tail" in him, "though it was clear the testator

postponed the devise over with a direct reference to benefiting" such descendants, or some of them: Which sort of reasoning, the judges assembled in Wild's case had already resolved, was sufficient for adopting this kind of construction. 6 Rep. 17 a-b. See also 1 P. Wms. 57, *Bamfield v. Popham*. And in this way, from this cause, the word "son" is, under such circumstances, necessarily made nomen collectivum, for the nonce; since an estate tail, in its nature, cannot be descendable to fewer than all generations. But in the case at bar there is a direct and express gift to the children of the first taker, if she has any, by way of remainder, from and after the termination of her estate: which, according to the decision in Wild's case, abundantly confirmed as I have already shewn that it is, absolutely precludes any similar construction here. My second remark on them is, that, where such words of limitation over follow a preceding limitation for life (expressly) to the first taker, the single opinion intimated in them is (*Moore* 682), that he probably will have no more than a life estate; except in the citation from Litt. Rep. 259, where it is abundantly certain that the devise is misstated, since it differs in that particular from every one of so many other statements of the same devise: Nor, with that exception, have I met with any case, so far as I can at 232 *present remember, that carries the point, upon such a devise, further than Popham's opinion in *Moore* goes. On the contrary, while it is perfectly settled, that where an estate is devised to one for life, with a limitation over upon an indefinite failure of issue of the first taker, there such taker has an estate tail, as the law was aforesaid, from the first moment of the estate's vesting in such devisee; which estate is not subsequently diminished into the life estate originally nominated for him in express terms, though he die without ever having had issue (*Doe v. Halley*, 8 Durnf. & E. 5; *Jiggetts v. Davis*, 1 Leigh 419). Yet it is settled no whit less firmly, that where a devise is to one for life with remainder over in case he die without issue living at the time of his death or at other not indefinite period, this gives to the first taker, at the beginning, a mere life estate, which neither the birth of issue subsequently, nor the circumstance of such issue surviving the first taker, can enlarge into more than a life estate, even where the will does not give an estate to them; the former branch of this proposition having been solemnly decided by Lord Hardwicke, after elaborate argument, in *Lethieullier v. Tracy*, 3 Atk. 774-797, Ambl. 204, 220, 3 Keny. 40, 1 id. 56-65; since which decision the point has been always considered settled both in England and in Virginia (1 Jarm. Wills 490; Lew. Perpet. 294-295; *Jenkins v. Clinton*, 6 Jur. N. S. 1045; *Jiggetts v. Davis*, 1 Leigh 420; 3 Lom. Dig. 310-311 [209-210];) and both it and the latter branch of the proposition having been decided in *New York. Eagle Fire Insurance Company v.*

Cammett, 2 Edw. Ch. Rep. 127. Now, in our case, there is an express estate for life, (and contingently somewhat longer than the first taker's own life, but not exceeding a life of another person), given, with no limitation over upon an indefinite failure of issue of the first taker: as I would proceed forthwith to prove, but that I
233 desire first to *notice some other authorities, specially relied on by counsel opposite. These I prefer to notice in this place, because I would not choose to turn back for that purpose after once entering upon what may be called our contention.

One of them is a citation at second hand (through the reported argument of counsel in *Jesson et al. v. Wright*, 2 Bligh 28, or rather through the printed reasons for plaintiffs in error in that case, see *Sugd. Prop.* 250, note p;) from 1 And. 43, pl. 110; not a decided case, and not of Anderson's own reporting. Serjeant Bendloes's Reports were never printed, in anything like the state wherein he left them, until 1689, about a century subsequent to his decease. Meanwhile some copies and more abstracts (much resembling in manner the marginal abstracts in some modern books of reports) had been made from them, sometimes directly, sometimes mediante some other copy (perfect, or, as it might happen, more or less imperfect) or some abridgment; concerning which manner of multiplying what were called copies of Bendloes's reports, Serjeant Rowe says, in his preface to the publication just now mentioned of 1689: "It is manifest that those different copies were but different notes and extracts from the original, wherein such as collected them made use of their own judgments in the manner of abridging and in the choice of the cases; and under the same observation may not improperly fall the notes of some of the same cases, which we find in the beginning of Anderson and [of] Moore, and in some places in Leonard's Reports;" all of which, to wit, Anderson, Moore, and Leonard, we may remark, were posthumously published, and therefore without any claim of authorship on the part of any of them. In point of fact, the first one hundred and thirty-one placita in 1 And. are, almost without an exception, thus taken

either from some copy of Bendloes's
234 reports, or (what *seems more likely)

from some abstract previously made therefrom, with an occasional condensation of, or curtailment from, even such abstract. In 1661 was published a volume, beginning (p. 1) with these words (literally translated): "Here follow cases reported by Serjeant Bendlowes, in the time of H. 8, E. 6, P. & M., and the Queen Elizabeth; written out of his own Reports verbatim;" which statement is glaringly false, as we now have the means of knowing, (whether or not consciously false on the part of the publisher), in regard to almost, if not quite, every one of the one hundred and sixty-six cases there given, (in the publication of 1689 the cases number three hun-

dred and two;) but there are many of the one hundred and thirty-one placita (before mentioned) in Anderson which agree verbatim with the corresponding accounts of same cases in this book; and others of those placita seem taken from the prototype of this volume, or (more probably) from some common prototype of both, (not Bendloes's original,) with a curtailment thereof by the person (whoever he was) that made the copy since published with the reports of Anderson. This appears, or something very like it, to have happened in regard to the placitum relied upon by counsel opposite in our case. [Here Mr. Green collated, in extenso, 1 And. 43, pl. 110; the book published in 1661, called sometimes Old, sometimes New, Benl. (see Wallace's Reporters, 3rd edit. 83-84 in notis, 93;) p. 30, pl. 124, almost, but not quite, literally translated in the Supplement (or Appendix, as it is called,) to Hughes's Abridgment, published in 1663, tit. Taile, pl. 2; a citation, from MSS., at the end of the report of *Richardson v. Yardley*, Moore 397; another citation, from MSS., in *Owen* 148, *Lilly v. Taylor*, 33 Eliz.; and yet another in 1 Bulstr. 219, *Whiting v. Wilkins*; all professedly derived from Bendloes; and then proceeded:] All of which variant accounts (except the last)

being together with that given
235 *in Coke's report of *Wild's* case, before the court in *King v. Melling*, it was therein said by Twisden, J. (as we may remember) that he would adhere to the version given by Coke, for the very sensible reason that, that version being, by a most reliable reporter, of what was alleged before all the judges to be Bendloes's report, the strong presumption is that it was the genuine account left by Bendloes. And in the same case it was said by Pollexfen at the bar, that he conceived the case "to be very doubtful and of no authority," by reason of the variations in the different accounts of it, though professing (all of them) to come from the same source, and for the further reason that, at best, it was but a "case moved [not to the court as such, but to the justices thereof as experts merely,] and their opinion [was delivered] without argument or debate, for aught appears," (Pollexf. 108, *King v. Melling*;) after a fashion, which would not now be tolerated, I presume, in any court of Westminster Hall—or "nuper de" Westminster Hall—for the very solid reasons suggested by Dyer, C. J., in 3 Leon. 30-31, pl. 58, anno 15 Eliz.; and of which I do not remember an instance since the dialogue between Serjeant Pheasant and the court, in Hill. 17 Car. 1, anno Domini 1641-2, reported in March 155, pl. 224; but which was very common in the time of the Year-Books; not infrequent, even after Dyer's remonstrance, in the reign of Elizabeth, as appears in Cro. Eliz. 10, pl. 4, 5; 13, pl. 6; 17, pl. 9; 61, pl. 3; 174, pl. 4; 182, pl. 3; 190, pl. 2; 278, pl. 5; 431, pl. 36; 532, pl. 64; 753, pl. 13; and of which some examples are reported as late as the early part of the reign of Charles the First. Litt. Rep. 70,

Anon.; 163-164, Pomfraye's case; Hetl. 74 [76] Anon.; 150, Mortimore's case. Finally (so far as that case put is concerned), no trace of it is to be found in the volume of Benl. Rep. published in 1689; whether because it was not in the MSS. from which

that publication was made, or whether
236 *it was deemed (from any cause) not fit for publication in it, we are not told. But in Mich. 10 Jac. 1, a case came before the Common Pleas (while Coke was still chief justice there), of which we have a reliable account; and in which it was held, that "if a man devise to his eldest son for life [et non aliter], the remainder to the sons of his body lawfully begotten, and, if they alien. that his daughters shall have the same estate, remainder to his right heirs; the eldest son has but an estate for life, and no estate tail, but his son shall have it by purchase, because it is expressly limited that he [the first taker] shall have it only for life." 1 Roll. Abr. 837, pl. 13; there given without name, but cited in King v. Melling, 3 Keb. 54, 99, as Portridge's, or Partridge's, case, by Lord C. J. Hale; who, by means of information derived from MSS., was able to state that Rolle's account was correct with the single exception of its leaving out the words "et non aliter;" which, therefore, in my preceding statement of it, I have supplied. King v. Melling, 1 Ventr. 231. This, sufficiently for all the purposes of our case, overrules and explodes the (probably never uttered) responsio prudentum bearing no sort of resemblance to judicial decision, retailed at second (perhaps third, or fourth, we know not at what) hand in 1 And. 43; discredited as that is shown to have been otherwise; especially with aid from the case of Lethieullier v. Tracy before cited, and other authorities of that class: To which I will now add Wedgwards case, Hill. 13 Car. 2 rot. 121, cited also by Hale, in the next sentence in Ventr. to that which I have last quoted. "A devise to his son Thomas for life, and, after his decease, if he died without issue living at his death, then to the daughter &c.; it was held to be an estate for life." This, as appears in 3 Keb. 99, King v. Melling, was the case of Plunket v. Holmes, 1 Lew. 11, T. Raym. 28, 1 Sid. 47, 1 Keb. 29, 119; in which last-mentioned book and page (and no where else) we discover that Thomas, the

237 *first taker under the will, was named Wedgwood (or Wedgward). As to which case of Plunket v. Holmes see Butl. Fearne 341; Boothby v. Vernon, 9 Mod. 147; (cited in Hooker v. Hooker, 2 Barn. B. R. 201, W. Kel. 192, 194, Ann. Hardw. 15, 18, Cunn. 4, 5, 7, 8;) 2 Saund. 382, note 1 to Purefoy v. Rogers; and the cases which I shall hereafter state, of Loddington v. Kime and Carter v. Barnadiston.—Moreover, as to this whole doctrine of raising estates, or enlarging or diminishing them, on an implication of intention, it was recently said by Lord Westbury C., a very great lawyer: "I quite agree with some remarks made at the bar, that the older

cases are no longer to be regarded as safe guides in such an inquiry. Great latitude was undoubtedly given by them to the doctrine of implication." Parker v. Tootal, 3 Hurlst. & C. (Am. ed.) 1015, 11 H. L. Cas. 143.

The case next in order, relied upon by counsel for appellants, is Hodges v. Middleton, 2 Dougl. 431; as to which I shall save myself the trouble of distinguishing it from our case, by giving it an answer more laconic. It is not law. The conflict between it and Wild's case, and also between it and the case of Ginger v. White, Willes 553, was pointed out by Serjeant Frere in his edition of Douglas, published as long ago as 1813. To the same effect also was the note previously published, of learned reporters, (both afterwards raised to the bench, one in England, the other in India), to Seale v. Barter, 2 Bos. & P. 498. In 1827 Mr. Jarman, in his supplemental volume to Pow. Dev. 495, note q, said: "In Hodges v. Middleton, Dougl. 431, Lord Mansfield and the court of King's Bench, inclined to think that where a testator [testatrix] devised to A. for life, and after her death to her children, upon condition that she or they constantly paid £30 a year for a clergyman to officiate in her [testatrix's]

238 chapel, and on failure thereof to testator's [testatrix's] own next heirs, *and in case of failure of children of A. then to her [A.'s] brother G., &c.; A. had an estate tail, or that, if she took an estate for life, the children took an estate tail; and, as recoveries had been suffered by both, the alternative of these propositions was not material. As the limitation to the children in this case was by way of remainder, there seems to have been no ground, whether there were children or not, for holding the parent to be tenant in tail,"—agreeably to what, I have before quoted Mr. Jarman as saying, is now admitted on all hands. "It is as difficult to perceive any solid ground for giving the children estates tail: The direction to pay the £30 a year would have enlarged their devise to a fee," which would have conduced equally to the same result, under the particular circumstances (of recoveries suffered), as either of the other constructions. This note is retained in the first and third English editions of Jarm. Wills, vol. 2, p. 308 of the former, p. 366 of the latter, and in all the American editions, with no change but that of adding "simple" to the last word "fee." And in 1831 Mr. Preston, in arguing Broadhurst v. Morris, 2 Barn. & Adol. 1, said: "Hodges v. Middleton was expressly overruled in a case in chancery, which has not been reported on this point, viz. Charles Monck and others v. The Commissioners of Woods and Forests." That case, therefore, in which the court, without occasion, and consequently without opportunity, to decide what estate either the mother or the children took, if either she or they took more than a life estate, whether in fee tail or in fee simple, yet contrived to mistake the law both as to the former and

as to the latter,—can now serve no purpose, but to mislead such as can be misled, and to furnish others with an admonition against implicit reliance upon even authentically recorded opinions, of judges whose names are in highest renown. “Quandoque bonus”—; of which I shall still have to notice only too many specimens.

239 *The next case, stated and commented upon by counsel opposite, is *Seale v. Barter*, 2 Bos. & P. 485; but as he has introduced a quotation from counsel's argument therein, which mentions the case of *Davie v. Stevens*, 1 Dougl. 321, I will first bestow some passing notice upon it. That was a marvellously plain case to have any question raised upon it; and it was so treated by Lord Mansfield, who said, after listening to counsel on both sides: “I had a mind to see, whether ingenuity could raise a doubt on the one side, or on the other supply an argument to make the case plainer than it is on the face of it.” The case, duly considered, only proves even less than what innumerable other authorities have long since established; to wit, that where a testator by his will sufficiently defines the sense he therein designs to put upon the word, he may, with effect, use any word in any sense, even if that sense be the direct opposite of its usual acceptation; just as well as our legislature could affix certain meanings to certain words and phrases, of their defining, wherever these are found in statutes enacted while the statutory definition is in force, “unless such construction would be inconsistent with the manifest intent.” V. C. 1849, c. 16, s. 17. In this manner, real property may pass under a testamentary gift of “personal estates,” (*Doe v. Tofield*, 11 East 246) and personal property may not. *Goodman v. Edwards*, 2 Mylne & K. 59. See *Carnagy v. Woodcock*, 2 Munf. 234; *Tebbs v. Duval*, 17 Gratt. 349, 361.—The case of *Seale v. Barter* turned altogether upon the codicil; whereby the testator devised all his estates to his son J. S. and his children lawfully to be begotten, J. S. being then married, but having no child; so that, according to the rule in *Wild's case*, as reported by Coke, (and with which, therefore, Lord Alvanley needed not to quarrel,) J. S. plainly took an estate tail; which construction assuredly was in no manner weakened by the further provisions of

240 the codicil, that J. S. should *have power to settle the same by will or otherwise on such of his children as he should think proper, (thereby determining the estate tail, as the court held, so far as its continuance would interfere with a settlement made in pursuance of such power;) and, for default of such issue, then to the testator's daughter E. S. and her children lawfully to be begotten, with a similar power; and, in default of such issue, to J. S. and E. S. equally between them; with a proviso that a settlement of £200 per annum should be made on any woman whom his son might thereafter marry, and that his estates should be chargeable therewith. The

wonder is, not that this was held to give J. S. an estate tail, but that the question should have been thought capable of bearing a moment's debate after *Wild's case*, confirmed as that had been in so many cases meanwhile, (and see, since then, *Broadhurst v. Morris*, 2 Barn. & Adol. 1, remarked upon by Kindersley, V. C., in *Davis ex parte*, 2 Sim. N. S. 121, 9 Engl. L. & E. Rep. 91; *Roper v. Roper*, 3 Comm. Pl. (L. R.) 32; *Parhman v. Bowdoin*, 1 Sumn. 359; *Nightingale v. Burrell*, 15 Pick. 104, 114; *Wheatland v. Dodge*, 10 Metc. 502; *Doe d. Thomason v. Andersons*, 4 Leigh 122, 130; *Wright v. Cohoon*, 12 id. 377;)—unless indeed the circumstance might have raised some doubt, which existed in the case, (2 Bos. & P. 487,) and was mentioned by Lord Alvanley, (*ibid.* 491,) but was not noticed by counsel on either side in argument, and received no particular attention from the court,—that after the making of the codicil and before the testator's death, the first taker had issue that survived him. As to this see 2 Jarm. Wills 310–312, 1st edit., 367–369, 3rd Engl. edit.

The last of the cases cited for appellants under this head, not already disposed of, either en masse, or in detail, is *Mellish v. Mellish*, 2 Barn. & Cr. 520. There is, I believe, no copy to be found in Richmond of that book; and from the very curt 241 abridgment, rather than *report, of the case in 9 Engl. C. L. Rep. 165–167, it is impossible for any but the brightest intellect, aided by the fullest information on this head, to be certain of discerning accurately the ground of the court's decision. But the same case is reported in 3 Dowl. & R. 804–821; and from that report, containing not only full arguments of counsel, but also numerous remarks of the judges inter arguendum, we may learn satisfactorily what views of the case led to the certificate which was sent. In substance the court held that the testator, not conjecturally, but certainly, from indications in the will itself, designed to give interests which necessarily required an estate tail in the first taker; or, as it is reported to have been said arguendo, by counsel whose contention was successful against an implication of an estate tail, “in *Mellish v. Mellish* the court read ‘son’ and ‘daughter’ as importing the whole line of issue; but that was expressly because the circumstances shewed that, if not so read, the estate would go out of the family; and the real and undoubted intention of the testator would be defeated,” (31 Engl. L. & E. Rep. 72, *East v. Twyford*; 4 H. L. Cas. 517, S. C.;) and, having reached this conclusion, which the could not but assume to be right, even if it were in other men's judgments wrong, they were at liberty, nay bound, so long as they rested in it, to give the devise that effect, by the authority of *Robinson v. Robinson* heretofore mentioned, and of numerous other cases: which, upon a like ground, were again followed in *Doe v. Davies*, 4 Barn. & Adol. 431, 1 Nev. & M. 654.

These authorities establish, that the word "children" may be made to mean heirs of the body or issue, the words "sons" to mean heirs male of the body or issue male, and the word "daughters" to mean heirs female of the body or issue female, for the sake of accomplishing the testator's intention, whenever his ascertained intention requires that sense to be put on them; and I

242 *conceive, from the context of Hale's opinion in *King v. Melling*, that he cited the case he did cite therein, whether by the name of *Bifield* or of *Biby*, to this point alone. But, while they do this, the same authorities inferentially show, further, that such is not the primary sense, the natural, or ordinarily the legal, signification of those words; since, in order to put that sense upon them, argumentation was requisite in proof that, in the particular cases, such an intention existed. And, therefore, every thing entitled to the name of authority concurs in sustaining the position of a good text-writer, that "'children,' 'son,' ['daughter,'] are technically words of purchase; yet either 'children' or 'son' [or 'daughter'] will, if it is the intention, be accepted as a word of descent;" just as, per contra, "'heirs' and 'heirs of the body' are technically words of descent; yet, if it is the intention, 'heirs' or 'heirs of the body' will be accepted as words of purchase." *Ram on Wills* 53. That is to say, these words and phrases will not change their nature, while they retain their natural meaning; but a meaning, different from their natural, will be put on them, when that is necessary for accomplishing the testator's intention. But then, intention, in order to produce such effects, must be "manifest and certain, not obscure or doubtful," as was resolved by the judges in *Wild's case*, 6 Rep. 16b. Or, in the words of Lord Hardwicke, it must appear by "declaration plain, that is, not saying in so many words, but plain expression or necessary implication, which is the same thing." *Garth v. Baldwin*, 2 Ves. sen. 65. Or, as Alderson, B., delivering the opinion of the whole court of Exchequer, after elaborate argument and time taken for consideration, said with pains-taking precision: "Upon a careful examination of the authorities we think that it may be safely laid down as a rule, that in a devise technical words, or words of definite meaning, shall always be construed according to

243 their legal or definite *effect, unless, from other inconsistent words in the will, it be quite clear that they are used in some other definite sense. Thus, if the words 'heirs of the body,' which are technical words, properly admitting only of one meaning, are used, it becomes necessary to show affirmatively that the testator meant clearly to use them as words of purchase;—it is not enough to raise a reasonable doubt whether he intended to use them as words of limitation, or to show a probable conjecture that he intended to designate children only by that phrase." "Another instance of the application of the rule may

be found, in the class of cases in which 'sons' [or 'daughters'] or 'children,' which in their proper sense are words of purchase, have been held to be words of limitation. There, in like manner, it must be demonstrated from the will affirmatively and clearly, that by these expressions the testator meant all the descendants [or all the male or all the female descendants] of the body to take as heirs." *Lees v. Mosley*, 1 Younge & Coll. Exch. Rep. 606, 607. And, as was said by Sir Thomas Plumer, M. R., if the intent be uncertain, if it be in equilibrio, or even in suspense or doubt, then the legal operation of the words must take effect." *Cholmondeley v. Clinton*, 2 Jac. & W. 96. See further *Ram on Wills* 31–32, 109 et seq.

I have now noticed, I believe, every authority, which has been cited by counsel opposite as favouring that side upon the topics hitherto discussed. And I think it may be stated without danger of mistake or of serious or plausible dispute, that the discussion has established, as applicable immediately to the case in hand, the following results:—First. That although, where an estate is devised to one, either expressly for life, or indefinitely, with whatever subsequent limitations, if the testator's intention be sufficiently discovered, to provide (by means of the same subject matter of estate) for all offspring of

the first taker, or for the whole of
244 *any line of such offspring, in every successive generation descending from such first taker, or for some described progeny within the whole of any line of such offspring, in every such generation, there, as the law was aforesaid, the will would give to the first taker an estate tail,—according to circumstances, either immediately, or else in remainder after some intervening estate,—where otherwise the property would not be transmissible, conformably to such intention, either to descendants at all, or else to descendants more remote than those the will has suo jure provided for: Yet such intention is never sufficiently discovered from mere conjecture, however plausible, or however probable in itself, but must always be proved, from the will, expounded in the light of such extraneous evidence as is legally admissible; by demonstration plain; past any doubt; so as not even to leave the judicial mind in any suspense about its having been thus demonstrated; else the legal operation of the words must take effect; upon the not unnatural, nay the necessary, presumption that the technical effect of the words is intended by the testator, if a different intention be not apparent therein.—Second. That a devise to one, either expressly for life, or even indefinitely, with remainder to the devisee's children, whether expressly for life, or indefinitely touching what estate they should take, would not, as the law was before 7 Oct. 1776, have made the first taker tenant in tail, either immediately or in remainder, by reason of an intention, thence presumed,

of the testator, to provide for all the descendants of such first taker, or upon any other ground. For this the decision in Wild's case, which has never since been shaken, but on the contrary has been very frequently confirmed, is ample authority.—

Third. That while an implication of such intention, as is necessary for giving such first taker an estate tail, immediately or in remainder, is sufficiently made out

245 *from a limitation over upon a failure of issue of the first taker whenever, at any time indefinitely future, it shall happen,—commonly (for the sake of brevity) styled an indefinite failure of issue; and while the same implication sufficiently results from a limitation over upon such failure of children, where the context demonstrates, with the plainness I have just now mentioned, that “children” is used as synonymous with “issue,” so as to comprehend successive generations as long as the progeny shall last; yet it is otherwise, where the limitation over is upon, what from its contrast with the foregoing is called, a definite failure of issue, or of “children” in the sense of “issue,” meaning a failure in some particular generation, or at or before some collateral epoch or event, designated: And while a limitation over, upon a failure of issue, must *prima facie* be construed as upon an indefinite failure,—which is all that, to the purposes of this case, is proved by numerous authorities collected by counsel opposite, and which authorities therefore, after this distinct admission of what they prove, I need not notice any further;—yet it is otherwise, either where the limitation is upon a failure of “children,” so denominated in the will, if there be not in the context enough to force that term out of its natural and also technical signification, into the larger signification of the term “issue;” or even where the limitation over is upon a failure of “issue” or “heirs of the body,” so denominated in the will, if it be shown by the context to mean a failure of such issue, or such heirs of the body, as “children” are in the natural and technical signification of the term last mentioned; that is, immediate fruit of the first taker's own body, the necessary parentage of his grandchildren, should any be born to him. The last in order of these propositions is inferrible from *Jesson v. Wright* in the House of Lords, and from our Virginia case of

246 *Moore v. Brooks*, and was actually decided *in *Doe d. Wright v. Jesson* in the King's Bench, *Jordan v. Adams* in the Common Pleas, and our Virginia case of *Prior v. Duncan*. The proposition immediately preceding it is clearly deducible *a fortiori* from the same authorities, and moreover was expressly decided in *Goodwin v. Goodwin*, *Denn v. Page*, *Hay v. Coventry*, *Foster v. Romney*, *Doe v. Vaughan*, *Ashley v. Ashley*, and the Pennsylvania case of *Curtis v. Longstreth*.

Upon these authorities, in consonance with the soundest as well as the best settled principles, it seems clear that Nancy Perry

would have had no more than an estate for the term of her own life and (contingently) the widowhood of any surviving husband she might leave,—not an estate tail, as the law was aforesaid,—even if the clause in question of her father's will were to be read as counsel opposite desires it should be; to wit, in the sense of giving a remainder to the testator's children after the remainder to those of Nancy Perry, though she should leave children, who, surviving both her and her last husband, should actually come into possession of the land. For, even then, according to the *lex temporis* (prior to 7 Oct. 1776), as the preceding authorities show, the remainder to the testator's children, would have taken effect at the termination of the life estate of her children; though they should have left ever so many children. These grand-children of Nancy Perry would have taken no more than the grand-child of Rowland Wild and his wife did; who took just nothing.

But I consider it to be very certain, that such is not either the true meaning or the legal construction of the clause under consideration; and that, on the contrary, both the former and the latter are the same as if the clause were in these words: “I lend to my daughter (certain) land, to be possessed by her and whosoever shall lawfully claim under her, during her natural life and

247 the widowhood of any surviving husband whom *she may leave; and at her death and the death or after-marriage of such surviving husband, if any, then to be equally divided among her children, if she has any; otherwise, then to be divided among all my children.” There is room to contend, that the word “then,” where it occurs the second time in this sentence, or rather in the corresponding sentence of the original, has the same meaning as where it occurs first; and that it is, in each instance, an adverb of time, denoting in a monosyllable what is expressed more at large by the phrase “at such time, and so soon, as she shall be dead and no surviving husband of her shall be remaining unmarried.” But I waive all dispute about that; being content to take the second “then” as denoting only the contingent event of the first taker having no children. Still the legal effect will be the same; and that is, to create what is now most commonly called an alternative limitation. Such limitations, or the gifts made by means of them, considered in conjunction with those for which they are contingently substitutionary, have also been called, sometimes contingencies with a double aspect, sometimes gifts upon a double contingency, sometimes devises or bequests on two alternative contingencies. *Sm. Ex. Int. § 129*. Under their now more common, as well as more accurate, appellation, they have been defined, and an illustrative example of them given, as follows: “An alternative limitation creates an interest that is only to vest in case the next preceding interest should never vest, in any way, through the failure of the contingency

on which such preceding interest depends. As where a testator devises to A. for life, and, if he have issue male, then to such issue male and his heirs forever; and, if he die without issue male, then to B. and his heirs forever." Ibid. § 128; Sm. Re. & Pers. Prop. 242. The case thus put for an example is the very case of *Lodding v. Kime*, 3 Lev. 431, 1 Salk. 224, 1

Ld. Raym. 203; which Mr. Jarman, 248 *both in his supplemental volume to Pow. Dev. 517-518, and in his work *On Wills*, vol. 2, pp. 338-339, assailed with remarkable vehemence; pronouncing it to be "clearly overruled." Not that any court, or even any single judge, or any text-writer, —save himself,—has passed that sentence of condemnation upon it; but he conceived it to be not reconcilable with some subsequent decisions. This, however, was a clear mistake of that able and (in general) accurate writer; which his English editors, since his death, have, in great measure, saved me the trouble of proving to be such, by their withdrawing from his work *On Wills* all traces thereof, and substituting instead a reconciling explanation. 2 Jarm. Wills 397-398, 3rd Lond. edit. His error was the consequence of an essential misstatement (by him) of the case, upon that very point for which it is here adduced. The devise was to one for life, and, if he should die without issue male, then over; which undoubtedly would have given the first taker an estate tail, if that had been all; because then it would have been a limitation over upon an indefinite failure of issue male. But the full statement of the devise, omitting only words clearly not material on the present occasion, is as follows: "As concerning my manors of Pickworth and Willoughby, I devise them to my uncle Evers Armin for his life, without impeachment of waste; and in case he shall have issue male, to such issue male and his heirs forever; and after the death of my uncle Evers Armin, in case he leaves no issue male, the manor of Pickworth to my nephew Sir Thomas Styles and his heirs forever. And as to the manor of Willoughby," concerning which the question arose, "in case my uncle Evers Armin die without issue male, I devise it to my nephew Thomas Bernardistone and his heirs forever:" thus indicating that the final limitation was not to take place whenever, at any time indefinitely future, there should happen a

249 *failure of the first taker's male issue; but that it must take effect, if at all, in case (only) the first taker should not have issue, that could take at the termination of the life estate given him. The case therefore,—in which it was held, that Evers Armin had but a life estate, with alternative contingent remainders limited thereon,—is a clear authority, that words, which ordinarily would import an indefinite failure of issue, yet shall not receive that interpretation where the context shows that the limitation following is not intended as a remainder, after a limitation to the first taker's issue shall have been spent, but is in-

tended as an alternative limitation, in case that (to the first taker's issue) shall never vest. And if this authority should be thought to need confirmation, after Mr. Jarman's assault (*alio intuitu*) upon it, I may mention that another case afterwards arose before the court of chancery, concerning the title to the manor of Pickworth under the same will, as to which the question was, in legal effect, precisely the same as it had been concerning the manor of Willoughby in *Lodding v. Kime*; and it received, twenty years after the decision in that case, precisely the same answer in the House of Lords, upon appeal, in accordance with the unanimous opinion of all the then judges. *Barnardiston v. Carter*, 3 Bro. P. C. edit. Toml. 64-74, 1 P. Wms. 505-510. After which the same will was again, by fresh bill, brought before Sir Joseph Jekyll M. R., and, by appeal from his decree, before Lord Parker (afterwards Macclesfield), C.; from both of whom it also received the same construction. *Carter v. Barnardiston*, 1 P. Wms. 510-522. And although Levinz reports (3 Lev. 435), that "before any judgment was given, the parties [in *Lodding v. Kime*] agreed and divided the estate;" which statement, repeated from Levinz in 1 Salk. 225, has been sometimes understood as asserting (what it does not) that no judgment was ever entered, and led Lord C. J. Ryder, for

250 *instance, into believing that the case was never determined, notwithstanding the statement in Lord Raymond's report presently mentioned, (*Doe v. Reason*, cited 3 Wils. 246); yet indubitably the fact was, as it is stated in the report of Lord Raymond, which concludes (1 Lord Raym. 209) with these unusual and remarkable words: "And therefore judgment was given [&c.] for judgment is entered upon the record for the plaintiff." The reason of which particularity will be seen in what Lord Raymond said when delivering (as chief justice) the court's opinion in *Shaw v. Weigh*; wherein, adverting to the passage I have quoted from Levinz, he said: This "is a mistake; for I heard the opinion of the court given *seriatim* myself, viz. Pasch. 9 Wm. 3, in the year 1697, that Evers Armin took but an estate for life, because the first issue male took the [a] contingent remainder. It has also had decisions in other places; it having been brought into the court of Chancery, and by appeal thence carried into the House of Lords: The judgment given in the court of Common Pleas was in all those places confirmed, and not in the least shaken; and has been acquiesced under ever since. Judgment is entered on the roll, in C. B., Trin. 5 W. & M. rot. 1551, as was said by Eyre, C. J., in another case." Fitzg. 21-22, and (in *totidem verbis*) Fortesc. 74-75. See also, 2 Stra. 844, 1 Eq. Abr. 183, pl. 23, more concisely to the same effect; 11 Mod. (edit. 1781, not Leach's) p. 298, Treby, C. J., in *Scattergood v. Edge*. In 3 Wils. 240, *Doe v. Holme*, it is also said that Lord C. J. De Grey, delivering the opinion of the court in that case,

said, about *Loddington v. Kime*, "though both Levinz and Salkeld report that the parties agreed, and divided the estate, before judgment was given, yet it appears from a MS. report of the case by Judge Blencowe, (which the reporter Serjeant Wilson has seen) that, after long consideration, judgment was given that Evers
251 Armin took *an estate for life, with contingent remainder over." And Sir Wm. Blackstone, who was one of the court that decided *Doe v. Holme*, in his report of that case, (2 W. Blackst. 778,) states the chief justice to have said, that *Loddington v. Kime* resembled "this case in all points. That was several times agitated in all the courts of Westminster Hall"—this, however, I cannot verify with respect to the courts of King's Bench and Exchequer—"and (continues the chief justice, according to Blackstone,) at length settled in Dom. Proc. by the unanimous opinion of all the judges." The real truth about the result in *Loddington v. Kime* is, doubtless, what is stated in 3 Bro. P. C. edit. Toml. 66, as follows: "After several arguments in the court of Common Pleas judgment was given in favour of Armyne Bullingham [the substantial plaintiff, though not in form such upon the record]. But both [of the substantial parties to the suit] being relations, they afterwards came to an agreement:" which, as that report proceeds to narrate in detail, was effectuated by deed enrolled, and fine, and recovery. See also 1 P. Wms. 507; and observe that the date there given, of Jan. 1697, was subsequent to Easter term 1697, according to the civil calendar used in England till the year 1752. No decision, therefore, ever came under review, that brought with it a greater amount of judicial authority touching the same identical point, than this does. Moreover it was not only followed in *Doe v. Holme*, but, furthermore, in that case, "the lord chief justice De Grey said, he should have been of the same opinion, although the case of *Loddington* and *Kime* had never been determined." 3 Wils. 243. And, without being cited, it was yet in effect followed, in our Virginia case of *Foxwell v. Craddock*, 1 Patt. & H. 250. Besides which, in Fearn. Posth. pp. 178-184, 185-190, there are two several opinions of probably the most able judge of such questions that has yet lived, (though
252 *never installed in a judicial office,) to precisely the same effect, on original reasoning and without distinct reference or allusion to these cases or any of them; though certainly not unaware of those in England, all of which had arisen and been determined before his day. Butl. Fearn. 225, 354-356 373-374. See also *Egerton v. Massey*, 3 Comm. Bench N. S. 338, 349-354. —Therefore, upon this distinct and separate ground, in addition to the ground heretofore discussed, I submit that Nancy Perry did not take more than an estate for her own life, with a contingent elongation thereof during the widowerhood of such husband as she might leave surviving.

Whether this contingent elongation would make any difference in the case of that devisee, favorable to her taking an absolute ownership in fee simple, through the medium of a constructive entail, is an inquiry which counsel opposite has not noticed, except in so far as it is involved in his discussion of,—Secondly, what he suggests is a difference between her title and that of Sally Stone under the same will; the devise in favor of the latter being of land "to be possessed by her and any husband, she may have, upon the same terms and conditions as Nancy Perry's."—I shall, therefore, now transfer my discussion, also, to the direct consideration of Sally Stone's title; though really that is, out and out, the same as Nancy Perry's.

The words in the devise to Sally, "to be possessed by her and her (future) husband," coupled with the residue of the same clause, would not, if she had married, have given an estate of any kind to her husband; for that consequence (of giving him an estate or interest under the will, apart from what his *jus mariti* would confer,) is annulled and absolutely stifled by the last words of the clause referring to the "terms and conditions" affecting Nancy Perry's land under the clause of the will concerning it:

253 Which certainly *gave to Nancy's present or future husband nothing whatever in the land, during her life or after her death, except—I was about to say, but in truth it did not give him even,—what he might derive from the marital right of himself or from the good pleasure of his wife. Under the former he would have the right of enjoyment during the coverture, but no longer, since of such an estate he could not be tenant by the curtesy because it was not descendable. 1 Lom. Dig. 55-56 [47-48]; see also *Boothby v. Vernon*, 9 Mod. 147, 2 Eq. Abr. 727, pl. 3. Under the latter, if his wife chose, he might have the same enjoyment continued durante viduitate sua (but no longer); for, although she (as being a feme covert) could not, either by deed directly from her to him, or by will, give him such benefit, for want of express power to that effect conferred by her father's will, yet such purpose was capable of accomplishment; it might have been effected by deed from her and him to some third person, to be conveyed back for any modification of estate agreed upon, within the limits (in point of duration) of her original estate. *Shepperson v. Shepperson*, 2 Gratt. 501; *Shearman's adm'r v. Hicks*, 14 id. 96. If no such conveyance were made, and she died leaving a surviving husband, her interest in the land during his viduity would be disposable as personal assets of her estate. V. L. 1803, 1814, c. 92, s. 54; V. C. 1849, c. 130, s. 18. And that these things would not have been at all different in regard to Sally's husband, if she had married and left a widower, I conceive to be sufficiently clear without quoting authority. Yet I beg leave to mention *Goodtitle v. Wodhull*, Willes 592, for the sake of its bearing both on this and on at least one

other question in this case. [Mr. Green particularly called attention to the penultimate paragraph of the court's opinion in p. 596.]

But while I contend for this, because it seems to me the correct construction;
254 I cannot perceive how my *cause would sustain detriment from admitting, that the will gave an estate in remainder, *durante viduitate*, to the respective surviving husbands (should there be such) of the testator's daughters; since it would seem impossible, that such a limitation to them would any way tend to make the several devises to the respective daughters import an estate tail, or more than a life estate, in these latter. Whether regarded as a contingent provision made by the testator for possible widowers of his daughters, or as a contingent elongation of their respective estates in order to give to them, respectively, the power of making (at their pleasure) such a provision; neither way could it give, or tend to give, any one, an inheritable estate.

Counsel opposite, however, insists that, as Sally Stone might have married a man not born till after the death of her father, so that (according to him, the Rule against Perpetuities would have forbidden her children of such marriage taking as purchasers; therefore "the court will sacrifice the testator's minor intent, that they should take by purchase," in order that it may—as it "will, under the doctrine of approximation or *cy pres*,—give effect to his paramount intent, that all the issue of his daughter should take; by giving an estate tail to such daughter, so as to enable the grandchildren to take derivatively through her, though they cannot be allowed to take in the particular mode pointed out by the testator."

Now the first remark I make upon this argumentation is, that it adroitly substitutes for what is certain,—namely, that the testator designed bounty for his daughter's children, if she should have any,—what is worse than uncertain, namely, that he designed bounty to her grandchildren and more remote descendants,—in three words, all her issue; whereas this latter intention (imputed) not only does not appear with the plainness of a perfect demonstration,

255 but moreover is so far *from it, that, according to the rule of the law prior to 7 Oct. 1776, the very contrary thereof does appear. For, according to that rule, if Sally's children had actually become possessed, under the will of their grandfather, still their children would have taken nothing; as is proved by Wild's case, and the half dozen other English cases which I have heretofore grouped together as supporting the decision in that case.—My second remark on it is, that, this unauthorized portion of the premises being subducted, the rest of the argument collapses. The will of Caleb Stone does not contain an attempt at giving, contrary to legal inhibition, an estate by purchase to the children of a person not in esse when it was itself executed;

for it requires that they shall be the children of a person (to wit, his daughter named) who was then in existence. And, if we suppose, *argumenti gratia*, that what it does attempt is equivalent, because such children may be the progeny of a father not himself born until after the death of the testator; what then? The book quoted by the counsel in support of his contention on this point, Smith's Original View of Executory Interests, does not sustain him: For, after stating the law of the cases, first, "where a testator devises an estate tail to a grandchild, by a child not yet born at the testator's death, to take by purchase, and he appears"—by demonstration plain must of course be meant, as has been before shown,—"to have intended that all the issue of such unborn child should take, so far at least as the rules of descent will permit," (§ 534, 535;) and, secondly, "where a testator attempts to create a perpetual succession of life estates in favor of children in esse and more remote descendants," (§ 536a;)—within neither of which classes does the present case range itself; it proceeds thus (§ 536b,) "but, where there is a single intent to create a limited number, only, of life estates in succession, not warranted by the Rule against Perpetuities, an

256 estate tail will not *be given to any of the persons intended to take life estates." And then an illustrative case is stated as follows: "A testator gave an estate to his son F., during his natural life; and, after him, he gave it to his eldest or any other son after him, during his natural life; and, after them, to as many of his descendants, issue male, as should be heirs of his or their bodies, down to the tenth generation, during their natural lives. It was held, that F. took for life only; Lord Ellenborough, C. J., observing, that in *Robinson v. Robinson*, 1 Burr. 38; *Doe v. Applin*, 4 T. R. 32; *Doe d. Bean v. Halley*, 8 T. R. 5, expressions were used denoting an intention that the lands should continue in the descendants of the first taker as long as there were any, without specifying or marking what estates such descendants should take; that this case, however, was not a case of a particular and a general intent, but a case of a single intent to create a succession of estates not warranted by law. *Seaward v. Willock*, 5 East 198." (See also 1 Jarm. Wills 263-264.) Among authorities cited in that case is one which I have heretofore mentioned from Willes 592, *Goodtitle v. Wodhull*, very forcible to the same purpose; to which I will add one other, the last that I shall state under this head. It is *White v. Collins*, Comyns 289, accurately stated in 3 Lom. Dig. 347 [239-240], from 6 Cruis. Dig. 362-3 [296-7], as follows: "Francis Harvey devised in these words: 'I give to my son Frank Mildmay my farm called East House Farm, &c. to enjoy the rents and profits thereof during the term of his natural life, with power to make a jointure of all or part, if he should marry; and after his death and jointure (if any be made) to the heir male of his body

lawfully begotten, during the term of his natural life; and for want of such heir male, I give the said farm to my son Carew Mildmay, &c. It was agreed, that the limitation to F. M. to enjoy and take the profits during his *life, and after his decease to the heirs male of his body, would make an estate tail. So, if it had been to the heir male of his body, in the singular number, where nothing appeared which explained the intent to the contrary. But here the intention appeared to be, that such heir male should have the land only for life, which showed that the testator did not intend that those words should be taken as words of limitation; and nothing appeared in the nature of the expression, which implied that they should be so. Heir male, or next heir male, were words of purchase,"—certainly, however, not more than child or children,—“and, in this case, where the devise was to F. M., and after his decease [and termination of the jointure, if he made any,] to the heir male of his body, during his life, the express limitation, during his life, showed that he intended his son should have it in remainder for his life only; and, when he devised it over, for want of such heir male, to C. M., this did not import that C. M. should not have it [should wait for it] till F. M. died without heirs male generally [i. e. indefinitely], but [that he should have it] for want of such heir male who was to have it for life.” The case was twice argued; once, with great ability, by Comyns himself, who has reported his own argument at considerable length, (pp. 291-301;) and the judgment, rendered in an inferior court, was unanimously affirmed. To the foregoing abstract of the case let me add, the special verdict found that the testator died leaving Carew Mildmay his eldest son, and Francis (the first taker in the devise which has been recited) his second son, who was not married nor had any issue; that he subsequently suffered a recovery for the purpose of converting his estate into a fee simple, and then devised it by his will, and died; and then the contest arose between his devisee and the remainderman in his father's will, to wit, Carew Mildmay; which terminated *in the manner we have seen.

The parallel between that case and ours, upon the point at present under discussion, appears to me to be absolutely perfect: For there, as here, a father devised land to one of his younger children, who was then, and at the death of the testator, childless and unmarried, for life, with power to settle the whole land upon any wife he might afterwards have,—though she might not be born until after the death of the devisor,—for the term of her life, such being the well-known nature of all jointures; and after his death and the termination of such jointure, in case any such were made, to the descendant, yet unborn, of the first devisee, who should be his heir male, during the term of his natural life; and, for want of such issue male, over. It is true, the limitation, in our case, to Sally

Stone's children, “if she has any,” is not expressly for life only; but counsel opposite contends it must be so construed, and this contention is absolutely necessary for his success; since, if they were construed to take a fee simple, that would effectually confine Sally Stone to the life estate nominated in the will for her, as cases almost innumerable have settled. Besides the many heretofore cited, may be mentioned a quite recent one, Crofts v. Middleton, 35 Engl. L. & E. Rep. 466. In that case, of White v. Collins,—to pursue and complete our parallel,—the first taker, claiming to be tenant in tail, undertook to devise the land, after a recovery suffered for the purpose of converting his fee tail, and, if he had had a fee tail, with the effect of converting it, into a fee simple; as, in our case, according to the contention of appellants, Sally Stone did, under general words in her will, devise the land in question, after her fee tail therein, under the law aforetime, had been converted into fee simple, by the statute, the precise effect of which, upon estates tail coming within its operation, was, in the words of Judge Lomax, (1 Lom. Dig. 34 [28],) “the *same as if the tenant in tail had suffered a recovery:” And the devisee of the first taker in that case missed of getting the land, because Frank Mildmay took no more than an estate for his life with a power to jointure any wife he might afterwards have, upon the whole land, for her life; as, in our case, the devisee (so-claiming-to-be) of the first taker must likewise miss of getting the land, because Sally Stone took no more than an estate for her life with power (in effect) to “jointure” any husband she might afterwards have, upon the whole land, for his life, provided he should not again marry.

Thus far I have conducted the argument on my part, as if the case of Smith v. Chapman, 1 Hen. & M. 240, never had been decided. Concerning it Professor Hoffman, in the first edition (1817) of his Course of Legal Study, remarked,—and he retained the remark in his enlarged and carefully revised second edition (1836), p. 186,—“this case is the most valuable case to be found [on the subject to which it relates] in the American reports.” And it certainly was not because I dissent at all from that estimate, that I have hitherto forbore to mention the decision. I had a better reason. Opposite counsel devotes to it a long discussion, concluding with an assertion that “the case has been overruled;” as he had begun with asserting that it “is the only one to be found in the books English or American, which tends to sustain the proposition that the testator's daughters took, under the will here, only estates for life and not fee tails.” And I was minded to show, first, that there was abundance of other authority tending in that direction with irresistible force; and, secondly, that therefore the decision (in Smith v. Chapman) ought not to have been overruled; as I now counter-asseverate that it has not

been. The true point decided in that case is not accurately represented in the marginal abstract of the reporters; and
 260 fault *may well be found with their representation. It is as follows: "A testator makes three devises (to his two sons and [his] daughter, severally), for the life of each devisee; and after his or her decease, to his or her child or children; if none, to the other two devisees for life, and then to be equally divided between their children; and [he] annexes a codicil, in which he says that, if all his children should die without issue of their bodies, his wife living, the life estate should go to his wife during her natural life, and, after her death, remainder to other persons. The two sons and daughter take each an estate for life; and the remainders over are good, and may take effect; the contingencies not being too remote." Now the single question before the court there was, whether one of the sons, who had died never having had a child, was seized of a mere life estate, or of some larger estate in the lands devised him; the suit being brought by his relict and her second husband to recover dower therein; and all that the court, affirming unanimously Chancellor Wythe's decree, could decide or affected to decide, was that the female complainant's late husband had not been seised of an estate whereof she was dowable; in other words, that his estate had been only for his life. And all that was said by any of the judges, about the limitation over in the codicil, was that it did not import an indefinite failure of issue, but a definite failure, to take place in the lifetime of the testator's surviving wife, which the judges interpreted to mean a failure at the death of each first taker, respectively, happening in the lifetime of his own (the testator's) widow; and not, even then, a failure of issue, in the larger sense of the word, but a failure of children. This appears as to Judge Tucker, 1 Hen. & M. 292, and as to Judge Roane, *ibid.* 298; the other two judges remaining silent as to this point: And so the opinion of the court was understood, when another case upon
 261 the *same will was recently before the present judges. On that occasion Judge Joynes, in whose opinion both his associates concurred, said, speaking of the same codicil: "There the testator speaks of the contingency of all his children dying 'without issue of their bodies,' in general terms, where the meaning was 'without issue of their bodies' (children) living at their death, as was held by this court in the case just mentioned." 17 Gratt. 363, *Tebbs v. Duval*. Interpreted thus, that will and its codicil contained nothing which could enlarge the life estate expressly given the first takers into an estate tail, as the law was *aforetime*; according to very numerous authorities I have already cited, and some others, cited in that case, for which reason I purposely premit them here. Whether it was a correct interpretation of the particular expressions there used, is an inquiry wholly foreign to the

present discussion, since Caleb Stone's will contains no limitation over upon either a definite or an indefinite failure of issue. For this reason I shall not now consume time in debating that question, or in attempting, formally, to prove what seems to me clearly demonstrable, that that interpretation was in accordance with numerous authorities, and all the best, which were then extant.—To show that upon the topics hitherto discussed other American authorities may be cited not less favourable to my side than *Smith v. Chapman* is (and is confessed by counsel opposite to be), I will merely refer to *Warner v. Mason*, 5 Munf. 242; *Grim's Appeal*, 1 Grant 209; *Walker v. Milligan*, 45 Penns. St. Rep. 178; *Tongue v. Nutwell*, 13 Maryl. Rep. 415; *Buise v. Dawes*, 4 Richards. Eq. Rep. 421; *Corbett v. Laurens*, 5 *id.* 301; *Reeder v. Spearman*, 6 *id.* 88; *McCorkle v. Black*, 7 *id.* 407; *Miller v. Hurt*, 12 Georg. Rep. 357.

If it has (as I trust it has) now been demonstrated, that there was not, under Caleb Stone's will, an estate tail "as the law was
 262 *aforetime*;" then we have finally *done, in this case, with that *aforetime* law; which had a quasi-continuing existence, for the sole purpose of bringing within the universal "common recovery," created by statute among us, such limitations of estates as would "aforetime" have created estates tail. No such estate being conferred, that *aforetime* law subsides into pure and absolute non-existence as constituting any part of the *lex temporis*, under which Caleb Stone's will was made. And therefore the remaining questions in this case are to be considered and treated, as if the testator had said, "I lend to my daughter Sally (certain property, real and personal, described,) to be possessed," &c., &c., "and, at her death and the death or after-marriage of any husband she may leave surviving, to be equally divided among her children, if she has any, to have and to hold to them, their heirs, executors, administrators, and assigns, forever, and, if she has none, then to be similarly divided among all my children, to have and to hold, in like manner, to them, their heirs, executors, administrators, and assigns;" Since, under a statutory provision to which I have before adverted as in force here from 1 Jan. 1787, this was as much the legal operation and effect of his gifts over, as if he had expressed them in *totidem et iisdem verbis*.

According to numerous authorities which have been before quoted, Sally Stone's children, if she had had any to take, would have taken as purchasers; so that their fee-simple in remainder would not have coalesced with the life estate given her, and thus invested her with the fee simple under the continuing operation of the Rule in Shelley's case, which was in force among us until 1 July 1850, (V. C. 1849, c. 116, s. 11; c. 216, s. 1;) and was not less potential to convert an express estate for life in the first taker into a fee simple, where the remainder was (in legal effect) to such

taker's heirs general, than it was to convert a like estate into a fee tail, where heirs of the body were the nominated remainders. *But were this otherwise, it would not affect prejudicially the limitation over in favor of the testator's children; which then would take effect as an executory devise after a previous limitation of the fee simple, (not the less because such previous limitation was, not direct, but indirect, and through the operation of the Rule in Shelley's case, as,—if it were not altogether needless,—might be proved from a case which fortifies divers others of my positions, especially respecting the construction of the word "children," *Murdock v. Shackelford's heirs*, 1 Brockenb. 130;) though such limitation would be totally cut off, if the first taker had a fee simple by conversion from a fee tail, under our statute, in consequence of the decision in *Carter v. Tyler*, 1 Call 165 (with which accords the decision, upon a like statute of New York, in *Lott v. Wykoff*, 1 Barb. 565, 2 Comst. 355;) that the courts will not, for the sake of avoiding this effect, construe that to be an executory devise grafted upon a fee simple, which before would have been a remainder limited upon an estate tail; which decision has ever since governed, and will (doubtless) always continue to govern, in cases arising upon deeds made, or upon wills of testators who died, before 1 Jan. 1820. Touching deeds subsequently made, or wills of testators who have died since, a law, which then took effect and still continues in force, has abolished, in this respect, all distinction between such metamorphosed estates tail and what I have heretofore called a natural fee simple. R. C. 1819, c. 99, s. 25, 36; V. C. 1860, c. 116, s. 9. In the sequel, at a place more convenient for introducing such a discussion, I shall prove (as I trust) that the limitation to the testator's children would be good as an executory devise, if it were necessary so to regard it. And therefore, for the present, I conclude, that Sally Stone took, under her father's will, nothing she could devise.

2. As to the slaves: The question does not necessarily stand on the same legal footing as in regard to the real estate, though the testator by his will lends her the girl Phoebe and her future increase "to be possessed upon the same terms and condition as" she would "hold" the land which he lent her.

By the respondents, in their answer, it is insisted that this gave her an estate in the slaves for no longer period than her own life; with a limitation over, to her children, if she had any, or, if she had none, then to the testator's, to take effect at her death, immediately, without waiting for the death or after-marriage of any surviving husband, whom she might leave. While, on the other hand, in their petition of appeal, appellants insist that she took in the slaves either an absolute and unqualified ownership in the nature of a fee simple, or else an ownership in the nature of a fee simple, only qualified by limiting over the property to children of

her own, or alternatively to the testator's children, at her death and the death or after-marriage of such husband, and that, this limitation over being (according to their contention) void for remoteness, therefore her estate remained absolute, discharged of such limitation over. I cannot think that any one of all these contentions, is maintainable. Of course, I do not insist that that of the respondents is wrong. I shall be well pleased, if the court shall think it is right. But if the court shall concur with me, that it is not, then, upon that hypothesis, underlying all this part of my argument, I shall endeavor, upon what seems to me the sound interpretation of the will, to defeat the pretensions set up for appellants.

That there was a limitation over, valid or invalid, of the slaves as well as of the land, seems to me to be too manifest to need proving. And assuming it to be so, the first question in order is, what manner of persons could take under the description of children either of Sally Stone or of the testator?—As to which, I take it to be

265 *perfectly settled that none but children, properly so styled, could; that grand-children or more remote descendants could not. It is true that Judge Tucker, in *Smith v. Chapman*, 1 Hen. & M. 290, speaking of the word "children," says: "It has, in a few cases, been construed to mean grandchildren, and even great-grandchildren;" adding, however, "but this construction is to be admitted only where no other construction can be made." He had before delivered himself more at large to the same effect. *Bernard v. Hipkins*, 6 Call 103. And in *Doe d. Thomason v. Andersons*, 4 Leigh 127, there is a similar dictum of President Tucker. But the cases in England (and neither of the Judges Tucker cites any other) have been examined with perfect accuracy and precision by Mr. Jarman; who has shown that even in wills the word "child" never has been allowed, and consistently with the decisions cannot be allowed, to comprehend a grandchild or (a fortiori) any more remote descendant, except in two cases; one, where the testator shows, by the context, that he has used the word as synonymous with "issue;" the other, where the devise or bequest is to the children of A., a person then, to the testator's knowledge, (which knowledge must be proved and cannot be presumed,) dead, leaving only grandchildren: And the later English editors of his work have shown that his conclusions are corroborated by decisions in numerous cases subsequent to the time of his writing. 2 Jarm. Wills 69-73, 1st edit.; 135-139, 3rd edit. Nor can I remember any case in Virginia, wherein the word "child" has been allowed larger scope; while it has been confined strictly to the natural signification, in the case of a statute, (*Bernard v. Hipkins*, 6 Call 101;) a special verdict, (*James v. McWilliams*, 6 Munf. 302;) and a will. *Mois v. Owen*, 2 Call 520; *Smith v. Chapman*, 1 Hen. & M. 240; *Tebbs v. Duval*, 17 Gratt. 349; *Hender-*

son v. Saunders, 1 Sands's Quart. Law
266 Rev. 27, 29-30. *And in our case there is a total absence of every circumstance that has been, at any time, thought favourable to the construction which would embrace grandchildren; since here there was no progeny (save in prospect) of Sally Stone, and there were plenty of other children of the testator both at the date of his will and at the date of her dying never-having-been-married and sine prole.

What manner of persons they must be, who could take under the description (in this will) of either his or her children, being thus ascertained; the next inquiry is, what persons (of that sort) were to take by force of the limitations contained in the clauses we are considering. And here it must be noticed, that those clauses contain no gift to the children of either Sally Stone or the testator, but what is contained in the "direction to divide the subject among them upon the happening of a particular event," for which reason, in the words of Judge Joynes on a recent occasion, "only such can take as answer the description at the period of division, unless a contrary intention can be collected from the will." *Tebbs v. Duval*, 17 Gratt. 364; citing *Leake v. Robinson*, 2 Meriv. 363; *Jones v. Mackilwain*, 1 Russ. 220; and referring also to 2 Redf. Wills 621. In that case the principle was a substantive and important, if not an indispensable, ground of the decision; and it may be regarded as perfectly settled. In 11 Engl. L. & E., Rep. 126, *Peard v. Kehe-wich*, (also reported in 15 Beav. 166,) Sir John Romilly M. R. said that, in *Leake v. Robinson*, "Sir Wm. Grant held, no doubt in accordance with all former and subsequent decisions, that there was no gift until" the period appointed for division, "and that the gift was only contained in the words" directing it. So here. And, as I shall assume now, prove hereafter, there is in this will nothing which indicates the presence of any contrary purpose. Let

267 us, then, ascertain by this standard who would, *under the clauses in question, take, were there no Rule against Perpetuities; and this upon the hypothesis aforementioned. Very clearly, no children of Sally Stone could, unless they were alive at the death of herself and moreover at the termination of her surviving husband's widowhood; and, as it was possible that the latest of these events might not happen within the compass of duration allowed by the Rule (which does exist) against Perpetuities, it follows that the limitation in favour of her children, as touching the slaves, was ab initio void. A clear authority to this effect is *Hodson v. Ball*, 14 Sim. 558, 574. See also 34 Barb. 594, *Brown v. Evans*; 8 Gray 86, 98-99, *Sears v. Russell*. But it does not thence follow necessarily, or at all, that the limitation in favor of the testator's children was void also. Perhaps it would have been, had he given to them upon the happening of the contingency designated; because then, the gift being to them and (in legal

effect, as we have before seen), their heirs, executors, administrators, and assigns, it might have taken effect, by the terms of the gift to them, and in absence of any Rule against Perpetuities, no matter at how remote a period the contingent event, on which it was to depend, should happen; and so the limitation would, perhaps, have come within the doctrine of the case of *Proctor v. Bp. Bath & Wells et als.*, 2 H. Blackst. 358, where the limitation condemned for remoteness was to the defendant Moore and "his heirs and assigns forever." But the gift here being in fact, according to the sound legal interpretation of its terms, a gift to such alone of the testator's children as should be living when the complex contingency should happen whereon the gift was dependent; the necessary conclusion is, that abstractedly from any Rule against Perpetuities, that contingency must happen within a life in being at the testator's own death or within the

time allowed for gestation afterwards,
268 to wit, the life of one *of his children, or else the gift must absolutely fail, by its own terms. This avoids all excess of remoteness, and perfectly satisfies the Rule.

The point thus presented is (in effect) noticed by Mr. Jarman, as one which he believed not to have been, at the time of his writing, "the subject of positive decision; namely, whether a devise which, from the nature of the qualification superadded to the devisee,—as in the instance of a gift to children living at the death of the testator,—can never extend beyond the period allowed by the rule of law, is good, though limited to arise upon an event which might, abstractedly considered, happen after that period, as an indefinite failure of issue; in other words, whether a bequest in a will made before 1838,"—when a statutory provision took effect in England, similar to that introduced at our revival of 1819, contained in R. C. (of that date), c. 99, s. 26, which took effect 1 Jan. 1820, and has continued in force ever since, V. C. 1860, c. 116, s. 10,—"if A. shall die without issue, to B. if then living, is to be regarded in precisely the same light as a gift in case A. shall die without issue living B." 1 Jarm. Wills 256, note a. The rest of his remarks there, as given by the editors of the third London edition of his work, blended with their own additions, (1 vol. 263,) are as follows: "Upon principle, it is difficult to perceive any solid difference between the two cases; and the opinion of Mr. Fearne seems to have been in favour of the validity of the former limitation, (Butl. Fearne 488, 500, n. ;) though none of the cases cited by this distinguished writer go directly to the point. Sir Lloyd [afterwards Lord] Kenyon, in *Jee v. Audley*, 1 Cox 326, expressly states such a limitation to be good. Sir W. Grant, though at one time he expressed doubts on the subject, (17 Ves. 483, *Barlow v. Salter*;) seems latterly to have been of the same opinion, (2 Meriv. 133, *Massey v. Hudson*;) and we have

the authority of Lord Brougham
 269 *on the same side. 2 Russ. & M. 406, Campbell v. Harding." All these authorities, however, were only dicta; but, since the date of the latest of them, the precise point, in substance, has been decided in England. In the case of Greenwood v. Verdon, 24 Law Journ. Rep. N. S. (or 33 Law Journ. Rep.) Ch. 65, the facts were as follows: "A testator by his will, after giving certain legacies and annuities, devised and bequeathed [all the rest of his personal, and all his real, estate] to his wife and his son J. V., during their lives, and after the death of his wife to his said son J. V. and to his heirs and assigns forever; and from and after the decease of his, the testator's, wife, and of his said son J. V. without issue, he gave and devised all the residue of his worldly property, both real and personal, "to be equally divided amongst the then surviving legatees, share and share alike:" And it was held that J. V. took a fee simple, subject to an executory devise over in case he should die without issue in the lifetime of any of the legatees, and not an estate tail; the contest being between his son, claiming as issue in tail, and his devisees in trust. In delivering his opinion upon the case, Sir William Page Wood, V. C., (since chancellor with the title Lord Hatherley) said: It is "clear that, under the words 'dying without issue,' unless there is something to restrain them, the testator must be taken to have intended an indefinite failure of issue, and that the limitation which was first made to the son in fee would necessarily be cut down to an estate tail. The whole point in this case arises upon the question, whether or not there are words in this will sufficient to limit the words 'dying without issue' to any particular definite period of failure of issue. I will say at once, that looking to the authorities, especially the case which is first of all reported as Campbell v. Harding, 2 Russ. & M. 390, before Lord Brougham, and afterwards under the name of Candy v. Campbell, 2 Cl. & Fin. 421,
 270 8 Bligh. *N. S. 469, in the House of Lords, I am bound to construe the words 'then surviving' to mean [surviving] 'at the time of the failure of issue of John the son;' the case therefore becomes narrowed to the point, whether or not, so construing the words, there is sufficient upon the face of the whole will, to show that a definite period was fixed, within which the failure of issue should take place." "Where the limitation is, upon death without issue, among the then surviving legatees, that is to say, to those parties expressed and named in the will who shall be surviving at that period, it must be a personal and not transmissible interest,"—not transmissible to the representatives of one deceasing before such period,—“and the only interest which the legatees [so described] could take would be an interest which should accrue to them from the circumstance of their having survived the period of the failure of issue; and, therefore, the period at which the par-

ties are to take being the period at which the failure of issue takes place, I cannot look upon that as an indefinite failure of issue, but as a failure of issue to take place in the lifetime of the several parties who are so named as legatees in the will." "As regards this particular case, it is clear that the failure of issue as described in the gift over points to a period clearly within the legal limitation. It is to his then surviving legatees, share and share alike, who are all individual persons named in his will, and the true construction I apprehend to be this: 'I give to my son in [fee simple], and, if he dies without issue and there are then any legatees under my will surviving, then I give it over to those legatees.' " And having adjudicated this to be the true construction, he decided without difficulty that the fee so given was not reduced to an estate tail, but remained a fee simple, subject to a valid executory devise over. And upon this and some other authorities, which I cited to them, the two judges
 271 who then composed *the court decided the case of Norris v. Johnson, 17 Gratt. 8. That case arose upon the will of a testator, who had twelve children, and directed his estate to be distributed in twelve equal parts among them, and then said: "It is my will and desire, that if any of my children die without heirs, for their part to be equally divided amongst all my children then living." And it was held, that this was a good executory bequest in favour of the children surviving one who died without issue, regardless whether the failure of issue took place at the death of the child so dying, or afterwards, provided it were in the lifetime of any child of the testator; as Judge Moncure explained distinctly in delivering the opinion of the court.

Now the true construction of Caleb Stone's will, in view of what has been said, I take to be the same as if his words had been these: "I lend to my daughter Sally" certain (described) property, real and personal, "to be possessed by her and any husband she may have, during her natural life and the natural life or widowhood of any husband she may leave surviving; and at her death and the termination of such surviving husband's widowhood by death or marriage, if that combination of events shall happen in the lifetime of any of my children, then to be divided among all my children then living, unless there shall also be then any child or children of Sally, in which case this limitation in favor of my children shall entirely fail of ever having effect in their favor; but if there shall be living any child or children of Sally, when she has died and her surviving husband has also died or again married, then to be divided among them, if more than one, else to go to such only one, no matter whether any of my children shall be then living or not." [In vindication of this as a sound legal construction Mr. Green, additionally to what had been before said, cited and commented upon the following author-

272 ities: 2 *Jarm. Wills 744, (reg. 19;) Spark v. Purnell, Hob. 75; East v. Cook, 2 Ves. sen. 32; Covenhoven v. Shuler, 2 Page 123, 130; Welcden v. Elkington, Plowd. 522; (with reference to the state of the law which existed then, as is shown in Manning's case, 8 Rep. 94 b, and Lampett's case, 10 id. 46 b,) Paramour v. Yardley, Plowd. 540; but especially the remarkable case of Green & ux. v. Hayman Rook & als., decided by Lord Nottingham, imperfectly reported in any one book, yet quite intelligible by combining the reports found in 2 Chan. Cas. 10, and in 2 Chanc. Rep. 169.] The latter combination of events, to wit, the termination of Sally's life, and of her surviving husband's widowhood, in the lifetime of some child of Sally's, might happen, after the death of all the testator's children; so that I see nothing in the will to require it shall happen in the lifetime of any, or within twenty-one years (plus even twenty-one years more) after the death of all, born in the lifetime of the testator. But the former combination of events, to wit, the termination of Sally's life, and the termination of her surviving husband's widowhood, either or both of such terminations being subsequent to the final extinction of her issue, and all happening in the lifetime of some one or more of the testator's children,—this combination of events—could not possibly happen but in the lifetime of one or more persons, described in the will, living at the death of the testator, and actually born (at furthest) within a period of gestation thereafter. And therefore the limitation over to the testator's children must be within the limits allowed by the Rule against Perpetuities.

This argument is assailable in one or the other of only two modes. First: As we have before seen, when Judge Joynes states the rule to be, "that where there is no gift to the objects, except in a direction to divide the subject among them" &c., 273 "only such can *take as answer the description at the period of division;" he subjoins a qualification, "unless a contrary intention can be collected from the will;" and it may be surmised that, in spite of all which has been heretofore said, a construction should be put on this will, in consequence of the testator's saying "among all my children," that would take in not only those living when the contingent division was to be made (if ever made), but also the descendants of such as were then dead or some representatives of them. This was not unperceived before, but a notice of it was purposely postponed until now; because the present seems the most appropriate place for suggesting, that such a construction would be perfectly suicidal, and, so far from accomplishing the testator's wishes in favor (supposing argumenti gratia that they were in favor) of more persons than his children living at the period of division, it would effectually frustrate his wishes in favor of any. Now, though "the rules of construction cannot be strained to bring a devise within the

rules of law;" yet says Jarman, (On Wills, vol. 2, p. 743,) "it seems that where a will admits of two constructions, that is to be preferred which will render it valid;" and in divers passages (of the same work, vol. 1, pp. 257, 260 et seq.) he shews that this, not only seems, but is certainly so. Quite as strong, perhaps even stronger, in the same direction, are the doctrines and decisions of our cis-atlantic courts, (Pond v. Burgh, 10 Paige 155; Mason v. Jones, 2 Barb. 144; Butler v. Butler, 3 Barb. Chan. Rep. 315; Dubois v. Ray, 35 N. Y. Rep. 165-166; Edwards v. Bibb, 43 Alab. Rep. 673-674;) in one of which (Pruden v. Pruden, 14 Ohio St. Rep. 254), in delivering the court's opinion upon a will, it has been said, "when an instrument of any kind is open to two constructions, the one consistent [with], the other repugnant to, law, the former must always be adopted," (Co. Litt., 42 a-b; Case of Churchwardens of St. Saviour's, 10 Rep. 67 b; Horton's *case, cited 3 Bulstr. 193, 1 Roll. Rep. 398; Atkinson v. Hutchinson, 3 P. Wms. 260; Archibald v. Thomas, 3 Cowen 290; 2 Pars. Contr. 1st edit. 12, 15-18;) and this, it may be added, "ut res magis valeat quam pereat," which, during many centuries, has been repositied among the maxims of our jurisprudence. On the present occasion, however, I am content with the more moderately pronounced doctrine, on which Knight Bruce, V. C., acted in Turner v. Frampton, 2 Collyer 336. "Ought" said he, "the word 'survivor' to be read other?" The bequest here would, I am apprehensive, be destroyed [under the Rule against Perpetuities] by such a reading; a consequence sufficient, as it seems to me, to prevent a departure from the correct and simple sense of the word." All I ask is an adherence to "the correct and simple sense of the word," children, in this case: As to which, besides authorities heretofore cited, some very recent and very strong may be seen in 2 Metc. Ky. Rep. 466, Churchill v. Churchill; 4 id. 339, Sheits v. Grubbs; 30 Georg. Rep. 167, Willis v. Jenkins.—Second: It is objected by counsel opposite, that as the limitation over to Sally Stone's children is void for remoteness, therefore the limitation to the testator's children must also be void; and Mr. Pettit cites a dictum of Judge Green as conclusive upon this point. The doctrine thus broached being of extensive consequence, and involved in obscurity, nay more, in contradiction, by the language used respecting it in our books; I shall doubtless stand excused for discussing it with the fulness necessary towards a satisfactory solution.

The manner in which the question arose in the case of Griffith v. Thomson, 1 Leigh 321, was as follows: George Thomson, having two sons and a daughter, legitimate, and a natural son, by his will in 1803, shortly before his death, made provision for each, and then added: "In case all 275 my children by my wife die *without heirs," which, as the court held, was

demonstrated by the context to mean issue, "my natural son Charles shall fall heir to my whole estate; and in case he also die without heirs, my estate shall be divided into six parts, and three-sixths shall go to my father's brothers that are alive, and the heirs of those that are dead (receiving no more among them than my father's brothers would have received had they been living,) two-sixths to go to C. Leland, S. Leland, L. Leland, H. Gaskins, and T. Legg, and the other sixth to go to my wife to be disposed of as she may think proper; but my wife is [first of all] to have the use of the whole so long as she lives, if all her own children," the testator's legitimate children, "die without heirs." All the testator's sons, legitimate and illegitimate, died after his death, without issue living at their respective deaths, (as the reporter's marginal abstract seems to say, the report is altogether silent as to this fact); his wife also died after him; all of them in the lifetime of his daughter, who moreover survived all her father's paternal uncles, and all the Lelands, and Gaskins, and Legg; and then died issueless, (as the reporter's marginal abstract states, in a silence of the report as to this fact also;) leaving a will, by which she gave the bulk of her estate to Sally W. Griffith, whom she constituted executrix thereof. And upon a contest, respecting only the personalty, between the latter, in her character of legatee and executrix, on the one hand, and on the other a surviving child of one of the testator's paternal uncles who died before him, and the personal representatives of another child of the same uncle, and the respective personal representatives of the testator's other paternal uncles, who survived him, and of his widow, and of the three Lelands, and of Gaskins, and of Legg, the three judges of the Court of Appeals who sat in the case, reversing the decree of the Chancellor, held that the limitation after the death of the natural son without *heirs, under which alone the parties here secondly mentioned could claim, was void in its creation, for remoteness; all of them concurring, that it was after an indefinite failure of heirs (issue) of the natural son. And Judge Green, whose opinion alone it is at present material to consider,—the case being irrelevant, but for his dictum relied upon by Mr. Pettit,—in the first place gave unanswerable reasons why the court should so decide; unless, indeed, it was an answer to them that the rule "stare decisis" required an adherence to the bad, but repeated, decisions of the same court (not the same judges) reported in 6 Munf. 174, 187, 301, and Gilm. 194, especially the decision in *James v. McWilliams*, 6 Munf. 301; and which decisions, it is probable, had governed the Chancellor in making his decree then undergoing revision. The main ground of all those previous decisions, and the sole ground of that in *James v. McWilliams*, was, that the respective limitations over were to persons in being in the lifetime of

the several testators, without any words indicating a purpose of these latter to give an interest to the former of such kind as that, upon their several deceases, it would be transmissible to their respective personal representatives. In opposition to which Judge Green showed, first, that without such words, a bequest of personalty, not affirmatively restricted to some less interest, would carry the whole property therein owned by the testator, as effectually as an express gift to the legatee and his executors, administrators, and assigns, would; so that, in case of his death, it would be transmissible to his personal representatives, not only where he became possessed thereof in his lifetime, but also where he died (if after the testator's death, so as to preserve the bequest from lapsing,) even before the contingent event had happened by which his title would be perfected—wherever the bequest to him was legally valid; a plain consequence whereof would seem *to be, that the decisions aforesaid reported in 6 Munf. and in Gilm., especially that in *James v. McWilliams*, rested upon untenable ground: And, secondly, that if the judges were to be regarded as having decided in those cases or any of them, that where a bequest expressed in that manner would not otherwise be legally valid, there it must be understood to have been given upon a failure of issue during the lifetime of such legatees over; then, apart from a serious objection that this would be "straining" the rules of construction for the sake of evading the Rule against Perpetuities, another perhaps more serious objection confronted the claimants under the bequest over, to wit, that the contemplated event, which was to give them an interest, had not happened, since there had not occurred, in the lifetime of the legatees, nominated to take under that limitation, the dying without issue which was to precede it; the daughter of the testator having outlived them all. And then, after giving these reasons, in the first of which all the three sitting judges, and in the second of which two of them (silente quoad hoc the third), expressly concurred, for reversing the decree; Judge Green proceeded to give yet another reason for it, as to which both of his companions were silent. If, therefore, this merely cumulative argument, (see *Williams v. Fry*, T. Raym. 237, 1 Mod. 86; *Pollard v. Baylor*, 6 Munf. 437;) of a single judge, did contain any doctrine that were unsound, "it ought not to preoccupate or prejudicate a judgment." *Foster v. Jackson*, Hob. 53-54. But, so far from containing anything unsound, Judge Green's words, if properly construed, with reference to the case then before him, (Ram on the Science of Legal Judgment 43-44;) furnished a ground upon which, exclusively, the decision made might have been solidly rested, and therefore, perhaps, ought to have been rested, since thus the court would have avoided calling in question, unnecessarily, their predecessors' *decisions. He said (1

Leigh 338): "There is another ground, on which all the limitations over, in this clause of the will, were clearly void. That to the testator's natural son, which preceded all the others, was accompanied with words of perpetuity: If all the other children died without heirs, he was to fall heir to the whole estate; and if he died without heirs, then over to those now claiming. These words give him, upon the expressed intention of the testator, as absolute an estate as if the gift had been to him and his heirs, in terms. So that the limitation over to him, upon a general failure of issue, was clearly void. And, where a preceding limitation is too remote, all that succeed it, even although limited to take effect in good time, are defeated." Which, being interpreted *secundum subjectam materiem*, meant only this: The testator having given shares of his estate to his legitimate children, respectively, to have and to hold (in effect) to them and their heirs, executors, administrators, and assigns, forever, and having afterwards so provided as that, according to the terms of his will, if, at any time indefinitely future, there should not exist issue proceeding (in any, no matter how remote, generation) from their bodies, then, after their deaths and such extinction of their issue, the shares so given them should pass over to the testator's natural son or (if he were dead when such event happened, then to) his representatives; this limitation over, standing alone would be clearly void for remoteness: and although the same did not stand alone, but was associated with a subsequent limitation over, whose intended effect, in combination with the former, was to be such, that the limitation over in favour of the natural son and his representatives should take effect in favour of the latter, if the natural son did not die, without issue, in the lifetime of certain other persons mentioned by name in the will, but if he did so die, then

279 in favour of those persons *and their representatives; this could not affect in point of validity, the combined limitations or either of them, with reference to the property given the first takers, since, whether the natural son died, or did not die, without issue, in the lifetime of any of these persons, still the consequence upon the first takers and those claiming under them was to be just the same. Unless the natural son died issueless within the compass of a life in being at the death of the testator, the limitation over to him was not to be defeated in favour of these other persons; and so the limitation over in their favour was "limited to take effect in good time" as far as concerned turning into their channel what had been previously destined for him and his representatives, under the first limitation over; but still it did not affect that first limitation, in regard to the operation thereof towards diverting into some fresh channel what was given to the first takers, whenever, if ever, they should all be dead and all their posterities extinct. Thus, equally with or without, the provision

in favour of the Lelands and the rest, and no matter what might be the construction put upon that provision, whether as requiring, or as not requiring, that in their lifetimes the natural son should be dead without issue, before they could take; the shares of the testator's legitimate children would be, by the terms of his will, put extra commercium during an indefinite period; so that, as long as there was issue remaining of any of them, after their deaths, no purchaser of those shares, under their title, would be sure of a good title, or of one that would not, at any moment afterwards, fail by the failure of such issue. This is precisely the mischief, which the Rule against Perpetuities was introduced to prevent or suppress (Butl. Fearn 430; Sm. Ex. Int. § 707;) and therefore, by that Rule, the legitimate children took in their respective shares, from the first, interests which were absolute, unrestricted, unfettered with

280 any (valid) *limitation over in favour of any person or persons. And correspondent to this was an opinion of Sir John Leach, M. R., delivered little more than a year before, in *Palmer v. Holford*, 4 Russ. 403.

But in this instance that happened to Judge Green, which near two thousand years ago was noted as of common occurrence, and which theretofore had, and since has, happened, and forever will happen, constantly: "*Brevis esse laboro, Obscurus fio.*" Had he said, "when a preceding limitation is too remote, all that succeed and depend upon it, even although limited to take effect in good time so far as it (alone) is concerned, are defeated;" he would have said all, that the decision, which he was concurring to make in the case before him, required, and what was perfectly true. This would accord with what was said by Buller, J., in *Robinson v. Hardcastle*, 2 Durnf. & E. 251: "That if a subsequent limitation depended upon a prior estate, which was void, the subsequent one must fall together with it;" but "if the subsequent limitation was not dependent upon the other, it might then take place notwithstanding the first was bad." And it seems to me that it is not treating Judge Green with perfect fairness and candor, to make him responsible for his dictum in the fullest extent thereof, according to the broadest sense of the words used. But, except for the sake of doing him justice, it no way concerns me how his dictum is understood. In any sense of it prejudicial to my cause, it is demonstrably not law.

Taken in the sense necessary for Mr. Pettit's purpose, it derives no support from either of the cases Judge Green cites; to wit, *Proctor v. Bp. Bath & Wells et als.*, 2 H. Blackst. 358, and *Chatham v. Tothill*, 7 Bro. P. C. edit. Toml. 453. I have before observed upon the fact, that in the first of these cases the limitation over, condemned for remoteness, was to the defendant Moore and "his heirs and assigns forever;"

281 under which, *though Moore himself had died the day after the testatrix,

yet his representatives, so far as the terms of the gift were concerned, might have taken at never so remote a period, and therefore the gift, limited in that manner, was not "limited to take effect in good time;" as Judge Green had just before demonstrated in some remarks (1 Leigh 335-337), the substance of which I have before given. It is noticeable, that before the case of Proctor v. Bp. Bath & Wells et als. was brought into court, Mr. Fearne was consulted upon the title, (Fearn. Ex. Dev. edit. Pow. vi;) and gave an opinion which accorded exactly with the decision afterwards rendered; this opinion is published by Powell in his edition of Fearn, (reprinted at Dublin, 1796, pp. 455-463, being the conclusion of a long editorial annotation which commences on p. 399;) and it indicates clearly that Mr. Fearne considered the limitation over to be void, for the sole reason that it offended the Rule against Perpetuities, by being in itself too remote. But the best explanation of the decision, I have anywhere seen, is in the reported argument of counsel in the case itself. They said: "It may be perhaps contended, on the other side, that though the devise to the son of Thomas Proctor should be void, as being too remote, yet that the devise over to Thomas Moore may take effect as if the prior devise had not been made." To this supposititious argument mark the reply given,—not that "the prior devise" being too remote, therefore the other must be void,—no; "but the devise to Moore is liable to the same objection, on account of the remoteness of the contingency, as the other; for, supposing there were no previous devise to the son of Proctor, the devise to Moore would be to him, [his heirs and assigns, forever,] if Thomas Proctor should have no son in orders; but no time is fixed for his taking orders." Proctor might have many sons, the last of whom might be posthumous; by the canons of the church, none of them

282 could take *orders before completing his twenty-third year, unless by special favour; by such favour he might as soon as he was twenty-one, (Burn's Eccl. Law, tit. Ordination, iv., vol. 3, p. 27, 2d edit. ;) but over the former of these ages he might at any time during his life: And, because he might, therefore the devise over in favour of Moore must wait for the death of all Proctor's sons, no matter when born, nor what longevity the longest liver of them should attain. This necessity clearly made the posterior devise even more remote than the prior.—In his own words, not affecting to give all or any words of all the judges or of any judge, the reporter tells us: "The court (absent Mr. Justice Buller) were clearly of opinion that the first devise to the son of Thomas Proctor,"—the first or other son of T. P. that should be bred a clergyman and be in holy orders,—"*was void from the uncertainty as to the time when such son, if he had any, might take orders; and that the devise over to Moore, as it depended on the same event,*"—rather

on the non-happening ever of that event,—"*was also void; for the words of the will would not admit of the contingency being divided, as was the case in Longhead v. Phelps, 2 Black. 704,*"—that is to say, the words "*in case Thomas Proctor should have no such son*" could not be read as if they were "*in case he should have no son, or that none of the sons he might have should be bred a clergyman and be in holy orders;*"—"*and (continues the reporter, assigning in his way the reasons of the court,) there was no instance in which a limitation after a prior devise, which was void from the contingency being too remote, had been let in to take effect, but the contrary was expressly decided in the House of Lords in the case of The Earl of Chatham v. Tothill, in which the judges founded their opinion on Butterfield v. Butterfield, 1 Ves. 134.*"—I have thus given all that is preserved of the reasons attributed to the court, for the

sake of shewing that the dictum of 283 Judge *Green, understood in any sense at all hurtful to my cause, has no support, not only from what was decided, but also from what was said, in that case. The nearest approach to such support is in the words, "*there was no instance in which a limitation after a prior devise, which was void from the contingency being too remote, has been let in to take effect,*" &c. Of course, if there had been no instance whatever, there could not have been any wherein such a limitation was allowed to prevail, "*even although limited to take effect in good time;*" but, as neither these words (of Judge Green), nor any like them, are used, the statement ensuing attributed to the court by the reporter, that "*the contrary was expressly decided in the House of Lords,*" does not import any negation of the validity of such a limitation as that in our case to the children of the testator. Nor is there anything in the case of Chatham v. Tothill, or in the case of Butterfield v. Butterfield, or in any dictum in either, that tends to damage, in any degree, my contention. [To prove this Mr. Green examined and commented upon those cases; but it is thought too manifest to need a report of his remarks upon them.] Similar to the decision in the case in 2 H. Blackst. 358, are the decisions in Bull v. Pritchard, 1 Russ. 213, before Lord Gifford, M.R., and again 5 Hare 567, before Sir James Wigram, V. C., (see 3 Myl. & K. 411, Bland v. Williams;) and in Joy v. Aspinwall, 23 Engl. L. & E. Rep. 453, 18 Jurist 284.

In a case, the facts whereof are material to be stated with some minuteness, for a reason that will be presently seen, by settlement previously to the marriage of John James and Mary Barrow, widow, certain personal property (which was hers) was conveyed to trustees, for her sole and separate use during the coverture, and that, after her decease, the trustees should stand possessed "*for all and every the child and children of the said Mary, by John*

284 Barrow her then late husband, or *by John James her said intended hus-

band, in such shares and proportions," &c. "as she should" appoint; and, in default of her appointment, then to divide (whatever was not appointed) "unto and amongst all and every the child and children of the said Mary," without distinction of her two marriages. Subsequently she made an appointment in favour of a son by her first marriage, for his life, and, after his decease, upon trust for such wife and children or child of her said son as he might leave behind him; "but in case" he "should die without leaving a wife or child him surviving, then, after his decease, in trust to assign the same unto her (Mary James's) daughter Frances," who was a child of the first marriage, "her executors and administrators." And Sir Richard Pepper Arden (afterwards Lord Alvanley) M. R. decided, first, that the appointment in favour of the son's wife and children was void, because they were not objects of the power, as had been clearly settled by previous decisions past any dispute, (2 Sugd. Pow. 6th edit. 273-278;) but, secondly, that nevertheless the limitation over in favour of the daughter, who was an object of the power, was valid, and would take effect in case the son should leave neither wife nor child surviving him; though, should he leave either, it would fail, simply because in that case the contingency would not have happened, in which (alone) the property was appointed over. *Crompe v. Barrow*, 4 Ves. 681. A decision ever since approved. 2 Sugd. Pow. 6th edit. 78. *Chance on Powers*, § 1581. Why, then, should not an executory bequest, unobjectionable on the score of remoteness in itself, be valid notwithstanding it comes in a will after, but without any manner of dependence upon, another executory bequest which is void for its excess of remoteness? Can the cause, which makes the limitation I have last mentioned void, be material in this respect, when it (the cause) has, towards the other limitation, no sort of connexion, either

285 direct, or indirect *(through some dependence of the one limitation upon the other)? On this point Mr. Jarman's opinion was always clear; and both in his edition of *Pow. Dev.* vol. 1, p. 401, n., and (sixteen years afterwards) in his work *On Wills*, vol. 1, p. 245, he put approvingly the very case I have last cited, as an illustration and proof that, while "all limitations ulterior to, or expectant on," a devise which is void for remoteness, are also, for that reason, void; yet it is otherwise where "the devise over is limited to arise on an alternative event, one branch of which is within, and the other is not within, the prescribed limits." His words are: "In *Crompe v. Barrow* a feme covert, under a power in her marriage settlement, bequeathed personal property to her son C. B. for life and, after his decease, to his wife and children, but in case he should die without leaving a wife or child him surviving, she devised it over to her daughter F. J. The bequest to the wife and children was held to be void, under the rule that the

person claiming under an appointment must be such as would have been competent to take, if named [indicated] in the deed creating the power, on which ground the legatees in question, as the children of persons [a person, C. B.] then unborn, were not competent. It was then contended, that the ultimate limitation to F. J. must fail with that to the wife and children; but Sir R. P. Arden M. R. held otherwise; there were, he said, two alternatives; if C. B. left no wife or children, the limitation over, being to a good object, should take effect; if he left a wife or children, it could not take effect. It is observable that, as C. B. the son was not in existence at the time of the execution of the deed creating the power (which in fact was a settlement previous to the marriage of his parents), the gift over to F. J., on the event of his [C. B.'s] death under the circumstances mentioned, though made to a competent person [that is, a person within the power,] was

286 liable *to objection on account of the remoteness of the event, on the principle acknowledged in the case (and, which, indeed, is indisputable), that the interests given by the appointment must be such as would have been good, if inserted in the power itself. The point seems to have escaped the observation of the very able judge by whom the case was decided." In this instance it was Mr. Jarman, not Lord Alvanley, that was inadvertent; and, from sheer want of attention, he fell into very gross mistakes of fact—in which, however, he was followed implicitly by Mr. Lewis in his very much bepraised work (9 *Law Review* 419, 423,) *On Perpetuities*, pp. 504-5, and note u;—but from all his expressions it is manifest, that, taking the facts to be as he supposed they were, he considered that Lord Alvanley would not have erred in holding the final limitation to be valid, in spite of the previous limitation being void for remoteness, if the final limitation had been, in the words of Judge Green, "limited to take effect in good time," as (for example) if it had been "limited to take effect" upon the death of C. B. before attaining his age of twenty-one years and without leaving wife or child surviving him. And accordingly Mr. Preston (*Abstr.* vol. 2, p. 170,) lays it down that, "though a limitation over, after and expectant on a limitation which is too remote, is generally, for that reason, void; yet, if in express terms the limitation over is to take effect, or [else] to fail, within a time to fall within the Rule against Perpetuities, the limitation over will be good;" referring to this case of *Crompe v. Barrow*, 4 Ves. 681, and to *Beard v. Westcott*, 5 Taunt. 500, (*perperam pro* 393).

The certificates of the judges of the Common Pleas in the case last mentioned were full and clear authority for this statement of Mr. Preston; which, when he made it (1818), was contradicted by nothing I am aware of, in the shape of authority.

287 Circumstances, *however, which occurred in the sequel, make it proper

to trace that case, from its commencement till its close, with precision. In what manner it at first began, we are not anywhere told, and can only conjecture. A testator, seised of freehold estates and possessed of leaseholds for long terms of years, devised and bequeathed them to the defendants Westcott and Johnson (and another since deceased), upon trusts, as follows: For the benefit of his grandson John James Beard and his assigns, during the term of ninety-nine years, if he should so long live; and immediately after his decease to the use of his (the said grandson's) first son and his assigns, for the like term of ninety-nine years, if he should happen so long to live, "and so on, in tail male, to such first son lawfully issuing forever;" and "for want, and in default, of such issue of such first son, then to the use and behoof of the second and all and every other son and sons of the" said John James Beard, "severally, successively, and in remainder, one after another, as they should be in seniority of age and priority of birth, and the issue male of such son or sons lawfully issuing, for the like term of ninety-nine years only (in case he should so long live)," &c. &c.; "and in case there should be no issue male of the" said John James Beard, "nor issue of such issue male, at the time of his death, or in case there should be such issue male at that time and they should all die before they should respectively attain twenty-one, without lawful issue male, then that" the testator's grandson Joseph Beard "and his assigns might receive and take the rents &c. thereof for the term of ninety-nine years, if he should so long live," with limitations to his first and other sons and their issue male, precisely similar to those in favour of the first devisee's male descendants; with ulterior limitations upon default of issue male of Joseph Beard, expressed in identically the same terms as

288 *the default whereon the limitation in his favour was grounded. John James Beard was plaintiff in a chancery suit, and the defendants were the (surviving) trustees together with others claiming or who might claim under the limitations after those in his favor; whence it appears inferrible that the suit was instituted (after a fashion very common in England, uncommon here,) to have the (valid) trusts of the will declared, ascertaining thereby the rights of the parties under it. And in answer to questions sent them, upon this case, the judges of the Common Pleas certified their unanimous opinion, that John James Beard took an estate for ninety-nine years, determinable with his life, in the freehold estates, and also in the leasehold estates, if these latter should so long continue: that upon his death, leaving one or more sons, his first son would take a like estate for a term of ninety-nine years, determinable with his life, in the freehold estates, and in what should then remain of the respective terms for which the leasehold estates were held; "that in the event of there being no son or sons of the said John James Beard, nor

issue male of such son or sons, living at the death of the said John James Beard, or there being such issue male at the time, [if] they shall all die, before they attain their respective ages of twenty-one years, without lawful issue male, the testator's grandson Joseph Beard will take a like estate in the said freehold and leasehold property, determinable as aforesaid; that upon his death, leaving one or more sons, his first son, in the events above mentioned, will take a like estate therein for ninety-nine years, determinable as aforesaid; and that in the event of there being no son or sons of the said Joseph Beard, nor issue male of such son or sons, living at the death of the said Joseph Beard, or there being such issue male at the time, [if] they shall all die before they obtain [attain] their respective ages of twenty-one

289 years," other *devisees, as directed by the testator, would take: adding, "We are also of opinion that all the other devises of those estates are void," of which, it will be remembered, there were divers anterior to the limitation in favour of Joseph Beard, and anterior to the limitation in favour of those who were to take upon such default of his issue male; these being void under the Rule against Perpetuities, for none other objection whatever was pretended against them. When this certificate was returned into Chancery, the case was argued by Romilly and Hayes in support of, and by Sugden against, it; and, "on the 17th Dec. 1811, the Master of the Rolls gave the following judgment: 'This case stood over, in consequence of a suggestion that the certificate of the court of Common Pleas involved in it the decision of a new question, which had not undergone any particular discussion, or received any particular consideration, in that court; namely, how far the validity of a limitation over, by way of executory devise, is affected by the circumstance that the period of twenty-one years, after the duration of an estate for life, has not any connection whatever with the minority of any person taking an interest under the preceding limitations. Now I do understand, that the question certainly did not receive any particular consideration in the court of Common Pleas, it being taken for granted that the rule upon this subject stood as it is commonly laid down in the books; namely, that the executory devise falls within the allowed limits, if the event upon which it is to take place must happen within a period of twenty-one years after the life or lives in being. I am not aware, however, that the point has been directly decided; and Lord Alvanley's doctrine in the case of Thellusson and Woodford, [4 Ves. 227, see p. 337,] is against the addition of twenty-one years, except by way of provision for the circumstance of the devisee being under age, or in ventre

290 sa mere, at the expiration of the life or *lives in being. And, as the question has now been raised, and as there is that degree of sanction to the doubt, it does seem to me desirable that it should be

set at rest by the decision of a court of law; so, therefore, I propose to send the case back again to the court of Common Pleas, to call their attention to the point, that they may have an opportunity of pronouncing an explicit opinion upon it. I have received this information from some of the judges.' The case was accordingly sent back to the court of Common Pleas; who refused to hear it argued, until the point upon which their opinion was required was stated. Thereupon the following question, with the approbation of the Master of the Rolls, was stated to be the question for the opinion of the court," (Sugd. V. & P. 7th edit. 807-808, n.; 11th edit. 1108-1110, n.;) and which was framed by Sugden, as he tells us (Sugd. Prop. 313, note u:) "How far the limitations over in the event of there being no son or sons of John James Beard, nor issue male of such son or sons, living at the death of the said John James Beard, or there being such issue male at that time, [if] they should all die before they attained their respective ages of twenty-one years without lawful issue male, were affected by the circumstance, that they were to take effect at the end of an absolute term of twenty-one years after a life in being at the death of the testator, without reference to the infancy of the person intended to take, or by the circumstance, that there might be issue of John James Beard living at his death, to whom the estate was given by the will, but who would be incapable of taking, according to the above certificate, for whose death under twenty-one the limitation over, in the event before mentioned, must await." And after full argument and long deliberation, the judges, in Michaelmas term 1813, returned, to this additional and pointed question, an answer,

in the terms of the question itself,
291 reaffirming *their former certificate.

5 Taunt. 393-414. Thus far, we may remark, apparently no judicial doubt existed in any quarter, respecting the soundness of the deliberately formed and reiterated opinion of the court of Common Pleas, that a succeeding limitation might and would be valid, if "limited to take effect in good time," though limitations preceding it were too remote. But, as Sugden is reported to have said 8 March 1826, in *Bengough v. Edridge*, 2 Cond. Engl. Chanc. Rep. 112, (from the report in 1 Simons) "when the case was brought on before the Lord Chancellor, upon the judge's certificate, his Lordship, though not without reluctance, granted a case to the King's Bench;" that is to say, conceded to counsel's importunity, that a case (stated) should be sent to the last mentioned court for its opinion. This was done; and the case was there argued, at the sittings before Michaelmas term 1821, by Sugden against the validity of the limitations over, and by Preston for the other side, on two questions, which were, in substance and almost verbatim, the same as the questions the judges of the Common Pleas had answered. And, after time taken for deliberation, the judges of the King's

Bench, in Trinity term, 1822, sent their certificate in these words: "This case has been argued before us, and we are of opinion that John James Beard, the grandson and heir at law of John James the testator, took, under the said testator's will, an estate for ninety-nine years, determinable with his life, in the freehold estates devised to him in the first instance; and also in the leasehold estates devised, if they should so long continue; and that, upon his death, leaving one or more sons, his first son will take an estate for ninety-nine years, determinable with his life, in the freehold estates, and what will then remain of the terms for which the leasehold estates are held. We are also of opinion that all the

limitations, subsequent and expectant
292 upon the limitation to the *first son of John James Beard, are void." 5 Barn.

& Ald. 801-815. The cause then (in November 1822) "came on for further directions," in the court of Chancery; when "Mr. Hart and Mr. Stephen contended, that the court of King's Bench had not returned a sufficient answer to the case; and that it could not be collected from their certificate, whether the circumstance, that the limitations were to take effect at the end of a term of twenty-one years, without reference to the infancy of the person intended to take, created such a suspense of the vesting as to render the limitations void. Mr. Sugden, for the plaintiff, insisted that the conclusion to which the court of King's Bench had come involved the decision of the point, [And] the Lord Chancellor [said]: It is impossible that the court of King's Bench should not have considered that point. The certificate of that court appears to me to afford a substantial answer to the questions put; and, under the circumstances of this case, I think the best thing I can do is to confirm it, and thus to help the case to the House of Lords, if the parties think it right to take it there. The inclination of my opinion is, that the court of King's Bench is right." Turn. & Russ. 25. The case did not proceed further; and what it did ultimately decide was long very much a puzzle. In Mr. Jarman's edition (1827) of Pow. Dev. vol. 1, p. 393, n., it is manifestly treated by that learned writer as a decision in favour of Lord Alvanley's opinion in *Thellusson v. Woodford*; as is rendered the more certain by the remark he makes upon what he says is a "note of Mr. Canning's," and which is indubitably so, though counsel (probably Preston), arguing before the House of Lords, subsequently claimed benefit from it, as a note by Mr. Butler and indicating Mr. Butler's opinion. 1 Cl. & Fin. 400, *Cadell v. Palmer*. It is distinctively marked as one of Mr. Canning's additions, (see Butl. Fearn, pref., p. ix, edit. Philad. 1826;) and is

293 in these *words (subjoined to Butler's note in a previous edition, which concluded with quoting Lord Alvanley's dictum in *Thellusson v. Woodford*): "But in the subsequent case of *Beard v. Westcott*, 5 Taunt. 393, it was held, that an executory

devise was good, though it was not to take effect till the end of an absolute term of twenty-one years after a life in being at the death of the testator, without reference to the infancy of the person intended to take." Upon which the remark of Mr. Jarman (in 1827) was, "it should be observed, that in the last edition of Mr. Butler's *Fearne*, 442, n., the position founded on the certificate of the Common Pleas, has inadvertently been suffered to pass uncorrected"; clearly showing upon what point, in his judgment, the certificates of that court and of the court of King's Bench clashed. Afterwards a case, which made a decision upon that point inevitable, was decided by Sir John Leach, V. C., in 1827, under the name of *Bengough v. Edridge*, 1 Sim. 173; and by the House of Lords (upon appeal from his decree), in 1833, under the name of *Cadell v. Palmer*, 7 Bligh N. S. 202, 1 Cl. & Fin. 372, 10 Bingh. 140, 3 Moore & S. 571. In that case Sugden and Preston were again counsel on opposite sides, and the former insisted, both before the Vice Chancellor, (2 Cond. Engl. Chan. Rep. 112,) and in the House of Lords, (1 Cl. & Fin. 394-395, 408,) that the King's Bench and Lord Eldon had decided *Beard v. Westcott* in accordance with what we have seen was Mr. Jarman's estimate of the result, and in accordance also with what had been Sugden's published opinion from an early period of his professional life, (Sugd. V. & P. 556-559, n., edit. 1806; 613-616, n., edit. 1808; Gilb. Us. 260, n., edit. by Sugd. 1811;) while the latter, in (at least,) seeming abandonment of the doctrine laid down in his work *On Abstracts* which I have before cited, explained away the final decision in *Beard v. Westcott* thus:

294 "To understand the grounds of the *certificate [by the judges of the King's Bench] in that case, it is necessary to consider the principle of the law applicable to perpetuities; the rule is, that if one limitation is too remote, every subsequent limitation must also be too remote, and for that reason void. In *Beard v. Westcott* the party [testator] attempted to introduce in the alternative (if the expression may be used) another gift after one which was too remote; and the language of the judges is adapted to that state of the case. The decision of the court of King's Bench is reconcilable with the rules of law, because it proceeded upon the ground, that a gift made by way of substitution, for one which is too remote, is as bad as that for which it is attempted to be substituted. That is the whole result of the certificate, and of the decision in *Beard v. Westcott*." 2 Cond. Engl. Chan. Rep. 100. And when the judges, attendant upon the Lords in *Cadell v. Palmer*, resolved that, upon the point then in judgment, they would follow the certificates from the Common Pleas in *Beard v. Westcott*, Bayley, B., who delivered their opinion, said: "Those certificates [the last of which was returned in November 1813] stood unimpeached until 1822, when the same case was sent by Lord Eldon

to the court of King's Bench; and that court certified that the same limitations, which the Common Pleas had held valid, were void, as being too remote; but the foundation of that certificate was, that a previous limitation clearly too remote, and which was so considered by the court of Common Pleas, made those limitations also void which the Common Pleas had held good. The subsequent limitations were considered as being void, not from any infirmity existing in themselves, but from the infirmity existing in the preceding limitation; and, because that was a limitation too remote, the others were considered as being too remote also. Whether the court of King's Bench gave any positive opinion upon that, I am unable to say. I

295 *think the court of King's Bench would have taken much more time to consider that point than they did,"—we have seen that they took rather more than six months after hearing arguments,—“and have given it greater consideration than it received, if they had intended to differ from the certificate that had been given by the court of Common Pleas; but, when it became totally immaterial, in the construction they were putting upon the will, to consider whether they were or were not prepared to differ from the court of Common Pleas, it is not to be wondered at that that point was not so fully considered as it might otherwise have been.” 3 Moore & S. 584, 1 Cl. & Fin. 420-421, 25 Engl. C. L. Rep. 69-70 (from the report in 10 Bingh. 140-156). According to the report in 7 Bligh N. S. 238-9, the learned and at that time aged Baron, sole survivor in Westminster Hall of the four judges who had signed the certificate from the King's Bench in *Beard v. Westcott*, said: “But the foundation of this certificate was, that a previous limitation clearly too remote, and which was so considered by the court of Common Pleas, made those limitations also void which that court had held good; and the question, whether the limitation of twenty-one years absolutely was valid after a life in being, did not receive that full consideration which it would otherwise have done, if the determination upon that point had not been superseded by the determination upon the other.” This may perhaps express more clearly what (on the whole) was meant; but it cannot be doubted that the venerable judge spoke substantially the words reported, with almost no variation, in three other reports as I have cited them: And these plainly prove that he would not, at that distance of time, venture to state positively what was the ground on which the court of King's Bench proceeded. Nothing that is extant, contemporaneous with the certificate itself, tends to shew that

296 the *court then relied at all upon the ground afterwards suggested by Mr. Preston. Nevertheless we have now met with words, delivered *ex cathedra*, which afford countenance to Judge Green's dictum in the broadest sense Mr. Pettit may choose to put upon it. But we have not met with

a decision, which at all favours that gentleman's cause,—I mean a decision that can abide criticism,—though we should agree that the certificate of the King's Bench, and even that Lord Eldon's inclination of opinion, in *Beard v. Westcott*, rested upon the ground indicated by Mr. Preston. Apart from what seem preponderant authorities already produced, including one certificate of the Common Pleas when Lawrence, J., was in that court, and another when Gibbs, J., (afterwards Chief Baron, subsequently Chief Justice,) had succeeded him in it, upon that identical case; I have yet to produce other authorities, which appear quite overwhelming.

There is a case first reported before Sir Wm. Grant, M. R., in 8 Ves. 12, *Cambridge v. Rous*, wherein a testatrix bequeathed personal property to trustees, upon trusts declared in these words: "To the sole and separate use of my sister [Mrs.] George Cambridge during the term of her natural life, and from and after her decease to divide the same equally between my said sister's children, when they shall severally and respectively have attained the age of twenty-seven years; the share of such as shall die under that age to go to the survivors in the same manner as his or her original share; the dividends or any portion thereof, at the discretion of my executors or the survivor or survivors of them, to be employed in the education of such children. In the event of my sister Mrs. George Cambridge not leaving any child or children at the time of her death, or of the death of all the children under the age of twenty-seven years, I give and bequeath the whole"

over. And in all editions of Vesey
297 Junior's **Reports*, from the first English, to the last American (industriously blazoned as Mr. Charles Summer's), there is a marginal note importing that the court held "the limitation over too remote." Which has also been disseminated in 2 Bridgm. Dig. 244, 2 Chitt. Eq. Dig. 808, and doubtless in other books. But nothing of the kind happened then; and the precise reverse thereof happened afterwards. The bill was filed by Mrs. George Cambridge and her husband, praying (among other things), that the limitations over, after the death of the feme plaintiff, might be declared too remote and void, and that (as a consequence of such declaration) the property might be decreed her as next of kin of the testatrix, or that it might be secured for such of the trusts of the will as were capable of taking effect. And the plaintiffs' counsel, among the most eminent at the chancery bar, said (as reported 8 Ves. 17-18) that, with respect to the question, whether the bequest over, after the estates "for life" (—so, but it seems by mistake, —) to Mrs. Cambridge's children, when they should severally have attained the age of twenty-seven years, &c. was too remote, "there was a double contingency in view; of which one [Mrs. Cambridge's] death without leaving children living at the time of her death, cannot be impeached. That

point, however, it is unnecessary to decide, till the event is determined, whether she shall leave children at her death or not." Respecting it, opposite counsel said not a word. And when Sir Wm. Grant spoke to it, the reporter (probably through misapprehension on his own part, see 1 Jarm. Wills. 247), makes him deliver himself thus blunderingly: "The next question" is "whether the bequest over, of the property given to Mrs. Cambridge for life, be not too remote; and if so, in all events she insists, the capital is undisposed of. It is admitted by the plaintiff, that a declaration

at present in her favour would be
298 premature; for it is *said, upon one contingency, if she dies leaving issue at her death, it will be good," the precise opposite of what the counsel should have said, and of what it is reported they did say. "But (continues the report of Sir Wm. Grant's remarks) in that case [of her leaving issue, not of her dying without leaving any,] it is equally clear, it will be too remote; the children not being to take till the age of twenty-seven. All, that is necessary to be done at present is, either to direct the dividends to be paid to Mrs. Cambridge for life, with liberty to apply upon her death, or to secure the fund." 8 Ves. 24-25. So that it is certain, no decision upon the point was then made, whatever the Master of the Rolls may have thrown out concerning his present impressions respecting it; as to which it is almost certain he did not say what the reporter attributes to him. But let opposite counsel make the most he can out of such (whether genuine or only putative) utterances, in face of the fact that that identical limitation over was, in due time afterwards, decided to be valid, and did actually take effect upon Mrs. Cambridge's death without issue then living. Unfortunately there has not yet been an American reprint of 25 Beavan, nor I believe has any copy of the London edition ever appeared in this part of Virginia: nevertheless, sufficient verification of the fact just now stated is found in the representations given in Law Journ. Dig. 1855-60, p. 375, and in Fisher's Digested Index 1859, p. 242, respecting the case of *Cambridge v. Rous* in 25 Beav. 409. Besides which, in numerous other instances identically the same legal proposition has been adjudicated: to wit, that where a limitation void for remoteness is followed by limitations over, not dependent thereon, but substitutionary for it, and which are contingently to take effect in an alternative, one branch whereof is within, the other not within, the duration allowed by the Rule against Perpetuities; there such
299 *limitations over are good in creation, and will take effect in event if there shall come to pass that branch of the contingency, which is not too remote. One remarkable case of this sort was *Leake v. Robinson*, 2 Meriv. 363, decided by Sir Wm. Grant himself: the reporter's abstract of which needs correction, as both defective and erroneous. It should be: "Gift [by

will] of real and personal estate, to trustees, upon trust to apply the rents and dividends (or so much [thereof] as they should think fit) to the maintenance &c. of [testator's grandson] W. R. R. until twenty-five; then to permit him to receive the same during his life; and, after his death, to apply the same (or so much &c.) to the maintenance &c. of all and every the children of W. R. R. until twenty-five respectively; then upon trust, to assign and transfer to such children so attaining twenty-five; 'and in case W. R. R. shall die without leaving issue living at the time of his death, or leaving such issue and all die before twenty-five, upon trust to pay &c. unto and among all and every the brothers and sisters of W. R. R. [some of whom might be born after the testator's decease,] share and share alike, upon their attainment of twenty-five or marriage respectively. Followed by a gift of residue, upon trust, as to one moiety, to permit the testator's daughter [Mrs. Robinson, the mother of W. R. R.] and her husband to receive the rents &c. during their lives in succession, and, after the death of the survivor, to [their] children (except W. R. R.) in the same manner as in respect to the former gift: And, as to the other moiety, upon like trust for the testator's daughter [Mrs. Mitford], her husband, [and the child or children (if any) of them]: With survivorship between the respective grand-children [of the testator]: And, in case of the death of either of [his said] daughters without leaving issue living at her decease, then to the children of the surviving daughter.—Held, that the

300 limitation to the brothers and *sisters of W. R. R., in default of issue [of him] living to attain twenty-five, was intended to include all his brothers and sisters, [whether born or not born in the lifetime of the testator, who should be] living at his [W. R. R.'s] death, [provided they lived till the period of vesting in them, by the death of all W. R. R.'s issue before attaining twenty-five,] and was consequently void for remoteness.—Held, vested interests at twenty-five in every instance, notwithstanding different expressions, there being no antecedent gift, of which it could have been the testator's intention merely to postpone the enjoyment; the gift being only the direction to pay at twenty-five.—[Held, Mrs. Mitford] having died leaving issue, the moiety of the residue intended for her children [was] undisposed of, as being [a limitation] void for remoteness, [because it was not to vest in them till their respective attainment of twenty-five; but] the other moiety [was] in contingency during the life of [Mrs. Robinson], and, if she should die without issue, [it would] be well given over to the children of [Mrs. Mitford, 'there being nothing in this bequest to make it too remote; and it being evident that the testator used the words surviving [daughter]—in the same sense as other [daughter]. But'—per Sir Wm. Grant, M. R.,—'if Mrs. Robinson shall leave issue, this half also will, at her death, be undis-

posed of, and divisible among the [testator's] next of kin,' (2 Meriv. 394,) because in that event the limitation to her own issue would come into play, which limitation is, for the same reason as the limitation to Mrs. Mitford's in a similar event is, void for remoteness]". See also *Minter v. Wraith*, 13 Sim. 52; *Goring v. Howard*, 16 id. 395; *Burley v. Evelyn*, id. 294-295; *Doe v. Challis*, 1 Ell. & Ell. (Am. edit.) 1091, 7 H. L. Cas. 531, (confirming the judgment of the Queen's Bench, which had been reversed in the Exchequer Chamber, 18 Ad. & Ell. N. S. 224, 231, 2 Engl. L. & E. 301 Rep. 215, 10 id. *429); *Fowler v. Depau*, 26 Barb. 224; *Akerman's adm'rs v. Vreeland's ex'or*, 1 McCarter 23; *Armstrong v. Armstrong*, 14 B. Monr. 333.

Now, in the case of *Beard v. Westcott* the limitation over, after, but not dependent on, prior limitations void for remoteness, was, by the terms of the will, to take effect "in case there should be no issue male of" the first taker, "nor issue of such issue male, at the time of his death, or in case there should be such issue male at that time, and they should all die before they should respectively attain twenty-one, without lawful issue male,"—which last expression, used in such connection, it is settled, means without issue living at such death under the age of twenty-one. *Doe v. Johnson*, 8 Welsb. H. & G. 81, 16 Engl. L. & E. Rep. 550; 2 Jarm. Wills 428-429. And therefore the certificate of the judges of the King's Bench, if rested upon the ground one of them (*Bayley*) was afterwards, as we have seen, disposed to rest it, necessarily collides with all this mass of authority; since the first branch of the contingency was unexceptionably within the line of perpetuity. Besides which, it seems to me most certain, if not perfectly manifest, that it would have been erroneous, though the contingency had been single, consisting of only what was the second branch thereof; and that the sole ground on which it can be rested, creditably to the judges who gave it, is that which, in the beginning, Mr. Jarman supposed was their real ground. In favour of it much might be well said, until the final decision in *Cadell v. Palmer*, as is shown by the reported arguments in that case, (see also 1 Atkins. Conveyance, 44-49;) and in giving his opinion therein, as chancellor, in the House of Lords, Lord Brougham said afterwards in another case, he showed (he thought), very clearly, that the doctrine of an absolute term of twenty-one years had originated in a manifest error, (9 Cl. & Fin. 598, *Phipps v. Ackers*;) which

302 remark is repeated, *with apparent approbation, by one whom the book it is repeated in shows (*passim*) to have been Lord Brougham's open undisguised unfriend. Sugd. Prop. 315. The decision in *Cadell v. Palmer* left, in truth, for such a certificate thereafter, as the court of King's Bench had given in *Beard v. Westcott*, no ground whatever.

The most plausible vindication, that can be suggested, of it, on any different ground,

was offered by Lord St. Leonards in the case of *Monypenny v. Dering*, 15 Engl. L. & E. Rep. 559; wherein I am compelled to quote his language from perhaps not the best report of it, not having access to the reports of De Gex, Macnaghten & Gordon; in whose second volume (p. 145 et seq.) the same case is reported. He said, as far as the report before me can be relied upon: "In that case," *Beard v. Westcott*, "successive life estates were given to a grandson and his unborn issue, which were clearly void beyond the first son; then followed a disposition," that in the two-fold or alternative contingency which I have just now re-stated, "the estate was to go over. The case was sent to the court of Common Pleas, and they were of opinion that the gifts after the gift to the unborn son of the grandson were void; but they were also of opinion that, if the event mentioned arose, the event being within the legal limits, the gift over would take effect. With that decision I could not agree; for in that case the testator never meant the gift over to take effect unless the previous persons, if they had lived, had been capable themselves of taking. I then prevailed upon Lord Eldon to send a case to the King's Bench. That court held that the gift over was void, not because it was not within the line of perpetuity, but upon the express ground that the limitations over were never intended to take effect unless the previous persons would, if they had been living, have been capable of enjoying the estate, and that the testator did

303 not intend that the *estate should wait for persons to take on a given event, where the person to take was actually in existence, but could not take; and Lord Eldon affirmed that decision. So that where there is a gift over, which is void for perpetuity, and a subsequent independent clause on a gift over, which is within the line of perpetuity, you cannot take under the independent clause, unless you can shew that it will accord and dovetail in with the previous valid limitations." Upon which statement it is obvious to remark, that, if it be correct, his lordship, in 1852 when it was given forth, better remembered the ground, "express ground," of the decision, than any body seems to have remembered or known or conjectured it, while the decision was comparatively recent; including his lordship, when as Mr. Sugden first, Sir Edward afterwards, he was counsel in all stages of the case styled, before the vice-chancellor, *Bengough v. Edridge*, and including also the judge who, delivering the opinion of the judges in the same case, then styled *Cadell v. Palmer*, had occasion to comment on what himself and his former associates had done in *Beard v. Westcott*. But a more important remark upon it is this: The solution it proposes is not a real solution. No claimant under the limitation over in that case ever could have occasion to pretend, that he might take while any person was in existence, whom the testator designed to prefer before him. The will expressly provided, that there should be no

such preferred person in existence, when the limitation over should take effect; whether by non-existence of all such at the death of the first taker, or by their subsequent cesser of existence before they should attain twenty-one. There might indeed be born, after the death of the testator, a son of the first taker, which son might de cease in the lifetime of his father, leaving male issue that might outlive the latter; in which case, as it seems, such issue could not take

304 by purchase, because *the Rule against Perpetuities would forbid it; but what then? If they did not die without issue before attaining twenty-one, the limitation over would, by force of its own terms, fail of effect, though the person, in existence and preferred by the testator, could not enjoy the benefit which the testator designed him, at least in the mode and manner designed; and if they did so die, the limitation over, in taking effect, would not interfere with any such person (all such being then non-existent), but only with others or another whom meanwhile the law, contrary to the testator's wish, would have instated ad interim in what, during such interim, his will would (against his wish) have failed to dispose of. This would not at all clash with any supposable intention of his; much less with an intention expressed in his will, or implied therefrom consistently with the settled rules of construction. Nor would it depart, in any degree, from (at least the spirit of) what is universally considered allowable. It is familiar learning, that an executory devise or bequest is good, if it be "within the line of perpetuity," though no preceding estate or interest be created, by the will; or though what preceding estate or estates, interest or interests, it does create, do not, nay by the terms of the will cannot, endure until the period or event has happened, which is appointed for the devise or bequest (executory) to become effectual. Butl. Fearne 395, 398-9, 400; 2 Prest. Abstr. 123-4, 125-131, 143-4; 1 Jarm. Wills 779-780; 4 Kent's Comm. 269; 3 Lom. Dig. 412-3 [288-9]. And what conceivable difference can it make, in reason or in law, quoad hoc, whether the failure to "dovetail in with previous valid limitations" proceeds from the testator's having made or attempted no previous limitations, or none susceptible of such dovetailing, or from his having attempted, but failed, to make some which are not legally valid? Is there any solid ground of objection against an application herein, of a doctrine

305 *common among civilians, that testamentary dispositions, contrary to law, "pro non scriptis habentur?" Huber. Prælect, tom. 1, p. 259, § 23. In regard to residuary dispositions in the same will, Sir Wm. Grant says: "It is immaterial how it happens, that any part of the property is undisposed of, whether by the death of a legatee, or by the remoteness, and consequent illegality, of the bequest. Either way it is residue,—that is, something upon which no other disposition of the will effectually operates. It may in words have

been before given; but, if not effectually given, it is, legally speaking, undisposed of, and consequently included in the denomination of residue," (*Leake v. Robinson*, 2 Meriv. 393;) so as to pass to the residuary legatee, just as, according to repeated decisions, he takes whatever is attempted to be bequeathed in a manner forbidden by the statutes against mortmain, (*Durour v. Motteux*, 1 Ves. Sen. 322; *Shanley v. Baker*, 4 Ves. 732; *Green v. Jackson*, 5 Russ. 35, 2 Russ. & M. 238;) unless the residuary bequest itself be contrary to legal inhibition. *Negus v. Coulter*, 1 Dick. 326. Can it be doubted, that whatever can be given by residuary bequest may be validly made the subject of a specific testamentary disposition? And what is to prevent either a specific or a residuary bequest thereof from being validly postponed during precisely the same period, and in precisely the same manner, as is allowed for a bequest of any subject whatever?—But I refrain, from further discussion of this point, because, as will be hereafter indicated distinctly, no tenet, any fancy can dictate respecting it, can interfere with any contention necessary for me to maintain in this case.

In *Monypenny v. Dering* the testator devised real estate "to the uses, intents, and purposes following (that is to say): To the use &c. that my brother Phillips Monypenny shall receive and take the rents &c. thereof, for and during the term of his natural
306 life, without *impeachment of waste; and from and immediately after his decease, to the use of the first son of the body of the said Phillips Monypenny, for and during the term of his natural life; and from and immediately after his decease, to the use of the first son of the said first son, and the heirs male of his body; and in default of such issue, to the use of all and every other the son and sons of the body of my said brother Phillips Monypenny, severally and successively, according to seniority of age, for the like interests and limitations as I have before directed respecting the first son, and his issue of the body, of my said brother Phillips Monypenny. And in default of issue of the body of my said brother Phillips Monypenny, or in case of his not leaving any at his decease, to the use of my brother Thomas Monypenny, for and during the term of his natural life," with ulterior limitations to the descendants of Thomas precisely similar to those in favour of the descendants of Phillips: "And in failure of all such issue of my said brother Thomas Monypenny, to the use of him, his heirs, and assigns, forever." Phillips Monypenny survived the testator, and died without ever having had issue, leaving his brother Thomas surviving him. And upon a case sent out of chancery to the court of exchequer, Rolfe, B., delivering the judgment of the latter court, said: "In our opinion the eldest son of Phillips Monypenny, if he had had a son, would have taken an estate for life only, and all the subsequent estates are void

for remoteness. Some stress was laid in the argument, on the words giving the property over to Thomas Monypenny in default of issue of my brother Phillips, or in case of his not leaving any at his decease. It was contended, that these latter words, whatever the construction of the limitation to the children of Phillips Monypenny, made the devise to Thomas and his issue good, inasmuch as it was to take effect on an event which must happen within
307 the *allowed period of time, namely, at the death of Phillips Monypenny, if he should then leave no issue, which event happened. But, looking at the whole context, we think the real meaning of the words was only this, on the death and failure of issue of my brother Phillips Monypenny, whether that failure shall occur at his own death or afterwards, I devise to Thomas; and therefore, whether the word issue, there used, is to be construed to mean issue generally, or such issue as had been previously designated, in either case the limitation over will be void, as being an attempt to create estates which were to commence at too remote a period, namely, the general failure of issue of Phillips Monypenny, or the failure of the particular issue mentioned by the testator." 16 Mees. & W. 418, 436-7. It is manifest, the barons did not consider the limitation over void because it followed limitations which were void for remoteness; and it seems in the highest degree probable, that had they construed the words of the will in the sense which was pressed upon them, they would have held the limitation over valid: As the justices of the Common Pleas did, upon the same case being sent afterwards to them for their opinion, (9 Man. G. & S. 793;) and as Sir James Wigram, V. C., did, when he confirmed the certificate from the latter court, (7 Hare 568, 597-600;) and as, lastly, the lord chancellor did, in affirming upon appeal the vice-chancellor's decree, without the slightest hesitation arising from the view which, as we have seen, he then presented of the decision in the case of *Beard v. Westcott*. "If (said he) the gift can be read as a gift in the alternative, that in case there is no issue living at the death of the brother, then, as nobody is excluded, effect may be given to it, consistently with *Beard v. Westcott*; for the estate is not carried over at the expense of any persons intended by the testator to take under the limitations." *Monypenny v. Dering*, 15 Engl. L. & E. Rep. 551, 559-560, 22
308 Law *Journ. Rep. (N. S.) Ch. 313, 17 Jurist 467, 2 De Gex M. & G. 145.

I submit that Mr. Pettit's objection, founded upon his interpretation of Judge Green's dictum, has now received an effectual answer; and that, under the will in our case, the limitation in favour of the testator's children living (as circumstances fell out) at the death of Sally Stone, without her having ever married or had issue, took effect; although, had she married and left children living at her own death and at the termination of her husband's widowerhood

(in case she left a surviving husband), that limitation would have failed, because the contingency would not have happened in which it was (by the terms of the will) to take place, notwithstanding the limitation in favour of her children would have failed also, by reason of its being *ab initio* void; as is well illustrated in the case of *Crompe v. Barrow*, and in that (more exactly similar) of *Leake v. Robinson*. And as this limitation, to the testator's children, "dovetailed in with the previous valid limitations," leaving no chasm whatever for the law to fill up, their claim suffers no prejudice from the decision in *Beard v. Westcott*, in any view thereof which would leave it a chance of maintaining itself in consideration and respect as an authority.

Where the vesting of a gift to persons unborn at the death of the testator is postponed for a fixed term, exceeding at all twenty-one years, the gift is void. 1 Jarm. Wills 230-231; *Palmer v. Holford*, 4 Russ. 403; *Speakman v. Speakman*, 8 Hare 180. But, in a comparatively recent case, the testator having directed that all his property should be sold at the end of thirty years from his decease, and that two-thirds of the proceeds thereof should "be divided amongst" his "children living at that period, or to their heirs;" the other third to be invested for the benefit of his wife, and after her decease to go "to such of" his "children as should then *be living, and to their heirs;" and the children of the testator living, at the death of his widow, which happened within the thirty years, and at the termination of that period, being the same; the vice-chancellor (Sir George James Turner) settled the construction of the word "or" in the first limitation to be the same as that of the word "and" in the second, and that therefore each branch of the gift was, in legal effect, to the children of the testator living at the respective periods indicated, and upon their deaths afterwards to their respective personal representatives; and, upon this foundation, he did not hesitate about holding that, in each branch, it was valid. *Lachlan v. Reynolds*, 9 Hare 796, 15 Engl. L. & E. Rep. 234. "It appears to me," said he, "that this amounts to no more than a gift to such, of several persons who may be living at the death of the testator, as shall be living at the end of the thirty years. The legacies are vested at the termination of a life in being at the death of the testator, and they are not, therefore, [therefore, not] liable to any objection on the ground of remoteness." More accurately,—should the legacies never vest, in consequence of there being, at the termination of the period fixed, no living child of the testator, then, at the death of the longest liver of them, before the termination of such period, the present right to the future proceeds of sale would have forthwith become vested, by lapse, in some other person or persons, (2 Lom. Ex'rs 110-116 [52-56]; 2 Wms. Ex'rs, 5th edit. 1100-1119;) who might validly dispose of the same, at

once, unless they were minors, and, in that case, as soon as they should become adult; so that, quacunq̃ue via, the right would not be put extra commercium for a term of suspense longer than is allowed by the Rule against Perpetuities. Now, can it be thought, that this gift would have been invalidated, if the testator had added that, in case there should be living at the close of the respective periods indicated any child or grandchild or *other descendant of some pre-deceased child of his, (an eldest son, we may suppose,) then his surviving children should not take? Or, if (going further) he had said that, in that case, the proceeds should be divided among the descendants of such pre-deceased child, in any prescribed proportions? Such gift over would doubtless be void, because it might protract the suspense of a vesting in any one, for the whole term of years indicated,—which might be sixty, seventy-five, or an hundred, just as well as thirty,—without any reference to the duration of lives in being at the death of the testator. But why should that affect an alternative gift, which by the terms of it must take effect or must fail within the compass of such a life? One branch of the alternative being void, if the other branch is allowed to be valid, the suspense of vesting is just the same, as if this latter branch stood, in the will, quite alone. So here.

I conclude, therefore, that this objection from remoteness does not in any manner affect us. But were it otherwise in regard to the slaves, still it would not invalidate our right to the land. For, as to that, each of the limitations over was, apart from the Rule against Perpetuities, alternatively, capable of taking effect as a contingent remainder; the case of *White v. Collins*, Comyns 289, heretofore stated, abundantly proves this; and whenever such is the case, it is an inflexible rule, that the limitation shall operate in that manner. Butl. Fearn 386-394; *Purefoy v. Rogers*, 2 Saund. 388; *Jiggets v. Davis*, 1 Leigh 402. Now no remainder could possibly be too remote, according to the *lex temporis* governing our case; and it is, principally, because the reporter's marginal abstract of *Smith v. Chapman*, 1 Hen. & M. 240, suggests the contrary with respect to contingent remainders, that I have heretofore noted it as reprehensible.—Touching this point there has arisen of late years a controversy, which was for some time very spiritedly kept up; the short history whereof is this: In 1843 Lord St. Leonards, then (as Sir Edward Sugden) lord chancellor of Ireland, expressed an opinion, in the course of his giving judgment upon the case of *Cole v. Sewell*, 2 Conn. & L. 344, 4 Dr. & War. 1, that remainders were not within the Rule against Perpetuities. Soon afterwards, and before the publication of any report of that judgment, Mr. Lewis, in his treatise on the Law of Perpetuity, pp. 408-417, delivered and endeavored to maintain an opposite opinion; commencing his discussion of the

subject in these words: "The limitations, to which our attention has been hitherto confined, were, either executory devises and bequests, or springing and shifting uses or trusts of the like nature. And it may probably, on the first view, appear that these several classes of limitations exhaust the doctrine of perpetuity, in respect of the seeming inapplicability of the Rule to limitations of direct remainders at common law. Indeed, as much has been, in effect, said by writers of even more than ordinary repute. Thus, the Commissioners on the Law of Real Property commence their observations on the subject of Perpetuities with the following statement: 'All future interests, not being remainders, are restrained in their limits, by the rules of law relating to perpetuities.' An opinion, thus sanctioned, deserves great respect; but it is conceived that, upon both principle and authority it must be dissented from." *Lew. Perp.* 408. Shortly thereafter the concluding portion of Mr. Jarman's work *On Wills* was given to the profession; which contained (vol. 2 pp. 727-735) with especial reference to Sir Edward Sugden's observations in *Cole v. Sewell*, an explicit adherence to the doctrine that remainders might be too remote. Very soon occasion was taken, in an article of great ability, in the *Jurist*, (vol. 8, pt. 2, pp. 22-23,) to condemn the views of both Mr. Lewis and Mr. Jarman, the writer supporting a conclusion practically, though not in theory, 312 resembling that of the lord chancellor of Ireland; subsequently to which, in the course of a paper published in the *Law Magazine*, (vol. 31, p. 362,) strictures were passed upon Mr. Jarman's observations, of like character and tendency. Then came an affirmance by the House of Lords, of the decree in *Cole v. Sewell*, 2 H. L. Cas. 186, 12 *Jurist* 927: And then, almost simultaneously, came out Lord St. Leonard's review of decisions in that House, under the name of a *Treatise on the Law of Property as administered by the House of Lords*, with a preface dated 11 Jan. 1849, and Mr. Lewis's *Supplement to his Treatise on the Law of Perpetuity*, with a preface dated Hillary Term of the same year; in the former of which (pp. 116-121) the writer notices the views of Mr. Jarman and Mr. Lewis, and treats the decision of the House of Lords as an affirmance of his own views; and in the latter (pp. 97 et seq.) Mr. Lewis struggles to maintain his, in an extended discussion, in the course of which (pp. 102-103) he remarks, "it seems that there are at least five different views entertained in the profession upon the question in dispute, although the practical conclusions do not vary to quite the same extent." Finally (so far as my information extends), comes out in 1861 the third London edition of *Jarman on Wills*, in which his remarks on this subject are silently suppressed, and vol. 1, pp. 234-236) the question is treated as no longer a question, but settled and closed by the decisions of the House of Lords in *Cole v. Sewell*, and in another case

of *Doe d. Winter v. Perratt*, 9 Cl. & Fin. 606, in favour of the views of Lord St. Leonards and those who had always agreed with him respecting it: And this, upon the short ground, that a contingent remainder never could have produced any such inconvenience as was designed to be prevented by the Rule against Perpetuities; because until it became vested (and, consequently, thereupon instantly alienable), it was always 313 barrable, by the *common law, which in this particular continued in force here till 1 Jan. 1820, when it was altered by R. C. 1819, c. 99, s. 20, 28. Since that time contingent remainders have been, among us, not less indestructible than executory devises and bequests; and therefore, in cases governed by the new law, perhaps our courts ought to bring them equally within the rule restraining remoteness. But, as our case is not affected by these comparatively recent statutory provisions, (retained as to their substance in V. C. 1860, c. 116, s. 12, 13,) I submit that the limitation over in favour of testator's children is, in regard to the land, good as a contingent remainder: And this point I willingly rest upon the authorities, and the discussions (pro and con) in the books, already referred to.

If, however, the court should hold that all the limitations, after that to Sally Stone, or after that (if it be so) to her and some future husband, were void; it does not thence follow, that (as counsel opposite contends) she took all the remaining ownership in (even) the slaves. As to the lands, it is plain she could no way get, by her father's will, an inheritable estate therein unless by taking an estate tail, on some or other of the grounds which have been heretofore discussed. To that subject I shall not revert further than to say, that even if she took, in the slaves, what would be an estate tail in land, and therefore would in personalty be an absolute ownership, still a limitation over, not transcending the line of perpetuity, would be valid, just as it would have been after an express bequest of the slaves to her and her executors, administrators and assigns forever. This has been settled by very many decisions upon the precise point,—in cases where the first gift was in terms of an express estate tail, *Lamb v. Archer*, Carth. 266, Comb. 208, Skinn. 380, 1 Salk. 225; *Fletcher's case*, 1 Eq. Abr. 193; *Paine v. Stratton*, cited and commented 314 on by Lord Hardwicke, 2 Atk. *647; *Crooke v. De Vandes*, 9 Ves. 397; *Lyon v. Mitchell*, 1 Madd. 467 [253]; *Redford v. Redford*, 1 Keen 486; *Mazyck v. Vanderhurst*, 1 Bail. Eq. Rep. 48; *Flinn v. Davis*, 18 Alab. Rep. 132;—in cases where an estate tail in realty would have been created under the operation of the Rule in *Shelley's case*, *Taylor v. Clarke*, 2 Eden 203-204; *Mansell v. Grove*, 2 Younge & Coll. C. C. 484; *Darley v. Martin*, 13 Comm. Bench Rep. 683, 24 Engl. L. & Eq. Rep. 275;—and in cases where such an estate in realty would be created by implication from the terms of the gift over, as where after a gift to the first taker indefinitely, (*Atkinson*

v. Hutchinson, 3 P. Wms. 258; Foley v. Irwin, 2 Ball & B. 435; Clapp v. Fogleman, 1 Dev. & Bat. Eq. Rep. 466;) or to him and his heirs, (Goodtitle v. Pegden, 2 Durnf. & E. 720; Dunn v. Bray, 1 Call 338; Cudworth v. Thompson, 3 Desauss. 256;) there was a gift over, if he should die without leaving issue; which is construed as importing, in dispositions of realty (as has been before pointed out) an indefinite, but, in dispositions of personalty, a definite, failure of issue of the person referred to. 2 Jarm. Wills 418-419. In the leading case of Forth v. Chapman, 1 P. Wms. 663, the limitation over did create an implied estate tail in realty, and yet, from this difference of construction, the very same words applied to personalty, disposed of in the very same clause, made a valid bequest over of it.—Concerning the last mentioned case, indeed, there is a passage in 4 Kent's Comm. 275-276, 1st edit. which has been retained in all editions since, that I have seen, to the eleventh inclusive, (vol. 4, pp. 281-282), with only such changes as, without altering the sense, yet indicate that the passage has been retouched; and which, for reasons that will be obvious, demands a passing notice. The words of it in the first edition are as follows: "The English courts long since took a distinction between an executory devise of real and [an executory be-
315 quest] of personal estate, and held that, while the words 'dying without issue' made an estate tail of real property, yet that, in respect to personal property, which was [is] transient and perishable, the testator could not have intended a general failure of issue, but [must have intended a failure of] issue at the death of the first taker. This distinction was raised by Lord Macclesfield in Forth v. Chapman, and supported afterwards by such names as Lord Hardwicke, Lord Mansfield, and Lord Eldon. But the weight of other distinguished authorities, such as those of Lord Thurlow, Lord Loughborough, and Sir William Grant, is brought to bear against any such distinction. There is such an array of opinion on each side, that it becomes difficult to ascertain the balance upon the mere point of authority." And in a note it is said: "The conflict of opinion, as to the validity of the distinction in Forth v. Chapman, is very remarkable, and forms one of the most curious and embarrassing cases in the law, to those well disciplined minds that desire to ascertain and follow the authority of adjudged cases. Lord Hardwicke, (2 Atk. Rep. 314,) Lord Thurlow, (1 Bro. 188, 1 Ves. jun. 286,) Lord Loughborough, (3 Vesey's Rep. 99;) Lord Alvanley, (5 Vesey's Rep. 440,) Lord Kenyon, (3 Term. Rep. 133, 7 Term. Rep. 595,) Sir William Grant, (17 Vesey's Rep. 479,) and the court of K. B., in 4 Maule & Selw. 62, are authorities against the distinction. Lord Hardwicke, (2 Atk. [the passage doubtless intended is in 3 Atk.] Rep. 288, 2 Ves. Rep. 180, 616,) Lord Mansfield, (Cowp. Rep. 410,) Lord Eldon, (9 Ves. Rep. 203,) and the House of Lords, in Keily v.

Fowler, 6 Bro. P. C. 309, are authorities for the distinction. As Lord Hardwicke has equally commended, and equally condemned, the distinction, without any kind of explanation, his authority may be considered as neutralized, in like manner as mechanical forces of equal power, operating in contrary directions, naturally reduce each
316 *other to rest." Now, incredible as it may seem to Kent's idolaters, till they shall have taken the trouble to read for themselves, with a moderate effort of attention, the books he cites, it is nevertheless true, that Lord Hardwicke, Lord Eldon, and the House of Lords did not, in addition to Lord Macclesfield and Lord Mansfield, maintain the distinction he states. Though Lord Macclesfield may have been of that opinion, (and was, if Sergeant Williams is not mistaken in what he says 2 Saund. 388 k—1, note 9 to Purefoy v. Rogers, 6th edit.,) he did not maintain or advance it in Forth v. Chapman. Lord Hardwicke, in the place first cited by Kent, (2 Atk. 314, Beauclerk v. Dormer,) was giving his decision against such distinction, but not against the authority of Forth v. Chapman. Lord Eldon, in the only case before him which Kent cites, (Crooke v. De Vandes, 9 Ves. 202,) said it was "impossible at this day to doubt," that the law was against any such distinction. And the judges, whose opinion was delivered to the House of Lords, in the case before it of Keiley v. Fowler, in the most emphatic terms, disclaimed all design of acting upon such a principle. Wilm. 312, 314. This they did by the mouth of Sir John Eardley Wilmot, chief justice of the Common Pleas; who, at the same time, (ibid. 313,) speaking of Forth v. Chapman, said: "A ray of his [Lord Macclesfield's] great genius irradiated that case." Lord Mansfield indeed would appear from the report of Denn v. Shenton, in Cowp. 410, (see p. 411;) and did thence appear to Serjeant Williams (see his note 9 to Purefoy v. Rogers, 2 Saund. 388 k—1, 6th edit.;) to have thrown out a dictum favourable to that distinction; but a more correct report of the same case, in 2 Chitty 662, (cited in subsequent editions of Kent's Comm.) shews that he did not utter such incorrect, but a different and correct, dictum, which reads there as follows: "In the case of land there is no instance where the words 'not leaving
317 issue' *are confined to having issue at his death; but it would be otherwise of personalty, for the sake of intention." And this was the precise distinction maintained in Forth v. Chapman; than which case none has ever commanded more general approbation in all respects, or more universal and exceptionless approbation in regard to that branch, which relates to personal estate, of the distinction acted upon in it. This distinction, not that stated by Kent, was approved by Lord Hardwicke, in Sheffield v. Orrery, 3 Atk. 288; Stafford v. Buckley, 2 Ves. sen. 180; and Southby v. Stonehouse, ibid. 616; by lord chief justice Wilmot, delivering the opinion of the judges

in the House of Lords, in *Keiley v. Fowler*; by Lord Mansfield, in the correct version of his dictum in *Denn v. Shenton*; and acted upon with expressions of strong approbation by Lord Eldon, in *Crooke v. De Vandes*, 9 Ves. 203: While not this, but that, was disapproved by Lord Thurlow in *Bigg v. Bensley*, 1 Bro. C. C. 188; and *Everest v. Gall*, 1 Ves. jun. 286, (where he shewed a disposition favourable to *Forth v. Chapman*;) by Lord Loughborough, in *Chandless v. Price*, 3 Ves. 99; by Sir R. P. Arden, afterwards Lord Alvanley, in *Rawlins v. Goldfrap*, 5 Ves. 440; and by Sir Wm. Grant, in *Barlow v. Salter*, 17 Ves. 479. Lord Kenyon did indeed, in *Porter v. Bradley*, 3 Durnf. & E. 143, and *Roe v. Jeffery*, 7 id. 595, show disapprobation of *Forth v. Chapman*; but it was because one branch of the distinction in it made "die without leaving issue" signify an indefinite failure of issue so far as realty was concerned, instead of making it mean a failure of issue at the death, as it was made to mean in regard to personalty, by the other branch of the distinction; which latter he approved, in those cases, and in *Daintry v. Daintry*, 6 Durnf. & E. 314, and acted upon in *Goodtitle v. Pegden*, 2 id. 720, wherein he said, "that, on conference with the rest of the court, they were clearly

of opinion, on the authority of *Forth v. Chapman*, which had been uniformly followed by a series of cases down to the present time, that the limitation over [in the case then before them] was good;" which was, of personal estate, upon a dying without leaving lawful heir. The decision of the court of King's Bench in *Dansey v. Griffiths*, 4 Maule & S. 61, was upon that branch of the distinction in *Forth v. Chapman*, which relates to real estate, and was in accordance with it; the struggle made in the case, unsuccessfully, being to obliterate that branch of the distinction, so as to make the word "leaving" operate in regard to realty in the same manner as, it was on all hands agreed, it must do in regard to personalty. Besides which, not only has each branch of the distinction, separately, been adopted and pursued in multitudes of cases since, but moreover this has happened in construing the same words in the same clause differently with respect to the two species of property; for example, as to real estate, in *Bamford v. Chadwick*, 14 Comm. Bench 708, 26 Engl. L. & E. Rep. 302; *Biss v. Smith*, 40 id. 541, 2 Hulst. & N. 105; see also *Doe v. Ewart*, 7 Ad. & Ell. 636, 3 Nev. & P. 197; and as to personal estate, in *Radford v. Radford*, 1 Keen 486; *Rathbone v. Dyckman*, 3 Paige 9; see also *Foley v. Irwin*, 2 Ball & B. 435; *Clapp v. Fogleman*, 1 Dev. & Batt. Eq. Rep. 466, 468. And in this court no case has been more frequently recognized, or approved more unqualifiedly, than *Forth v. Chapman*. See *Dunn v. Bray*, 1 Call 338; *Pleasants v. Pleasants*, 2 id. 338, (where Judge Roane misstates *Forth v. Chapman* in the same manner as Chancellor Kent misconceived it;) *Hill v.*

Burrow, 3 id. 349, (where Judge Roane states *Forth v. Chapman* correctly, but in the same case, p. 352, Judge Fleming misstates the distinction, on the authority of Cowper's misreport of Lord Mansfield's dictum in *Denn v. Shenton*;) *Tate v. Tally*, 3 Call 359; *Wilkins v. Taylor*, 5 id. 155; *Dillard v. Tomlinson*, 1 Munf. 203; *Deane v. Hansford*, 9 Leigh 257; *Callis v. Kemp*, 11 Gratt. 85-86; *Moore v. Brookes*, 12 id. 148; *Tinsley v. Jones*, 13 id. 292-293; also *Lynch v. Hill*, 6 Munf. 114.

If, indeed, Sally Stone had taken in the slaves an interest resembling an estate tail, then an abortive attempt at limiting the same over would not have prevented her acquiring by the will an absolute ownership of them: As was decided in the cases before mentioned of *Butterfield v. Butterfield*, 1 Ves. sen. 134, and *Chatham v. Tothill*, 7 Bro. P. C., ed. Toml. 453; and as is perfectly settled, (*Butl. Fearne* 463-466;) whether such attempted limitation over is void, for remoteness, (1 Jarm. Wills) 783; *Kampf v. Jones*, 2 Keen 756; *Ring v. Hardwick*, 2 Beav. 352; *Courtier v. Oram*, 21 id. 91; *Webster v. Parr*, 26 id. 236,—I refer to the two last mentioned cases upon information concerning them at second hand;—*Powell v. Brown*, 1 Bail. 100; *Key. Chatt.* § 282;) or for any other reason, (*Harvey v. Stracey*, 22 Law Journ. Rep. N. S. Ch. 23, 42, 1 Drewry 73, reported imperfectly, 3 Engl. L. & Eq. Rep. 13, from 16 Jurist 771; *Stevens v. Gadsden*, 20 Beav. 463; *Gerard v. Butler*, id. 541;—*Doe v. Eyre*, 3 Man. G. & S. 557, 5 id. 713, which seems to tend contrariwise, was followed in *Robinson v. Ward*, 4 Jurist N. S. 625, better reported 27 Law Journ. Rep. N. S. Ch. 726, by *Kindersley, V. C.*, but with manifest and avowed reluctance, and which reluctance had for it certainly very specious, if not solid, reasons, as appears in *Serjeant Manning's* note, 5 Man. Gr. & S. 747;) or that it fails of effect, because there is no person answering the description of him, her or them, in whose favour the limitation over is made, in existence when the circumstances have come to pass, that would entitle such person to take, if in existence. 1 Jarm. Wills 750; *Jackson v. Noble*, 2 Keen 590; *Eaton v. Barker*, 2 Collyer 124; *Jackson v. Staats*, 11 Johns. 337, 351; *Waldron v. Gianini*, 6 Hill 601; *Lowry v. O'Bryan*, 4 Richards Eq. Rep. 262; *Parry v. Lyon*, 5 id. 202. But where, as in our case, a testator gives ("lends") personalty for life or for any less interest than what in realty would constitute an estate tail, an attempt at limiting it over, which is for any reason abortive, will not enlarge the first taker's interest, except where such attempted limitation over is void as being upon an indefinite failure of issue of the first taker, if this can be called an exception, seeing that such a limitation over would in realty create an implied estate tail. "We," said *Bigelow, J.*, delivering the opinion of the court in *Battle Square Church v. Grant*, 3

Gray 142, 156, "understand the rule to be, that if a limitation over is void for remoteness, it places all prior gifts in the same situation as if the devise over had been wholly omitted. Therefore a gift of the fee or the entire interest, subject to an executory limitation which is too remote, takes effect as if it had been originally limited free from any divesting gift. The general principle applicable to such case is, that when a subsequent condition or limitation is void by reason of its being impossible, repugnant, or contrary to law, the estate becomes vested in the first taker discharged of the condition or limitation over, according to the terms in which it was granted or devised; if for life, then it takes effect as a life estate; if in fee, then as a fee simple absolute."

It is true, that in *Tayloe v. Graves*, Jeff. 40, Barradall (at p. 42) reports himself arguing to have said: "I take the law to be very clear, that if a chattel is given to one for life, or the use for life, (for there is no difference,) and no remainder is limited, or a remainder that is void either in its creation or in event, the absolute property vests in the devisee for life, and can never revert back again to the representative of the testator." And that doctrine has been upheld by decision in two modern American cases, *State v. Savin*, 4 Harringt. 56, n., and *Brownfield's Estate*, 8 Watts 468.

321 *But to the passage I have quoted from Barradall's argument there is appended a "quære de hoc;" which seems to be not an interpolation of Mr. Jefferson; for it is also found in an ancient MS. copy, penes me, of Barradall's Reports. And when, on the 16th of November 1786, Mr. Marshall was proceeding to contend, in the high court of chancery, that a quasi-reversion could exist after a bequest for life of a slave, Wythe, C., interrupted him with the question: "Do you suppose, Sir, that this doctrine of a reversion in a slave, after an estate for life, will be controverted?" Which clear intimation of opinion seems to have terminated debate upon the point, not to be renewed in any subsequent stage of that case. *Dudley v. Crump*, 1 Tuck. (manuscript) Notes of Cases 23; s. c. on appeal (*Crump's ex'rs v. Dudley*), 3 Call 507. And in March 1793, by his decree pronounced in *Nance v. Woodward*, Wythe 4, (2nd edit. 180,) the same chancellor enforced the same doctrine sub silentio, treating it, in his "opinion," as not even open to question. Nor has the question, so far as I know, been ever stirred again in our (Virginia) courts. But elsewhere it has been often stirred, and as often (except in the Delaware and the Pennsylvania cases before mentioned) decided in favour of such quasi-reversion in a chattel. *Ayres v. Falkland*, 1 Ld. Raym. 235, 1 Salk. 231, Com. Dig. tit. Chancery, 4 W. 21, 1 Freem. 272; *Goring v. Bickerstaffe*, 2 Freem. 166; *Kimpland v. Courtney*, id. 250; *Harrington v. Harrington*, 1 Ch. App. (L. R.) 564; *Brown v. Kelsey*, 2 Cushing 243; *Hoes v. Van Hoesen*, 1 Barb. Ch. Rep. 379, 3 Denio

610, 1 Comst. 120; *Anon.*, 2 Hayw. 161; *Black v. Ray*, 1 Dev. & B. 334; *Geiger v. Brown*, 2 Strobb. Eq. Rep. 359, n.; *Glover v. Harris*, 4 Richards. Eq. Rep. 25; *Vannerson v. Culbertson*, 10 Smed. & M. 150. See Key. Chatt. § 274-280, 283, 284. In the case of *Forth v. Chapman* heretofore mentioned, the lord chancellor held a limitation over of a leasehold, *though to take place on the death of a first taker without leaving issue, good; upon the distinction that such a limitation, applied to personalty, was upon a failure of issue at the death of the first taker, though the same limitation, applied to realty, would import an indefinite failure; but Sir Joseph Jekyll, M. R., upon an opposite construction, had held the limitation over of the chattel real, void: And in that stage of the cause, before an appeal taken, "it being debated by counsel, where the residue of the term vested" after the death of the first taker, more precisely the two joint first takers; Peere Williams reports the master of the rolls to have "declared that the subsequent words increased their interest, and gave the whole term to them, it being plainly intended to dispose of and devise away the whole term from the testator's executors; that a devise of a term to one for a day or an hour is a devise of the whole term, if the limitation over is void, and it appears at the same time that the whole is intended to be disposed of from the executors." 1 P. Wms. 665-666. Now, as Sir Joseph held (contrary to what was subsequently the lord chancellor's opinion upon appeal,) that the limitation over of the personalty, not less than of the realty, was upon an indefinite failure of issue, which would create an implied estate tail in the latter; he therefore necessarily considered that it gave in the former an absolute ownership, (agreeably to many decisions theretofore made, *Burford v. Lee*, 2 Freem. 210; *Anon.*, ibid. 287; *Ridge v. Hudson*, Bunb. 12;) which, in accordance with numerous authorities I have already cited, would remain absolute, where the limitation over was held void for remoteness. So that, understood secundum subjectam materiam, and as applied to the particular case before him, his general position, repeated in Bac. Abr. tit. Remainder and Reversion, A; and reproduced in President Tucker's dictum in *London v. Turner*, 11 Leigh 412-413, is a mere truism. The *doctrine appears in a more imposing form in *Doe v. Cooke*, 7 East 269, 3 Smith 236; where the testator, possessed of a leasehold for a long term of years unexpired, bequeathed it to Thomas Cooke, son of William Cooke by Elizabeth his deceased wife, for and during the term of his natural life; and after his decease to his child or children by any woman whom he should marry, his or her (such child's) or their (such children's) executors, administrators, and assigns, forever; but upon condition that, in case the said Thomas Cooke should die an infant, unmarried, and without issue, the premises should go over to his father William Cooke and his (W.

C.'s) three other children by the said Elizabeth his late wife, share and share alike, his, her, and their heirs, executors, administrators, and assigns, forever; and Thomas having died without issue, but after his marriage and over twenty-one, Lord Ellenborough, C. J., delivering the opinion of the court, said: "The contingency, upon which the estate was to go over, was to consist of three things, the death of Thomas Cooke,—during his infancy,—without leaving wife,—or child; and, as William Cooke and his children appear to have been the objects of the testator's bounty next to Thomas Cooke and his family, it would be very strange to suppose that the testator introduced into his will contingencies, which might defeat William Cooke's interest, without an intention of conferring some advantage [therefrom] on Thomas Cooke; and that he meant, if Thomas Cooke died an infant leaving a wife and no children, [—if he left children, the will in express terms gave it to them—] or should die after he attained the age of twenty-one, that the limitation over should fail, without any advantage whatever resulting to Thomas Cooke. And, though the disposition of a term to one for life, with a remainder over, will in general entitle the first devisee to no greater interest than an

estate for his life, if the remainder
324 should not take effect, and *the residue

of the term will go to the personal representatives of the testator; yet this rule will not hold, if it appear that the testator's intention was to dispose of the whole from his executors; which we think was the intention of the testator in this case." Nevertheless, as the matter was presented on the footing of a verdict in ejectment in favour of the plaintiff, subject to the court's opinion upon a case agreed; wherein it was stated, "the lessors of the plaintiff claim under" the testator's "will, and are entitled if the limitation to William Cooke be void [ineffectual] under the facts stated;" his lordship could do no more than add: "And, it being admitted in the statement of the case, that the lessors of the plaintiff are entitled, if the limitation to William Cooke and his three children cannot take effect in the events which have happened, we are of opinion that there must be judgment for the plaintiff." Had the court not been trammelled with that agreement of the parties, we do not know certainly what would have been the judgment. Perhaps it is a fair inference from the language of the chief justice, that Thomas Cooke would have been held to take the whole interest in the term, transmissible (since he was dead) to his personal representatives. But, if so, nothing can be more manifest than that such judgment would have proceeded upon the ground that the testator intended such bounty for him and his. Moreover the complex event had not happened, in which it was designed by the testator the limitation over should take effect. The case, therefore, had it been so decided, would not have been authority for similarly

deciding in another case, wherein the limitation over would in event take effect agreeably to the testator's intention, but for the reason that the law will not allow such intention to prevail, and wherein moreover he did not intend, so far as tokens the law deems sufficient indicate, any benefit to the first taker capable of enduring longer than till such event.

325 *Nothing in either of the printed reports of that case furnishes a clew to discover in what manner the lessors of the plaintiff could claim under the will of the testator. Perhaps it was under a residuary clause. Under such a clause, in *Andree v. Ward* and *Green v. Ward*, 1 Russ. 260-265, where a testator bequeathed a sum of stock, upon trust to pay the interest to his son during life, with a direction, if he married a woman with a fortune of a specified amount, to settle the fund upon her and the issue of such marriage, but, in case of the son's decease leaving no issue of his body, the stock was given over to various persons; and the son after marrying a woman who had not the fortune required by the will, died leaving issue of the marriage; it being held that the son's life interest in the stock was not enlarged by implication into a quasi estate tail, that the issue of his marriage took no interest in the stock, and that the gifts over failed in event; the residuary legatees took. *Keyes* (Chatt. § 281) relies on these cases as "authorities directly in point," to prove that in such cases "the property reverts to the donor or his representatives;" and in effect they seem to be so, for whatever passes under a mere residuary clause would, without such clause, go to testator's next of kin as undisposed of. At any rate there are authorities in point to sustain him. Thus in *Ibbetson v. Ibbetson*, 10 Sim. 495, it was held that personalty, bequeathed on an event which was too remote, "fell into and formed part of the testator's residuary personal estate from and after the death of" the first taker; as appears from the terms of the decree set out in 10 Sim. 516; which decree was affirmed on appeal, 5 Myl. & Cr. 26: And this case was followed in another precisely similar, except that in the latter, for want of a residuary clause, the property went to the testator's next of kin. *Dungannon v. Smith*, 12 Cl. & Fin. 546, 10 Jurist 721; affirming in House of Lords the decision of the court *below, *Flan. & K.* 638, 1 Dr. & War. 543, n., 5 Ir. Eq. Rep. 84, Sugd. Prop. 342-346. See also *James's ex'ors v. Masters*, 3 Murph. 110; *Creswell v. Emberson*, 6 Ired. Eq. Rep. 151. These authorities are not counterpoised by *Johnson's adm'r v. Johnson's heirs*, 8 B. Monr. 470; *Stewart's ex'or v. Wyatt*, id. 475.

In Caleb Stone's will there is a residuary clause; so that quacunque via, whether his children living at the death of Sally Stone could or could not take under the limitation over in their favour, at any rate she took, under her father's will, nothing she could bequeath, in the slaves.

II. Supposing this to be so, still, in their petition of appeal, appellants insist that some other way she took, in some undivided portion of the land and of the slaves, an interest which under her will they can claim; and therefore that the decree should be reversed for dismissing their bill. This hypothesis we deny, for reasons already stated; but, supposing it well founded, still, as it was not advanced in the bill, and the record does not shew that application was made, in the court below, for leave to file an amended bill, the decree should be affirmed, and appellants left to commence (if they choose) a fresh suit with modified pretensions. [Mr. Green's argument under this head, relating only to rules of chancery procedure, need not be reported.]

MONCURE, P., delivered the opinion of the court:

The court is of opinion, that under the will of Caleb Stone, which was recorded in 1810, his daughter Sally, who died without ever having married or had any children, was entitled only to a life estate in the land and slave and future increase of the slave loaned to her by the 10th and 11th clauses of the will.

The 10th clause must be read thus: "10th.

I lend to my daughter Sally, 140 acres
327 of land to be possessed *by her during her natural life and the natural life or widowhood of any husband she may have; and at her death and the death or after marriage of her husband, then to be equally divided among her children, if she has any, and if she has none then to be divided among all my children."

By the 11th clause the slave Phœbe and her future increase are loaned to the said Sally, on the same terms and conditions with the land.

If Sally Stone had left a husband her estate would have been enlarged and extended to the death or after marriage of her husband, when it would have determined. In other words she was entitled under the will to a vested estate for her life, and to a contingent estate in remainder at and from the period of her death until the death or after marriage of any husband she might have who should survive her. But as she had no husband, the contingency never happened and her estate therefore ended at her death.

The language of the will is very plain, and to a mind unaccustomed to legal technicalities and difficulties, it would seem to be strange that there could be any doubt about the meaning of the testator. The difficulty arises from the word "children," which is twice used in the 10th clause. And the question is asked, could the testator have intended to give the property over only to children, to the exclusion of the descendants of any deceased child or children? From the improbability of such an intention it is argued that he must have used the word "children" as a word of limitation and not of purchase, and that the 10th clause must be construed as if it had

been a gift to Sally Stone and the heirs of her body; which would have created an estate tail in the realty, which the statute would have converted into an estate in fee simple, and an absolute estate in the personalty.

Now it is very probable that if the
328 testator had been *asked when he gave instructions for his will, whether he intended by the use of the word "children" to exclude the descendants which might be living of any child that might be dead, supposing the will to have that effect, he would have answered "No," and would have directed such words to be used as would plainly express his intention. But whatever may be our conjecture on that subject, we cannot give effect to any supposed intention which is not expressed by the words of the will. The most we could say in such a case is, *Voluit, sed non dixit*. We sit here not to make wills for testators but to expound them. And we must give effect to every will as it is written by the testator, provided it be legal, however strange and capricious it may seem to have been.

Here is an express loan to his daughter Sally during her natural life. This is plain language, and standing by itself it cannot be misunderstood. What is there in the will to change its natural meaning? Only the word "children," which twice follows it in the same clause. Now this word children is just as plain as the loan for life previously given. Its meaning is, issue in the first degree, and it can generally have no other meaning unless there be other words in the will to give it such other meaning, except the rule in Wild's case applies, which is founded on peculiar reasons. A testator may use words in any sense he pleases, however different that sense may be from their natural meaning; and therefore he may use the word "children" to embrace grandchildren, or other descendants, or issue indefinitely; but then it must appear from his will, at least generally, that such was his intention. We say generally because there may be cases in which the word "children" in a will would be construed to mean "grandchildren," although there might be nothing in the will to show such a meaning; as when

the gift is to children, and the proof
329 de hors the will, is that *the testator had not, and in the nature of things could not have, children, but had grandchildren; then the grandchildren would take under the will *ut res magis valeat quam pereat*; and so in the like cases. But this is not such a case. There is nothing in the will nor de hors the will in this case, to change the natural and ordinary meaning of the words used, and we must therefore give effect to them according to that meaning.

We therefore think that the word children in this will is a word of purchase and not of limitation, whether the devise over to children be void for remoteness or not; from which it follows that the estate ex-

pressly limited to the testator's daughter Sally during her natural life, &c., in the former part of the 10th clause, is not enlarged into an estate in tail in the land, nor into an absolute estate in the slave and her increase, by the word "children" in the latter part of the clause.

It is sufficient and only proper for us to decide in this case that Sally Stone had only a life estate in the property aforesaid, without deciding who were entitled to it at her death. We therefore do not intend to decide the latter question. The solution of that question belongs to the court in the suits which it appears are depending for the division of the land and slaves, or distribution of the proceeds of the sale thereof, among the persons entitled thereto. To those suits the appellants can be made parties, if they claim to be entitled to participate in such division or distribution.

The view we have taken of this case renders it unnecessary for us to examine the many authorities referred to by the learned counsel who argued it. But wishing the profession to have the benefit of their arguments, which displayed extraordinary legal research, we request the reporter to publish full notes of them in his report of this case.

It follows, from what we have said, 330 that the decree *of the Circuit court must be affirmed; but without prejudice to any interest which the said Sally Stone, or her representatives, may have in the said property, or any part thereof, otherwise than under the loan to her as aforesaid.

The decree was as follows:

That Sally Stone was entitled only to an estate for her life in the land and slave Phoebe and her increase under the loan made to her by the tenth and eleventh clauses of the will of her father Caleb Stone, and that there is no error in the said decree. Therefore, without expressing any opinion on the question as to what persons were entitled to the said property at her death, and without prejudice to any interest which she or her representatives may have in the said property or any part thereof otherwise than under the loan to her as aforesaid, or to any claim which the said representatives or the appellants may assert to any such interest by becoming parties to the suit instituted and still pending, as appears from the bill, for the sale of the said property and distribution of the proceeds, or otherwise, it is decreed and ordered that the said decree be affirmed, and that the appellants do pay unto the appellees thirty dollars damages, and also their costs by them about their defence in this behalf expended.

Decree affirmed.

331 *Lohman v. Crouch & als.

January Term, 1869. Richmond.

1. **Sale of Land—Negotiable Paper—Confederate Currency.**—In July 1862, W. sells land in Henrico county at public auction, and it is purchased by C.

Nothing is said at the time of the sale as to the kind of money which will be received, but the land is sold for its value estimated in Confederate money as of that date, and C. makes the cash payment in that money, and gives his negotiable notes payable in one and two years, with a deed of trust to secure them. M. receives payment of the first note when it becomes due, in the same money, and has sold the second note to L., who has paid for it in the same currency. When this second note fell due, C. tendered payment in Confederate notes which was refused; and he files a bill to have the amount due ascertained, and to be permitted to pay the same and have the deed of trust released. **HELD:**

1. **Negotiable Paper—Confederate Money.**—The sale was made with reference to Confederate notes as a standard of value, and L., though the holder for value of the negotiable note, takes it as it was held by W.

2. **Same—Tender of Payment—Interest.**—C. having tendered the money to L. when the note fell due, L. is only entitled to the value of the Confederate notes at that time; but C. not having retained the money, must pay interest from that day.

3. **Same—Same—Equitable Conditions.**—C. having tendered the money as soon as it was due, the court cannot impose upon him any equitable conditions beyond the payment of the sum due upon the note.

4. **Case at Bar—Tender—Valid.**—C. sends an agent to L. on the day the note is due to pay it; and the agent tells L. he is sent to pay the money and get the note; and he shows L. a parcel of money which the agent holds in his hand, which is more than the amount of the note. L., without objecting that it is not the precise amount due, refuses to receive payment, because the notes have greatly depreciated since the note was made. It was a good legal tender.

5. **Tender—Quære.**—**QUÆRE:** If the tender had not been made until after the note fell due, upon what equitable terms would C. have been relieved? Would he have been required to pay L. the value of the Confederate notes he paid W. for the note at the time he bought it, or the proportionate value of the land?

332 *This was a bill filed in July 1867, in the Circuit court of the city of Richmond, by Edward Crouch against F. W. E. H. Lohman, Wm. A. Wyatt and another. The bill set out a sale of a tract of land by Wyatt to Crouch on the 16th of July 1862, at the price of thirty-nine hundred dollars, of which one thousand dollars was paid in cash, and Crouch executed his negotiable notes for the remainder, at twelve and twenty-four months, interest added. The twelve months' note was for \$1,537, and the twenty-four months' note was for \$1,624. They both bore date the 16th of July 1862, and were secured by a deed of trust upon the land, in which James M. Taylor was the trustee.

When the twelve months' note fell due, plaintiff promptly paid the same to Wyatt, and proposed to pay the other note though it was not then due; but Wyatt informed him that in March 1863, he had sold it to Lohman. That the plaintiff then in July

1863, applied to Lohman to be permitted to pay the note, but Lohman declined to receive the money on the ground that he had no use for the money, and would rather wait until it was due.

That in July 1864, when the said note was approaching maturity, the plaintiff, being sick, sent to said Lohman by plaintiff's daughter, F. E. Walker, the full amount of said note, viz. \$1,624, in Confederate States treasury notes, in payment of said note. Lohman admitted he had the note, but refused to receive payment of said note, on the ground that the currency had depreciated since he bought it.

The plaintiff charged that the true understanding and agreement between Wyatt and himself, at the time the notes were executed, was that the said notes were to be paid in Confederate currency, and none other, when they should mature; and accordingly Wyatt readily received payment in July 1863, of the first note. That Lohman was

333 bound to receive payment *in Confederate States treasury notes at the maturity of the note; and that therefore the plaintiff was entitled to that relief which a court of equity is authorized to give by the 4th section of the act passed March 3d, 1866, for the adjustment of liabilities, &c.

The prayer of the bill was that the court would ascertain and determine whether anything was due to Lohman, and if anything, how much; and upon payment thereof, that the said note might be delivered to the plaintiff, and that the deed of trust might be released, and for general relief.

The defendants answered the bill. Wyatt admitted the sale, the payment of \$1,000, and the execution of the two notes and the deed of trust as stated in the bill. He denies that there was any agreement or understanding between himself and the complainant, that payment of these notes when due, would be received in Confederate currency, however depreciated it might be. Nothing whatever passed between them as to the kind of money in which the notes were to be paid. The contract was a legal contract, and gave the right to claim legal currency in discharge thereof. It was true he did receive Confederate currency for the first note, but he received it not because he was bound to receive or had agreed to receive it, but for other motives which were operating upon thousands of other persons at that time. He, early in 1863, sold and endorsed the second note to the defendant Lohman, who paid him for it the full amount for which it called, in Confederate currency.

Lohman says in his answer, that it is utterly untrue that he bought the note with any understanding or agreement on his part, that he was to receive payment thereof at maturity in Confederate treasury notes, however much depreciated they might be. He claimed that having bought the note, and it being endorsed to him, he became as holder, entitled to the full

334 benefit *thereof, and of the deed of

trust to secure it. He admits a casual conversation with the plaintiff in July or August 1863, when the plaintiff asked him if he did not want the money for the note, to which respondent replied, in substance, that the note was not due, and he did not want the money. He says about the 19th of July 1864, plaintiff came with a lady, whom respondent understood to be his wife, to the residence of the respondent, and offered to pay the amount of the note, \$1624, in Confederate treasury notes. The respondent refused to receive them, because such notes were then depreciated enormously below the value of gold. No money was produced, and no tender was actually made to this respondent, but if it had been he would have refused it for the reason above stated. He has no recollection of any interview with Mrs. Walker, and no recollection of any tender of Confederate treasury notes made by her, but even had such tender been made by her at the time and under the circumstances mentioned, he would have refused it for the reason above stated.

The defendant further said, he is advised that he has a right to receive either what the money represented by his note was worth in gold at the time of the purchase (from which time Edward Crouch, the complainant, has had full possession and enjoyment of the property,) or the value of the property as represented by his note. Either of these would be acceptable to this respondent. That the property purchased by Crouch was worth before the war, at the gold standard, not less than \$3500; and when the plaintiff purchased it, fully the purchase money of \$3900. At that time Confederate treasury notes were only depreciated to the rate of \$1 40 to one dollar, as compared with gold; not more depreciated than United States National Bank currency now is.

Mrs. Walker was examined as a 335 witness by the plaintiff. *She says she went to the house of the defendant Lohman the day the note fell due, and introduced herself to him as the daughter of the plaintiff, and told him she had come to pay him the money due and get the note. He asked me what kind of money I had; I told him Confederate money. He said he would not receive Confederate money. He said he paid gold and silver for the note, and would not receive anything else. Witness further said she had in her hand \$1800, and showed it to Lohman.

Wyatt was also examined as a witness. He says as to the money, when he took Crouch's notes, he expected to receive payment in the currency that was afloat at the time the note became due; and that if he had held the note he passed to Lohman when it fell due, he should have felt compelled to take payment in the currency of that date; but he did not tell Lohman that he expected to be paid in that currency. It appeared that a previous answer had been prepared for him which was not filed. In this answer he had stated that the sale was made wholly with reference to Confederate currency.

The cash payment was made in Confederate currency, and he expected the credit payments to be made in the like currency, or such other as might be in circulation at the maturity of the notes; and he received payment of the note due July 1863 in that currency.

It appears from the evidence in the cause, that the land was sold at public auction, and that nothing was said at the time of the sale about the currency in which the payments were to be made. A short time before the war it was purchased by Wyatt at \$3200, which was considered a fair price for it. It was then in good repair; but before the sale to Crouch in July 1862, it had been badly torn to pieces by the soldiers who encamped on or near it. A witness, Canthorn, who lived near it, estimated its value in money, such as before the
336 *war at the time of the sale in July 1862, at \$2500. And it appeared that at this last date Confederate treasury notes was in value as \$1 50 to one dollar in gold; and in July 1864 they were as \$21 50 to one in gold.

The cause came on to be heard on the 12th of February 1868, when the court held that the plaintiff's note held by Lohman was made with reference to Confederate States treasury notes as a standard of value; and that the amount due upon it in Confederate notes had been tendered by the plaintiff to him; and decreed that the said note for \$1624 be commuted into lawful money of the United States at the rate of twenty dollars of Confederate treasury notes for one of the lawful currency of the United States; and fixed the amount due from Crouch to Lohman at eighty-one dollars and twenty-five cents, with interest from the date of the decree. And it was further decreed, that upon the plaintiff's paying to Lohman the said sum of \$81 25, with interest as aforesaid, Taylor, the trustee in the deed given by Crouch to secure the purchase money, should release and reconvey the land to Crouch. And Lohman was decreed to pay the costs of the suit. From this decree Lohman obtained an appeal to this court.

Howison, for the appellant.

1st. What was the legal contract between these parties prior to the statute scaling debts? This question is answered by the case of *Omohundro v. Crump*, 18 Gratt. 703. This case is in all respects like that, except that the appellant here was a holder for value of a negotiable note without notice of anything, except that it was given for land, and was secured by a deed of trust. As such he took the note free from all equities between the former parties. *Chitty on Bills* p. 90 marg.; *Robertson & Co. v. Williams*, 5 Munf. 381; *McNeil v. Baird*, 6 Munf. 316; *Vathir v. Zane*, 6 Gratt. 246; *Wilson v. Lazier*, 11 Gratt. 477. As to the tender in 1864, Confederate money could not be a legal tender.

Upon the question whether parol evidence

was admissible to prove the consideration of the note, Joynes, J., says, in *Omohundro v. Crump*, 18 Gratt. 703, 705, it was at least doubtful independent of the statute; and in *Woodward, Baldwin & Co. v. Foster*, 18 Gratt. 200, it was held that parol evidence was inadmissible to vary the obligation.

2d. How does the statute in relation to scaling Confederate contracts bear upon the case?

As to the tender. The bill asserts that plaintiff made a tender of the money; but the answer says that no tender was made. In such a case as this the plaintiff should make out his case beyond any question; and I submit that Mrs. Walker's testimony does not establish a legal tender. *Stephen's Ni. pri.* 2004, 2006, edi. of 1844.

In *Dearing's adm'x v. Rucker*, 18 Gratt. 426, it was held that the general assembly had no power to impair the obligation of a contract. All the statute did was to open the case to evidence and then fix the value. It is proved that there was no agreement between Crouch and Wyatt that Confederate money should be taken in payment of the notes; nothing was said upon the subject. The act of March 3d, 1866, Sess. Acts, p. 184-6, § 2, provides for cases in which, according to the true understanding and agreement of the parties, the contract was to be performed in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value. Now the question is what was the agreement; and here there was no agreement, except to sell and purchase the land at the price bid for it by Crouch.

338 *H. Cannon, for the appellee.

The case turns upon the character of the contract. The evidence shows it was made in July 1862; when there was no money in circulation but Confederate treasury notes. The land was sold with reference to these notes as a standard of value; and the cash payment was made in them. There is therefore nothing in the case to require a different rule of adjustment from that acted on in *Dearing's adm'x v. Rucker*, 18 Gratt. 426. If this be a contract falling within the operation of the act of March 3, 1866, then the endorsee only took what the payee held.

As to the tender. It is true Confederate treasury notes were not money in the sense of legal money, but there may be a tender of chattels, if chattels are the subject. 2 *Parsons Contr.* 646. Then did Crouch tender the money. Lohman does not deny the tender; he only says he does not remember; and Mrs. Walker proves it.

RIVES, J. The first enquiry in this case, is into the character of the negotiable note, which was purchased by the appellant of William A. Wyatt in March 1863. If that note is to be taken according to the understanding of the parties as payable in Confederate notes, then it is subject to be scaled under the act of March 3, 1866. If, however, it expresses a specie debt, it can only be discharged in that constitutional currency,

dollar for dollar, and admits of no reduction unless by the operation of the legal tender law of congress. In this latter case, the judgment must be for the dollars expressed on its face. There can be no intermediate ground; and I am free to say that if in this investigation I should come to the conclusion that the note in question, belongs to this latter class of demands, I would sanction no compromise of so clear a right, but

concede a recovery to the full nominal
339 amount. It is, *therefore noticeable

that the holder of this note while resisting its payment in Confederate notes as of the date of its maturity, acknowledges in his answer that either one of two settlements would be acceptable to him; namely, the value of the Confederate currency at the date of the note, or the value of the property, as represented by the note. The bill sets out a Confederate contract, solvable in Confederate notes. The averment is plain and distinct that "the notes were to be paid in 'Confederate currency' and none other, when they should mature." This is denied by the appellant in his answer sub modo only. He limits himself to a restricted disclaimer of "any understanding or agreement on his part to receive payment thereof at maturity in Confederate treasury notes, however much depreciated they might be." He nowhere denies his obligation generally to receive this currency; but leaves it to be inferred that if it had not depreciated, and for a stronger reason, if it had appreciated, he would not have made the objection. His claim, therefore, rests not upon the fact that the note was not truly payable in Confederate currency, but rather upon the grievous depreciation of that currency at the maturity of the note. When we take, in connection with this qualified denial, the fact already mentioned, that the answer advances no other claim, nor asserts any other right, but "to receive either what the money represented by the note was worth in gold at the time of the purchase, or the value of the property as represented by the note," we cannot escape the conclusion that there is nothing in the answer of the appellant that denies the character given to this note by the bill, or disputes the receivability of Confederate notes. His pretension is simply, that he should not bear the loss of this depreciation, but should receive either the worth of this currency at the execution of the note, or else, the proportionate
value of the real estate represented

340 *by this particular instalment of the purchase money therefor.

The answer of the other defendant in this cause, Wm. A. Wyatt, is stronger upon this point. After setting out with the same restricted denial of an agreement "to receive payment in Confederate currency, however depreciated it might be," this respondent goes further and asserts "the right to claim legal currency in discharge thereof." But the respondent is confronted with his own deposition in this cause, wherein he acknowledges that he had previously given another answer, which contained this dis-

tingent declaration that "the sale was made wholly with reference to Confederate currency. The cash payment was in Confederate currency, and this respondent expected the credit payments to be made in like currency, or such other as might be in circulation at the maturity of the notes." This testimony discloses the respondent's ignorance of the legal force of the answer filed, and sufficiently proves the understanding for Confederate currency. Thus stands the case upon the pleadings.

But when we look into the circumstances attending the contract, and recall the historical fact that at that time Confederate money was the only circulation, we cannot doubt that all the parties contemplated a payment in that currency. The price of the land is proven by Cauthorn to have been a Confederate price; the cash payment was Confederate, and the second instalment was received without objection in the same currency at a time when it had sunk to the ratio of six and a half for one. As between the original parties to this contract—Wyatt and Crouch—there can be no difficulty in declaring these notes to be payable in Confederate notes. Did the note purchased by Lohman lose this character, or wear any other aspect in its transfer to him? Though negotiable, and for that cause protected in

the hands of a holder for value against
341 all equities *between the original parties to it, it was not thereby transmuted into a specie debt. There is no pretence for alleging that it was ever purchased or held as such; on the contrary, I have already endeavored to show from Lohman's answer that he set up no such claim, but actually submits to a scale of it as of its date or its value, as shown by the share of land for which it purported to have been given. The consideration which he gave for it consisted of Confederate notes, which from the time of its execution had so fallen as to require then four and a half for one. He, therefore, knew its character when he negotiated it.

Upon this point this case is decidedly stronger than that of Dearing's adm'x v. Rucker, 18 Gratt. 426. There, the consideration of the bond was in part an antecedent specie debt; yet inasmuch as a check by which at one time the demand was liquidated, would have been payable in Confederate currency, and there was a novation of the debt by a loan, the court, while divided on the main question, concurred in treating the bond, which like the negotiable note here, merely called for dollars and cents, as clearly payable in Confederate currency. The president of the court, who dissented from the rule laid down in that case for the application of the scale, nevertheless agreed with the court as to the character of the bond in this particular, and regarded it, notwithstanding the absence of all reference to Confederate notes, as payable in them. The bond bore date the 14th June 1862, and referring to it, the president took this broad ground, that "Confederate notes being the principal, if not the only currency of the

country during the period aforesaid, it is fair to presume, in the absence of evidence to the contrary, that any contract made during that period was intended to be performed in that kind of currency, or was made with reference thereto as a standard of value." I fully concur in the reasonableness of this presumption ordinarily,

342 *and applying it to the case at bar,

I cannot conceive how any one can doubt that this note, whether in the hands of the original payee, or a purchaser for value, is to be taken and treated as payable in Confederate notes, if current at its maturity.

An effort was made in the argument to liken this case to that of *Omohundro v. Crump*, 18 Gratt. 703, where the bond was held to be payable in the legal money of the country. But the transactions are of different dates, and are deemed, under the circumstances, to have reference to different currencies. The bond of *Omohundro* bore date on the 8th day of November 1861, before Confederate paper money had filled the channels of circulation. The table of value of Confederate currency, admitted by consent in this case, as evidence, commences with January 1862, showing conclusively that before that time this currency had either not so entered into circulation or been depreciated as to admit of such quotations in the market. Besides the act of March 3, 1866, for scaling Confederate debts, applied to no contracts entered into before the 1st of January 1862. The cases, therefore, are wholly dissimilar, and governed by different principles.

Upon precedent, then, as well as reason, I think, we have satisfactorily ascertained that the note in question was payable at its maturity in Confederate paper money, if not then extinct as a circulating medium. It is material at this point to enquire whether there was any default on the part of the maker when it fell due. He is in a court of equity seeking a release of his land from the lien of this note; and if he is culpable or guilty of any default in its payment, he might be required to account for the value of the land at the time of the purchase under the authority of *White v. Atkinson*, 2 Wash. 94. The reasoning of

all the judges in that case shows that 343 if it had been a specie contract, *performance of it would have been decreed upon the payment of the purchase money, as agreed, with interest; but in view of the fact that it was made on the fluctuating basis of a depreciating currency, it was held that the purchaser under such circumstances should be required by the court of equity, whose aid he was seeking, to do equity, which was deemed to be, in that case, to pay the value of the land at the time of the contract, instead of the value of the money agreed upon. There the purchaser did not punctually pay, nor offer to pay, the purchase money according to his undertaking. Here, however, the facts are quite different. Let us first look into the bill and the appellant's answer,

and see how far the facts are conceded in the pleadings. The bill alleges that the complainant applied to Lohman in July 1863 to pay off and discharge the said note before its maturity; "but the said Lohman declined to receive the money in advance on the ground that he had no use for the money, and would rather wait until it became due." The fact of such application is not material, except as displaying the animus of the parties, because there was no sort of obligation on the holder to receive payment till due. How is this allegation, however, met in the answer? Certainly not by a denial; but rather by an admission of an interview with the complainant about that time, when he was "asked if he did not want the money for the note, or some words to that effect, to which respondent replied, in substance, that the note was not due, and he did not want any money;" the respondent restricts his denial to the phrase, "he would rather wait until it became due;" so that the averment of the bill of the fact of this application is substantially uncontradicted by the answer. But the material averment of the bill is, that "when the note was approaching its maturity, the complainant, being sick at the time, sent

344 to the said Lohman, by his daughter, the full amount of *said note in Confederate States treasury notes, and she, with the money in her hand, tendered him the sum due by said note," which was refused on "the ground that the currency had depreciated since he bought the note." The version given by the answer is somewhat variant; the respondent states that "about the 19th of July 1864 the complainant came with a lady, whom this respondent understood to be his wife, to the residence of this respondent and offered to pay the amount of the note of \$1,624 in Confederate treasury notes. This respondent refused to receive them, because such notes were then depreciated enormously below the value of gold. No money was produced, and no tender actually made to this respondent, but if it had been, he would have refused it for the reason above stated."

This fact then stands confessed by the pleadings, namely, that about the maturity of the note the holder was waited upon by the maker or his agent, and was offered the amount of the note in the currency, for which as we have seen it called. But whether this offer was so made as to constitute any actual tender, is the only point in issue? This I think is determined by the testimony of Mrs. Walker, who made it. Her statement is, that when she called upon Mr. Lohman to pay this note, she informed him of her business, and "proposed to pay the money and get the note; that she had \$1800 with her, held it in her hand, and showed it to him, and offered to pay him the amount of the note, but he declined it, saying he would not receive Confederate money, that he had paid gold and silver for the note, and would not receive anything else." It will be conceded that the legal incidents of a valid tender are the actual

production and proffer of the precise sum due, so as to relieve the creditor of anything on his part to be done to reap the full fruition of his contract. But these may be dispensed with, either expressly or impliedly, by the creditor. The doctrine is
 345 *a reasonable one. It is accommodated to the circumstances of each case, so as to give to the respective parties the natural and intended benefits of their acts. Thus, if it be objected in this case that, according to the pretensions of Lohman, there was no actual production of the money, we may well exclaim what was the necessity of it, when his refusal was in no wise predicated of its non-production, but was such as to waive by the strongest implication the necessity of producing it; and again, if the objection be that the tender was for more than the whole debt, the question recurs, whether the creditor by not objecting for the want of change, but for a different and collateral cause, did not thereby abandon this objection. Thus, in the case of *Bevans v. Rees*, 5 Mees. & Welsb. R. 306, Lord Abinger said: "I am not disposed to lay down general propositions, unless where it is necessary to the decision of the case; but I am prepared to say, that if the creditor knows the amount due to him, and is offered a larger sum, and without any objection on the ground of want of change, makes quite a collateral objection, that will be a good tender." I conclude, therefore, that the tender in this case was a good one, and that if, instead of retaining the sum, the debtor had taken instant measures to set it aside, or bring it into court for the creditor, it would have availed to stop interest. At any rate, the debtor has made no default, and in coming into equity for relief, need not be subjected to terms, and is well entitled to ask to stand upon the literal terms of his agreement, even upon the ruling in *White v. Atkinson*.

But the complainant in this case specially invokes the relief authorized by the 4th section of the act of March 3, 1866. This section contemplates and provides for two classes of "bona fide and actual tenders in Confederate States treasury notes;" one of
 346 tenders at the maturity of the claim, and the other of tenders *after the maturity of the claim. In both a court of equity is authorized to grant relief, subject, however, to two conditions: first, that it shall not appear "that the creditor was justified in refusing to accept the amount tendered in consequence of a substantial and decided depreciation of said currency after the time at which payment ought to have been made, and before the time at which the tender was made; and secondly, that it shall not otherwise appear to be inequitable to grant such relief." The first of these conditions is pregnant of meaning and instruction upon the application of the scale in this case. It bases an exception upon the fact of a signal depreciation between the time of maturity and the time of tender, leading irresistibly to the conclusion, that payment or tender

of payment is regular, legitimate and unobjectionable at the former period. It virtually appoints the maturity of the claim as the time for ascertaining the value of the Confederate notes, or "other equal or better currency" to be tendered or received in discharge of it. We should, therefore, violate the plain meaning of this provision under which we are called upon in this case to act, if we were to yield to the appellant's demand to scale his claim as of the date of its execution rather than of its maturity.

But it is supposed and urged that this 4th section should be controlled or modified in this respect so as to be reconciled to the 2nd section of the same act, which, it is said, applies the scale at the date of the contract. But this assumption is incorrect. There is no such restriction in this section. It existed in the act of 1781 before the adoption of the constitution of the U. S. A new duty grew out of that constitution and was devolved upon the assembly of 1866; and that was, so to frame their laws for the adjustment of Confederate liabilities as not to violate the constitutional provision against laws impairing the obligation of
 347 contracts. In obedience to this requirement the *assembly of 1866 departed from the precedent of 1781, and instead of confining the scale to the time of the contract, as did the act of 1781, took care to provide the alternative of "such other time as may to the court seem right in the particular case," so that the court might at all times, further and effectuate the understanding of the parties, and avoid any violation of their contract. It has been supposed that the fifth section of the act of 1781 assimilated that act to the present one so far as the designation of the time to apply the scale, is concerned; but it is manifestly a larger discretion given the court "to award such judgment as to them shall appear just and equitable," without pointing specially as this latter act does, to the period of scaling. Upon this question of legislative intent, some light may be obtained by reverting to an antecedent law upon the subject of the currency. I refer to the act of October 14, 1863, ordaining the currency in which contracts on or after the 20th of October 1863, shall be deemed to be payable. It designates it as "the currency, which, at the time the contract becomes payable, shall be receivable in payments to the State, &c." It is, therefore, another and instructive instance, in which the legislature adopts "the time the contract becomes payable" as the proper juncture to fix the liabilities of the parties.

But after all, the function of courts is restricted to the proper interpretation and due execution of contracts. They have no authority to modify or alter the contracts that may be submitted to them for construction or execution. When the true understanding of the parties, has been arrived at it becomes in itself a law to the court, and demands a scrupulous fulfilment. The legislature, also, is incompetent to control or vary contracts, and any law having that

effect, is simply void. Our enquiry in this case must, therefore, be directed to ascertain in what way the contract between the maker and holder of this note, is to be executed *under existing circumstances, in conformity with its true obligation, and with legal principles.

They were both dealing in an unstable and precarious currency. It was inconvertible, and its payment, indefinite in point of time, was contingent upon the ratification of a treaty of peace between the Confederate States and the United States. We have only to revive our recollections by consulting the table that has been given in evidence, to renew our appalling sense of its rapid and progressive depreciation. We can more sensibly feel and test this by working out results by this table. Suppose Lohman, in the choice offered him, had taken the first note of \$1,537, he would only have given for it in gold \$341, and would have realized at its maturity only \$160, showing a loss upon the operation in the course of five months of \$181. So, when he chose the second note, he paid for it in real value only about \$383 11. Such experience banished credit from business and pecuniary transactions during the Confederacy, and made cash, a necessity in all dealings. Wherever credit was given, unless it was long enough to survive this currency, it necessarily entailed loss and often most grievous loss. Hence when the outcry of hardship is raised against the courts in the execution of these Confederate contracts, it is not due to their judgments, but rather to the evils inseparable from such a deplorable state of the currency. It is not in the power or within the province of courts to avert or redress ills proceeding from such a revolutionary state of society, trade and currency. If the appellant's pretension is sustained, and this note is to be scaled as of its date, then he makes a profit of near \$700, receiving \$1,082 for what cost him in real value, but \$383, at the time of his purchase; his claim, therefore, is two-fold; to escape what he denounces through his counsel here as an atrocious wrong, and reap a profit of a kind he could never have contemplated.

349 *But if he may thus obtain a profit without the scope and intent of his bargain, may not his adversary enjoy a gain which results to him as the fruit of his bargain? In any event, there must be a loss on one side and a gain on the other, and it is the province of the court to fix it according to the understanding of the parties and the legal effect of their dealings.

Hazard and speculation, after a certain period, entered of necessity into all dealings with this paper money. I will not say that there might not have been some folks of small commerce in life or business, who regarded it and dealt with it as with stable and real values; but they were the exceptions from which no rule for judicial guidance can be safely or properly drawn. It is not, therefore, a matter of presumption to impute risk to Confederate credits at a

marked stage of this depreciation; it was necessarily in the contemplation of the parties, at least, by intendment of law, if, in some rare cases, it were not so in fact. How else shall we account for the signal and notorious fact, that credit, from having universally prevailed, gave way during the Confederacy to cash in all business transactions? It was plainly because credit in such a currency, was unsafe and impracticable.

When we come, therefore, after the expiration of this currency, to pronounce upon debts payable therein at future dates, we must necessarily determine who, according to the fair intent of the parties and the principles of law,—creditor or debtor,—is to bear the loss incident to this depreciating medium. It will be readily conceded that it would be competent for the parties to provide for such contingency in their agreement; but in the absence of such provision we must look into the nature of the contract and the rights of the parties to discern where this liability properly rests. In case of a deferred payment, it is but a

reasonable inference that the debtor, 350 in thus stipulating for credit, *had a motive for it, and expected a benefit from it. We may not know or be able to conjecture the motive or the benefit; but he is not the less entitled to gratify the one or enjoy the other. Nay, more; if he has no special design in the indulgence, for which he bargains, and it be the mere result of a vague or visionary caprice, he acquires all the incidental advantages that attend upon this delay, whether contemplated or not, and they cannot be wrested from him without a violation of his contract. When one engages to pay, at a future day, the notes of a depreciated and depreciating currency, who can rightfully undertake to say that the obligor did not count, as he reasonably might have done, upon a greater facility of payment from the greater cheapness of the paper, and the consequent advance of prices at that day? Or how can he be denied such advantages if they really occur, although he may not have reckoned or foreseen them? Whatever may be his bargain, he is entitled to its legitimate fruits. So, on the other hand, if the creditor gets, on the agreed day, the commodity for which he contracted, though fallen in value since the date of the contract, he suffers no wrong, though it prove a loss, for the simple and obvious reason that he gets all he bargained for; and in case of default, his measure of recovery is the value of the commodity at the time of delivery, and not at the date of the contract.

This reasoning is strikingly exemplified by the facts of this case. The appellee, Crouch, got two years' time on his purchase. This indulgence was, of course, a material and valuable ingredient in his contract. The medium of payment became so cheapened, that at the end of one year he sought to discharge both of the deferred instalments, and failing at that time to

retire his last note, he was prompt and particular in offering to meet it at maturity. Can it be denied that he faithfully did all he agreed to do? The only justification attempted *for the rejection of this tender, was the great depreciation of the paper; but there seems to me to be no mode of sustaining this plea, except by interpolating in the contract a condition that does not pertain to it; namely, to be payable in Confederate notes, provided they had not fallen in value since the contract. It is needless to say that the whole spirit of the law, which inflexibly upholds the sanctity of contracts, would revolt against such a change of the agreement, and such a dangerous precedent as it would be of the deliberate infraction of the terms of the parties. The obligation of the creditor to assume the risk of depreciation in such a case, inheres, *ex justitia*, in his agreement to receive at a future day depreciating paper money. He was bound to contemplate the probability of a further decline, and if he did not guard against it it was his fault, and he must take the consequences. That this contingency was in the mind of the appellant, is probable from his selection of the last note. He, doubtless, thought that safest, as it had the greater chance of surviving the war, and of being realized in a better or improved currency. Should he thus bargain for this benefit, and now refuse to bear the adverse chance which has befallen him? It is never a hardship to be required to abide one's bargain; there may be an individual loss in it; but it becomes a solemn pledge to the public of the cost at which the law protects the interest of trade, the honor of pecuniary dealings, and the sanctity of contracts.

This appeal was, doubtless, allowed to give us an opportunity of reviewing the case of *Dearing's adm'r v. Rucker*, in which there was a division of opinion. I have accordingly reconsidered that case in its bearing upon this, with a full and honest purpose to change my opinion, if, upon a patient review of it, I became aware of its error. I have not, therefore, gone over the grounds or authorities that were so well taken and *expounded by my brother Joynes in that case, but have only pursued with brevity the course of reasoning that led me to concur in his opinion, and now conducts me to a reaffirmance of it.

For these reasons, I am of opinion that there is no error in the decree of the court below, which may not be amended here. As already intimated, interest should be allowed on the sum decreed, from the date of the tender, the 19th of July 1864.

JOYNES, J. I concur with Judge Rives in thinking—

1. That the evidence proves, that "according to the true understanding and agreement of the parties," the note in this case was payable in Confederate treasury notes, and that this evidence was admissible against Lohman, the endorsee.

2. That the evidence proves that Crouch made a sufficient tender to Lohman of the Confederate notes payable on said note, within the meaning of the fourth section of the act of March 3, 1866.

3. That Crouch not being therefore in default, the court has no authority to impose any equitable conditions upon him beyond the payment of the sum due on the note.

4. That the tender was not sufficient to stop interest, because it does not appear that the money was kept in readiness to be paid whenever it might be called for. *Gyles v. Hall*, 2 P. Wms. p. 378; *Shumaker v. Nichols*, 6 Gratt. 592; *Gammon v. Stone*, 1 Ves. sen. R. 339. And, therefore,

5. That the decree should be amended so as to make the interest run from the maturity of the note, and that so amended it should be affirmed.

If there had been no tender, I think the court should have imposed equitable terms on the plaintiff. *White v. Atkinson*, 2 Wash. 94, establishes that when a contract for the purchase of land is made in a currency *which is already greatly depreciated, and which is constantly undergoing still further depreciation, specific execution will not be decreed in favor of a vendee who is in default, upon his merely paying the purchase money and interest according to his contract. The same principle applies equally in a bill to redeem an incumbrance. I incline to think, however, that all that Lohman could have insisted on would have been that Crouch should have been required to pay him the value of the Confederate money he paid Wyatt for the note—that would have saved Lohman from loss; while to give him the full value of the land, which was not his, would be to give him more than he parted with; and thus to exceed the demands of equity. It is true that, as a general rule, when a mortgagee assigns the mortgage for a consideration which is less than the sum due upon the mortgage, the assignee is entitled to the benefit of his bargain, and the mortgagor will not be allowed to redeem upon paying to the assignee what the mortgage cost him; he must pay all that is due on it. *Phillips v. Vaughan*, 1 Vern. R. 336; *Williams v. Springfield*, ib. 476. That rule is obviously just, where the only condition of redemption is the payment of what the mortgagor owes under his contract. But I doubt whether that rule can justly be applied to an exceptional case where, as in *White v. Atkinson*, the court requires more than the payment of the agreed purchase money. It requires more, in order to do justice to the defendant, and justice is done to him when he is paid for all he ever parted with, and is thus protected against loss.

MONCURE, P., dissented.

Decree amended so as to give interest from the maturity of the note, and affirmed.

354 *Rich. Fred. & Pot. R. R. Co. v.
Snead & Smith.

January Term, 1860. Richmond.

(Absent, MONCURE,* P.)

1. **Due Bill—Signed by Railroad President—Parol Evidence.**—R. the president of a railroad company, signs his name without any addition, to a due bill, acknowledging that there is due to S. & S. \$484, in full of labor performed on cottage lot of the railroad company. It being uncertain on the face of the note, whether the labor was performed for R. or the company, parol evidence is admissible to ascertain that fact.

2. **Railroad President—Authority to Make Contracts—Due Bill.**—The authority of the president of a railroad company to make contracts for necessary labor for the company, is incident to his office. And he may furnish evidence of the amount payable under the contract, either before or after the service, and put that evidence, in his discretion, into the form of a due bill or promissory note; unless such power is restricted by special legislation or by regulations of the company known to the other company known to the other contracting party.

3. **Verdict Contrary to Evidence.**[†]—Where the question in the appellate court, is, whether a verdict is contrary to the evidence, where the ultimate facts upon which the legal conclusion in the case must rest, are to be deduced by balancing the different facts proved, and by weighing and comparing the inferences to be drawn from them, respect should be paid to the verdict and judgment of the court below.

This was an action of assumpsit in the Circuit court of the city of Richmond, brought by Joseph H. Snead and Benj. E. Smith, late partners, against the Richmond, Fredericksburg & Potomac Railroad Company, to recover the hires of slaves which the plaintiffs alleged were employed by the company. The declaration contained only the common counts.

Upon the trial the question in dispute was, whether the slaves had been hired
355 by Edwin Robinson, who *was at the time the president of the company, for himself or for the company. The jury found a verdict for the plaintiffs, for the sum of four hundred and eighty-four dollars, with interest thereon from the 21st of May 1856 till paid; and the defendants thereupon moved the court for a new trial on the ground that the verdict was contrary to the evidence; but the court overruled the motion, and rendered a judgment on the verdict; and the defendants excepted, and obtained a supersedeas. The material facts, as they appeared to this court, are stated by Judge Joynes in his opinion.

Steger & Sands, for the appellants.

Lyons & August, for the appellees.

*He was a relation of the parties.

[†]**Verdict Contrary to Evidence.**—See monographic note on "Bills of Exceptions" appended to *Stoneman v. Commonwealth*, 25 Gratt. 887; and note to *Read v. Com.*, 23 Gratt. 924; *Dusenberry v. Alford*, 5 W. Va. 117, and see also, *Corder v. Talbott*, 14 W. Va. 288, citing the principal case as authority on this point.

JOYNES, J. This is an action of assumpsit by Snead and Smith against the Richmond, Fredericksburg & Potomac Railroad Company, to recover for certain work and labor performed by the slaves of the plaintiffs. The declaration contains only the common counts. And the principal question is, whether the money claimed by the plaintiffs is due from the railroad company or from Edwin Robinson, who was president of the company at the time the work was done. The jury found a verdict for the plaintiffs; and the court overruled a motion of the defendants for a new trial. The bill of exceptions certifies the facts found on the trial. Such was the obvious intention of the certificate, and I perceive no inconsistency between any of the "facts" certified. It is not enough, however, that a bill should purport, by its terms, to certify "the facts proved," if such is really not the substance of what is certified. *Vaiden's case*, 12 Gratt. 717.

The plaintiffs gave in evidence the following paper, the body and signature of which were proved to be in the handwriting of Robinson, the president of the company, and which was given by him to
356 one of the *plaintiffs upon a settlement for the work, which is the ground of the present claim:

"Richmond, May 31, 1856.

\$484. Due Joseph H. Snead and Benjamin E. Smith four hundred and eighty-four dollars, in full, of labor performed on cottage lot of the railroad company, the same payable on demand, with interest from date. Ed. Robinson."

It does not distinctly appear, from the terms of this paper, whether it was designed to acknowledge a debt due by Robinson, who signed the paper in his own name, or by the company, whose officer and agent he was, and upon whose lot the work is stated to have been done. The language is ambiguous and consistent with either view, and parol evidence of the consideration, and of the origin of the paper, is admitted to explain its meaning in this respect. *Early v. Wilkinson*, 9 Gratt. 68, 1 Am. Lead. Cas. 606, 3d ed., notes to *Rathbone v. Budling*; *Nash v. Towne*, 5 Wall. U. S. R. 689. That would be so, even if the action were founded on the paper itself. It is so a fortiori where the action, as in this case, is founded on the original consideration.

It was proved on the part of the plaintiffs, among other things, that they removed to Ashland, where the cottage lot is located, in the fall of 1854; that Robinson, who was the president of the railroad company, applied to the plaintiff Snead to hire the hands of the plaintiffs, and agreed to give him \$1 25 a day for each of them; that during the months of November and December 1854, the hands worked under the direction of one Thompson, who was a section master upon the railroad of the defendants; that in January 1855, the hands of the plaintiff were turned over to the control and management of the plaintiff Smith, who made all the contracts for work done by them and

357 kept the *accounts; that they were seen at work under the direction of Thompson, the section master, sometimes upon the railroad of the defendants and sometimes upon the cottage lot, the property of defendants; that some of the first work done by the hands of the plaintiffs were paid for by the defendants; and that between 1852 and 1856 one Taylor was employed by said Robinson to do work upon the cottage lot of the defendants, for which work he was paid by defendants. It was further proved by the plaintiffs, that in the spring of 1856, the plaintiff Smith being about to remove from Ashland to the county of Luenburg, the plaintiff Snead advised him to go down to Richmond and settle the accounts with the defendants; that Smith went down accordingly, and when he returned told Snead that he had taken a note with interest, but that in consequence of the action of Thompson he had been compelled to lose about \$100.

These are all the material facts proved by the plaintiffs, except one or two, to be mentioned hereafter.

The defendants gave in evidence certain proceedings of the board of directors of the railroad company, and other documents connected therewith, from which the following facts appear:

In the year 1836, the railroad company purchased, for the purpose of procuring timber and wood for the use of the railroad, a tract of over 400 acres of land, on which Ashland is now situated. A cottage was subsequently built upon this land, but the date of its erection does not appear, though it seems to have been erected prior to November 1852. In November 1852 the board of directors passed a resolution authorizing the president to convey a title upon payment of the purchase money, to such persons as had purchased or might purchase any portion of the lands of the company in the neighborhood of the cottage. This

358 building *was erected at the expense of the railroad company. In July 1857 the board passed a resolution reciting that the president had, under the authority conferred by the resolution of November 1852, disposed of 43 acres and a fraction, of the land, comprising lots No. 22, 23 and 24, to himself and others associated with him in the improvement known as the Hotel property, and that upon said lot No. 24, a building known as the Cottage building had been located at the expense of the company, the cost of which, with such other improvements as had been made in like manner, was to be refunded by the said purchasers, and directing a conveyance of the said property to Edwin Robinson and his associates, upon payment of the cost of such improvements and interest, to be ascertained by the treasurer and superintendent. In September 1857 a resolution was adopted appointing one arbitrator to act with another to be selected by the Ashland Hotel Company, for the purpose of ascertaining the expenses which had been incurred by the company in the erection of the cottage and other

buildings, and in the improvement of the adjoining grounds. In April 1858 the arbitrators made their report, in which they stated that the railroad company furnished all the materials and executed all the work for the cottage building, except the painting, plastering, a portion of the window blinds, and the gas fixtures; that in respect to the gravelled walk and the decorations of the lawn, the gravel, and most of the labor of spreading it, were furnished by the railroad company, and that the cutting down of the trees and wood on the lawn, and the grubbing and shrubbing of the lawn were done by the railroad company, and that the balance of the work, such as grubbing, ploughing and grass seeding, were done by the hotel company. They

assessed the cost of the improvements as follows: *The cottage, as far as completed by the railroad

company,	\$2,150 00
Bathing house and kitchen,	350 00
Gravelled walk and work on lawn,	100 00

\$2,600 00

At the same time the board passed a resolution confirming the report of the appraisers, and reciting that it had been agreed between the Railroad Company and the Ashland Hotel and Mineral Well Company, that the latter company should pay the amount assessed by the said report, and that the property upon which the said cottage and other improvements were located should thereupon be conveyed to said hotel company, and that a deed had been executed and tendered in accordance with said agreement, and directing the treasurer of the railroad company, before the delivery of the said deed, to require of the hotel company their obligation, payable on demand for \$4,407 50, with interest, with Edwin Robinson as security, who should execute his individual bond for the same sum, and payable in like manner, and deposit with the treasurer one hundred shares of the stock of said company, with a power of sale as a further security.

It was further proved by the defendants that, for several years prior to 1856, Edwin Robinson claimed the hotel and cottage lots as his own, and had expended large sums in the improvement of them; that he built a hotel upon the hotel lot, which he kept by an agent; that the improvements put upon the property by Robinson were very extensive, the cost of them in 1856, at which time they had all been completed, being some \$50,000 or \$60,000; that he had built and paid for two cottages on the cottage lot, and had also paid for certain additions to the ball room, which was on the said lot, and for certain repairs to the fencing and other job work on the said lot, all before 1856; that the cottage *lot was used by Robinson in conjunction with the hotel lot, the ball room, billiard saloon and bowling alley being on the cottage lot; that Edwin Robinson was the principal if not the only stockholder in the Ashland Hotel and Mineral Well Company; that

after the appraisement aforesaid, the property above mentioned was conveyed to said company; that Robinson about 1855 and 1856 was hard run for money, but that his credit was good, and he could always borrow large sums.

It was proved, on the part of the plaintiffs, in addition to the facts already mentioned, that, prior to the fall of 1860, Edwin Robinson had failed, and left the State of Virginia; that he as a man of integrity, and that the plaintiff Snead had, from time to time, lent him money, for some of which he still held his bonds; that payment of the debt claimed in this action was not claimed of the defendants before the fall of 1860 (when the action was commenced), because the plaintiffs were not in want of money, and the debt bore interest, and was considered a good investment.

It was further proved by the treasurer of the defendants, that while Robinson was president he did sometimes execute notes for the defendants; that these notes were in printed forms, in which the company promised to pay, and were signed by Robinson as president; that the usual mode of certifying work done for the company, was for the superintendent to certify what was done and its value, and to accompany the certificate with an order on the treasurer to pay it, which was the course required by the regulations of the company; and that the witness had never known the president to give such certificate for work done for the company.

The defendants further proved that about twelve years before the trial (which was in March 1868), a witness who met the plaintiff Snead at Ashland, heard *him say, that he was very busy doing some work for Mr. Robinson on the cottage lot.

These are all the material facts of the case.

The original contract of hiring was made with the plaintiff Snead by Robinson, who was then the president of the railroad company. Both he and the company were then probably engaged in doing work upon the cottage lot, though it does not appear when Robinson commenced his improvements upon that particular lot. The terms of the contract, except as to the price, do not appear; as far as appears nothing was said about the particular work for which the negroes were hired, or as to the party who was to pay the hire. The contract was made some time in the fall of 1854, and the slaves worked in the months of November and December of that year. What particular work they did in those months does not appear; but it does appear that the work, whatever it was, was done under the direction of Thompson, who was a section master of the defendants. The necessary inference is, that it was work done for the defendants; for it cannot be presumed that the agent of the defendants would have the direction of the hands engaged in working for any party other than the defendants.

Whether there was a new contract after

January 1, 1855, when the control of the slaves and the making of the contracts for their labor, were turned over to the plaintiff Smith, does not appear. But the slaves still worked as before, under the direction of Thompson, who was still a section master of the defendants. They so worked, sometimes on the railroad of the defendants, and sometimes on the cottage lot. And it does not appear that these slaves worked at any time upon the cottage lot, except under the direction of said Thompson. The inference must be, for the reason already assigned, that all the work done by them on the said lot, was done for the 362 defendants, and that *they were in their service. They were, therefore, employed sometimes upon the cottage lot, and sometimes upon the railroad, as occasion required, but always under the direction of Thompson.

And accordingly the plaintiffs understood that their contract was with the railroad company. Snead advised Smith to go to Richmond to settle his accounts with the company. Smith went to Richmond and had the settlement, and when he came back told Snead that he had taken a note with interest, but that in consequence of the action of Thompson he had been compelled to lose about \$100. Robinson was then in good credit.

Why should Snead then treat the claim to be settled as one against the company, if it was really against Robinson? And what had Thompson to do with the claim, except as the agent of the defendants, under whose direction the slaves had worked in their service? It further appears, that the payment of the note was not sooner demanded of the defendants, only because it bore interest, and was regarded as a good investment.

But that is not all, for it appears that some of the first work done by the plaintiffs' slaves was paid for by the defendants. This was an admission that the slaves were in their service, and, in the absence of notice to the company, gave the plaintiffs a right to look to the defendants for the payment of the subsequent hires, at least to the extent of all the work done upon their property.

It is true that Robinson was, at the same time, doing work at his own expense, upon the cottage lot; but it does not appear that the slaves of the plaintiffs did any work on that lot, or elsewhere, under his direction, or under the direction of any agent or servant of his. The improvements put upon the cottage lot by him may have been more extensive and costly than those 363 *put upon it by the defendants, but it appears that those of the defendants amounted to \$2,600, at least. And while Robinson claimed the lot under an executory agreement with himself as president of the company, with the terms of which he had not yet complied, and which had not yet been assented to by the board of directors, the title was confessedly in the defendants, and so remained until after April 13, 1858.

It is insisted, however, that the appraisal of the arbitrators shows that of the \$2,600 assessed by them as expended by the railroad company upon the improvement of the cottage lot, only \$100, was for such labor as would probably be performed by slaves. But this proves nothing against the plaintiffs. They were not privy to that appraisal, and are not bound by it. The slaves may have performed labor in connection with the cottage, bathing house and kitchen, and which was, therefore, embraced in the first two items of \$2,150, and \$350, or it may have been the intention of Robinson to charge himself with the payment of the note held by the plaintiffs, although the work was done for and on the credit of the company, and he may, therefore, have given no account of it to the arbitrators. But, however all this may have been, and whatever Robinson may have done or intended, without the knowledge and assent of the plaintiffs, the work, as we have seen, was done upon a lot belonging to the defendants; it was done under the direction of an agent and servant of the defendants, while they were engaged in making improvements on the said lot; the plaintiffs understood and believed that their contract was with the defendants, and, therefore, gave credit to them alone; and they were justified in thus giving credit to the defendants, by the fact that the defendants had paid them for part of the labor of the same slaves, and had not notified them that they would be liable no longer, even for work done on their property.

364 *The authority of Robinson as president of the railroad company, to make contracts for the necessary labor for the company, was incident to his office, and has not been disputed. So he might furnish evidence of the amount payable under the contract, either before or after the performance of the service, and put that evidence, in his discretion, into the form of a due-bill or promissory note. Such incidental powers exist by law and general usage, and exist in all cases where the authority of the president is not restricted by special legislation, or by regulations of the company known to the other contracting party. And it is obvious from the testimony of the treasurer, that there was then no regulation of the company restricting the power of Robinson to execute promissory notes for the company.

The argument, however, is, that as Robinson usually gave notes of the company on printed forms, and signed them as president, it is to be presumed that the paper given to the plaintiffs, which is not on a printed form, and not signed as president, was not intended to bind the company. It is not proved that he never gave an acknowledgment of debt, or made any other paper binding the company, except on a printed form, and with the addition of president to his signature. But if that had been proved, it would only have been a circumstance to be weighed by the jury, in

determining the question in this case, namely, whether the work for the price of which the action is brought, was done for the defendants, and so as to make them liable to pay for it.

Upon the whole, I am of opinion that the verdict of the jury is fully sustained by the facts proved.

It is not necessary therefore to say anything in reference to the case of *Slaughter's adm'r v. Tutt*, 12 Leigh 147, which was cited in the argument by the counsel for the railroad company, to show that as 365 the facts *proved, and not the evidence merely, has been certified, we ought to draw our own conclusions from them, uninfluenced by the opinion of the jury or of the Circuit court. That case, however, admits, that when the facts proved do not establish the fact necessary to a just conclusion, but such further fact is to be inferred from the facts proved, and the facts proved leave it uncertain whether such further fact can or cannot be fairly inferred, respect ought to be paid by the appellate court to the verdict and judgment in the court below; and I apprehend that respect should thus be paid to the verdict, and judgment below, in every case where the ultimate facts upon which the legal conclusion in the case must rest, are to be deduced by balancing the different facts proved, and by weighing and comparing the inferences to be drawn from them. In such a case, this court should not reverse the judgment upon the verdict, unless it be a case of "plain deviation."

I am of opinion, therefore, to affirm the judgment.

RIVES, J., concurred in the opinion of Joynes, J.

Judgment affirmed.

366

*Alley & als. v. Rogers.

January Term, 1860, Richmond.

1. Case at Bar—Negotiable Notes—Confederate Currency.—On the 24th of May 1859, G. conveyed real estate in Henrico to W. to secure four negotiable notes of that date, payable in 6, 12, 18 and 24 months to R., who lived in Kentucky. The notes were endorsed by R. and deposited by him in the F. bank for collection. On the 21st of February 1861, G. conveyed to A. this real estate, with much more, in trust for payment of his debts; debts being a lien upon any of the property to be paid first. On the 17th of April 1863, A. sold the greater part of the real estate conveyed to W., and conveyed the same by deeds of different dates to the purchasers; and some of these purchasers conveyed subsequently to others. The last two of the notes aforesaid were protested for nonpayment, and remained in the bank until the 14th of September 1863, when A. paid them to the bank in Confederate notes, and took them up; Confederate notes being then the only currency, and being generally received by the banks in payment of notes either owned by the bank or deposited for collection, and being then depreciated to about twelve for one in gold; but the deed of trust to W. was not released.

After the war R. filed his bill claiming that the two notes were still due, and seeking to enforce the trust for their payment, and he made G., the bank, A., and the purchasers from A., and the present holders, parties. **Held:**

1. **Note in Bank for Collection—Protested—Payment to Bank.**—If a note deposited for collection in a bank where it is made payable, is not paid at maturity, but being protested, is permitted by the owner to remain in the bank, however long or from whatever motive, he may permit it thus to remain there, it may, as a general rule, be safely paid to the bank by the debtor: provided he has no notice that the bank in fact has no authority to receive the money.
2. **Same—Payment in Confederate Currency.***—In regard to notes deposited at a bank for collection during the war, when Confederate money was the only currency, they might properly have been paid in such money: at least without notice that other money was demanded.
3. **Same—Protested—Left in Bank—Quære.**—In regard to notes payable at bank before the war, deposited for collection and protested for non-payment, but neglected *to be withdrawn by the owner residing in this State—*Quære*: whether, after two or three years, the bank had authority to receive payment of such notes in a currency which came into existence after the protest of the notes, and had depreciated in value at the time of payment as twelve to one compared with specie, in which payment might legally have been demanded.
4. **Same—Non-Resident Owner—Payment in Confederate Currency.**—In this case of a non-resident owner, the bank had no authority to receive payment of the two notes in the depreciated Confederate currency; the payment by A. was a void payment, and the said notes are still due and unpaid, and the deed of trust to W. to secure them is a subsisting security; and R. is entitled to have the same enforced for the payment of said notes.
5. **Case at Bar—Sale of Land to Pay Debt.**—R. is entitled to have a decree for the sale of the said real estate, without first proceeding against G., or the bank, or A., or any other person.
6. **Proceedings against Purchasers of Land, Subject to Liens.†**—If it is not necessary to sell the whole of the real estate conveyed to W., to pay said notes, the part not sold by A. is first to be sold; and after applying the proceeds of said sale to the payment *pro tanto* of said notes, the balance due upon them should be raised ratably out of the lots now held by the purchasers respectively, in proportion to the amounts of the purchase money for which they were respectively sold by A. on the 17th April 1863, without

*Collection by Agent in Depreciated Currency.—See *Ewart v. Saunders*, 25 Gratt. 207; *Pilson v. Bushong*, 28 Gratt. 237.

†Proceedings against Purchasers of Land, Subject to Lien of Judgment, Deed of Trust, etc.—While there is one decision to the contrary (*Beverley v. Brooke*, 2 Leigh 425), it seems now well settled in Virginia that when land, subject to a lien, is bought by purchasers at different times, the purchasers shall be subjected in equity in the inverse order of their purchases. If any of the land remains in the hands of the debtor, that, of course, should be subjected first. See *Brengle v. Richardson*, 78 Va. 406; *McClas-*

regard to the dates of the deeds from A. to the purchasers.

7. **Decree—Interlocutory—Decree between Co-Defendants.‡**—The decree for the sale of the land for the payment of the said notes, being interlocutory, though it is affirmed on appeal, there may be a decree between the co-defendants when the cause goes back, if it is a proper case for such a decree.

On the 24th of May, 1859, Benjamin W. Green, by deed of trust dated on that day and duly recorded, conveyed certain real estate in the town of Sidney, in the county of Henrico, to John G. Williams and Mortimer M. Young, as trustees, to secure to B. F. Rogers the payment of four negotiable notes, dated on the same day, and payable at 6, 12, 18 and 24 months after date, at the Farmers Bank of Virginia. The word "Farmers" was omitted in the notes, and there was a blank in its place, but they were plainly intended to be
368 *payable at the Farmers Bank of Virginia, and were so treated by the parties. On the 28th of August, 1860, the said J. G. Williams, M. M. Young and B. F. Rogers, by deed dated on that day, released to B. W. Green a portion of the said real estate conveyed by the said deed of trust. The notes were deposited in the said bank for collection. The first and second were paid at maturity, or at least no question arises in regard to them in this case. The third and fourth for \$1,811 08, due November 27, 1860, and \$1,860 94, due May 27, 1861, were not paid at maturity, but were protested for non-payment.

On the 21st of February 1861, the said B. W. Green and his wife, by deed of trust dated on that day, conveyed all his property, including his interest in the said real estate in Sidney, to A. D. Williams and others, trustees, to secure the payment of certain debts upon certain terms and conditions therein mentioned. A. D. Williams alone acted as trustee under that deed; and on the 17th of April, 1863, he sold a part of the property thereby conveyed, including the greater part of the real estate in the town of Sidney, conveyed by the deed of trust to J. G. Williams and M. M. Young, and not released as aforesaid. By the terms of the deed of trust from Green and wife to A. D. Williams, &c., the trustee was directed, after paying the expenses of the trust, to apply the trust fund in the first place to the payment of "all liens by deeds of trust, judgments, or otherwise, upon said trust property."

On the 14th of September 1863, about five months after the sale made by said A. D.

key v. O'Brien, 16 W. Va. 791; *Renick v. Ludington*, 20 W. Va. 511; *Conrad v. Harrison*, 3 Leigh 532; *Rodgers v. McCluer*, 4 Gratt. 81; *Henkle v. Allstadt*, 4 Gratt. 284. See *McClung v. Belrne*, 10 Leigh 402, and *Jones v. Phelan*, 20 Gratt. 241, where the principal decisions are discussed. See also, 2 Min. Inst. (4th Ed.) 306, and cases there collected.

‡Decree between Co-Defendants.—As to when there is a proper case for a decree between co-defendants, see *foot-note* to *Ould v. Myers*, 23 Gratt. 383.

Williams as aforesaid, he paid the amount of the said two protested negotiable notes at the Farmers Bank of Virginia in Confederate money at par, though the same was then depreciated in value in comparison with gold as twelve to one, and the notes were thereupon delivered to him by
369 *the receiving teller of the bank, to whom the Confederate money was paid.

At the time of the execution of the deed of trust from Green to J. G. Williams and M. M. Young, for the benefit of B. F. Rogers, the said Rogers was a resident of Bourbon county, in the State of Kentucky, as is stated in the deed, and he has ever since continued to reside there. It does not appear that he had any agent in Virginia to attend to the collection of the said two notes, except so far as the said bank might be considered as such an agent. Something is said in the record as to Messrs. Macfarland and Roberts having been his agents or attorneys, but there is no proof of the fact, and certainly none that they had any agency in regard to the said notes before the end of the war. The notes remained in the bank after they were protested, and until they were paid as aforesaid.

After A. D. Williams had paid the amount of the said two notes as aforesaid, he called on J. G. Williams and M. M. Young, trustees in the deed for the benefit of B. F. Rogers, and requested them to execute a release of that deed, at the same time tendering to them for execution such a release which had been previously prepared; but they refused to do so, as B. F. Rogers was not a party to the said release. A. D. Williams thereafter brought a suit in chancery to compel the execution of such a release, but the papers belonging to the suit were destroyed in the great fire in Richmond on the 3d of April 1865, and the suit seems to have been since abandoned.

When the war was over, B. F. Rogers, after being informed of what had transpired during the war in regard to the said notes and the property conveyed for their security as aforesaid, claimed the said notes as still being due and unpaid to him, and requested the trustees in the deed for his benefit to proceed to execute the trusts of the same; which, however, they declined
370 *to do, except under a decree of a court of chancery. And accordingly the present suit was brought by him for the purpose of obtaining such a decree. The bill charges that William A. Alley is in possession of a portion of the said real estate, and claims to be the owner thereof under a conveyance from the said A. D. Williams, trustee, and George N. Gwathmey, dated the 24th of January 1865, and that Martin M. Lipscomb, trustee for Adeline T. Lipscomb, is in possession of other portions of said real estate under conveyances from Samuel D. Fisher and wife, dated the 14th of September and 26th November 1864. And the said J. G. Williams, M. M. Young, B. W. Green, A. D. Williams, William A. Alley, Martin M.

Lipscomb, as trustee for Adeline T. Lipscomb, and the said Martin M. Lipscomb and Adeline T. his wife, and the president, directors and company of the Farmers Bank of Virginia, are made defendants to the bill. Afterwards, according to suggestions made in the answers of said Alley, and Lipscomb and wife, the said Gwathmey and Fisher were also made defendants by an amended bill. After sundry answers had been filed, depositions taken, and other proceedings had in the cause, it came on to be heard on the 20th of November 1867, when the court was of opinion that the president, directors and company of the Farmers Bank of Virginia had no authority to enter into the transaction of the 15th of September 1863, between the defendant A. D. Williams and the said bank, disclosed in the deposition of the said A. D. Williams, whereby the latter obtained possession of the two protested notes in the bill mentioned, by paying into the said bank the nominal amount of the said notes, including interest and charges of protest, in the then Confederate currency; and that the plaintiff's right to have the possession of the said two notes, and to require the deed of trust of the 24th of May 1859 to be enforced for their payment, was not
371 affected *or impaired by the said transaction; and the court therefore decreed that one of the commissioners of the court should enquire and report what is the description and value of the real estate embraced in the said deed of trust, not including that portion thereof which was released by the deed of release of the 28th of August 1860, and how and by whom, and in what proportions, the same is held, and the value of each portion; and in case sale of the same, or any portion thereof, shall be necessary to satisfy the debt of the plaintiff charged thereon, what portion thereof ought in equity to be first sold, and in what order the respective portions thereof ought to be sold for that purpose. And the said commissioner was directed also to enquire and report what relief, if any, the defendants Martin M. Lipscomb, trustee, and his wife, and William A. Alley, respectively, would be entitled to have decreed to them against their vendors respectively, in case the portions of the real estate held by them respectively should be sold to pay the said debt due to the plaintiff charged thereon.

Commissioner Pleasants made a report in pursuance of that decree; to which report the defendants Alley and Lipscomb and wife excepted—the said Alley excepting because the commissioner reported that he Alley had no recourse over against his vendor Gwathmey, and the said Alley and Lipscomb and wife excepting, because the commissioner reported no liability of the president, directors and company of the Farmers Bank of Virginia who received the Confederate money and delivered possession of the notes to the trustee, A. D. Williams.

On the 11th of March 1868, the cause was again heard on the papers formerly read and the report and exceptions; and it being

suggested that the defendant Green had been adjudicated a bankrupt, the court, without at that time passing upon the 372 said exceptions, but reserving *the questions raised by them for future consideration and decision, decreed that unless the defendants, or some of them or some one for them, should, within sixty days from the date of the decree, pay into the Planters National Bank of Richmond to the credit of the cause, the sum of \$5,213 55 with interest on \$3,672 02 part thereof, from the 27th day of February 1868 until paid (due on account of the said protested notes according to the said report) and file with the clerk of the court a certificate of the proper officer of such bank of such payment, then certain persons, who were appointed commissioners for the purpose, were directed, after advertising the time, place and terms of sale as therein mentioned, to sell at public auction on the premises so much of the real estate embraced in said deed of the 24th of May 1859 and not released by the said deed of the 28th of August 1860, as would be sufficient to defray the expenses of the sale and the costs of the plaintiffs in the suit; and also to raise the said principal sum and interest; the said property to be sold in the order mentioned in the said report of commissioner Pleasants, for cash as to one-third of the proceeds of sale, and upon credit as to the residue, of six, twelve and eighteen months in equal instalments, taking negotiable notes of the purchasers respectively, for the credit instalments, with interest added, &c. From this decree the defendants Wm. A. Alley, and Martin M. Lipscomb in his own right, and as trustee for Adeline T. Lipscomb his wife, applied for and obtained an appeal to this court. The proofs as to the payment of these notes by A. D. Williams, and the usage of the bank, are stated in the opinion of the court.

Howison and August for the appellants insisted:

1st. That the bank was the agent of 373 Rogers authorized *to receive the money upon the notes. That the bank would have had this authority if the notes had not been endorsed by Rogers, and the case is much stronger in favor of the authority with his endorsement upon them. Nor did the authority to receive payment of the notes cease when there was a failure to pay them, at their maturity; but it continued as long as they were left with the bank. Payment to the holder of negotiable paper is always a good payment. Story Agen. § 98, § 104. And the effect of the usage of banks in such cases is to extend this authority. Id. § 106, § 202, § 413.

2d. That the bank having received payment in Confederate notes, which was the only currency at the time they fell due, and when they were paid, they were authorized to receive them. They referred to Russell v. Hankey, 6 T. R. 12; Warwick v. Noakes, Peake's Ni. Pr. 68; Phillips v. Blake, 1 Metc. R. 156; Riedenour v. McClurkin, 6 Blackf. R. 411; Mills v. Bank United States,

11 Wheat. R. 431; Bank of Washington v. Triplett, 1 Peters' U. S. R. 25; Whitmell v. Johnson, 17 Mass. R. 452; United States Bank v. Bank of Georgia, 10 Wheat. R. 333; Lowry v. Murray, 2 Porter's R. 280; 2 Parsons on Notes and Bills, p. 209; Field v. Carr, 5 Bingh. 13, 15 Eng. C. L. 348; Smith v. Essex County Bank, 22 Barb. R. 667; Montgomery County Bank v. Albany City Bank, 3 Seld. R. 459.

3d. That under the circumstances the appellants having paid their money and received their deeds without any knowledge of the appellee's lien, and the bank having received the money from Williams, and Williams having received it from the appellants, the plaintiffs should have been required to proceed against the bank and Williams, and also against Gwathmey and Fisher, the vendors of the appellants, before proceeding for a sale of the land.

374. *N. Howard and Roberts for the appellee.

Bankable money was the same when these notes were deposited in bank for collection as it was when they were executed in 1859, and that money was specie and bank notes. A reference to the acts of the Confederate congress on the issue of treasury notes, will show that it was impossible that Confederate notes were the currency when Rogers deposited his notes in the bank. At that time, therefore, there could be no usage of the banks to receive Confederate notes in payment of paper deposited for collection.

On the 17th of April 1861 the act of secession was passed; and by the act of congress of July 13th, 1861, and the proclamation of President Lincoln of August 16th, founded thereon, the State of Virginia, with other States, were declared in insurrection; but Kentucky was not included in the number, and from that time all intercourse between the citizens of the two States was forbid, and was illegal; Rogers, a citizen of Kentucky, was thenceforth forbid to have any intercourse with the people of Virginia, and it is to be inferred that his leaving the notes in the bank was in obedience to the law, and therefore no laches or negligence can be imputed to him in not withdrawing the notes.

Then the only authority given by Rogers to the bank in relation to the notes was that given by the deposit of them for collection; and there is nothing to show that he knew of the usage of the banks to take Confederate money in payment of notes so deposited. It would seem from all the cases that a party must have had knowledge of a usage, in order to bind him by it; though the length of time for which a usage has existed is sometimes held to be sufficient evidence of notice. In this case a usage could not have existed for more than two years; not long enough certainly to imply notice to Rogers. There is no proof of actual notice, and Rogers living in Kentucky, outside of the Confederacy, 375 *and in an enemy's country, cannot be presumed to have had notice of a

usage which was peculiar to the Confederacy, and could not exist elsewhere.

On the subject of usage, we refer to the *Bank of Washington v. Triplett*, 1 Peters' U. S. R. 25; *Adams v. Otterback*, 15 How. U. S. R. 539, 559. It will be seen that a party is bound by a usage existing at the time he does the act. But here the attempt is to bind him by a usage not existing when the notes were deposited, and of which he had no knowledge at any time. The last case cited covers ours in all points as to usage, and this case is even stronger than that; and there is no case where a usage has been held to affect a non-resident owner of a note, or where a note had been deposited before the usage had commenced.

Although the notes were endorsed by Rogers, they were endorsed only for collection, and this fact is clearly shown by the circumstances, and was known by Williams when he paid them, as he proves by his own testimony.

All the cases show that the payment in such cases must be in specie or bank notes: In this case the payment was in Confederate notes. Then when the authority was to receive payment in specie or bank notes, can the bank receive Confederate notes, notes not in existence at the time the authority was given, and certainly not of the same character as bank notes. We know that no law suspending specie payments by banks can compel a creditor to take anything else than specie in payment of his debt.

Upon the extent of the authority of an agent to collect a debt we refer to *Wilkinson v. Holloway*, 7 Leigh 377; *Smock v. Dade*, 5 Rand. 639; *Powell v. Chapman*, 19 Eng. C. L. R. 499; *Partridge v. Bank of England*, 58 Eng. C. L. R. 396, 425; *Sweeting v. Pearce*, 97 Id. 449, 480, 486; *S. C.* 99 Id. 534 to 542. These cases refer to the contract

of the endorser; as are all the cases 376 *that have been cited. The usage as to the time of notice, &c., is different from the authority to collect money, authorizing the taking something different from money and of much less value. We refer to *Sykes v. Giles*, 5 Mees. & Welsb. R. 645; 5 Rob. Prac. 692; *Marine Bank of Chicago v. Chandler*, 27 Illin. R. 525, 548.

It has been suggested that when the bank received the Confederate notes and credited the amount to Rogers, the bank was responsible to Rogers for the amount in specie, and therefore the debtor was discharged. But this is hardly correct. The bank receiving the payment in Confederate notes was not as able to pay as if the money had been paid in specie; and for this reason it is held that a payment to an agent in anything but money is not valid. *Barker v. Greenwood*, 2 Young & Col. R. 414, 419.

As to the defence that these appellants were bona fide purchasers, A. D. Williams was the agent of all the purchasers in obtaining a release of the incumbrances; and they are bound by notice to him: He says he knew of the deed of trust; and the purchasers took their deeds after being satisfied that the notes had been or would be paid

off. The deed of trust showed the notes, and that Rogers lived in Kentucky. Williams does not seem to have made any enquiry as to the authority of the bank to receive Confederate money. He had no right to rely on an inferior officer or even the president of the bank; but should have applied to the trustee in the deed to know whether he would release it. This he did not do. In this state of facts the purchasers are bound by the knowledge of Williams. *Le Neve v. Le Neve*, Amb. R. 436, 440; *Sheldon v. Cox*, Id. 624, 626; *Toulmin v. Steere*, 3 Meriv. R. 209, 222; *Harvey's adm'r v. Steptoe's adm'r & als.*, 17 Gratt. 289; *Crump v. United States Mining Co.*, 7 Gratt. 352; *Hobson v. Theluson*, Law Rep. Queen's Bench 645, 648-9, 651.

377 *And this is not inconsistent with *Evans v. Greenhow*, 15 Gratt. 153; for it does not appear that the grantor had notice of the execution in that case.

It is insisted on the other side that it was error to decree a sale of the land before the plaintiff had exhausted his remedies against the bank and against Williams, Gwathmey and Fisher. We have filed a bill to enforce the deed of trust for the payment of the debt. If there had been no conveyance of the land, and we had brought the suit to enforce the deed; there is no case which would authorize the decree for the sale of the land and a decree against Green for the balance. But if there could be such a decree against Green, it could not be against the other parties; and Green is a bankrupt. The bank too is insolvent, and has conveyed all its effects to a trustee, and they are now impounded in the bankrupt court, and as to Williams, according to a decision of this court, he was not our agent, and we cannot have a decree against him. The decree in this case, so far as it goes, conforms to the decree in the case of *Henkle v. Allstadt*, 4 Gratt. 284. And if this is a case for a decree between co-defendants, the decree appealed from is interlocutory, and such a decree may be made after the case goes back to the Circuit court. We refer to *Mayo v. Tompkins*, 6 Munf. 520, 528; *Cocke v. Harrison*, 3 Rand. 494, to show we are entitled to an immediate decree.

Lyons, for the appellants, in reply. The defence of alien enemy cannot be combined with another defence, and must be made specially. 1 Chitty's Pl. 479.

I shall not discuss the question whether an agent to collect a debt is authorized to take barter or pay his own debt, though exceptions exist even in such cases. Here we say that Confederate notes were at the time the payment as made, treated as 378 money. It is true, *the constitution of the United States does not authorize the making paper money a legal tender; but money may be money for purposes of business, though not a legal tender.

It is a familiar principle of the law of agency, that if the principal can communicate with his agent and does not, then the agent is justified in his act, if he acts in good faith and with reasonable judgment.

An agent to collect a debt is not to take a horse or a note. As illustrative of this whole subject, I refer the court to the case of *Partridge v. The Bank of England*, 58 Eng. C. L. R. 396.

The question is narrowed down to the single enquiry, whether the agent in this case, was restricted to taking only gold or silver, or whether the debtor will be discharged if he pays his debt in the money of account; the money then constituting the currency of the country. The question is not here whether the agent is or is not liable to his principal, but whether the agent acting in good faith in receiving the money the debtor is not discharged.

If the creditor chooses to demand specie and so instructs his agent, then the agent of course has no right to take anything else. But if, when the usual currency is not specie, the creditor deposits his note in the bank without instructions, and the debtor gives a check upon the bank for the amount, and receives his note, then is not the bank bound to pay the creditor in specie. If the creditor might demand specie from the bank for the amount of the note placed to his credit, then the debtor had the same right to demand specie for his check as the creditor had; and the bank having taken the check, must be considered as having been paid in specie, or whatever currency the agent had a right to receive.

It is conceded in the cases cited in the argument, that if a party is informed of a usage, he is bound where the agent acts in accordance with it. If the usage is to take bank notes in payment, can the agent be held liable for taking the bank notes, when the creditor sent the note for collection without instructions to the agent.

The deed from Green to Williams conveyed a large amount of property, and provided that the trustee, after paying expenses, should pay off all liens by deed of trust, judgments, &c., upon the property. This was the first trust to be executed. Williams undertook the trust, sold the property, and if he received enough to pay in gold this lien upon the property, he was bound to pay them, and a creditor is entitled to recover from Williams the amount of his debt, or pro rata, if the property did not sell for enough to pay all. Here the property covered by this lien sold for a sum in Confederate notes, which converted into gold, at the then existing rate, was enough to pay these notes. Williams was therefore bound to pay them, and the court should have decreed against him for the debt. It is a familiar doctrine of equity, that the court will bring all the parties before the court, and make such a decree as will do justice to all of them. 1 Story's Eq. Jur. § 27, 28, and for this purpose will marshal the assets; and on these principles the decree should have been first against Williams, and if the money could not be made out of him then against the land.

It is said Rogers does not claim under the deed from Green to A. D. Williams.

This, however, is not important. The party who received the money was before the court, and the court should have put the burden upon the proper party. The trust provided for the payment of all the debts, and a purchaser was therefore not bound to see to the application of the purchase money. 2 Sugd. Vend. 299, paragraph 9, And a party claiming under a prior deed, permitting the trustee under a second deed to sell the property and *receive the money, and stands by and says nothing, loses his right.

I come now to consider the authority of the bank to receive payment of these notes, and on this question I refer to 2 Parsons on Notes and Bills 208, 209, note a; 5 Rob. Pr. 888, 889, 890. These authorities establish the proposition, that when a party deposits a note by a general endorsement in a bank for collection, the debtor has a right to pay it in the notes of the bank or by a check upon it. And I have found no case which holds that the bank is not authorized to receive payment after the day when the note falls due. It is the usual practice, that if a note is paid before the opening of the bank on the day after it is due, the credit of the debtor is not affected by the failure to pay it on the day it fell due.

In this case there was a blank endorsement by the payee of the notes, and a delivery of them to the bank. Thus holding them, the bank had a qualified property in them, might have passed them, might have sued the maker upon them, and he could not have defeated the action, on the ground that they did not belong to the bank, and the bank being the holder, the debtor as certainly entitled to pay to the bank. Then can there be any question that the bank, being thus in possession of the notes, might receive payment for the notes? Suppose the day after a note falls due the maker comes and proposes to pay it in specie, but the bank declines to receive it because the note is over due, and then the maker fails, would not the bank be liable for not accepting it?

But it is said the bank had no right to receive Confederate notes in payment of the notes. There can be no doubt that at the time these notes were paid Confederate notes constituted the only money in circulation, and that it as generally received in payment of debts at that time. The history of currency shows *that paper has always been regarded as money, and that it possesses many advantages. Smith's Wealth of Nations, book 1, ch. 4; book 2, p. 126, 522; Encyclopedia Britannica, title Money; Encyclopedia Americana, p. 208. Money is that thing which, in the community in which it circulates, is treated as money. Money of account, money which is received in payment, &c., &c., is money. Then, when these notes were taken up, they were paid in money; and therefore it was a valid discharge of the debtor, whatever may be the case as to the agent. *Commercial Bank of Pa. v. Union Bank of New York*, 3 Kernan's R. 203. And the

case of *Sweeting v. Pearce*, 99 Eng. C. L. R. 534, cited on the other side, sustains this view. In *Partridge v. The Bank of England*, 58 Eng. C. L. R. 396, the agent did not receive money, nor was the payment made in the usual mode, and he passed off the note to pay a debt of his own, and the broker knew it. *Parker v. Greenwood*, 2 Young & Col. R. 414; *Marine Bank of Chicago v. Chandler*, 27 Illin. R. 525, 548; *Pratt v. Foote*, 5 Seld. R. 463. Then upon the facts this case comes clearly within the principle of these cases.

But it is said Williams was the agent of the purchasers. How was he their agent? He was the agent of the creditor and the debtor, but not of the purchaser. The purchaser was not bound to see to the application of the purchase money, and Williams was then in no sense his agent.

MONCURE, P., delivered the opinion of the court. After stating the case he proceeded as follows:

The errors in the decree assigned in the petition for the appeal are, 1st. Because the bank was the agent of the plaintiff, authorized by law to receive payment of the said notes, and if the plaintiff has any remedy, it is against the bank. And 2dly. If the petitioners are liable, it can only be

after the remedy against the bank, 382 *and then, if necessary, that against Gwathmey and Fisher are exhausted.

In the argument it was also contended that the remedy against the trustee A. D. Williams must be exhausted before the appellants or the land held by them can be made liable. We will now proceed to consider these assignments of error.

1st, That the bank was the agent of the plaintiff, authorized by law to receive payment of the said notes, and if the plaintiff has any remedy it is against the bank.

It was proved in the cause by Robert A. Payne, that on the 14th of September 1863, he, as receiving teller of the bank, received the amount of the two protested notes aforesaid, in Confederate currency, from A. D. Williams, trustee, and placed the amount to the credit of B. F. Rogers on the books of the bank; that it was the usage of the Farmers Bank of Virginia in which the witness was employed, and he believes of all the banks, that if notes deposited in bank for collection were not paid at maturity, they were noted or protested and handed over to the note clerk, and there they remained until the maker or endorser called and paid them, or the holder withdrew them. If the holder did not withdraw them and gave no instructions to the contrary, it was the usage of the banks to receive payment of such notes at any time when payment was offered. This usage was long and well established and as generally known to customers of the banks and persons having business with them. Confederate currency, so far as the knowledge of the witness extended, was universally received by the banks in Richmond during the war, in payment of notes held by said

banks, either for their own benefit or for collection; and he thinks this usage of the banks was so general and so widely known, as to be familiar with their customers and those having business with or through them. He did not know that the notes 383 were well secured by *deed of trust on real estate in Sydney ample to secure their payment in good money.

A bank at which a negotiable note is payable, and at which it is deposited for collection, is of course the agent of the holder or depositor to receive the money if paid at such bank at the maturity of the note, and, though not then paid, has no doubt implied authority to receive the money at any time thereafter and while the note remains at the bank. It very often happens that such a note is taken up at bank shortly after the protest thereof, and with a view to save the credit of the debtor; and it therefore very often happens that a protested note is suffered by the owner to remain at bank some time after protest, with a hope that it may be thus taken up. It does not often happen that a protested note is left very long at bank, especially when the debtor can be made to pay it, or the creditor has a deed of trust or other security, which he can enforce for its payment. There is then no motive for leaving the note at bank, but a strong one for taking it away. Still, however long, and with whatever motive, a protested note may be permitted by the owner to remain at bank, it may, as a general rule, be safely paid to the bank by the debtor, provided he has no notice that the bank in fact has no authority to receive the money. In regard to notes deposited at a bank for collection during the war, when Confederate money was the only currency, they might, properly, have been paid in such money, at least without notice that other money was demanded. To have made such a deposit without such a notice, could have been for no other purpose and with no other expectation than to get Confederate money. In regard to notes payable at bank before the war, deposited for collection, and protested for non-payment, but neglected to be withdrawn from bank by the owner, residing in this State, it might be very questionable whether, after the lapse of two or three years, 384 *the bank would have authority to receive payment of such notes in a currency which came into existence after the protest of the note, and which, at the time of such payment, had depreciated in value as 12 to 1 compared with specie, in which payment might legally have been demanded; or whether the debtor, having notice of the facts, could make a valid payment of the note in such a currency and under such circumstances. It might not be reasonable to infer an authority to receive payment in such a currency under such circumstances, from the mere omission to withdraw the notes from the bank.

But however that may be, the case we have under consideration is a very different case from any that has been stated. Here

B. F. Rogers, the payee and the owner of the notes in question, was a non-resident of Virginia and a resident of the State of Kentucky when the notes were drawn, and when the deed of trust was executed for their security, and he has ever since resided in the State of Kentucky. The fact that he resided there is expressly stated in the deed of trust, which was duly recorded, and was no doubt notorious to all the parties concerned. The notes were deposited by him for collection at bank long before the war; one of them became due, and was protested in November 1860, nearly six months before the war, and the other became due, and was protested in May 1861, just after the war commenced; at that time Confederate money had not become the currency of this country. The notes could not well, if possibly, have been withdrawn from the bank by B. F. Rogers after the protest of the last note and before the end of the war. Kentucky, where he lived, was one of the United States, and he was separated from Richmond "by a line of bayonets." There were certainly instances, and perhaps many of them, in which that line was crossed; and the record shows that
 385 two of his brothers and *several of his nephews, residing in the same county with him, visited Richmond during the war; though it does not appear that he had any knowledge of the visit. At all events, there was so much difficulty and so much danger in the communication between the two places, which was expressly prohibited by the law of the government under which he lived, that he cannot be held accountable for not having withdrawn these notes from bank after the war commenced; nor can any inference be fairly drawn from that fact, that he authorized the bank to receive, and the debtor to pay, the amount of these protested notes in September 1863, in a currency depreciated to the degree of 12 to 1, as compared with specie, when the notes were payable in specie, and were secured by a deed of trust on real estate, exceeding in value the amount of the notes. What motive could B. F. Rogers have been supposed to have for making such a sacrifice? A. D. Williams knew when he took up the notes that they did not belong to the bank, but belonged to B. F. Rogers, a non-resident of the State and of the Confederate States, by whom they had been deposited before the war only for collection. He knew they were perfectly secured by a deed of trust on real estate. His only object in taking up the notes was to obtain a release of that deed of trust. It was a means to an end. The equity of redemption, in the property conveyed by that deed, was included in the subsequent deed of trust to him under which he had made a sale of the very property bound by the prior deed, and he wished to free the property from that incumbrance, so as to be able to make a good title to the purchasers from him. He made his sale on the 17th of April 1863, just five months before he took up the notes, when the deed of

trust for the benefit of Rogers was on record and in full force. Instead of going to the bank and taking up the notes by the payment of the amount in Confederate money, he ought to have gone to the trustees
 386 *in the said deed of trust, and learned of them the terms on which he could obtain a release. He did go to the trustees, but after he had taken up the notes, and then he carried with him a deed already drawn for execution by them, which, of course, they refused to execute without authority from the creditor.

We therefore concur in the opinion of the Circuit court, that the bank had no authority to receive payment of the notes in depreciated Confederate currency; that A. D. Williams had no right to make such a payment; that the said payment was not a valid one; that the notes still belong to B. F. Rogers, notwithstanding such payment, and that the deed of trust for his benefit is still a subsisting security, in full force and effect. And this disposes of the first assignment of error, except the latter branch of it; "that" if the plaintiff has any remedy it is against the bank. Certainly the bank is liable to somebody for the value of the Confederate money which it received, and B. F. Rogers might, if he chose, elect to enforce that liability, though not perhaps without giving up his right to the notes, and under the deed of trust. The ground he takes is, that the bank had no authority to receive the payment, and that it was a void act. By seeking to enforce it, he might make it a valid act. At all events, he is not bound to proceed against the bank, whatever may be its liability. The unlawful act of the bank and of A. D. Williams cannot deprive B. F. Rogers of his plain and simple remedy under his deed of trust, and involve him in a troublesome and expensive pursuit of a bankrupt corporation.

2dly. It is insisted by the appellants that if the property held by them as aforesaid be liable to satisfy the demand of Rogers, it can only be after the remedies therefor against the bank, A. D. Williams, Gwathmey and Fisher, respectively, are exhausted.

We have already disposed of the
 387 supposed remedy *against the bank, and shown that it can interpose no obstruction to the right of Rogers to proceed directly against the property subject to his deed of trust. And the other supposed remedies, to wit, against A. D. Williams, Gwathmey and Fisher, may be disposed of in the same way. Rogers came into court, claiming that his debt was still due and his deed of trust for its security in full force, notwithstanding what had occurred as aforesaid, and asking that the trusts of the deed might be executed for his benefit. We think that his claim is well founded, and his right to what he asks for is the legitimate consequence. If the protested notes had not been taken up by A. D. Williams as aforesaid, Rogers would have had no difficulty in having the trusts of his deed executed, without coming into court for that purpose. But an obstacle was thrown

in his way by the intromission of A. D. Williams, and he had to come into court to remove that obstacle. Having removed it, he stands at least on as high ground as if it had never been thrown in his way. He did not ask for a personal decree against his debtor Green, or any body else, but only for the enforcement of the deed of trust by a sale of the property thereby conveyed, or so much of it as might be necessary for the payment of the debt. It was proper for him to make the terre tenants of the property, or portions of it, claiming title thereto under alienations subsequent to the said deed of trust, defendants to his suit, as they had an interest in the subject in controversy; and it was proper for the court, in decreeing a sale of the property to satisfy the debt, to direct it to be sold in such order as would best consist with the rights of all the parties and the justice of the case. The trust creditor had a right to have the trust property sold for the payment of the trust debt, notwithstanding the subsequent alienations; but he had not a right to have it

388 sold in any certain order, not affecting the security *of the debt. The order of selling it, provided it be without prejudice to the rights of the trust creditor, is therefore subject to the equitable control of the court. But the plaintiff cannot be required to take a personal decree against any of the defendants. He cannot be delayed or embarrassed by the prosecution of any of their rights or remedies inter se. He has put no such matters in issue by his bill. If they are proper subjects for adjudication in this cause, it is by a decree between the co-defendants, and not by a decree in favor of the plaintiff against any of them. There is nothing in the decrees which have been rendered by the court, and which are only interlocutory, that can prevent the Circuit court from rendering any decrees between the co-defendants which it may be proper to render in the cause; and indeed the said court in the decree appealed from, seems to have contemplated a future decree between the co-defendants by expressly reserving the questions raised by the exceptions to the commissioner's report, for future consideration and decision.

We therefore think that the decree appealed from is correct and ought to be affirmed, at least upon the merits. We are not satisfied, however, that the order prescribed by the report of the commissioner and the decree of the court for the sale of the lots held by William A. Alley, S. D. Fisher and M. M. Lipscomb, trustee for his wife Adeline T. Lipscomb, respectively, is correct, although there is no exception to the report in that respect. That order is, that the lots held by said Alley shall be sold before the lots respectively held by said S. D. Fisher and M. M. Lipscomb, trustee; no doubt upon the ground that the lots held by Alley were conveyed to him, after the lots held by S. D. Fisher and Lipscomb, trustee, respectively, were conveyed to B. W. Green, by A. D. Williams, trustee, under the deed of the 21st of

February 1861; and that the inverse 389 order *of the subsequent alienations of incumbered property is the true order in which the property ought to be sold to satisfy the incumbrance. The principle is right, as has often been held by this court. *Conrad v. Harrison, &c.*, 3 Leigh 532; *McClung v. Beirne*, 10 Id. 394; *Rodgers v. McCluer's adm'r, &c.*, 4 Gratt. 81; and *Henkle's ex'x, &c. v. Allstadt, &c.*, Id. 284; by which cases the prior case of *Beverley v. Brooke*, 2 Leigh 425 has been overruled. But the application of the principle to this case seems not to be correct. It appears that the lots held by Alley and those held by S. D. Fisher and Lipscomb, trustee, respectively, were sold at the same time, or on the same day, by A. D. Williams, trustee, that is, on the 17th day of April 1863; and that the said holders claim the said lots respectively, directly or indirectly, under purchasers who purchased them at that sale and on that day. If this be so, then it would seem that these holders stand on an equality, and the lots held by them should bear the burden of Roger's incumbrance ratably, that is, in proportion to the prices at which they were respectively sold at the sale made by A. D. Williams, as aforesaid. That these lots were conveyed by A. D. Williams to the purchasers at his sale, or their assigns, at different times, makes no difference. The rule of equality was fixed by the sale, and was not affected by the order of the conveyances, subsequently made by the vendor. 4 Gratt. 81, supra. We think that so much of the decree as directs a sale of the said lots held by said Alley, Fisher and Lipscomb, trustee as aforesaid, in the order mentioned in the report of commissioner Pleasants, ought to be reversed, and the said report ought to be recommitted to the commissioner, with instructions to make further enquiry, and report as to the order in which the said lots ought to be sold, if necessary, according to the principles set forth in the foregoing opinion. In all other respects we think 390 the decree *ought to be affirmed, and with costs to the appellee Rogers, as the party substantially prevailing.

The decree was as follows:

The court is of opinion, for reasons stated in writing, and filed with the record, that the president, directors and company of the Farmers Bank of Virginia had no authority to receive payment of the two protested negotiable notes in the proceedings mentioned in depreciated Confederate currency; that the payment made of said notes in such currency by A. D. Williams in September 1863, as stated in his deposition, was a void payment; that the said notes are still due and unpaid, and belong to the appellee, B. F. Rogers; that the deed of trust of the 24th day of May 1859, from Benjamin W. Green to John G. Williams and Mortimer M. Young, is still a subsisting security, in full force and effect, for the payment of the said notes, except as to that portion of the property conveyed by said deed of trust, which was released by the

deed of the 28th of August 1860, in the proceedings mentioned; that the said B. F. Rogers is entitled to have the said deed of trust enforced for the payment of said notes, with all interest and costs of protest due thereon, by a sale, if necessary, of the property conveyed by the said deed of trust, or so much thereof as may be sufficient for the purpose, except as aforesaid; that he is entitled to a decree for such a sale without being first required to have any recourse against the president, directors and company of the Farmers Bank of Virginia, B. W. Green, A. D. Williams, S. D. Fisher, G. N. Gwathmey, or any other person; that if these parties, or any of them, can be made liable in this suit, as to which this court expresses no opinion, it must be by a decree between co-defendants, which decree, if proper, it will be competent for the Circuit court to make hereafter, as the decrees

391 already made are interlocutory only, and *that there is no error in the said decrees already made, at least upon the merits; but the court is of opinion that there is error in so much of the decree of the 11th day of March 1868 as prescribes the order of priority, in which the lots of land held by the purchasers respectively are to be sold for the satisfaction of the said debt due to B. F. Rogers. It appears that these lots were sold on the same day, to wit, the 17th day of April 1863, by A. D. Williams, trustee, though his conveyances of them were made afterwards and at different dates; and that the said holders respectively claim the said lots, directly or indirectly, under purchasers who bought them at that sale and on that day. The court is therefore of opinion, that if it be not necessary to sell the whole of the land conveyed by the said deed of trust of the 24th day of May 1859, not released by the said deed of the 28th of August 1860, for the purpose of satisfying the said deed of trust, then the balance of the said debt due to B. F. Rogers, which may remain unsatisfied after applying to its payment the nett proceeds of the sale of the two lots still held by the said A. D. Williams, trustee, and directed to be first sold, ought to be raised ratably out of the lots now held by the said purchasers respectively, to wit: William A. Alley, Martin M. Lipscomb, trustee for his wife Adeline T. Lipscomb and S. D. Fisher, in proportion to the amounts of the purchase money for which those lots were respectively sold at the sale made by the said A. D. Williams, trustee, on the 17th day of April 1863 as aforesaid.

Therefore it is decreed and ordered, that so much of the said decree of the 11th day of March 1868, as is above declared to be erroneous, be reversed and annulled, and the residue thereof, and the decree of the 20th day of November 1867 affirmed; and that the appellee, B. F. Rogers, as the party substantially prevailing, do recover of the appellants his costs by him about his

392 *defence in this behalf expended.

And it is ordered that the cause be remanded to the said Circuit court for fur-

ther proceedings to be had therein in conformity with the foregoing opinion; which is ordered to be certified to the said Circuit court.

Decree reversed in part, but confirmed on the merits, with costs to the appellees.

393 *Billgerry v. Branch & Sons.

January Term, 1866, Richmond.

1. **Check Payable within Enemy's Lines—Endorsed—Endorsement Void.**—Bills or checks drawn by a bank in Richmond, Va. upon a bank in New Orleans, were endorsed in Petersburg, Va. in February 1863, to a resident of Vicksburg. The late war was then in progress, and Petersburg, Richmond and Vicksburg, were within the Confederacy, whilst New Orleans was in the permanent possession of the Federal forces. The endorsement was illegal and void, and the endorsee cannot recover against the endorser, in an action brought after the war.
2. **International Law—Applied to the Confederacy.***—The international law applied to all transactions between persons residing within the limits of the authority of the Confederacy and persons residing in the United States, outside of the Confederate authority.
3. **Case at Bar—Demand of Payment—Illegal.**—After Vicksburg had been taken possession of by the Federal forces, viz. on the 23d of October 1863, the bills were presented for payment at the New Orleans Bank, and payment was refused. Under the proclamation of the President of the United States of April 2, 1863, intercourse between Vicksburg and New Orleans was still prohibited, and the demand of payment was illegal.
4. **No Mail Communications—Notice Mailed—Insufficient.**—Notice of demand and refusal to pay, was put into the postoffice at New Orleans, on the 23d of October 1863, directed to the endorsers at Petersburg, Va. The war being then in progress, and there being no mail communication between New Orleans and Petersburg, the notice was insufficient.

This was an action of assumpsit in the Circuit court of the city of Richmond, brought in October 1866, by Joseph Billgerry against Thos. Branch & Sons, brokers. The object of the suit was to recover from Branch & Sons the amount of three bills or checks drawn on the 26th day of August 1862, by the Farmers Bank of Va. at Richmond, upon the New Orleans Canal and Banking Company, at New Orleans, payable

*The Civil War—Persons on Opposite Sides of Belligerent Lines—Intercourse.—In *McVeigh v. Bank of Old Dom.*, 26 Gratt. 812, the court, citing the principal case, said: "There can be no commercial intercourse between persons on different sides of a belligerent line, during the war; and a civil war, such as our late war, stands in this respect, on the same footing with a war *inter gentes*." See to same effect, *Walker v. Beauchler*, 27 Gratt. 516; *Small v. Lumpkin*, 28 Gratt. 882, and *note*; *Taylor v. Hutchison*, 25 Gratt. 536. See the principal case distinguished in *McVeigh v. Bank of Old Dominion*, 26 Gratt. 800.

to John Enders or order, each for the sum of two thousand dollars. *These checks were endorsed in blank by Enders, and on the 20th of February 1863, they were endorsed by Thomas Branch & Sons specially to the plaintiff. On the 23d of October 1863, the checks were presented at the New Orleans Canal and Banking Company for payment, which was refused; and they were regularly protested, and notice of protest was put into the postoffice at New Orleans, directed to the defendants at Petersburg, Virginia. At the time these checks were drawn, and when they were endorsed by Branch & Sons to Billgerry, the war between the United States and the Confederate States was in progress, and the act of congress of July 13th, 1861, and the proclamation of President Lincoln, of the 16th of August 1861, in pursuance thereof, were in force. New Orleans had been taken possession of by the United States forces, on the 1st of May 1862, and was held by them, until the end of the war. On the 4th of July 1863 Vicksburg was surrendered and came into their possession; whilst Richmond and Petersburg, in which last mentioned place the defendants lived, were within the Confederate lines, and so remained until the 3d of April 1865. It was in proof that there was no mail communication from New Orleans in October 1863; and there was none such between New Orleans and Richmond, or Petersburg, from that time until some time after the surrender of Lee's army in April 1865; and Billgerry, whose testimony was taken, states that as soon as the mail communication was opened between the places he wrote to Branch & Sons, giving them notice that the checks had been protested for non-payment. It appeared further that Billgerry was a resident of Vicksburg from 1861 until the end of the war in 1865; and that at the time the checks were drawn by the Farmers Bank that bank had funds in the New Orleans bank sufficient to pay them; and this continued to be the case until August 26th, 1863, when they were paid over to an officer *of the United States army, under an order of General Banks, then commanding the United States army in New Orleans.

The plaintiff's original declaration, contained nine special counts and the common counts in assumpsit, and his amended declaration contained three special counts.

The first three counts of the original declaration treated the counts as bills of exchange, and alleged the drawing, endorsement, demand, dishonor, protest and notice in common form, each check being the subject of a separate count. The three succeeding counts did not differ substantially from the first three, except that they described the papers as checks instead of bills of exchange.

The 7th, 8th and 9th counts treated the papers as bills of exchange, and differed from the first three in this, that they alleged the existence of the war as an excuse for delay in making presentment until Oc-

tober 27, 1863; and in this, that they alleged that notice to the defendants of the dishonor of the bills was given by a notice directed to them and deposited in the postoffice in New Orleans on the 28th day of October 1863, and that as postal communication between New Orleans and Richmond was then interrupted by the war, another notice was given to the defendants after the cessation of hostilities.

The amended declaration contained three counts, one on each check. These counts contained the following special averments: That at the time the said checks were drawn and endorsed, and afterwards, the plaintiff was a citizen and resident of Vicksburg; that Enders was a citizen and resident of Richmond; that the defendants were citizens and residents of Petersburg; and that the Farmers Bank and the Canal Bank had their location and residence respectively in

Richmond and New Orleans; that by proclamation of the *president of the United States, dated August 16, 1861, the State of Mississippi, including Vicksburg, that part of the State of Virginia, including Richmond and Petersburg, and the State of Louisiana, including New Orleans, were declared to be, with others in a state of insurrection, except such parts thereof as might be occupied and controlled by the forces of the United States engaged in the dispersion of said insurgents; that the State of Louisiana continued in insurrection until May 1st, 1862, when the said city of New Orleans was occupied and controlled by the forces of the United States engaged as aforesaid, and so remained; that the State of Mississippi continued in insurrection until July 5, 1863, when Vicksburg and the surrounding country, were occupied and controlled by said forces of the United States, and so remained; that that part of Virginia embracing Richmond and Petersburg, continued in insurrection until the 10th day of April 1865; that commercial intercourse between these last named cities and New Orleans was unlawful from May 1, 1862, until April 10, 1865, and that commercial intercourse between Vicksburg and the surrounding county, and New Orleans, was unlawful from May 1, 1862, until July 5, 1863; that the plaintiff after receiving the checks from the defendants in February 1863, took them to Vicksburg, where he remained until the said town was occupied by the troops of the United States as aforesaid; that as soon as communication between Vicksburg and New Orleans was re-opened and became lawful and safe, the plaintiff, by permission of the military authorities, went to New Orleans; and that on the 27th October 1863, the said checks were presented, dishonored and protested; that intercourse and communication between New Orleans and Richmond and Petersburg were then unlawful, and that notice of dishonor was given to the defendants when intercourse between the said places became lawful and was restored.

*Each of these counts likewise contained an allegation that the Farmers

Bank, at the time of the occupation of New Orleans, had funds in the Canal Bank, upon which said checks were drawn, and that before the same were drawn, the said funds had been seized by the military authorities of the United States, so that at the date of said checks the Farmers Bank had no funds in the Canal Bank.

The defendants demurred to each count of the original declaration, and to the whole declaration, and also to each count of the amended declaration, and to the whole; and they also pleaded non-assumpsit; and the plaintiff joined in the demurrers, and took issue on the pleas. And then, by consent of the parties, a jury was waived, and the whole matter of law and fact was submitted to the court pursuant to the statute.

Upon the hearing of the cause the court sustained the demurrers to all the special counts, but overruled the demurrers to the common counts and to the original declaration, sustaining the demurrer to the amended declaration; and upon the evidence rendered a judgment for the defendants. The plaintiff, thereupon, moved the court to set aside the judgment and grant him a new trial, but the court overruled the motion.

To this judgment, overruling the motion for a new trial, the plaintiff excepted, and spread all the evidence, which was in writing, upon the record, and applied to this court for a supersedeas; which was awarded.

Wise and Fitzhugh, for the appellant.

Crump and Jones, for the appellees.

RIVES, J. It does not seem material to consider or settle the question of pleading raised by the demurrers to the original and amended declarations in this case. The common counts in indebitatus assumpsit, which were sustained, would have sufficed to sustain a recovery under *the authority of Bank of U. S. v. Jackson's adm'r, 9 Leigh 221. The contract was one of privity between these parties, and sprung out of the payment of money by one to the other. Had the case been submitted to a jury, it would have conduced to a clearer development of the issue, if the plaintiff had been allowed to count specially, as he did in his amended declaration, upon the particular facts of his demand. The practice of relying on these general counts, was disapproved and discouraged at an early date in the case of Wood v. Luttrell et al., ex'ors of Carr, 1 Call 232, 240, by Judge Pendleton, who used this just and emphatic language: "I cannot forbear to mention that I do not like this new practice of general counts much, as they tend to surprise the other party without giving him the opportunity of preparing for a full defence." But in this case the parties waived their right to have a jury for the trial of this cause, and agreed that the whole matter, of law and fact, should be heard and determined by the court. Inasmuch, therefore, as the court held and was well justified in holding, that a recovery, if at all, might be had under the common counts; and proceeded to hear and determine the case upon

its merits under these counts, we are relieved of the necessity of adjusting the pleadings with any technical nicety. There was, perhaps, no other reason for sustaining the demurrer to the amended declaration, save that it did not, in the opinion of the court, set out a legal cause of action; a conclusion also reached in the judgment given for the defendants upon the facts.

We are therefore remitted to the enquiry whether the contract in this case was capable of being asserted in a court of law.

The parties to this contract were all alike residents of the Confederate States. In February 1863, the plaintiff in error purchased of the defendants three several drafts of the Farmers Bank of Virginia upon the New Orleans Canal and

399 Banking Company, *bearing date the

26th August 1862, for the sum of two thousand dollars each. Prior to the date of these drafts, the city of New Orleans had been taken by the forces of the United States, and so "occupied and controlled" by them as to be excepted out of the terms of the president's proclamation of 16th August 1861, that had declared Louisiana, along with other southern States, in a state of insurrection against the United St

The taking of the city was followed by the president's proclamation of 12th May 1862, raising the blockade of its port from and after the 1st day of June 1862; and the decisions of the Supreme court have fixed the 6th of May 1862 as the period of the full and final restoration of the city to the jurisdiction and authority of the United States. These facts disclose a case of a contract of endorsement between citizens within the insurrectionary districts, during the pendency of hostilities, of a bill drawn by a bank in Virginia upon a bank in New Orleans, that was then claimed and recognized as within the rightful territory of the United States. This statement is sufficient to reveal, in its true light and bearing, the important question upon which we have to pass in this case. In another part of this investigation, I may have to recapitulate other circumstances relevant to other topics of this discussion; but for present purposes, I have stated all that is necessary to possess us of the points made in this case.

Now it is alleged that the purchase of this bill was illegal and void on two grounds: First, that it was a trading, condemned and avoided by the laws of nations in case of international wars, which, for the purposes of this argument, are assumed to rest upon the same principle and reason as our late internal war; and secondly, that it was prohibited and annulled by the act of congress of July 13, 1861, interdicting "all commercial intercourse" between the inhabitants of the insurrectionary

400 *districts and the citizens of the rest of the United States. These positions

are plainly contradictory; the one referring the claim to the decision of international law, and the other to the decision of municipal law. They cannot both stand together: a choice must be made between

them. If the case rests on international law, the municipal is excluded; and e converso, if within the pale of the municipal, it is without that of the international.

Hence, our first enquiry should be, whether the contract relied on in this case is affected by, or within, the purview of the law of nations touching dealings between alien enemies; and herein we have to consider at the outset the assumption already alluded to; namely, that our late civil strife was attended with all the legal incidents and consequences of a war inter gentes. In calling this an assumption, I do not mean to treat with any disrespect the argument of the counsel for the appellees; but I rather indicate thereby the strong and decided sense I entertain of what I humbly submit it can be satisfactorily shown to be. I understand the position to be, that there is no distinction upon reason or authority, between public war of whatever sort and international war, in the vacating of contracts between individual citizens of belligerent countries flagrante bello. That we may more critically examine and determine the soundness of this position, let us first acquire a precise and definite idea of this important tenet of the law of nations. Its indispensable attribute is, that it should be a contract between "alien enemies," because the doctrine is founded on the principle, that a declaration of war puts not only the adverse governments in their political capacity at war, but renders all the subjects of the one the enemies of the subjects of the other. Vattel, bk. 3, c. 5, § 70; also note to *Clemontson v. Blessig*, 11 Exch. R. 135. Hence, "no valid contract can be made, nor any promise arise, by implication of law from

401 any *transaction with an enemy," says Justice Clifford, in *Hanger v. Abbott*, 6 Wall. U. S. R. 534.

These conditions are all fulfilled in the case of foreign wars between independent nations, because it can be aptly said of them, that a state of war is contradictory of a state of commerce, and that there cannot be war for arms and peace for commerce. Considerations of public safety, imperiously forbid all contracts between alien enemies; so that after the termination of the war, during which they were made, the illegality of the transaction may be set up as a valid defence against an action founded upon any such contract. But are such conditions found in a war waged between citizens of a common country; and is this doctrine at all applicable to the status or the dealings of fellow-citizens embroiled in a civil war? Under our complex system of State and Federal governments, the constitution of the United States is not overthrown by the insurrection of any portion of the people, however formidably arrayed or efficiently organized under all the facilities of revolt arising out of their separate organizations into States, under all the forms and with all the powers necessary to command the resources and services of their inhabitants. Whatever

may have been the theory, on which this rebellion was projected and justified, it has confessedly yielded to the grand arbitrament of arms; and we need not now be disquieted or harassed by any doubt that the constitution of the United States reigned supreme over all the States and all the citizens during the whole of this deplorable conflict and since, with such exceptions only as are due to the clash of arms and the necessities of State. We shall in vain look through the whole range of decisions of the Supreme court for the slightest intimation that this rebellion had affected the supremacy of the constitution; or released the revolted States or their citizens, from

its authority or their allegiance
402 *to it. It is true that the war was of such dimensions, and was so organized, under the auspices of the revolted States, into a new and separate Confederacy that the government of the United States was compelled to waive some of its strict and theoretical rights over the insurgents. It would have been idle to send out with its armies, as was done in the case of the whiskey insurrection in Pennsylvania, civil officers, to whom captured insurgents might be turned over for arrest, trial, conviction and punishment. It was the dictate of necessity and policy to recognize the Confederate States as a government de facto; to concede belligerent rights to them; to acknowledge a state of internal war; to treat captives, both on land and sea, as prisoners of war, and provide for their exchange; to declare a blockade of the ports in the insurrectionary districts; and assert under the law of nations the rights of capture and prize jure belli. These concessions were properly made to mitigate the rigors of this fratricidal war, and conduct more effectually and humanely to the suppression of the revolt. They were conceived in the spirit of the exalted teachings of the most enlightened and accredited publicists. Vattel, bk. 3, ch. 18, § 294, recommends that "the common laws of war—those maxims of humanity, moderation and honor, which we have already detailed in the course of this work—ought to be observed by both parties in every civil war. For the same reasons, which render the observance of those maxims a matter of obligation between State and State, it becomes equally, and even more necessary, in the unhappy circumstance of two incensed parties lacerating their common country. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals; if he does not religiously observe the capitulations, and all other conventions made with his enemies, they will no longer rely on his word; should he burn and ravage,

403 *they will follow his example; the war will become cruel, horrible, and every day more destructive to the nation." While therefore in the pursuance of these wise and humane maxims, the government of the United States departed from the theory strictissimi juris in its constitutional

suppression of this insurrection, there was never in any authoritative quarter an admission that the insurgents, by reason of being acknowledged as quasi enemies to the extent of these concessions, were not amenable to the constitution and the laws. This did not in fact involve any contrariety in the status thus ascribed to them; and when such was alleged in the Prize cases, 2 Black. U. S. R. 635, 670, Justice Grier, with no little warmth, denounced it as "the anomalous doctrine, which this court are now, for the first time, desired to pronounce, to wit: that insurgents who have arisen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not enemies, because they are traitors; and a war levied on the government by traitors, in order to dismember and destroy it, is not a war, because it is an insurrection."

But if by the intendment of law the constitution of the United States pervaded the whole land, notwithstanding the insurrection, and was in theory the supreme law to insurgents as well as loyal citizens, the municipal law went along with it, and governed contracts. To term the citizens of the Confederate States enemies, is far from being tantamount to calling them "alien enemies." We are told, 2 Black. U. S. R. 274, that "the word 'enemy' is a technical phrase peculiar to prize courts, and depends upon principles of public policy, as distinguished from the common law; and besides, that citizens of the Confederacy, while traitors, for having cast off their allegiance and made war on their government, are none the less 'enemies.'" All this is con-

404 clusive to show that the courts have never for *one moment lost sight of, or relinquished, the principle of the nullity of the attempted withdrawal of the southern States, and the supremacy of the constitution and the laws in spite of it. Upon what principle and reason then shall we be required in this case to take rebellious subjects out of the pale of a constitution, which they have failed to overthrow, and submit their dealings and contracts to international rather than municipal law? It would seem to be enough to reply, that the correct theory of our disastrous conflict does not admit of the idea that the parties to it were foreign and independent nations, and the citizens of the one "alien enemies" respectively of those of the other.

Upon principles of reason therefore, distinguishing the case of our late war from that of a war inter gentes, I conclude that this case does not come under the interdict of international law against contracts between "alien enemies." But we are told that we are not left to the conclusions of reason upon this subject, but are shut up to the decisions of the Supreme court of the United States, that are alleged to apply this doctrine for the vacation of contracts between opposing belligerents pending the war to our late war, as fully as if it had been an international war. This assertion

cannot rest upon anything more than analogy; but, even thus qualified, it excites my unfeigned surprise. I shall therefore take up all these cases in their order that have been referred to, and ascertain whether they are susceptible of being used as authority for a position, which I have endeavored to show is contrary to reason.

The first reference is to the Prize cases, 2 Black. U. S. R. 635. The chief controversy in those cases was as to the right of the president, in the absence of any act of congress declaring or recognizing a state of war, to proclaim a blockade of the ports in possession of the States in rebellion. There was a difference of opinion among the judges on this point; but all con-
405 ceded *the right to exist after the act of 13th July 1861, authorizing the president to interdict all trade and intercourse between the inhabitants of the States in insurrection and the rest of the United States. The court, however, was of opinion that the right to institute this blockade, pertained to the president jure belli, and, therefore, upheld the authority and legality of his proclamation of blockade of 19th of April 1861, although prior to any congressional recognition of the war.

Another proposition was also laid down in these cases, namely, that property of persons within the Confederacy was to be deemed enemy's property without reference to the individual status of the owner, and, therefore, lawful prize. These were cases affecting the rights of the United States as sovereign, and of captors claiming under its laws, where, as I have already shown, the government had chosen to follow the law of nations rather than exercise its municipal right to close its ports. Thus, in the case of *The Circassian*, 2 Wall. U. S. R. 135, the chief justice observed that "the government of the United States, involved in civil war, claimed the right to close, against all commerce, its own ports seized by the rebels, as a just and proper exercise of power for the suppression of attempted revolution. It insisted, and yet insists, that no one could justly complain if that power should be decisively and peremptorily exerted. In deference, however, to the views of the principal commercial nations this right was waived and a commercial blockade established." This declaration of one who was a member of President Lincoln's cabinet, is an authoritative disclosure of the motive for exchanging the municipal right, for the belligerent right under the law of nations. But this falls far short of the pretension that has been founded on these cases. It in fact receives no countenance from them. But resort is had

406 to certain *incidental remarks of Justice Nelson, who gave the dissenting opinion in these cases. He is depicting the consequences of war, and enumerates among them the invalidity of contracts flagrante bello. The statement of the doctrine was perfectly true in the connection in which he made it; but the doctrine was in nowise involved in the adjudication of those cases;

and cannot now be wrested from the context, and made to apply to the quite different question we are now making, without an inexcusable perversion of his "obiter dicta." And yet this is all the analogy between those cases and the one at bar.

Next comes the case of *Mrs. Alexander's cotton*, 2 Wall. U. S. R. 404. This cotton was captured on land by a naval force of the United States in the spring of 1864, and was libelled as prize of war; but it was held not to be "maritime prize," and to be embraced by the act of congress of March 12th, 1863 (12 Stat. at Large 591), providing for the collection of abandoned property, &c.—whereby such property captured during the rebellion should be turned over to the Treasury Department to be sold and the proceeds deposited in the national treasury, so that any person asserting ownership of it might prefer his claim in the court of claims under the said act; and on making proof to the satisfaction of that tribunal that he had never given aid or comfort to the rebellion, have a return of the net proceeds decreed to him. In this case as in the Prize cases, the proposition was again reiterated that "the court could not look into the personal character and dispositions of individual inhabitants of enemy territory."—"We must be governed," says the Chief Justice, "by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United

States, must be regarded as enemies, 407 until by the action *of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed." But this language, broad and comprehensive as it is, must be confined for purposes of interpretation to the case in hand; and that was one between the rights of the government on the one hand, and those of a citizen on the other hand. It did not relate to controversies between individuals on the opposite sides, or tend to admit or tolerate the plea of 'alien enemy' in suits between such parties after the cessation of the war. Nothing breeds more confusion of ideas than to seize on a particular expression, tear it from its context, and then insist on the universality of its meaning, and its application to cases not in the mind of the writer, because of its capacity literally to embrace them. Without proper discriminations, we must continually fall into serious errors in weighing and interpreting judicial decisions; and it is through the lack of such precaution, as it seems to me, the notion prevails that this and the Prize cases attribute to civil wars as well as to international wars this faculty of annulling contracts between belligerent individuals.

The *Ouachita Cotton* case, 6 Wall. U. S. R. 521, to which we were next referred, does not relate to the question we are now considering. It was wholly under the municipal law, and involved the construction of the act of congress of July 13th, 1861, and the subsequent proclamation of Presi-

dent Lincoln in pursuance of it, under which it was held, that purchases of cotton from the rebel Confederacy, by citizens or corporations of New Orleans, and libelled during the war, were void. These measures were regarded as "restoring New Orleans after its occupation by the military forces on the 6th of May 1862, so completely to the national authority as to clothe its citizens with the same rights of property, and subject them to the same inhibitions and disabilities as to commercial intercourse 408 with the territory *declared to be in insurrection as the inhabitants of the loyal States." This, I presume, might also have been the case had these belligerents been foreign and independent nations in this predicament towards each other, under the authority of *The Hoop* and *The Bella Guidita*, 1 C. Rob. Adm. 196 and 207, and *United States v. Rice*, 4 Wheat. R. 246; so that Justice Swayne, apart from the act of congress and the proclamation of the president, justly regarded it as "the result of well-settled principles of public law."

The last case that has been cited for the appellees on this point is *Hanger v. Abbott*, 6 Wall. U. S. R. 534. It was there decided that the war had the effect of suspending the statute of limitations in the States, so that the time during which the courts in the lately rebellious States were closed to citizens of the loyal States, is, in suits brought by them since, to be excluded from the computation of the time prescribed by such statute, though exception for such cause, be not provided for in the statute. This doctrine is deduced from, and justified by, the principle, that while war does not annul an antecedent debt, it suspends the remedy therefor, so that the right and the remedy are both revived by peace; but this would be nugatory should the war last for the period of limitation, and there be nothing to stop the running of the statute. To give efficacy therefore to the principle, that the return of peace brings with it both "the right and the remedy," it is necessary that the statute should be suspended for the war; or else, as it is here said, "the citizens of a State may pay their debts by entering into an insurrection or rebellion against the government of the Union, if they are able to close the courts, and to successfully resist the laws, until the bar of the statute becomes complete." This is, in truth, a precedent for removing obstacles from the path of the creditor after the war; and I

do not see how it can be tortured into 409 an authority for annulling *all war debts and contracts sued on after peace. It is true in this case, as in the Prize cases, much is said upon the general consequences of war in the prohibition of all trading, negotiation, communication and intercourse between the citizens of one of the belligerents with those of the other, without the permission of the government; but it has only a remote and incidental bearing upon the point in issue, is, in truth, a mere preface to the discussion of it, and in no respect enters into the body of the

judgment. While, therefore, I do not dissent from these declarations, but, on the contrary, accept them as a part of the law of nations, I do humbly protest against the effort to make them authority in reference to a civil war or any other public war, except a war *inter gentes*.

I have thus carefully canvassed and sifted these authorities, and have not been able to find anything in them that assimilates civil to international war in its avoiding trading and contracts during its pendency. Had such an incident belonged to civil war, why is it that no instance of it can be found, after the most diligent search in the records of judicial proceedings, during such wars? and where was the necessity of the act of congress, if in our intestine warfare the public law of nations applied to it, and effected the same end?

But all this is mere negation. Positive and direct authority exists against this pretension of the appellees, and that in a decision of the Supreme court. In it, I have found the very basis, and staple of the arguments I have been advancing. I allude to the case of *Mauran v. Insurance Company*, 6 Wall. U. S. R. 1. It arose upon a policy of insurance upon a ship afterwards captured by a Confederate vessel; which policy had a marginal warranty, "free from loss or expense by capture."

To determine whether this loss arose from "assailing thieves" or "pirates," for which the insurer was bound to pay; or from
410 a capture, "the risks of which the assured took upon himself by his warranty, made it necessary for the court to ascertain and define the character of the Confederate States government. It accordingly did so, and declared it to be a government *de facto*. Justice Nelson, whose language in the Prize cases was quoted by the counsel for the appellees, delivered the opinion of the court in this case, and laid down their theory of our late struggle in the following striking passages: "We agree that all the proceedings of these eleven States, either severally or in conjunction, by means of which, the existing governments were overthrown and new governments erected in their stead, were wholly illegal and void; and that they remained after the attempted separation and change of government, in judgment of law, as completely under all their constitutional obligations as before. The constitution of the United States, which is the fundamental law of each and all of them, not only afforded no countenance or authority for those proceedings, but they were, in every part of them, in express disregard and violation of it. Still, it cannot be denied but that by the use of these unlawful and unconstitutional means, a government in fact was erected greater in territory than many of the old governments in Europe, complete in the organization of all its parts, containing within its limits more than eleven millions of people, and of sufficient resources in men and money to carry on a civil war of unexampled dimensions,

and during all which time, the exercise of many belligerent rights were either conceded to it or were acquiesced in by the supreme government; such as the treatment of captives, both on land and sea, as prisoners of war; the exchange of prisoners; their vessels recognized as prizes of war and dealt with accordingly; their property seized on land referred to the judicial tribunals for adjudication; their ports blockaded and the blockade maintained by

411 "a suitable force and duly notified to neutrals, the same as in open and public war. We do not enquire whether these were rights conceded to the enemy by the laws of war among civilized nations; or were dictated by humanity to mitigate the vindictive passions growing out of a civil conflict." Again in *White v. Cannon*, 6 Wall. U. S. R. 443, it is said that "the objection that the judgment of the Supreme court of Louisiana is to be treated as void, because rendered some days after the passage of the ordinance of secession of that State, is not tenable. That ordinance was an absolute nullity, and of itself alone, neither affected the jurisdiction of that court or its relation to the appellate power of this court." If then we accept these opinions of the Supreme court as the law of the land, I do not see, how the contracts of the citizens of a common country, though harassed by civil war, are to fall under the ban of international law as to contracts between alien enemies in time of war. To impute the doctrines of 'alien enemy' to the relations of a people under the same constitution of government in the eye of the law, though engaged in an insurrectionary war, would be in flagrant opposition to these decisions, which we are bound to respect and follow.

That the understanding of the country, also conforms to the state of the law, as thus expounded, we have striking proof and an impressive example in the general acquiescence in the nullity of the sequestration or confiscation laws of the Confederate States. A greater hardship and loss cannot well be conceived; and yet I have not heard of the first case in this State, of an attempt to resist at law the repayment of a debt or the restoration of property, which had been sequestered or confiscated under this law of the Confederate States. And yet if this pretension of applying international law to the case, be correct, this law stands justified

by the strict rights of war; and is
412 really valid, "though not approved by the practice and rules of later times.

But it seems the question was made before the Circuit court of the United States at Raleigh, in which the chief justice reviewed the very points that have been made in the argument here; and fully sustained the views I have taken. The pamphlet containing his opinion—*Shortridge et al. v. Macon*—is before us. He was met there, as we are here, by the assertion that the decisions of the Supreme court, already cited, declared the principle that all the doctrines of international law as to war *inter gentes*

were applicable to the powers and rights of the two governments, and the dealings of the respective citizens of each, with those of the other; so that a state of civil war, like a state of international war, would validate acts of confiscation, and also stop interest on debts thus deemed to be foreign. But he distinctly disclaimed and repelled this interpretation of these cases, and gave judgment for the debt, interest, as well as principal.

After a succinct recapitulation of the points settled by the Supreme court, he adds with emphasis: "But there is nothing in that opinion which gives countenance to the doctrine which counsel endeavor to deduce from it; that the insurgent States, by the act of rebellion, and by levying war against the nation, became foreign States, and their inhabitants alien enemies."

I have thus taken much pains to ascertain if this pretension of the appellees could derive any support from the decisions of the Supreme court. It seemed to me, under the circumstances, a strange quarter to seek for it; for if it can be found there, it must be allowed that this august tribunal has gone far towards rehabilitating the doctrine of secession, and giving life to the Confederacy in its ashes. And for what ends of justice, I demand to know, are we required to vamp up this obsolete theory of a separate and independent existence

413 *of the late Confederacy? The parties to this controversy were citizens of this Confederacy; and contracting under that faith, what merit have the appellees in this defence? It must be allowed that this defence is curiously constructed; it consists in part of the law of nations, and in part of the municipal law; of the former, so far as the incapacities growing out of international war, are concerned; and of the latter, when it becomes necessary to invoke it for the re-annexation of New Orleans, a part of the Confederate territory, to the United States. Upon the theory of a separate Confederate nationality, no act of mere military occupation, nor law of the congress of the United States, could avail to withdraw this city from its sovereign so as to make its inhabitants, for purposes of contract, alien enemies to other subjects of the same sovereign; although under the doctrines of *The Hoop & Bella Guidita*, already cited, it might not be allowable for the latter to ship supplies to the former. If required, then, to stand exclusively upon their theory of an international war, unassisted by the laws of congress, the appellees, and all the other parties, in interest, to this controversy, including the Canal and Banking Company of New Orleans, would be inhabitants and citizens of one common country; and there could be no pretext for imputing the relations of alienage or hostility to any. But, to make out this defence, another ingredient is wanted; and that is found in the laws of congress and the proclamation of the president of the United States, whereby New Orleans is

transferred from the dominion of the Confederacy to that of the United States. Such a mixed and incongruous plea, therefore, does not challenge my particular regard, nor offer any peculiar temptation to be seduced into the avowal of doctrines, that might prove hazardous to the business of life in times of civil commotion. For my

part, I feel it to be a duty within my
414 province, *to protect, as far as practicable, the contracts of men from being affected by internal disturbances, so that the stream of commerce may not be impeded or diverted, nor the faith of contracts dissolved by intestine wars. If I have not erred in the positions I have so far advanced, I have succeeded in excluding this case from the pale of the law of nations. I am therefore relieved from the necessity of saying anything as to the numerous authorities that were cited on this head; I read them all with an interest and attention due to the gravity of the doctrine, and its able and satisfactory exposition in these cases, but, in my view, they have no legitimate application to this case.

Let us now turn to the only remaining branch of our enquiry, and see whether this action is defeated by the law of congress. It may seem hard to subject a contract between confederates during the war to an act of congress, of which it is reasonable to suppose they might not have had cognizance; but such a consequence necessarily attends the overthrow of the usurped governments. The act in question (July 13th, 1861,) authorized the president by proclamation to declare the inhabitants of any State, or part thereof, to be in a state of insurrection against the United States, whereupon "all commercial intercourse by and between the same, and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful, as long as such condition of hostility shall continue." This act was followed on the 16th August 1861 by the proclamation of the president, declaring, among other things, "that all commercial intercourse, &c., is unlawful, and shall remain unlawful until such insurrection shall cease, or has been suppressed." The effect of these two measures was to suspend intercourse during the continuance of hostilities. I shall not stop to enquire what was the character of "the commercial intercourse"

thus prohibited, whether it was aimed
415 at the negotiations of *trade as within the mischief, or merely at the locomotive commerce, as more palpably indicated by the context, which is restricted to "all goods and chattels, wares and merchandise." I am willing to concede in view of judicial decisions upon the cognate doctrine in the law of nations, that the interdiction was levelled at all contracts that might tempt to the violation of this prohibitory policy. But it is indispensable to discriminate between the edict of international law and the terms of this statute. The former, we have seen, annulled all contracts within the prohibited class, so

that no action could be maintained upon them after the termination of the war; not so, however, with this act of congress; it is merely suspensory. Had congress thought proper to follow the law of nations in this respect, it could and would have done so; but a tender and considerate deference, doubtless, to the peculiarities of the conflict, it chose a milder course, and merely suspended the right and the remedy during hostilities. It did not simply declare "commercial intercourse" unlawful, and stop there, leaving it to be inferred, as an intendment of law, that every act of such intercourse was therefore void, and incapable of supporting an action after the war. But the prohibition is made to depend upon "the condition of hostility," so that when the latter ceases, the former is removed, and a contract, unlawful in its inception, ceases to be so upon the return of peace. This, I take it, is the plain and unambiguous meaning of the act.

This bill was purchased by the appellant in February 1863, when New Orleans, where it was payable, had reverted to the United States. Grant that this transaction was unlawful at that time, the illegality was temporary and contingent, for both the law and the proclamation declared that it should cease with the suppression of the insurrection. No step need to have been taken before that time to fix the liabilities of the parties to the bill.

Had there been an understanding that this negotiation should await the termination of the war, it would have been as innocent as an assignment for value of the obligation of a debtor within the Federal lines. But there is no proof in this case of any purpose on the part of Billgerry to present or collect this check across the lines of contending armies. On the contrary, his conduct bespeaks a different purpose. He quietly remains at his home till the advancing wave of conquest passes over him and opens communication for him with New Orleans. He then duly presents his bill, and upon non-payment has it protested, and attempts to give notice thereof in the accustomed mode. But his right of action was still in abeyance, because his endorsers were separated from him by a line of bayonets. This continued to be the case till the insurrection was finally broken and suppressed by the surrender of Lee. Then his rights and remedies awoke from their state of suspended animation, and were endued with as much power and life as if the municipal law had never suspended them. It seems to me that this is a just and accurate interpretation of the terms and spirit of the law, and fully sustains the present cause of action.

The undertaking or agreement of the appellees, as endorsers, however, was collateral and contingent. To hold them responsible, due and reasonable diligence must be shown in giving them notice of the dishonor; so that they might enjoy every conceivable opportunity and facility of securing themselves from loss. The

question of due diligence, is one of law; and is well settled by a numerous train of authorities. The party, whose duty it is to give this notice is bound to due and reasonable diligence; but it is not required of him to see that the notice is brought home to the party. If it is given in the usual way and in reasonable time, it is sufficient to

excuse the party, on whom it rests, 417 *though it may never be received. 1 Am. L. Cas., p. 396, and note. But an omission to give this notice may be excused by circumstances rendering it impossible to do so. But the excuse is contemporaneous with the obstacle; so that upon the removal of the latter, the duty revives. The pendency of war is an adequate excuse. 1 Pars. on Cont. 278; Hopkirk v. Page, 2 Brook. 20. Here, then, there was no duty to give notice till the war ended. It is not, therefore, material to enquire into the validity of the notice that was mailed along with the protest in October 1863, when there was no mail communication with Virginia. It was perhaps futile and supererogatory. But was this notice given in the usual way and in due time after this impediment was removed? The proof is that about two weeks after the surrender of Lee's army, the appellant wrote a letter to Branch & Sons from New Orleans, informing them of the protest of the bills; and it was just at that time, as is proven by a special agent of the post-office department, that mail communication was first opened from within the United States lines to Richmond or Petersburg. This, therefore, brings the appellant within the rule that charges his endorsers and fixes their liability to him on their collateral undertaking for the honor of the bills which they sold him.

On the whole, therefore, it seems to me that the demurrer to the amended declaration should have been overruled, and judgment given for the plaintiff's demand.

JOYNES, J. The counsel for the defendants have contended in the argument: 1. That the contracts arising out of the endorsement and delivery of the checks by the defendants to the plaintiff were illegal and void, so that no action could be founded upon them. 2. That if these contracts were legal and valid, there has been 418 *no sufficient presentment and demand of payment of the checks. And 3. That if the presentment and demand were sufficient, there has been no sufficient notice of dishonor.

Premising that a check is a bill of exchange, though subject to some peculiar rules, which need not be now adverted to, and that every endorsement of a bill is equivalent to the drawing of a new bill, I proceed to consider the first and principal question.

It is a general principle of law, that war operates as an interdiction of all commercial and other pacific intercourse and communication with the public enemy; and it follows as a corollary from this principle,

that every species of private contract made with subjects of the enemy during war is unlawful. "The rule thus deduced," says Wheaton, "is applicable to insurance on enemy's property and trade; to the drawing and negotiating of bills of exchange between subjects of the powers at war; to the remission of funds in money or bills to the enemy's country; to commercial partnerships entered into between the subjects of the two countries after the declaration of war, or existing previous to the declaration, which last are dissolved by the mere force and act of the war itself, although as to other contracts [existing before the war] it only suspends the remedy." Wheat. Elements, by Lawrence 556. So Kent says: "The insurance of enemy's property is an illegal contract, because it is a species of trade and intercourse with the enemy. The drawing of a bill of exchange by an alien enemy on a subject of the adverse country, is an illegal and void contract, because it is a communication and contract. The purchase of bills on the enemy's country, or the remission and deposit of funds there, is a dangerous and illegal act, because it may be cherishing the resources and relieving the wants of the enemy. The remission

of funds in money or bills to subjects 419 of the enemy is *unlawful. The inhibition reaches to every communication, direct or circuitous. All endeavors at trade with the enemy, by the intervention of third persons, or by partnerships, have equally failed, and no artifice has succeeded to legalize the trade without the express permission of the government. Every relaxation of the rule tends to corrupt the allegiance of the subject, and prevents the war from fulfilling its end. The only exception to this strict and rigorous rule of international jurisprudence is the case of ransom bills, and they are contracts of necessity, founded on a state of war, and engendered by its violence. 1 Kent 67-8.

The same great jurist uses this language in *Griswold v. Waddington*, 16 John. R. 438. "There is no authority in law, whether that law be national, maritime or municipal, for any kind of private, voluntary, unlicensed business communication or intercourse with an enemy. It is all noxious, and in a greater or less degree is all criminal. Every attempt at drawing distinctions has failed; all kind of intercourse, except that which is hostile, or created by the mere exigency of the war and necessity of the case, is illegal. The law has put the sting of disability into every kind of voluntary communication and contract with an enemy, which is made without the special permission of the government. There is wisdom and policy, patriotism and safety in this principle, and every relaxation of it tends to corrupt the allegiance of the subject, and prolong the calamities of war."

"The idea that any remission of money may be lawfully made to an enemy, is repugnant to the very rights of war, which require the subjects of one country to seize the effects of the subjects of the other. The

property so remitted, if in cash or any tangible subject, would become a just cause of the seizure while on its passage. An alien enemy has no right of action during war, and he cannot sue, because it 420 would be drawing *resources out of the country, how then can it be lawful to make remittances to him? The law that forbids intercourse and trade must equally forbid remittances and payment."

See Halleck Int. Law, 356 et seq.; note to *Clementson v. Blessig & als.*, 11 Exch. R. 135; S. C. 32 Eng. L. & Eq. R. 544.

In *Willison v. Pattison & al.*, 7 Taunt. R. 439 (2 Eng. C. L. R. 176); S. C. 1 J. B. Moore 133 (which latter report of it I will cite, as it is much fuller and better every way than the other), was an action of assumpsit on three bills of exchange accepted by the defendants and endorsed to the plaintiff. They both were drawn at Dunkirk in France by Michelin, a subject of France, resident there, payable to his own order three months after date upon the defendants, British subjects, resident in London, who were the holders of certain cambrics, shipped to them by Varlet of Dunkirk, and by him assigned to Michelin. The bills were accepted, payable when the cambrics should be sold, which were subsequently done. The bills were endorsed by Michelin, the drawer, to the plaintiff, an English born subject, then and still a resident of Dunkirk. At the time these bills were drawn, endorsed and accepted, France and England were at open war with each other. The action was brought after the return of peace, and the court held that it could not be maintained.

Gibbs, C. J., thus states the propositions maintained by the respective counsel in the argument. "My brother Best has contended that all communication with an alien enemy, during war, must be prohibited, as the policy of law thereby secures this State from all dangers to be apprehended from a foreign country, and that in order to prevent all communication with a foreign enemy, he has insisted, that if subjects of a foreign State draw bills on persons in

this country, and seek to enforce pay- 421 ment thereon, the mischief is *incurred. He has further insisted that this was a direct trading. This, however, my brother Lewis has denied, and contended that the mere drawing or endorsing bills is not such a communication, with an enemy as is contravened by the general policy of law." And the Chief Justice, in giving the reasons of his judgment, said: "It is illegal for an alien, in an enemy's country, during war, to draw a bill on a subject resident in this, and then sue him here for the amount of such bill, on the restoration of peace. It gives rise to a communication between subjects of both countries, which ought to be avoided. The drawing and accepting these bills are in themselves illegal." Park, J., after quoting the rule *ex natura belli commercia inter hostes cessare non est dubitandum*, adds: "Although the evidence of trading is not con-

clusive, it is still a trading." * * *
 "Though the plaintiff might be in ignorance of the circumstances attending these bills, still he receives them from the drawer, and must, therefore, be fully aware that they were a species of contract, originating with an alien enemy." Burrough, J., said: "It was the object of the drawer in the present case, who was an alien, to obtain money from the acceptors, who were residents in this country. The drawer having assigned [consigned?] the cambrics to the acceptor for sale, is entitled to the money arising on the bills. Can it be contended, that if the cambrics had been sold, Michelin could have maintained an action for money had and received? If not he could by no device obtain it from this country. If, therefore, the action for money had and received could not be maintained by Michelin, being an alien enemy, can he possibly transfer his interest to another, which interest will ultimately revert to his benefit.

In Willison v. Pattison there was an actual communication had and a contract directly made, between subjects of the hostile powers, inasmuch as the bill was
 422 sent *over from France to England for acceptance, and was accepted. But it is not necessary that any such actual communication should take place, in order to vitiate the contract of the drawer or endorser of a bill. When a man draws a bill upon another and negotiates it, he, in substance and fact, dispatches a communication to him, directing him to pay the money to the owner of the bill. The drawing and negotiation of the bill have a direct tendency to bring about actual intercourse and communication, because the bill cannot otherwise perform its office. And, upon general principles, any contract is unlawful, which has a tendency to promote and encourage the doing of an act which the law condemns and forbids, whether, in any particular case, the act be really done or not. Upon this ground the vice attaches to the drawing and negotiation of the bill. The other ground of decision stated by Burrough, J., namely, that the bill is an attempt by the drawer to transfer to another a right to demand and receive money which he could not lawfully demand himself, leads to the same result. Obviously, if the drawer may lawfully draw for his funds in the hands of the drawee, the drawee may lawfully pay the drafts, or remit the funds. But, as we have seen, the payment or remittance of money by a subject or citizen of one belligerent to a subject or citizen of the other, during war, is unlawful. Griswold v. Waddington, supra.

But it was contended, with great earnestness and ability, by the counsel for the plaintiff, that the rights of the parties in this case must be determined with reference to the municipal law alone; that the late conflict between the United States and the Confederate States was not a war in the legal sense, and did not produce the effects of a war upon the rights and relations of

citizens; that on the part of the Confederate States it was nothing more than an
 423 insurrection or rebellion *against the lawful authority of the United States, and on the part of the United States was only an exertion of force to suppress the insurrection; and that the principles of international law, applicable to a war inter gentes, cannot properly be resorted to for the determination of any question between citizens arising out of that conflict or affected by it. It was further argued, that the only restriction upon intercourse during the war was that imposed by the act of congress of July 13, 1861, and the proclamation of August 16, 1861, which was merely a suspension for a time of the right of free intercourse guaranteed by the constitution; and that the existence of the conflict between the government and the insurgents, and the suspension of intercourse during its existence, did not deprive any citizen of the right to draw a bill of exchange upon another citizen, or any other citizen of the right to purchase such a bill, even though the drawer and drawee were on opposite sides of the conflict, such acts not involving any actual locomotive intercourse, which would alone violate the prohibition against intercourse; and that, in order to defeat a recovery in this case, it was incumbent on the defendants to establish that there has been a violation of that prohibition.

I shall not enter upon a discussion of the theory and principles of the constitution of the United States, or of the respective rights and powers of the Federal and State governments, for the purpose of determining the political and constitutional character and consequences of the late unhappy conflict. Fortunately, such a discussion is not necessary. The principles of law which are to be applied to the solution of the question now before us, seems to me to have been fully settled by the Supreme court of the United States. I do not think it necessary to cite the decisions of any inferior tribunal, and shall cite only a few cases in the Supreme court.

424 *The subject of the late war first came before the Supreme court in The Prize Cases, 2 Black. U. S. R. 635, decided at December term 1862. These cases involved the validity of certain captures for breach of the blockade established by president Lincoln in April 1861, at a time when no legislation had been had by congress in reference to the war. Four vessels were involved, two of which belonged to neutrals, and two to citizens of Richmond, Virginia. Two questions were discussed and decided by the court: 1. Had the president a right to institute a blockade of ports in the possession of persons in armed rebellion against the government, on the principles of international law? 2. Was the property of persons domiciled or residing within the States in rebellion, a proper subject of capture on the sea as "enemies' property?"

The court, after observing that the right of prize and capture depended on the jus

belli, proceeded to enquire whether, at the time the blockade was instituted, a state of war existed between the United States and the insurgents. If these relations, existing under the constitution, between the government and the insurgents, had the effect of rendering it impossible that a conflict between them could be a war, in the legal sense, and of restricting the government to the use of means provided by the municipal law for the suppression of an insurrection, then the blockade was not lawfully instituted. In order, therefore, to determine the validity of the blockade, it was necessary to determine what was the legal character of the relations existing between the parties to the conflict.

The following extracts from the opinion will exhibit the views of the court:

"The parties belligerent in a public war are independent nations. But it is not necessary, to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war
425 may exist *when one of the belligerents claims sovereign rights as against the other."

"A civil war," says Vattel, "breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. These two parties therefore must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms."

"The true test of the existence of civil war, as found in the writings of the sages of the common law, may be thus summarily stated. When the regular course of justice is interrupted by revolt, rebellion or insurrection, so that the courts of justice cannot be kept open, civil war exists, and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land."

"It is not the less a civil war with belligerent parties in hostile array, because it may be called an insurrection by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations."

"The law of nations is also called the law of nature, it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this court are now for the first time desired to pronounce, to wit, that insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not enemies, because they
426 are traitors, and [that] *a war levied

on the government by traitors, in order to dismember and destroy it, is not a war, because it is an insurrection."

Pursuing these views, and others which need not be adverted to, the court held that there existed between the government of the United States and the insurgents a state of civil war, in the sense of the international law, which brought with it the common incidents of war, and among them the right to institute a blockade.

The views of the court upon the second question will appear from the following extracts:

"The appellants contend that the term 'enemy' is properly applicable to those only who are subjects or citizens of a foreign State, at war with our own." * * *

"They contend also that insurrection is the act of individuals, and not of a government or sovereignty; that the individuals engaged are subjects of law; that confiscation of their property can be effected only under a municipal law; that by the law of the land, such confiscation cannot take place without the conviction of the owner of some offence; and finally, that the secession ordinances are nullities, and ineffectual to release any citizen from his allegiance to the national government, and consequently that the constitution and laws of the United States are still operative over persons in all the States for punishment as well as protection."

The court proceeded to show, that the claim of sovereignty on the part of the United States, did not prevent the exercise of belligerent rights or the existence of belligerent relations, and added:

"All persons who reside within [the insurgent] territory, whose property may be used to increase the revenues of the hostile power, are in this contest liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made
427 war on *their government, and are none the less enemies because they are traitors."

The four dissenting judges held, that war, in the legal sense, did not exist at the time the blockade was instituted, because it had not been declared by congress. They held that prior to the act of congress of July 13, 1861, the president could only exercise the powers given to him by the municipal law, his operations being limited to the suppression of an insurrection, but that congress could bring into operation the war power, and thus change the nature and character of the contest; and that, after such action by congress, instead of being carried on under the municipal law, it would be carried on under the law of nations and the acts of congress as war measures, with all the rights of war; p. 692. They not only held that such a contest, after the action of congress, would give to the government the rights of war under the international law, but that it would likewise be attended with the consequences of war in respect to the rights and relations of citizens; pp. 688, 693. On p. 687, the conse-

quence of a state of war, according to the international law, are stated. They are referred to as consequences which must result from regarding the pending conflict as a civil war. The Judge says: "The people of the two countries become immediately the enemies of each other; all intercourse, commercial or otherwise, unlawful; all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemies' property, the drawing of bills of exchange, or the purchase [of bills] on the enemy's country; the remission of bills or money to it, are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved, and, in fine, interdiction of trade and intercourse direct or indirect is absolute and complete, by the mere force and effect of war itself."

428 *The only point upon which the minority differed from the majority was, in respect to the time at which the conflict assumed the character of a war, in the legal sense. The majority held, that the conflict had become a war by the mere course of events, and without any action by congress, while the minority held, that the action of congress was indispensable to give it that character. But there was no difference of opinion in respect to the legal consequences resulting from the state of war, whenever the conflict assumed that character.

In *The Venice*, 2 Wall. U. S. R. 258, the court says: "While these transactions were in progress, the war was flagrant. The States of Louisiana and Mississippi were wholly under rebel dominion, and all the people of each State were enemies of the United States. The rule which declares that war makes all the citizens or subjects of one belligerent enemies of the government, and of all the citizens or subjects of the other, applies equally to civil and to international wars."

This relation of mutual enmity is one of the fundamental conditions of a state of war. It is part of a system of rules for the government of men in a state of war, which is founded in necessity, and which has been established by common consent throughout the world. That system, as we have seen, subjects individuals to restraints and disabilities in respect to their acts and contracts, which are unknown in time of peace. The relation of the citizens of the several States under the constitution, is that of friends; the relation between citizens on opposite sides in the late war, was that of enemies. The relations under the constitution were suspended, and superseded for the time, by new relations under the laws of war. And so the rights and privileges existing under the constitution in respect to intercourse and contracts, were displaced

429 *and superseded, for the time, by the restraints and disabilities which resulted from the state of war.

In *The Hampton*, 5 Wall. U. S. R. 372, the vessel was captured in a creek in the State of Virginia, and was libelled and

condemned as prize of war, upon the principles of the international law. Brinkley, a loyal citizen, appeared and claimed the vessel as mortgagee. The bona fides of the mortgage were not disputed, nor was it disputed that he was a loyal citizen. The precise offence for which the vessel was libelled is not stated in the report, but it was conceded that the vessel might have been condemned under the act of July 13, 1861. The offence, therefore, was one embraced by that act, which provides that goods, &c., coming from or going to a State in insurrection, by land or water, along with the vessel, &c., in which they are, shall be forfeited.

It was held that the vessel was properly condemned under the international law, which was not superseded by the act of congress, and that notwithstanding the loyalty of the mortgagee, and the fairness of his debt, his right was forfeited upon the principles of international law, though it would have been saved if the condemnation had taken place under the act of congress.

This case, therefore, decides, 1, That intercourse during the late war, was unlawful upon the principles of international law, and independently of the act of congress: And 2, That the effect of the international law was to override and extinguish the claim of a loyal citizen, under a bona fide mortgage.

In *The William Ragaley*, 5 Wall. U. S. R. 377, Bragden, who claimed a share of the vessel and cargo, was a loyal citizen, resident in Indiana. At the breaking out of the war he was a member of a mercantile partnership in Mobile, which owned the vessel and cargo. He never aided the rebellion; never, after the rebellion began, exercised any control or ownership
430 over the *vessel or cargo; and had no connection with or knowledge of the unlawful voyage which occasioned the capture. In consequence of his loyalty to the United States, his interest in the partnership effects, had been confiscated by the Confederate government. His claim was rejected. The court held, among other things, that the effect of the war was to dissolve the partnership existing between the claimant and the parties in Mobile, and that it was his duty promptly to dispose of and withdraw his interest, and that by his failure to do so, his interest became liable to be treated as enemy's property. These propositions were based exclusively on the principles applicable to international laws. The court further recognized the principle, applicable to war inter gentes, that an executory contract with a citizen or subject of the enemy, if it cannot be performed except in the way of commercial intercourse with the enemy, is ipso facto dissolved, as equally applicable to the late civil war.

In *Hanger v. Abbott*, 6 Wall. U. S. R. 532, the principle of law applicable to a state of war inter gentes were applied to the late civil war, to determine whether the statute of limitations of Arkansas ran, during the war, against a cause of action held

at the commencement of the war, by citizens of New Hampshire against a citizen of Arkansas. In the opinion of the court, the ordinary consequences of a war inter gentes; the prohibition of intercourse; the dissolution of partnerships; the prohibition of contracts made during the war, and the suspension or dissolution of contracts made before the war; the right to confiscate debts due to citizens or subjects of the enemy; the suspension of the remedy for the recovery of debts, and the restoration of the remedy upon the return of peace; were fully stated, and were recognized as equally applicable to the late civil war. It was accordingly held, that the act of limitations did not run during the war. And this

431 decision *was placed exclusively upon the principles of international law applicable to a state of war inter gentes.

These decisions of the Supreme court settle beyond question that the late conflict between the United States and the Confederate States was a war, in the legal sense, with all the incidents and consequences of a war, as they are known to the international law; that accordingly all the citizens on one side were enemies of all the citizens on the other, and that all commercial or other pacific intercourse or communication between them, unless specially authorized, was unlawful, to the same extent and for the same reasons as in a war inter gentes, and that in order to determine how the contracts of individual citizens were affected by the late war, recourse must be had to the general principles applicable to a state of war, as they are found in the international code.

This doctrine by no means involves a recognition of the Confederate States as a political sovereignty. The concession by the government of belligerent rights to the Confederate States, and the application by the courts of the general laws of war, to the determination of questions arising out of the conflict, only recognize the existence of a conflict of such magnitude, and with such an array of strength, that it could not be dealt with otherwise than as a war; they involve no concession of political rights to the association of States which carried on the conflict.

Nor does the fact that Louisiana was one of the Confederate States, and that the city of New Orleans was to the last claimed by the Confederate States as belonging to them, afford any ground for refusing to apply the law of war to this case. The checks were drawn and endorsed after the city of New Orleans had passed under the permanent dominion and control of the United States. Its relation to the Confederate States, which were only a

432 government de facto, and *whose authority was therefore dependent upon the exercise of power, and not upon the existence of right, were thus broken up and destroyed. From that time we must regard New Orleans as belonging to the Federal side of the conflict, and its citizens as enemies of the citizens of the other belligerent. 6 Wallace 521, and cases cited. Nor does it

make any difference that the plaintiff and defendants were all of them citizens of the Confederate States, if, as claimed by the defendants, the contract between them was in violation of the common law of the civilized world.

I do not think it necessary to consider whether, as contended by the counsel for the plaintiff, the act of congress of July 13, 1861, and the proclamations of the president in pursuance of it, prohibiting commercial intercourse, were a law to the parties to this suit at the date of their contract, all of whom were then citizens and residents of the Confederate States. If they were, it would not follow, as contended by the counsel, that actual locomotive intercourse was necessary in order to affect the contract between these parties. Such actual locomotive intercourse, accomplished or attempted, would, doubtless, be necessary, as under the general law of war, to subject property to forfeiture. But the prohibition of intercourse, thus made by congress, must be construed with reference to the object it was designed to effect, and so enforced as to accomplish the policy on which it was founded. It was obviously dictated by the same policy, and designed to effect the same ends, as the like prohibition in the international law, and any contract which would be regarded as a violation of the one, ought to be regarded as a violation of the other.

But even if this act of congress did not operate as a law to the parties to this suit, at the date of their contract, I apprehend that no court of the United States, or of a

State, should lend its aid for the enforcement *of a contract made in violation of the policy of that act.

433 This court must deal with this case just as a court of the United States would deal with it.*

*Substantially the same question involved in this case was decided by Chief Justice Chase in the Circuit court at Richmond, June 1868, in the case of *Moon & Bro. v. Foster & Moon*, of which I have obtained an authentic account since this opinion was delivered.

The action was brought to recover the amount of certain negotiable notes. The defendants pleaded payment, and accord and satisfaction, and to sustain their defence, gave in evidence a draft drawn by the Bank of North Carolina at its branch in Winslow, in that State, on the branch of the Bank of Virginia at Portsmouth, bearing date the 10th day of December 1862, which draft, it was contended, was delivered by the defendants to the plaintiffs, and accepted by them in payment of the debt. At the date of the draft, Portsmouth was in the permanent occupation and control of the forces of the United States; but the condition of Winslow, in that respect, was a subject of dispute.

The Chief Justice instructed the jury, "that if they should find that Winslow was not, at the time of the making and issuing of the draft, in the occupation or control of the national forces, then the draft in controversy being an act of prohibited commercial intercourse, was not valid negotiable paper." Whether Winslow was so occupied or controlled he left to the jury.

The argument that Billgerry had a right, which was guaranteed to him by the constitution, to go to New Orleans at his pleasure, which was only suspended by the war, seems to me to have no force. The suspension was accompanied by an absolute interdict of all commercial intercourse in the meantime, and a consequent disability to enforce any contract made during the war, which tended to produce a violation of that interdict. The interdict was as absolute while it lasted, and as fatal to all contracts in violation of its policy, as if it had been perpetual, or as if there had been no such general right of intercourse under the constitution.

It was argued too, that Billgerry might have intended to keep these checks, until it should become lawful to present them for payment, and that the court ought rather to presume a lawful than an unlawful
434 intent. *I doubt whether a party who makes a contract during war, which, upon its face, and according to the usual intent and import of such contracts, is a violation of the policy of non-intercourse, ought to be allowed to say that he did not design any such violation. It would be difficult to determine whether such an averment was founded in truth, and to permit such defences to be alleged, would cripple the efficiency of the rule, which, we are told, admits no exceptions (6 Wallace R. 535), and which declares "a strict and rigorous" policy, which no artifice is permitted to evade.

But what are the facts? Billgerry parted with his money to Branch & Sons, in February 1863. He would necessarily lose interest until he could collect the money on the checks. He has been examined as a witness, as have also the only two of the defendants who were cognizant of the transaction. Neither of them testifies that there was any understanding or expectation that the presentment of the checks would be withheld, much less any contract that they should be withheld, until it should be lawful to present them. On the contrary, John R. Branch, who conducted the transaction with Billgerry, shows his understanding and expectation, when he says, that he "judged Bilgerry to be a blockade runner." And not only does Billgerry nowhere say that there was any understanding with Branch, or any intention on his own part, that presentment would be delayed, but he admits, that after he bought the checks, he tried to find somebody by whom he could send them to New Orleans for collection, but could not. The checks indeed seem to have remained in Virginia from August, 1862, when they were drawn, to February 1863, when they were sold to Billgerry. But that fact throws no light on the contract between Billgerry and Branch & Sons. It may be accounted for by supposing, that nobody
435 had been found, in that interval, who wanted funds on *New Orleans, or who would pay enough for them. When we remember how much activity and enterprise were displayed during the war,

in "running the blockade," and the large profits that were made by it, we should require pretty strong proof to convince us, that a party who drew a sight draft on a point where Federal money was to be had, contemplated that it would be withheld from presentment for an indefinite period of the war, or that a party who laid out a large sum in the purchases of such a draft, intended so to withhold it.

It follows, from these views, that, upon the evidence, the judgment was properly rendered for the defendants. They also show that the demurrers to the special counts were properly sustained. Each of those counts sets out the drawing of a check by a bank in Richmond upon a bank in New Orleans, and the endorsement of the check by the defendants to the plaintiff, at periods when we know that the war was flagrant, and all commercial and other intercourse between Richmond and New Orleans were unlawful.

But even if the contract could be held valid, there is another ground which is fatal to the case of the plaintiff, both upon the pleadings and the evidence. In order to charge the defendants as endorsers, it was necessary that the checks should be presented to the Canal bank and payment thereof demanded, and, in case of dishonor, that due notice thereof should be given to the defendants. The only presentment and demand set out in the pleadings or proved by the evidence, were made on the 27th day of October 1863, when all commercial intercourse between Vicksburg, where the plaintiff resided, and New Orleans, where the checks were payable, was unlawful. By the proclamation of the president, dated August 16, 1861, prohibiting intercourse with the States in rebellion, an exception
436 was made of "such parts of States as may be from *time to time occupied and controlled by forces of the United States engaged in the dispersion of the insurgents." This exception is set out in the amended declaration, and was relied on in the argument as authorizing Billgerry to go to New Orleans after the fall of Vicksburg. But this exception was repealed by the proclamation of April 2, 1863. That proclamation declared the same States to be in insurrection, and revoked all the exceptions made in the former proclamation, but again made certain local exceptions, of which "the port of New Orleans" was one. This proclamation declares "that all commercial intercourse not licensed and conducted as is provided in said act, between the said States and the inhabitants thereof, with the exceptions aforesaid, is unlawful, and will remain unlawful until such insurrection shall cease, or has been suppressed, and notice thereof has been given by proclamation." Vicksburg was not excepted from the operation of this proclamation, so that commercial intercourse, except with the license of the president, between Vicksburg and New Orleans was unlawful at the time at which presentment of these checks was made. The license given to Billgerry

by the military authorities was a nullity. The *Ouachita Cotton*, 6 Wall. U. S. R. 521.

The demand of payment therefore which was made, was one which the plaintiff could not lawfully make, and which the Canal Bank could not lawfully comply with. A demand to charge the endorsers should have been one which the bank might lawfully have complied with.

In respect to the question of notice of dishonor very little need be said. To give any effect to the notice deposited in the postoffice in New Orleans in October 1863, it should at least have been shown that the law, or a general usage, required that the letter containing the notice should be preserved by the postmaster until the restoration of intercourse, and then forwarded to its destination. In the absence of such proof, the deposit of a notice in the postoffice at New Orleans, addressed to Petersburg in the midst of the war, was of no avail. It is not necessary to express an opinion as to whether the evidence is sufficient to prove that due notice was given to the defendants after the close of the war.

Upon the whole, I am of opinion that the judgment ought to be affirmed.

MONCURE, P., concurred in the opinion of Joynes, J.

Judgment affirmed.

438 *Corbin & als. v. Mills' Ex'ors & als.

Robinson's Adm'r v. Mills' Ex'ors & als.

Lancaster & als. v. Corbin & als.

January Term, 1860, Richmond.

1. Audited Accounts—Prima Facie Correct—Bill to Surcharge.*—The accounts of an executor which have been regularly settled in the mode prescribed by law, are to be taken as *prima facie* correct. They are liable to be impeached on specific grounds of surcharge and falsification to be alleged in the bill, but the court will not decree an account, upon a general allegation that the settled accounts are erroneous.

*Audited Accounts—Prima Facie Correct—Bill to Surcharge.—See the proposition laid down in the first headnote approved in *Leake v. Leake*, 75 Va. 804; *Green v. Thompson*, 84 Va. 392, 5 S. E. Rep. 507; *Radford v. Fowlkes*, 85 Va. 846, 8 S. E. Rep. 817.

In *Leach v. Buckner*, 19 W. Va. 45, the court, citing the principal case, said: "The principle is well settled, that the *ex parte* settlement of a fiduciary is only *prima facie* correct, and parties interested may file a bill to surcharge and falsify the account so settled." See, to the same point, *Anderson v. Fox*, 2 H. & M. 260; *Kyles v. Kyle*, 25 W. Va. 378; *Cavendish v. Fleming*, 3 Munf. 198; *Shugart v. Thompson*, 10 Leigh 434; *Mountjoy v. Lowry*, 4 H. & M. 428; *Preston v. Gressom*, 4 Munf. 110; *Burwell v. Anderson*, 3 Leigh 348; *Newton v. Poole*, 12 Leigh 112; *McCall v. Peachy*, 3 Munf. 288; *Atwell v. Milton*, 4 H. & M. 268. But it should be noted well that such bill to surcharge and falsify such *ex parte* settlement must specifically state the particular error. See *Green v. Thompson*, 84 Va. 392, 5 S. E. Rep. 507; *Radford v. Fowlkes*, 85 Va.

2. Account Ordered—Additional Objection to Settled Accounts—Affidavit—Weight.†—When an account has been ordered upon a proper bill, if an additional objection to the settled accounts is discovered in the progress of the cause, the plaintiff may raise the objection before the commissioner, with a proper specification in writing; and the defendant may meet the objection by an affidavit, which shall have the same weight as an answer would have had if the matter had been alleged in the bill.

3. Bill for Account by Legatee—Overhauling Settled Accounts.‡—Executors have regularly settled their accounts before a commissioner of the court of probate, and they have been approved and recorded. A devisee and legatee of their testator files a bill, and without specifying any errors in the settled accounts, calls upon them to render an account of all their actings and doings. The executors may object to any overhauling of their settled accounts, except so far as they may be open to objections apparent on their face.

4. Same—Answer—Presumed True.§—To such a bill the executors answer, giving a full account of their administration; and there is a decree for an account. The allegations of their answer, though affirmative, must be taken as true, unless disproved, so far as they relate directly to the accounts which they are thus required to give.

5. Same—Same—Same.—If in such a case the plaintiff does not amend his bill, and specify errors in the accounts, allegations in the answer, though not explanatory of the account, and therefore not perhaps within the scope of the discovery sought by the bill, but having a relation to the subject matter of the account and important to a correct understanding of the

846, 8 S. E. Rep. 817; *Shugart v. Thompson*, 10 Leigh 434.

As to the burden of proof being on the party seeking the surcharge, see *Wimblish v. Rawlins*, 76 Va. 48; *Radford v. Fowlkes*, 85 Va. 846, 8 S. E. Rep. 817.

The annual account may be impeached, surcharged, or falsified at any time and in any proceeding, or errors or mistake may be corrected on final settlement. *Leake v. Leake*, 75 Va. 792; *Newton v. Poole*, 12 Leigh 112; *Shearman v. Christian*, 9 Leigh 571; *Burwell v. Anderson*, 3 Leigh 348; *Mountjoy v. Lowry*, 4 H. & M. 428; *Cavendish v. Fleming*, 3 Munf. 198; *Kyles v. Kyle*, 25 W. Va. 376.

†Account Ordered—Additional Objection to Settled Accounts—Affidavit—Weight.—The proposition set forth in the second headnote was approved in *Davis v. Morris*, 76 Va. 85; *Williams v. Newman*, 93 Va. 727, 26 S. E. Rep. 19. See also, *Chapman v. Shepherd*, 24 Gratt. 377.

‡Bill for Account by Legatee—Overhauling Settled Accounts.—The proposition laid down in the third headnote, that an executor can object to an overhauling of his settled accounts save in so far as they are open to objections apparent on the record when the bill for account does not specify any errors in the said account, was referred to and approved in several subsequent cases. See *Blackwell v. Bragg*, 78 Va. 540; *Seabright v. Seabright*, 28 W. Va. 436.

§Same—Answer—Presumed True.—The rule laid down in the fourth headnote as to the presumed truth of the answer has been sustained by several subsequent decisions. See *Bell v. Moon*, 79 Va. 349; *Radford v. Fowlkes*, 85 Va. 846, 8 S. E. Rep. 817; *Ward v. Cornett*, 91 Va. 679, 23 S. E. Rep. 494.

motives of the executors and of the circumstances under which they acted, unless disproved, are to be taken as true.

6. **Will—Legacies—Demonstrative—General.***—Testator gives to his daughter for life \$540 *per annum*, payable quarterly, being the interest on the purchase money (\$9000) of the real estate on &c. sold by me to B. He gives two other sums to the daughter for life *per annum*, described as the interest on the purchase money of other parcels of land, sold, to other parties, and \$300 *per annum*, payable semi-annually, the interest on \$5000 of State stock of Virginia. And at the death of his daughter he gives these several principal sums of money to the children of his daughter. And he receives payment of part of the purchase money specified, in his lifetime. The legacies both to the daughter and her children of the three first sums are demonstrative and not specific. The legacy of the stock and the interest upon it is a general legacy of so much State stock and the interest upon it, as it is paid by the State.

7. **Same—Construction—Vested Legacy.†**—To this bequest testator adds: In case of the death of any child of my said daughter, born or to be born, unmarried under the age of twenty-one years and not leaving issue, the share of property coming to this child shall immediately vest in and belong to his or her surviving brothers and sisters and their lineal descendants: the descendants taking their deceased parent's share. A child of the daughter, over twenty-one years of age at the death of the testator, after his death marries and dies in the lifetime of her mother, not having had a child and her husband surviving her. The legacy vested in the child at the death of the testator: and it did not divest upon her death without children, but her husband takes it as her administrator.

***Will—Legacies—Demonstrative.**—In *Morris v. Garland*, 78 Va. 223, the court citing the principal case as its authority, said: "A demonstrative legacy is a legacy of quantity, with a particular fund pointed out for its satisfaction, and it is so far general and differs so much from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets; yet it is so far specific that it is not liable to abate with general legacies upon a deficiency of assets." Again, on page 224, the same court continues by saying: "If, however, I entertained a doubt as to the character of this legacy, I should feel constrained by the well-settled rule of construction, which has been fully recognized in this state, that a legacy will not be held to be specific unless there appears in the will a clear intention to make it so, to construe this legacy to be not specific but demonstrative," and cites as its authority the principal case and *Skipwith v. Cabell*, 19 Gratt. 789. See also, on the subject of demonstrative legacies, *Myers v. Myers*, 88 Va. 134, 13 S. E. Rep. 346; 3 Min. Inst. (2d Ed.) Part I, 569.

†**Wills—Construction.**—In *Tallaferro v. Day*, 83 Va. 91, where the testator bequeathed to his wife his estate both personal and real, with all the profits arising therefrom, for life with the privilege of selling any or all of the real or personal estate that she might think proper and investing the proceeds in other property, and further gave the wife the privilege of apportioning the estate between three

Nicholas Mills, an old citizen of Richmond, departed this life on the 13th of September 1862, having made his will, which bore date on the 17th of October 1861, and which was duly admitted to probate in the Hustings court of the city of Richmond on the 24th of September 1862; when his son, Charles S. Mills and Robert R. Howison, two of the executors named in the will, qualified as such: the third nominated executor, his grandson, Thomas V. Robinson, being then in the army, did not qualify until the 15th of December 1862. Mr. Mills left a large estate, and a number of children and grandchildren. The questions

440 which were considered *in these causes arise under the fourth, sixth, ninth and fourteenth clauses of the will, though the whole scheme of the will is necessary to be looked to, in order to judge correctly of the conduct of the acting executors.

The 4th clause of the will is as follows:

"4. I give, devise and bequeath unto my executors, hereinafter named, in trust for the separate benefit of my daughter, Sarah Ann Robinson, and her children and grandchildren, born or to be born, subject to the purposes, limitations and conditions hereinafter declared, the sum of one thousand and eighty dollars per annum, payable semi-annually, being the interest on the purchase money of the real estate on Main street, Richmond, sold by me to Charles Y. Morris; also, the further sum of four hundred and fifty dollars per annum, payable quarterly, being the interest on the purchase money

designated children according to her discretion, the court held that the wife took an estate for life in all her husband's estate and was invested with the legal title thereto, not in her own absolute right, but in trust in aid of the purposes of the testator, as expressed in the will; and the three children took vested interest in remainder in fee in such shares as should be apportioned to them by the wife under the authority of her husband's will. The court cited, among others, the principal case as authority for its holding.

In *Stokes v. Van Wyck*, 88 Va. 733, 8 S. E. Rep. 387, a testator, dying in 1834, limited to his daughter an estate for life, remainder to her issue in fee, and in default of issue, with limitation over to his own heirs. The question arose as to whether the limitation over to the heirs referred to the heirs at the time of his death or of the heirs at the time of his daughter's death. The court held, that it referred to the heirs living at the time of the testator's death, and said, that though there might be no decisions in Virginia on the precise question raised in the case, yet, the principle had frequently been recognized and applied by the court in analogous cases. The court then proceeds to cite the principal case. *Hansford v. Elliott*, 9 Leigh 79; *Catlett v. Marshall*, 10 Leigh 79; *Martin v. Kirby*, 11 Gratt. 67; *Brent v. Washington*, 18 Gratt. 526, as authority.

Vesting of Remainders.—In *Hinton v. Milburn*, 23 W. Va. 171, and *Woodward v. Woodward*, 28 W. Va. 208, the principal case was cited as authority for the proposition that estates in remainder vest at the earliest possible period unless there is a clear intent of the testator to the contrary. See *Mills v. Mills*, 28 Gratt. 442, for the sequel to the principal case.

which would be sufficient to produce in interest thereon at six per cent. per annum sixteen hundred dollars in like money in quarterly payments. And upon this conveyance the rent reserved was to cease.

By an endorsement on this lease, the lessees undertook to pay all taxes upon the property. And it was declared and agreed, that upon the incorporation of the company then contemplated, and its proper organization with a capital of not less than eighty thousand dollars, and the assignment and transfer of the said lease to said company, with the same or similar covenants on the part of the company, and buildings should

447 have been erected on the property demised of not less *value than forty thousand dollars, the liabilities of the parties of the second part should cease and determine, and from that time the lessors, and those claiming under them, should look alone to the company and the property demised for the performance of the said covenants and stipulations which might be entered into by the said company.

The Exchange Hotel Company was subsequently organized, and proceeded to build the hotel at a cost of \$125,185 01, and rented out the property until 1862, when not being able to rent it satisfactorily, the company determined to sell it. It was sold at public auction in November 1862 for the sum of \$101,000, subject to the rent charge held by Mr. Mills' estate, and to another rent charge granted for another part of the ground on which the hotel was built, to Mrs. Ann Stetson for life, and at her death to Joseph Allen, and was purchased by Robert A. Lancaster, Samuel W. Harwood, Emile O. Nolting and Samuel J. Harrison, and was conveyed to them by the company by their deed, bearing date the 24th of November 1862.

By deed dated April 30th, 1863, Charles S. Mills and R. R. Howison, executors of Nicholas Mills, deceased, reciting that Lancaster, Harwood, Nolting and Harrison have paid to said executors, in current money of the Confederate States, the sum of \$26,666 66 $\frac{2}{3}$, being a sum sufficient to produce in interest thereon, at the rate of six per cent., the sum of sixteen hundred dollars per annum, conveyed to them with special warranty, the property embraced in the lease aforesaid. And by deed dated the next day, Lancaster and wife and Harrison and wife, for the consideration of \$79,833 33, conveyed their interest, being two-fourths in said property, to Wm. A. Stuart. Harwood, on the 22d of May 1863, conveyed to Nolting and Stuart his interest in the property in trust, to secure to them the payment

448 annually of one-fourth of the sum of \$1,600, the same to be paid *quarterly; that is, two hundred dollars to each of them, with the right to extinguish the rent by the payment of \$3,333 33 $\frac{1}{3}$; and by deed dated July 13th, 1863, Stuart conveyed to Lawson Nunnally his moiety of the Exchange hotel property in trust, to secure certain debts therein named.

Charles S. Mills and R. R. Howison hav-

ing qualified as executors of Nicholas Mills, deceased, in September 1862, they proceeded to sell the real estate not specifically devised, consisting of the lot on Leigh street, and it was sold at public auction on the 28th of October following, for the sum of \$128,236 30, and was conveyed by them to the purchasers. On the 18th of November 1862, they received in Confederate money on the bonds of the Midlothian Mining Company \$15,300; on the 3d of January 1863, they received payment of the bond of the Exchange Hotel Company \$10,000; on the 12th of March 1863, they received payment of the last bond of Charles Y. Morris, principal and interest \$9,268 88. This bond constituted a part of the debt of Morris, mentioned in the bequest to Mrs. Robinson and her children. This debt was evidenced by two bonds of Morris, dated the 1st day of October 1861, each for \$9,000; the first payable five, and the second ten years after date, and each providing on its face that Morris should have the privilege of anticipating its payment, or any part of it, at any time in sums of not less than five hundred dollars, interest being rebated on the payment so made until the maturity of said bond. The first of these bonds was paid to Mr. Mills in his lifetime, the second was paid to the executors as above stated, and, thereupon, the deed of trust upon the real estate, purchased to secure them, was released. The executors appear to have applied the moneys received by them as soon as it was received, either by investing it in Confederate States bonds, or in payments to the legatees. They settled their accounts 449 before a *commissioner of the court of probate in December 1863 and 1864, in which accounts they appear to have embraced all the moneys received, and they show the investments and payments made by them for and to the legatees, and these accounts were returned to the court and confirmed.

In respect to the bequest to Mrs. Robinson and her children it appears further, that Mr. Mills, by deed dated the 25th of September 1861, in consideration, as stated in the deed, of the sum of \$8,000, conveyed to Lewis Hyman certain real estate on Main street in the city of Richmond; and on the same day Hyman conveyed the same real estate in trust to secure the payment of the sum of three thousand dollars due by four bonds bearing even date with the deed, drawn by said Hyman and payable to said Mills at six, twelve, eighteen and twenty-four months after date, each for the sum of \$750, with interest thereon payable semi-annually. The executors state, in their answer, that these bonds were paid by Hyman to Mr. Mills in his lifetime, as was the other part of the purchase money mentioned in the deed from Mills to Hyman. Of the debt of Bradford, one bond of one thousand dollars appears to have fallen due in January 1863, when it was paid by Bradford to the executors.

On the 27th of September 1865, Nicholas Mills Corbin, one of the grandsons of Nich-

olas Mills, deceased, and one of the devisees to whom was given the Reed's plantation, in Caroline county, filed his bill in the Circuit court of the city of Richmond, in which he stated the death of Nicholas Mills, his will, the qualification of Charles S. Mills and R. R. Howison as executors, the subsequent qualification of Thomas V. Robinson; the plaintiff's interest in the estate under the 4th, 9th and 14th clauses of the will; that he has recently attained lawful age, and that he is anxious to have a just and fair settlement of the account of
450 the executors and *a division and distribution of the estate, so far as may be proper under the will. He is urged to ask the aid of the court to effect such a settlement and distribution, because he is not satisfied with the conduct of the executors in administering the trusts of said will, and because the estate in the county of Caroline, which by the 9th clause of the will the testator devised to his executors in trust for the benefit of the plaintiff and his brother and sisters, and for their support, &c., have been and are so neglected and mismanaged by the executors, as that the complainant and his brother and sisters have not derived, and are not deriving, any adequate advantage or benefit therefrom. And making the executors, in their characters as executors and trustees, and all other persons interested in the estate, parties defendants, he calls upon the executors to exhibit a true and perfect inventory of all the estate, &c., which have come to their hands; that they be required to render an account of all their actings and doings as executors and trustees; that the will be construed, and all questions arising thereunder be settled by the court; that the executors be required to account for and pay into court all the trust moneys and proceeds of the trust property which have come to their hands; that a division and distribution may be made of the estate as far as proper; that all proper accounts may be ordered; and for general relief.

Charles S. Mills and R. R. Howison filed a joint answer, in which they gave a very full account of their administration of the estate of Mr. Mills. They say Mr. Mills was remarkable for industry, sagacity, prudence and foresight in the management of his business. He made his will about the 17th of September 1861. The Confederate States had then been organized, Confederate treasury notes had become the currency of the country, and was received by the banks of Virginia. At that time the war was in active operation, and was
451 *already attended by losses and disturbances to which such a war would necessarily give rise. Under these circumstances Mr. Mills made his will, by which he directed his real estate to be sold, for the purposes stated in the 14th clause of the will. But this was not all he did. During the year 1862 he collected, in Confederate currency, the whole amount of the debt due him from Hyman, mentioned in the 4th clause of his will; one-half of the debt due

him from Charles Y. Morris, \$1,000 of the debt due him from Bradford, and \$7,000 on account of a debt due him from the Exchange Hotel Company. Of these debts, Bradford's originated prior to the war and was secured on real estate; and that of the Exchange Hotel Company originated many years before the war. The sums of money thus collected by Mr. Mills in Confederate currency was invested by him in eight per cent. Confederate bonds; and he left at his death \$19,000 in Confederate eight per cent. coupon bonds, and \$7,000 in North Carolina eight per cent. coupon bonds; all of which had been purchased by him during the year 1862. In relation to the first bond of Morris, he applied to Mr. Mills in 1862, proposing to pay it, and Mr. Mills promptly stated that he was perfectly willing to receive in payment of that debt or any other debt due him, the currency of the Confederate States. Mr. Morris therefore paid the amount into the Farmers Bank of Va., to the credit of Mr. Mills, and received his bond. This occurred early in June 1862.

They say that immediately after the death of Mr. Mills, they endeavored to obtain the presence of Thomas V. Robinson, who was then in the army, that he might qualify with them as executor, but they did not succeed, and as it was uncertain when he could obtain leave of absence, they deemed it their duty at once to offer the will for probate, and proceed to its execution. After qualifying as executors, they considered it their duty to proceed, without un-
452 necessary *delay, to sell the real estate of the testator, according to the directions of the will. The real estate consisted almost entirely of the lot of ground on Leigh street, which was valuable, but unproductive, yielding no income to the grandchildren, who, as residuary legatees, were entitled to the proceeds. It sold very high, far higher than was expected, having been appraised a few weeks before at about \$68,000, and selling for about \$128,000. The sale was of course on the basis of bankable currency.

They say the question of investments then engaged their earnest and careful attention. They looked to the directions of the will; the action of Mr. Mills in his lifetime; they made enquiry whether loans could be made on real and personal security, and they found that none such could be made. They then consulted the most judicious men they knew, such men as the presidents of the banks, prominent and prudent merchants and business men. The result of these consultations was, that investments in Confederate eight per cent. bonds were such as would best meet the will of the testator, and that all other investments that could be made were more or less affected by the same contingencies. Under these circumstances they invested in Confederate eight per cent. bonds.

The question of receiving in bankable funds debts due the estate, which became payable according to their tenor, and which were tendered by the parties owing them,

was anxiously considered by the executors. They refer especially to the three debts before mentioned, of Bradford, Morris, and the ground rent due from the Exchange Hotel Company, and say these debts were all tendered in bankable funds to these executors by the parties owing them, or bound for them, and entitled to pay them. They refer to the action of the Virginia legislature, intended to compel the receipt of Confederate treasury notes by the people
453 of the State, and to *the revenue laws of the Confederate congress, designed to effect the same object, which, if their investments had been made in any other securities, or if they had refused to take these treasury notes in payment of debts, would have absorbed in taxes all the interest, and much of the principal, of the estate, leaving no income for the objects of the testator's bounty.

With respect to the charge in the bill that the "Reed's plantation" had been mismanaged, they say—It will hardly be contended that the testator's will required the executors to go personally on the plantation and manage it. None of them were fitted for such duties. Charles S. Mills did what his father had been doing; he gave such time and attention to the plantation as he could; and he did this cheerfully without compensation, for the benefit of his nephews and nieces interested. The slaves were not a part of the testator's estate; they were held under a trust in which Messrs. Macfarland and Rhodes were trustees for Mrs. Corbin and her children. After Mr. Mills' death Mr. Macfarland requested Charles S. Mills to continue to act as agent for the trustees, as his father had done. This he did. He retained the same overseer who had been there for ten years, and he received and disbursed such funds as came to his hands, without charging a commission. And he filed his account showing his receipts and disbursements; and showing a small balance in his hands in Confederate money, which was in bank to his credit at the time of the fall of Richmond. They state the settlement of their accounts by a commissioner of the court of probate and their confirmation by the court; and they exhibit copies of them.

The executors submit to the court the question, whether an afterborn grandchild will take as a residuary legatee; and whether the legacy to Mrs. Robinson and her children, &c. was deemed pro tanto by the receipt by the testator in his lifetime,
454 of part of the *debts mentioned in the bequest. Believing that it was not, they have paid to Mrs. Robinson her annuity. They unite in the prayer of the bill for a distribution of the estate according to the rights of the parties.

In May 1866, Thomas V. Robinson, the other executor, answered separately. He says that as soon as he heard that the other executors had advertised the lot on Leigh street for sale, he wrote to his mother, from whom he had received the information, protesting against the right of his co-exec-

utors, before allowing him a reasonable time to qualify, and without any notice to him, to sell, within so short a time after the testator's death, the large and valuable real estate of the testator; whose estate was free from debt, and was possessed of the most ample means of supplying all the demands which could properly be made against it under the will or otherwise; and of this his co-executors were informed before the said sale was made. He says he was never consulted by his co-executors in regard to any act pertaining to the administration of the estate until after the fall of Richmond and the surrender of the army of Northern Virginia. That he has always protested against their unauthorized acts in proceeding to exercise the discretion and power vested by the testator jointly in his three executors, without consulting him in the exercise thereof; and he submits to the court whether their acts can be ratified or approved. And he presents to the judgment of the court the question whether sales of real estate for investment in Confederate securities, and collections of good debts secured on real estate, for such investments, by two of the testator's executors in spite of the solemn protests and objections of the third, where the execution of the powers and duties conferred by the will are confided to the joint discretion of these executors, will be ratified and confirmed by a
455 court of equity, especially *when such action is attended, as in this case, with the loss and ruin of the estate.

In August 1866, Mrs. Robinson also answered the bill. She insists that the legacy to herself and her children is not specific but demonstrative, and that she is entitled to have it satisfied out of the general estate. She denies that the executors were authorized or justified in taking any thing but specie or its equivalent for debts due the estate. She insists that the sale of the real estate by two of the executors was invalid, and was a violation of the will of the testator; and so also was their deed to Lancaster and others, granting and releasing the real estate and ground rent therein mentioned. And she prays that the principal sum out of which her annuity is to be paid may be taken out of the hands of the said executors, and that the same may be invested under the directions of the court.

On the same day, Mrs. Robinson filed a cross-bill in the foregoing suit, referring to and adopting her answer as a part of her cross-bill, and praying that the said answer and the statements and averments thereof, may be taken and treated as a cross-bill exhibited by her in this suit against the plaintiff and her co-defendants.

To this bill, Charles S. Mills and R. R. Howison put in their answer, filing their answer to the bill of Corbin as a part of their answer to the cross-bill. They made farther statements as to the sale of the real estate. They comment also on the answer filed by their co-executor, Thomas V. Robinson, filed in the original cause, and contest his statements as to their treatment of

him, and file letters and papers to sustain them; but it is not necessary to say more on that subject.

On the 21st of May 1866, upon the filing of the answer of Thomas V. Robinson, the court made a decree—That Charles S. Mills and Robert R. Howison, executors of Nicholas Mills, deceased, and trustees under his will, render an account of all their 456 transactions as such *executors and trustees, before one of the commissioners of the court; and that Thomas V. Robinson do render the like account. In taking which accounts, the commissioner will regard as prima facie correct, the settled accounts of the executors; but subject to be surcharged and falsified by any other party. To report whether the land called the Reed's plantation can be divided among the devisees thereof; and also what constitutes the residuary estate of the testator, Nicholas Mills, devised and bequeathed to his grandchildren, after providing for the annuities and special legacies bequeathed by the will; how said annuities and special legacies have been provided for by the executors; and of what said residuary estate and its accumulations consist; with what amount the executors are justly chargeable on account of the estate of their testator; and whether distribution of the residuary estate is proper and practicable.

In November 1866, commissioner Pleasants filed his report. He says, the stated accounts of the executors are sought to be surcharged and falsified before your commissioner in respect of large sums which were received by the executors in payment of debts due to their testator's estate, or as proceeds of the sale of real estate sold by them under the will. These sums, it appears, were invested by them in Confederate States bonds. The question is raised by the pleadings, whether credits should be allowed the executors for these investments. This, the commissioner says, is a question to be decided by the court before he can state the accounts of the executors.

That it cannot be ascertained what is the residuary estate until it is decided whether the legacy to Mrs. Robinson and her children is specific, of the bonds and stocks mentioned in the fourth clause of the will, or is a demonstrative legacy. And he asked

the court further to decide whether 457 the interest of the children of *Mrs.

Robinson is vested or contingent. It appears that one of these children intermarried with Edward T. Robinson after the death of the testator, and has died without issue; her husband surviving her. It is a question therefore to be decided, whether the interest of this child of Mrs. Robinson has passed to her husband, or will pass to such of the children of Mrs. Robinson as may survive her, or will then fall into the residuary estate.

As to the enquiry directed in relation to the Reed's plantation in Caroline; in order to pass upon this enquiry, it is first necessary to determine whether the partition will not violate the rights of Robert B.

Corbin, the son-in-law of the testator. The testator, by the eighth clause of his will, gives to said Corbin an annuity for life of three hundred dollars, and directs that he shall have the privilege of residing at the said plantation during his life, and of having whatsoever is necessary for his comfortable boarding supplied by the farm.

In October 1865, Nicholas Mills Corbin instituted another suit in equity in the Circuit court of the city of Richmond against Robert A. Lancaster, E. O. Nolting, Samuel W. Harwood, Samuel J. Harrison, Wm. A. Stuart, Charles S. Mills and Robert R. Howison, executors of Nicholas Mills, deceased, and as trustees under his will, and all the parties in interest under the said will. In his bill he charged that very large sums of money, well secured upon real estate, and which were owing to the testator at his death, were shortly thereafter collected by Charles S. Mills and Howison, two of his executors, in a depreciated currency at its full value, when the same was not a legal tender for the payment of said debts, and was well known by the parties paying the same, and to the said executors, to be worth in value nothing like a fair equivalent for the value of said debts. He

then sets out the facts in relation 458 *to the lease by Mr. Mills to Fry and others, and the subsequent conveyances of the Exchange Hotel property, as herein before given, and the receipt of the money by the said executors from Lancaster and his associates, and the release and conveyance of the property as before stated. He charges that it was an unjust and unlawful exercise of the power and discretion vested in the executors. That said release and conveyance was made by the said executors, and obtained by the said purchasers under such circumstances, and for a consideration so grossly inadequate, as to render the transaction a fraud upon the rights of the plaintiff and the other parties entitled under the will of Mr. Mills to beneficiary interests in said debt. And he charges that it was not a release, but a sale of the said lease to Stuart and Nolting. The prayer of the bill is, that the transaction may be declared a breach of trust by the executors, in which the alienees participated, and was fraudulent: That the real estate embraced in the deed from Mills and wife to Fry and others, may be charged in equity with the payment of the debt and interest thereon, or that the said sum of \$1,600 per annum, with interest, shall be paid as provided in said deed; and for general relief.

Charles S. Mills and Robert R. Howison answered the bill. They exhibit a copy of their answer to the first bill, and pray that it may be taken as a part of their answer to this bill. They deny that they have committed any breach of trust, or abused their power or discretion in relation to the said lien; and they deny that the debt secured on the Exchange Hotel property was purchased from them by Stuart and Nolting. They never sought the collection of this lien, never applied for, or desired it. They

were content to let it remain on the property, and to receive the annual rent of \$1,600 for the purposes of the estate. But

when the payment of the principal
459 was tendered by, or *on behalf of Lancaster and his associate purchasers, who were the grantees of the Exchange Hotel Company, and therefore by law in privity with the estate of their testator, the respondents were compelled to act upon it. Only two courses were open to them; either to refuse the payment, and thereby to subject the estate of the testator to a crushing taxation, which would extinguish the whole income, and gradually extinguish the principal itself, thereby leaving the annuitants and beneficiaries entirely unprovided for; or to receive the payment as tendered; to increase the investment from a six per cent. to an eight per cent. fund, and thereby to increase the income, and save the infant beneficiaries from the heavy taxation which they would otherwise endure. They refer to the deed of Mills to Fry and others, authorizing the payment in current money of the United States. They say that at the time they were called upon to accept or refuse the payment offered, the congress of the United States had authorized the issue of the National Bank notes as currency. The legislation of the Confederate States forbade the use and circulation of United States currency. That gold had ceased to be currency, either in the United States or Confederate States; that the currency of the United States had greatly depreciated below the value of gold, and was to gold about as two to one; and a still further depreciation was feared by the prudent and cautious. And thus the funds in which the deed authorized payment to be made, might well have been considered of less value for the purposes of the testator's estate than the current funds actually received.

Lancaster and the other purchasers of the property, also answered the bill. They say they bought the property at public auction, and in the announcement of the conditions of sale, the auctioneer referring to the rent charge, of \$1,600 per annum, stated that
460 under a covenant running with the land, the owners of the *property had the privilege of discharging the rent charge, by paying a principal sum equal at six per cent. to its production; the same being in accordance with the provisions of the lease from Mr. Mills, and being recognized by his executors so to be; one of whom was present. But whilst E. O. Nolting was desirous to discharge the said rent charge, his associates, Lancaster, Harrison and Harwood were not, and the privilege was not availed of. Afterwards the defendants Lancaster and Harrison proposed to sell their interest to Wm. A. Stuart, and he expressed a preference to have the property free from incumbrance; whereupon Lancaster, &c. payed off the requisite principal sum, viz. \$26,666, to lift the same, which was done with the money of Lancaster, Harrison and Nolting—the two first

being reimbursed by their sale to Stuart. Harwood was still indifferent to the transaction, and contented himself with reserving the privilege at a future time if he should desire it; and he has not yet availed himself of the privilege.

They refer to the accounts of the executors to show that they credited the estate with the amount paid for the rent charge, and that C. S. Mills and T. V. Robinson, two of the executors, and the plaintiffs took large sums of money as specific and residuary legatees under the will; and that neither they or any one else ever excepted to the accounts. And they further say that since April 1863, the owners of the hotel have remained in possession without any demand of rent by the executors, and without an intimation from them, or the plaintiff or any one else, of any objection that the rent charge had been paid off, or any desire that the transaction should be cancelled, until the downfall of the Southern Confederacy.

Thomas V. Robinson also answered, referring to and filing a copy of his answer in the first suit, and insisting upon the views and grounds therein presented.

461 *The three causes came on to be heard together on the 14th day of June 1867, when the court without deciding any of the questions made by the pleadings and the proofs, directed that commissioner Pleasants ascertain and report to the court, what constitutes the estate of the testator Nicholas Mills at this time in the hands of his executors; and how the said special legacies and annuities have been provided for by them, and of what the said residuary estate, with its accumulations, now consists, and what is the value thereof.

In November 1867, the commissioner returned his report. He gave a statement of all the estate in the hands of the executors, showing in what it consisted, and the par value thereof; and also what part of it was invested for the special legatees. He reported further that the pecuniary legacies and annuities had been paid up to the time of the report; and the future provision for their payment proposed by the executors was by setting aside certain specified public bonds, and Bradford's bond for \$7,000; which bonds were worth at par \$76,186 50; and the annual interest thereon was \$4,752 65. He reported the value of the residuary estate, after deducting the special investments, the real estate devised and the securities above mentioned, which it is proposed to set aside for the payment of the annuities, at \$45,958 60. The report shows that the amount of Confederate bonds invested in trust for the special legatees was \$28,300; and the amount of said bonds constituting a part of the residuary estate was \$191,500.

The plaintiffs and the defendants, the grandchildren of Nicholas Mills, other than the children of Charles S. Mills, excepted to the report: 1st. Because it shows the investment by the executors of \$191,500 of the trust funds in Confederate bonds. 2d. Be-

cause the specific legacies to the six grandchildren of \$2,000 each were invested in these bonds. 3d. Because the provision *for the payment of the bequest to Mrs. Robinson and her children was not adequate or suitable for the purpose. There were other exceptions which need not be stated.

On the 14th March 1868, the three causes came on again to be heard together, when the court held: First. That the executors C. S. Mills and R. R. Howison acted within the scope of the authority vested in them by the will of their testator, Nicholas Mills, deceased, and bona fide in selling the real estate, and investing the proceeds of the sale in Confederate bonds; and were not to be held responsible for the loss which has resulted from said sales and investments. Second. But that the said executors were not authorized by law nor by the will of their testator, to collect any part of the principal of the investments which had been made by him secured upon real estate, receiving the nominal amount thereof and investing it in Confederate bonds; and that the payments made to them by Bradford and Morris, were received by the said executors and trustees in the said currency in violation of the rights and interests of the cestuis que trust, and of their duties as executors and trustees under said will. But the court forbore to express any opinion whether the said executors and trustees were primarily liable for the loss of the said trust fund so collected, as the said Bradford and Morris were not parties in either of these suits. Third. That the receipt by said executors from Lancaster and others of the sum of \$26,666 67 in said Confederate currency, and in releasing in their favor and for the consideration aforesaid, the deed from Mills and wife to Fry and others, was a breach of trust on the part of the said executors and trustees, in which the said Lancaster and his associates actively participated; and that Wm. A. Stuart and others claiming the benefit of said deed of release, are affected by actual or constructive notice of the said breach of trust.

And that the real estate embraced *in the said deed of lease of Mills and wife to Fry and others, is liable to the satisfaction of the said annual charge of \$1,600 as provided by the said deed, from and after the 30th day of April 1863, in quarterly payments, for the purposes of the will of said Nicholas Mills, deceased, with legal interest on the deferred instalments, in the same manner the same would be liable therefor if the said deed of release had not been made. And the said deed of release and the subsequent deeds from Lancaster and Harrison to Stuart, from Stuart to Nunnally and from Harwood to Stuart and Nolting, were set aside and annulled. And liberty was reserved to the parties beneficially interested in the payment of the said annual charge, to apply to the court for further relief, &c.

Fourth. That the legacy and bequest made in the 4th clause of the will for the

benefit of Mrs. Robinson and her family, was not a specific legacy of the particular debts and State stocks therein mentioned, but merely demonstrative, and the payment of said legacy or bequest is charged upon the testator's estate by the 14th clause of the will. And that the children of Mrs. Robinson, living at the testator's death, whether they had attained lawful age or not, did not take any vested estate in the fund provided by the said 4th clause for the benefit of herself and her family. And that the defendant, Edward T. Robinson, adm'r of his deceased wife, Nannie M. Robinson, who had arrived at lawful age, at the testator's death, is not entitled, in right of his said wife, to any interest in said fund. And commissioner Pleasants, in executing the duties required of him by the interlocutory decree of the 21st of May 1866, was to conform to this opinion and decree.

Lancaster and his associate purchasers, and Stuart, applied for an appeal from so much of this decree as referred to the question involved in the case of Corbin against Lancaster and others; Nicholas Mills 464 Corbin, *and the other grandchildren of Nicholas Mills, deceased, except the children of Charles S. Mills, applied for an appeal from the decree in the case of Corbin v. Mills' ex'ors and others; and Edward T. Robinson, adm'r of Nannie M. Robinson, deceased, applied for an appeal from so much of said decree as held that the legacy to the children of Mrs. Robinson was not a vested legacy. All of which applications were granted.

The cases were argued by J. Alfred Jones and Conway Robinson, for Lancaster and his associates, and E. T. Robinson; by Howison and R. T. Daniel, for the executors; and by Macfarland & Roberts, N. Howard and Wm. Daniel, for the grandchildren, and for Mrs. Robinson and her children.

JOYNES, J. The original bill prays that the executors of Nicholas Mills, deceased, may be required to render an account of all their actings and doings as such executors, and that all questions arising upon the construction of the will of the said testator may be adjudicated and settled by the court; and for general relief, &c.

The bill specifies but one complaint against the conduct of the executors: that is contained in the allegation, that the estate in Caroline has been neglected and mismanaged. This complaint is made the subject of comment in the answer of the executors; but after that, we see no more of it throughout the whole progress of the case. The executors exhibit with their answer accounts of their transactions, which had been duly settled, returned, and recorded according to law. Anticipating, however, as it would seem, what parts of their administration were to be made the subject of complaint, though none of them, with the unimportant exception already mentioned, had been specified in the bill, the executors

proceed in their answer to give a minute history of those transactions, and to make a general vindication of their administration.

465 *The executors might have objected to an overhauling of the transactions embraced in their settled accounts, except so far as they might have been open to objections apparent on their face, on the ground that there was no specification of errors in the bill. It is a familiar principle, that the accounts of an executor, which have been regularly settled in the mode provided by law, are to be taken as *prima facie* correct. They are liable to be impeached on specific grounds of surcharge or falsification to be alleged in the bill, but the court will not decree an account upon a general allegation that the settled accounts are erroneous. This rule not only results from the presumption which the law makes in favor of the correctness of a settled account, but it is necessary to prevent surprise to defendants, and to give them the advantage of their answer, to which they are entitled, on the principles which govern equity practice. When an account has been ordered upon a proper bill, an additional objection to the settled accounts may be discovered in the progress of the case. It would be attended with inconvenience and delay to require the plaintiff in any such case to amend his bill for the purpose of alleging the additional objections. It will save time and expense, and generally be attended with no inconvenience to allow the plaintiff to raise the objection before the commissioner with a proper specification in writing, and to allow the defendant to meet the objection by an affidavit, giving to the affidavit the same weight which would have been given to an answer if the matter had been alleged in the bill. This is the full extent to which the settled rule of practice can be safely and conveniently relaxed, and this is the extent to which, as I understand it, Judge Stanard meant to go in *Shugart's adm'r v. Thompson's adm'r*, 10 Leigh 434.

The executors, however, made no objection in the Circuit court to the decree for an account. In the argument here by one of the executors, he insisted that
466 *all the allegations in the answer of the executors, should be taken to be true, unless disproved, and alleged that such was the understanding in the Circuit court. This was not assented to by the counsel for the plaintiff, and there is no evidence in the record of any agreement to that effect. The counsel for the plaintiff insisted that the affirmative allegations of the answer could not be received as true, unless sustained by proof. When this ground was taken by counsel for the plaintiffs in the argument, the counsel for the executors raised an objection, for the first time, to the sufficiency of the bill.

The bill, however, calls upon the executors to render an account of all their actings and doings as executors, and the allegations of their answer, though affirmative, must

be taken as true unless disproved, so far as they relate directly to the account which they are there required to give. *Fant v. Miller & Mayhew*, 17 Gratt. 187. There are allegations in the answer, however, which relate to matters not directly involved in, or explanatory of, this account, and therefore, perhaps, not within the scope of the discovery sought by the bill, though having a relation to the subject matter of the account, and important to a correct understanding of the motives of the executors and of the circumstances under which they acted. It may be doubtful how far such allegations of collateral matter ought to be received as true, within the rule laid down in *Fant v. Miller & Mayhew*.

But even if we should give credit to any allegation of matter of fact contained in the answer, the state of the case will still be deficient in some important particulars. Thus it is important that we should know what was the real value of the Leigh street lots. The appraisement put the value at \$68,000 in Confederate money. But obviously, the appraisement cannot be relied upon, for at the sale made about two weeks afterwards, the lot brought \$128,000. The conclusion must be, either that the property

467 sold for a great deal more than it *was worth, which is not probable, or that the appraisement was far below the true value. So it is important to know what was the value of Confederate treasury notes when the collections of principal money were made from Morris and Bradford, and also to what extent such notes were then available, according to the common usages of business in Richmond, for the payment of debts payable in specie, and well secured on real estate, or for the purchase of property or otherwise. The court cannot take judicial notice of such facts, and there is no proof in respect to them.

The purchasers of the Leigh street lots, as well as Morris and Bradford, should also have been made parties to the bill, in the absence of any declaration on the part of the plaintiff that he did not intend to hold them responsible. It is the policy and practice of courts of equity not to do justice by piecemeal.

The case must, therefore, go back for the purpose of making these parties, and of ascertaining the facts suggested. When the case comes on to be heard, all the allegations of fact in the answer, whether bearing directly upon the matter of the account or not, should be taken to be true, so far as they may not be disproved, unless the plaintiff shall elect to amend his bill by, alleging his objections to the settled accounts, with proper specifications, according to the established course of pleading in such cases. If he does that, the weight due to the answer which may be filed can be easily estimated. If he chooses not to amend his bill by setting out the specific objections, he cannot complain if the answer is taken as true in all its parts unless disproved, or require the court to make nice

cause the specific legacies to the six grandchildren of \$2,000 each were invested in these bonds. 3d. Because the provision *for the payment of the bequest to Mrs. Robinson and her children was not adequate or suitable for the purpose. There were other exceptions which need not be stated.

On the 14th March 1868, the three causes came on again to be heard together, when the court held: First. That the executors C. S. Mills and R. R. Howison acted within the scope of the authority vested in them by the will of their testator, Nicholas Mills, deceased, and bona fide in selling the real estate, and investing the proceeds of the sale in Confederate bonds; and were not to be held responsible for the loss which has resulted from said sales and investments. Second. But that the said executors were not authorized by law nor by the will of their testator, to collect any part of the principal of the investments which had been made by him secured upon real estate, receiving the nominal amount thereof and investing it in Confederate bonds; and that the payments made to them by Bradford and Morris, were received by the said executors and trustees in the said currency in violation of the rights and interests of the cestuis que trust, and of their duties as executors and trustees under said will. But the court forbore to express any opinion whether the said executors and trustees were primarily liable for the loss of the said trust fund so collected, as the said Bradford and Morris were not parties in either of these suits. Third. That the receipt by said executors from Lancaster and others of the sum of \$26,666 67 in said Confederate currency, and in releasing in their favor and for the consideration aforesaid, the deed from Mills and wife to Fry and others, was a breach of trust on the part of the said executors and trustees, in which the said Lancaster and his associates actively participated; and that Wm. A. Stuart and others claiming the benefit of said deed of release, are affected by actual or constructive notice of the said breach of trust.

And that the real estate embraced *in the said deed of lease of Mills and wife to Fry and others, is liable to the satisfaction of the said annual charge of \$1,600 as provided by the said deed, from and after the 30th day of April 1863, in quarterly payments, for the purposes of the will of said Nicholas Mills, deceased, with legal interest on the deferred instalments, in the same manner the same would be liable therefor if the said deed of release had not been made. And the said deed of release and the subsequent deeds from Lancaster and Harrison to Stuart, from Stuart to Nunnally and from Harwood to Stuart and Nolting, were set aside and annulled. And liberty was reserved to the parties beneficially interested in the payment of the said annual charge, to apply to the court for further relief, &c.

Fourth. That the legacy and bequest made in the 4th clause of the will for the

benefit of Mrs. Robinson and her family, was not a specific legacy of the particular debts and State stocks therein mentioned, but merely demonstrative, and the payment of said legacy or bequest is charged upon the testator's estate by the 14th clause of the will. And that the children of Mrs. Robinson, living at the testator's death, whether they had attained lawful age or not, did not take any vested estate in the fund provided by the said 4th clause for the benefit of herself and her family. And that the defendant, Edward T. Robinson, adm'r of his deceased wife, Nannie M. Robinson, who had arrived at lawful age, at the testator's death, is not entitled, in right of his said wife, to any interest in said fund. And commissioner Pleasants, in executing the duties required of him by the interlocutory decree of the 21st of May 1866, was to conform to this opinion and decree.

Lancaster and his associate purchasers, and Stuart, applied for an appeal from so much of this decree as referred to the question involved in the case of Corbin against

Lancaster and others; Nicholas Mills 464 Corbin, *and the other grandchildren of Nicholas Mills, deceased, except the children of Charles S. Mills, applied for an appeal from the decree in the case of Corbin v. Mills' ex'ors and others; and Edward T. Robinson, adm'r of Nannie M. Robinson, deceased, applied for an appeal from so much of said decree as held that the legacy to the children of Mrs. Robinson was not a vested legacy. All of which applications were granted.

The cases were argued by J. Alfred Jones and Conway Robinson, for Lancaster and his associates, and E. T. Robinson; by Howison and R. T. Daniel, for the executors; and by Macfarland & Roberts, N. Howard and Wm. Daniel, for the grandchildren, and for Mrs. Robinson and her children.

JOYNES, J. The original bill prays that the executors of Nicholas Mills, deceased, may be required to render an account of all their actings and doings as such executors, and that all questions arising upon the construction of the will of the said testator may be adjudicated and settled by the court; and for general relief, &c.

The bill specifies but one complaint against the conduct of the executors: that is contained in the allegation, that the estate in Caroline has been neglected and mismanaged. This complaint is made the subject of comment in the answer of the executors; but after that, we see no more of it throughout the whole progress of the case. The executors exhibit with their answer accounts of their transactions, which had been duly settled, returned, and recorded according to law. Anticipating, however, as it would seem, what parts of their administration were to be made the subject of complaint, though none of them, with the unimportant exception already mentioned, had been specified in the bill, the executors

shows that the intention was to give stock of the nominal value of \$5,000, according to its face, and not give as much stock as would amount in real value to \$5,000 in money.

Then a further question arises, whether Mrs. Robinson and family are entitled to receive the sum of \$300 per annum for life, whether the \$5,000 of State stock will yield it or not.

I infer that the testator had, in the arrangement of his testamentary plans, appropriated in his mind, as the portion of Mrs. Robinson and her family, the three houses in Richmond, which he sold shortly before the date of his will to Morris, Hyman and Bradford, together with \$5,000 of State stock. In his will, therefore, he appropriates to them \$5,000 in stock, and also the funds arising from the sales of three houses. The interest on the stock and the interest on these funds are given to Mrs. Robinson and family for life, and the stock and funds are to go over after her death. The \$5,000 of State stock is the fund which is to produce the \$300 per annum. Mrs. Robinson and her family, therefore, cannot get the \$300 per annum unless the \$5,000 of State stock will yield that sum in interest. They will receive whatever interest the stock may pay, which cannot exceed six per cent., and any arrears unpaid will be due to them, to be received whenever the State may be able to pay them. The fund here referred to, though spoken of as stock, consists of bonds or certificates of debt of the State of Virginia, bearing six per cent. interest. It doubtless never entered into the mind of the testator that any contingency would happen in which this interest would not be regularly and fully paid.

In the execution of this clause of the will, therefore, it will be the duty of the executors to invest the sum of \$34,500 (being the aggregate of the several sums of \$18,000, \$7,500 and \$9,000) out of the general assets, and to set apart out of the Virginia State stock left by the testator as much as, on its face, represents the nominal amount of \$5,000. This money and stock will constitute the fund, of which the interest will be applicable to the support, &c., of Mrs. Robinson and her children, &c., during her life, and the capital divisible among her children and descendants after her death. For the raising of the said sum of money, the several funds of purchase money mentioned in the will, will be primarily liable, if that should become important.

It appears from the report of the commissioner, that Nannie M., a daughter of Mrs. Robinson, intermarried with Edward T. Robinson after the death of the testator, and has since died without leaving issue, and leaving her husband surviving. The Circuit court held that the children of Mrs. Robinson, living at the death of the testator, did not take vested interests in remainder in the fund provided by the fourth clause, and that Edward T. Robinson in the right of his wife, of whom he is ad-

ministrator, is not entitled to any interest in the said fund. That is the question raised by the second appeal.

It is a familiar principle, that the law favors the vesting of estates, and where a legacy is given, which is not to be enjoyed in possession until some future period or event, it will, where no special intent to the contrary is manifested in the will, be held to be vested in interest immediately on the death of the testator, rather than contingent upon the state of things that may happen to exist at the period of payment or distribution. *Catlett & ux. v. Marshall & als.*, 10 Leigh 79; *Martin v. Kirby*, 11 Gratt. 67; *Brent v. Washington's adm'r*, 18 Gratt. 526; *Doe v. Considine*, 6 Wall. U. S. R. 458. And the question is, whether a special intent is manifested in this will, that the legacy in remainder, after the death of Mrs. Robinson, shall vest only at her death in such children and descendants of deceased children as may happen to be then living.

I think that no such special intent is manifested in the will, and that the children of Mrs. Robinson, who were living at the death of the testator, took immediate vested interests subject to be divested in the events described. See *Skey v. Barnes & als.*, 3 Meriv. R. 335; *Leeming v. Sherriatt*, 2 Hare's R. 14; *Salisbury v. Petty*, 3 Hare's R. 86; *Sturgiss v. Pearson*, 4 Madd. R. 411; *Brent v. Washington's adm'r*, 18 Gratt. 526; *Parker v. Golding*, 13 Sim. R. 418.

The interest of Mrs. Nannie M. Robinson was not divested in favor of descendants, because she left none. It was not divested in favor of the surviving brothers and sisters, because she did not die under age and unmarried, and without issue. An estate once vested will not be divested, except upon the occurrence of the very event described. *Harrison v. Foreman*, 5 Ves. R. 207; *Sturgiss v. Pearson*, 4 Madd. R. 411. The provision in favor of the surviving brothers and sisters, imports, according to the natural sense of the words, that all three of the conditions must exist in order to entitle them to take; and such is the settled construction in such cases. *Doe v. Cooke & al.*, 7 East R. 269; *Doe v. Rawding*, 2 Barn. & Ald. R. 241.

The construction which I put upon the 4th clause is sustained by the 6th clause. This clause provides that, upon the marriage or attaining to the age of twenty-one of any child of Mrs. Robinson in her lifetime, she may make an advancement to such child, not exceeding "such child's portion of the said trust fund." This recognizes the title of such child to a portion of the fund, which could not be if the interest is to vest only on the death of Mrs. Robinson in such of her children as may be then living. The provision authorizing Mrs. Robinson to prescribe "terms, trusts, conditions and limitations" to such advancement, only indicates the prudent forecast of the testator, and his desire that such arrangements might be made for the benefit

and protection of the child as Mrs. Robinson should think necessary *or expedient. This construction makes the 6th clause entirely consistent with the 4th.

It follows, therefore, that Edward T. Robinson, as adm'r of his deceased wife, Nannie M. Robinson, is entitled to her interest in remainder after the death of her mother, in the fund created by the 4th clause of the will.

The decree should be reversed, and the cause remanded for further proceedings.

The other judges concurred in the opinion of Joynes, J.

The decree in the first two causes was as follows:

The court is of opinion, for reasons stated in writing, and filed with the record, that the said Circuit court, instead of proceeding to make a decree upon the merits of the said first mentioned cause of Corbin v. Mills' ex'ors & als., should have required the plaintiff to amend his bill, so as to make Charles Y. Morris and Thomas Bradford, and the purchasers of the Leigh street lot, parties defendant; and after the said parties had been brought before the court, should have allowed all the parties to take new evidence, and should, if the state of evidence made it proper, have directed an enquiry by a commissioner to ascertain what was the true value of the Leigh street lot at the time of the sale thereof by the executors, and what was the average value of said property, in fee simple, in ordinary times, before the commencement of the late war; and also to ascertain what was the value of Confederate treasury notes, as compared with specie, at the several dates at which the executors received from Charles Y. Morris and Thomas Bradford payments in said notes on account of the principal money due from them respectively to the testator at the time of his death; and to what extent said treasury notes were at said several times available, according to the common usages of business in

*Richmond, for the payment of debts payable in specie, and well secured on real estate, or for the purchase of property or otherwise.

The court is further of opinion that, according to the true construction of the fourth clause of the will of Nicholas Mills, deceased, the bequest therein of the several sums of \$1,080, \$450 and \$540 per annum to Sarah Ann Robinson for life, were not specific legacies of the interest, payable on certain debts, but were demonstrative legacies; that is to say, they were general legacies, payable out of the general assets, but with an appropriation of certain subjects as the primary fund for their satisfaction; and that the bequest of the several sums of \$18,000, \$7,500 and \$9,000, after the death of said Sarah Ann Robinson, were in like manner demonstrative and not specific legacies.

The court is further of opinion that the bequest, after the death of the said Sarah Ann Robinson, of \$5,000 in Virginia State

stock is a general legacy of bonds or certificates of debt of the State of Virginia, of the nominal amount of \$5,000 on their face, and that the bequest of \$300 per annum to said Sarah Ann Robinson for life, is a bequest of the interest payable on said \$5,000 of bonds or certificates, and that in case of any failure of the State to pay interest on said bonds or certificates, the said annual sum of \$300 is not to be made up out of the general assets.

The court is further of opinion that the children of Sarah Ann Robinson, who were living at the death of the testator, took immediate vested interests in remainder, after the death of the said Sarah Ann Robinson, in the property mentioned in said clause; and that the share thereof, which so vested in Nannie M. Robinson, who intermarried with Edward T. Robinson, passed on her death to her said husband surviving, as her administrator. Therefore, it is decreed and ordered, that the

decree in each of these causes be reversed and annulled, *and that the appellants, in the first of the said causes, do pay unto the appellees therein, respectively, their costs by them expended in the cause; and that the executors of Nicholas Mills, deceased, out of the assets in their hands, pay to the appellant in the second cause his costs expended in the prosecution of the appeal here. And it is ordered that these causes be remanded to the said Circuit court for further proceedings, in accordance to the foregoing opinion and decree.

The decree in the third cause was as follows:

The court is of opinion that, while the court will take judicial notice of the fact, that on the thirtieth day of April 1863, the date of the transaction which is the subject of controversy in this cause, the treasury notes of the United States, and also the treasury notes of the Confederate States, were greatly depreciated in value, as compared with specie, it is not competent for the court to take judicial notice of the rate of depreciation of either currency at any particular time, nor of the extent to which, at any particular time, the treasury notes of the Confederate States were available, according to the common usages of business, for the payment of debts contracted before the war and payable in specie, or in current money of the United States, or for the purchase of property or otherwise.

The court is further of opinion, that inasmuch as the record in this cause contains no evidence upon these points, or either of them, it does not contain sufficient materials to enable the court to make a proper decision upon the questions in controversy. The court is therefore of opinion that the said Circuit court, instead of proceeding to make a decree upon the merits of the controversy in the existing state of the record, should have directed an enquiry by a commissioner, to ascertain what was, on the thirtieth day of April 1863, the value, as compared with specie, of the treasury notes

(\$7,500) of the real estate on Main street, sold by me to Lewis Hyman; also, the further sum of five hundred and forty dollars per annum, payable quarterly, being the interest on the purchase money (\$9,000) of the real estate fronting on Franklin street, sold by me to Thomas Bradford; also, the further sum of three hundred dollars per annum, payable semi-annually, being the interest on \$5,000 of State stock of Virginia. These annual sums, to the extent necessary, are to be applied by my executors to the genteel support and comfort, in all respects, of my said daughter Sarah Ann Robinson and her family during her life, and the proper and suitable education of her children and grandchildren born, or that may be born; and if, after providing for these purposes, any surplus remains, I direct my executors to invest such surplus in some productive stock, or in a safe loan on good real or personal security, the dividends or interest to constitute a portion of the trust fund hereby provided for the benefit of my said daughter Sarah Ann Robinson and

441 her *family. At her death it is my will and desire, and I give and bequeath accordingly, that the principal (producing said interest), to wit: \$18,000 from the property sold to Charles Y. Morris; \$7,500 from the property sold to Lewis Hyman; \$9,000 from the property sold to Thomas Bradford, and \$5,000 in Virginia State stock, together with all the accumulations from the surplus aforesaid, that may be invested or may have arisen, be equally divided, share and share alike, between and among the children of my said daughter and their lineal descendants, the descendant or descendants of any deceased child taking such child's share; and in case of the death of any child of my said daughter (born, or to be born), unmarried under the age of twenty-one years, and not leaving issue, the share or shares of property and estate coming to such child under this clause of my will, shall immediately vest in, and belong to his or her surviving brothers and sisters and their lineal descendants, share and share alike, the descendants of any deceased child taking such child's share. But I hereby will and direct that all the property and estate herein given in trust for my daughter Sarah Ann Robinson and her issue, shall be held subject to indemnify my estate against any loss by reason of the covenant which I have entered into to Edmund Fontaine, in respect to the property on Sixth street, contained in the deed made by me as commissioner and trustee, dated the 1st of January 1853, and of record in the Hustings court, Richmond, in the event that said conveyance be not assented to and confirmed by such issue, when and as they become respectively competent to make such assent, and shall become entitled to, or be given, a share of the property hereby given in trust for the said Sarah A. Robinson and her issue."

The testator then gives Mrs. Robinson absolutely, as her separate property, some household furniture, and one thousand dol-

lars, which he directs his executors to 442 *pay to her immediately on his decease, or as soon thereafter as possible.

By the 5th clause of his will, the testator gives to his executors certain slaves by name in trust for Mrs. Robinson and her children and grandchildren, as is provided in the fourth clause.

The sixth clause is as follows:

"6. In the event of the marriage, or the attaining to the age of twenty-one years of any child of my said daughter Sarah Ann Robinson, it shall be the duty of the executors, if required so to do, in writing under the hand and seal of my said daughter, and attested by at least two credible witnesses, to make to, or for the benefit of, such child, such advancement from the estate given in trust for my daughter and her issue, as shall not exceed such child's portion of said trust fund, but such advancement may be as much less than such portion as my said daughter may direct. And in the writing thus executed by her, my said daughter may prescribe on what terms, trusts, conditions and limitations such advance shall be made; and it shall be settled accordingly under the superintendence of my executors."

By the ninth clause of his will, the testator gave to his executors in trust, for the four children by name of his daughter Mary C. Corbin, an estate in the county of Caroline, called the "Reed's plantation." The same to be for their equal benefit, with limitations over to the other children, if one or more of them died unmarried, under the age of twenty-one years, and without leaving issue living at his or her death.

The fourteenth clause is as follows:

"14. All the real estate which I may leave at my death, not otherwise specially disposed of, I desire that my executors shall sell in such manner and on such terms as they may deem most advantageous. All 443 money on hand and stocks in companies not specifically *given or bequeathed in this will, all debts due me, and all other personal estate owned by me, I hereby direct my executors, as soon after their qualification as practicable, to dispose of as follows: My slaves shall be disposed of as provided in the next clause of my will; all other funds shall be applied first to the payment of my funeral expenses, medical bills, all just debts I may owe at my death, and then to the two sums of one thousand dollars each given to my daughters Sarah Ann Robinson and Jane R. Blair, then to provide for the punctual payment of the annuities hereby given; then for the pecuniary legacies given to my children; then for the pecuniary legacies hereby given to my grandchildren. All the rest and residue of my estate (except slaves) not specifically devised or bequeathed herein, no matter of what it may consist or where it may be, not effectually disposed of by this will, or which may turn out by lapse of devisees, legatees or legacies, not to be effectually disposed of by my will, I hereby bequeath as follows: first out of such resid-

uary fund shall be paid to my sons Charles S. Mills and Ronald Mills each three thousand dollars; and the remainder I give and bequeath equally, share and share alike, to all my grandchildren, and the lineal descendants of such as may die, such descendants taking the share of the parent; but my six grandchildren to whom two thousand dollars each is bequeathed, are not to participate without bringing into the division the said legacies of two thousand dollars each so given them.

In all the provisions which the testator makes for his children, except Charles S. Mills, the property is given to the executors in trust for the benefit of the child and his or her children, and at his death for his children, &c., with limitations over among the grandchildren, and their descendants. Of these there are three beside the two already mentioned; and there are annuities *which the executors are to pay to another son and a son-in-law. By the thirteenth clause the testator gives to six of his grandchildren by name \$2,000 each, which his executors are directed to invest in safe and productive stocks, or safe loans on real and personal estate, to be applied if necessary to their support, and if not so necessary, the interest to accumulate and the whole to be paid as they shall marry or come to the age of twenty-one years.

The eighteenth clause of the will is as follows:

"18. I authorize and empower my executors, when they may deem it expedient, and when requested so to do by the person or persons for whose benefit the trust fund is held, to change by sale and repurchase or otherwise, the investment of any trust property given by this my will, taking care, however, to secure the substituted investment in a safe form and substance, and to hold and appropriate the same under the same trusts, uses, conditions, limitations and powers, as those herein declared applicable thereto. And in case any person or persons for whose benefit the trust fund is, shall be an infant, the change of investment may be made by my executors without the consent of such infant."

21. I appoint my son Charles S. Mills, my grandson Thomas Verney Robinson and Robert R. Howison executors of this my will, and having confidence in their capacity and integrity, I direct that security shall not be required of them on their qualifying as such.

Besides the annuities for life left by the will to one of his sons of \$800 a year, \$300 a year to his son-in-law, and the annuities to his daughter Mrs. Robinson, the pecuniary legacies bequeathed to his children and grandchildren amounted to \$37,500, and out of the residue \$3,000 each to his two sons Charles S. and Ronald Mills. There were specific legacies of three hundred and fifty shares of Richmond, Fredericksburg and

Potomac Railroad Company's stock, 445 one hundred *shares of the stock of the Midlothian coal company, \$10,000 of Virginia State bonds, and \$5,000 of the

bonds of the city of Richmond. The slaves not specifically bequeathed were directed to be hired out by the executors.

The estate was appraised on the 14th of October 1862, the valuation being in Confederate money. The real estate not specifically devised, consisted of a lot on Leigh street running from Seventh to Eighth streets, with the buildings thereon, which was valued at \$55,950: the slaves were valued at \$12,100; the stocks in various railroads, &c. were valued at \$92,975. Of these there were of the Richmond, Fredericksburg and Potomac Railroad Company, three hundred and eighty-nine common, valued at \$75 a share, and one hundred and thirty-three shares guaranteed, valued at par \$100. There were of Midlothian coal mining stock, two hundred and fifty shares valued at \$50 a share, and of Exchange hotel stock, one hundred and ninety shares, valued at \$60 a share. There were of bonds of the State of Virginia, the Confederate States and corporations, \$126,906 42; of these there were State bonds amounting to \$33,300; Confederate States bonds \$19,200 Richmond city bonds \$22,076; North Carolina bonds \$11,430; the furniture was valued at \$6,159. The whole amounting, with carriages and horses, to \$318,965 42. In addition to the foregoing the executors gave a statement of debt, supposed to be good, \$12,450; and the estimated value of ground on which the Exchange hotel stands, now under ground rent, \$25,000. As this is one of the subjects of controversy in one of these cases, it is necessary to give the facts in relation to it.

By deed bearing date the 31st of July 1839, Nicholas Mills and wife leased for one hundred years, with covenant for perpetual renewal, the greater part of the ground on which the Exchange hotel now stands, 446 to *Hugh W. Fry and six others, upon an annual rent of \$1,600 in current money of the United States, payable quarterly, with condition that if the rent remained unpaid for thirty days after it became due, and there was no sufficient distress upon the premises whereof to make the rent, Mills might re-enter and hold the same again as of his former estate. And the parties of the second part covenanted that they would erect on the premises within two years from the date of the lease, valuable and permanent buildings which would cost in material and workmanship, not less than forty thousand dollars, and that they would keep the same well and sufficiently insured, and in good repair.

And it was further covenanted and agreed between the parties, that the premises demised with all the buildings which should be put upon them, should be conveyed by Mills and wife, or their heirs, with general warranty, at any time within five years from the 1st day of January 1840, on receiving the sum of twenty-five thousand dollars current money of the United States, and all rents that had accrued thereon up to the time of the said payment, or at any time after the said five years, upon receiving in current money of the United States a sum

of the United States, and also of the treasury notes of *the Confederate States, and to what extent, at that time, the treasury notes of the Confederate States were, according to the common usages of business in Richmond, available for the payment of debts contracted before the war and payable in specie or in current money of the United States, and well secured on real estate, or for the purchase of property or otherwise, with leave to any of the parties to file additional evidence, as they may be advised, upon any matter involved in the cause, and that the said decree is therefore erroneous.

Therefore, it is decreed and ordered that the said decree be reversed and annulled, and that the appellees, the executors of Nicholas Mills, dec'd, out of the assets in their hands, pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And the cause is remanded to the said Circuit court for further proceedings to be had therein, in conformity with the foregoing opinion and decree.

Decrees reversed.

478 *Jones v. The Commonwealth.

October Term, 1868, Richmond.

1. Criminal Law—Failure to Indict—Habeas Corpus.—

In September 1867, J. is committed to be tried for a felony at the October term of the County court, and at that term of the court an information is filed against him, and he elects to be tried in the Circuit court and is remanded for trial in that court. He remains in jail until the April term of the court, 1868, no indictment having been found against him. The grand jury terms of the County court are November and June. At the April term of the Circuit court after the grand jury has been discharged, he applies for a writ of *habeas corpus* to obtain his discharge. **HELD:**

1. **Same—Prisoner Remanded to Circuit Court—Indictment.**—Having been committed for trial in the County court, that is the court in which he is held to answer, in the sense of the statute, though he had been remanded for trial in the Circuit court; and he should be indicted in the County court.*

2. **Same—Statute—"Second Term"—What it Means.**—The second term of the court, spoken of in the statute, is the second term at which a grand jury is directed to be summoned.

3. **Same—Same—Same.**—If it was so that the prisoner was held to answer in the Circuit court, that would not be until he was remanded to that court; and therefore, though the prisoner was committed for trial in the County court, before the September term of the Circuit court, that could not be one of the two terms spoken of by the statute.

4. **Same—Same—Same—Term Must Be Ended.**†—And if the November term in the County could be connected with the April term in the Circuit

court, still though the grand jury at the April term had been discharged before the application for the writ, the judge might have ordered another grand jury to be summoned during the term, and therefore the term could not be counted as one of the terms until it was ended.

5. **Felony—Information of No Avail—Indictment.**—The filing of the information being unauthorized in the case of a felony, is of no avail, and an indictment must be found within the time prescribed by the statute.

479 *The prisoner was committed to the jail of the county of Rockbridge in September 1867 upon the charge of felony in stealing a horse, the property of Wm. M. Harvey of Botetourt. In April 1868, being still in the jail, he applied to the judge of the Circuit court of Rockbridge, for a writ of habeas corpus, in order to obtain his discharge. The facts are stated by Judge Moncure in his opinion.

J. B. Dorman & Letcher, for the prisoner.
The Attorney General, for the Commonwealth.

MONCURE, P., delivered the opinion of the court:

This is a writ of error to a judgment of the Circuit court of Rockbridge county, on a writ of habeas corpus. The plaintiff in error was committed to the jail of said county, under a warrant of a justice of the peace dated the 7th day of September 1867, for trial in the County court of said county, on the first day of October court 1867, for the offence of horse stealing. On that day an information was filed against him in the said County court for the said offence, and being thereupon arraigned, he demanded to be tried in the Circuit court of said county; whereupon he was remanded to jail for trial in that court. Afterwards, to wit: On the 18th day of April 1868, he presented his petition for a writ of habeas corpus to the said Circuit court, then in session, stating in the petition that three grand juries for the said county, had been impaneled and discharged during his imprisonment, one at the September term 1867 of the said Circuit court, one at the November term 1867 of the said County court, and the other at the then present term of the said Circuit court, and that no indictment had been found against him for the said offence by either of the said grand juries, and therefore claiming to be entitled to immediate discharge from further imprisonment.

The writ was accordingly awarded, and *the case coming on to be heard during the same term of the said Circuit court, to wit: On the 20th day of April 1868, upon the said writ and the return thereto, the court was of opinion that the petitioner was not illegally detained in the custody of the jailor, and therefore ordered that he be remanded to jail. A bill of exceptions was taken to the said opinion and judgment of the court, in which, among other things not material to be here mentioned, it is stated that "it was further

*See the opinion, for the statute.

†See principal case cited in *Glover v. Com.*, 86 Va. 288, 10 S. E. Rep. 420.

proved that a grand jury for Rockbridge county was impaneled at the term of this Circuit court, on Sept. 12th, 1867, after the commitment of said Jones as aforesaid, and that said grand jury was discharged without finding an indictment for said offence against said Jones; that a grand jury for said county was also impaneled at the November quarterly term of said County court and was also discharged without finding such indictment; that a quarterly term of said County court was held in March 1868, but under the order of said court made several years ago there was no grand jury at said March term; that the grand jury terms of said County court of Rockbridge county are held in the months of November and June; that a grand jury was impaneled at the present term of this Circuit court of April 13th, and was finally discharged several days previous to this petition, without finding any such indictment as aforesaid; and that therefore, the petitioner then claimed to be "entitled to his discharge from further imprisonment. But it appearing to the court that the attorney for the Commonwealth had, through misapprehension of the effect of the criminal procedure act of 1867, which had not then been expounded by the Supreme Court of Appeals, filed an information against the petitioner at the October term of said County court, and that said petitioner, when arraigned for trial on said information, had demanded to be tried thereon in this court at its present term; and this court having held

481 *the proceedings irregular, and refused to permit a trial on said information, and thereupon the court being of opinion that there had been no such failure to prosecute as under section 13, chapter 207 of the "act 'to revise and amend the criminal procedure,' passed April 27th, 1867, entitled the prisoner to his discharge;" therefore "the court ordered the petitioner to be remanded to jail." And this is the judgment to which the writ of error in this case was awarded.

This court has recently decided, that according to the true construction of chapter 207 of the Code, as amended and re-enacted by the act passed April 27, 1867, entitled "an act to revise and amend the Criminal Procedure" (Acts of Assembly 1866-67, pp. 915, 926, § 2), a person cannot be put upon trial for any felony unless an indictment shall have first been found against him therefor by a grand jury in a court of competent jurisdiction; and cannot therefore be put upon trial for a felony upon an information. *Matthews v. The Commonwealth*, and *Garner v. The Commonwealth*, 18 Gratt. 989. The Circuit court therefore rightly "held the proceedings irregular, and refused to permit a trial on said information." But did the court rightly hold "that there had been no such failure to prosecute as under section 13, chapter 207," aforesaid (Acts of Assembly 1866-'7, p. 928-9), "entitled the prisoner to his discharge." We are of opinion that it did.

That section, or so much of it as is ma-

terial to be here set forth, is in these words: "A person in jail on a criminal charge shall be discharged from imprisonment if a presentment, indictment or information be not found or filed against him before the end of the second term of the court in which he is held to answer, unless it appear to the court," &c. The attorney general argued, that an information was filed against the prisoner in due time, the requisition of the statute was strictly complied with, and he was therefore not 482 entitled *to his discharge. But we are clearly of opinion that the statute should be construed distributively—*redendo singula singulis*; and that "presentment" and "information" refer to misdemeanors only, while "indictment" refers to felonies also. A misdemeanor may be tried on a presentment or information, as well as on an indictment, while a felony can be tried on an indictment only; and that kind of accusation must be made within the period limited by the statute, which the nature of the offence requires. The offence in this case being a felony, it was therefore necessary that an indictment should be found against the prisoner "before the end of the second term of the court, in which he is held to answer, unless," &c. Had there been any failure or default in this respect when the judgment in this case was rendered?

It is true that no indictment had been found against the prisoner; but is it true that there had been two terms "of the court in which he was held to answer," within the true intent and meaning of the statute? We think not.

The court in which he was held to answer was the County court, and that is the court therefore in which the indictment ought to be found. Had there been two terms of that court, within the meaning of the statute, when the judgment in this case was rendered? We think that the "term of the court," in the meaning of the statute, is a "grand jury term," at which only an indictment could be found. The record shows that there are during a year but two grand jury terms of the County court of Rockbridge, which are held in the months of November and June, and that one only of them was held, to wit: in November, after the commitment of the prisoner for trial in October 1867, and before the judgment in this case was rendered in April 1868. It follows, therefore, that there had not been 483 two terms of the court in which he was held to answer, *within the meaning of the statute, when the said judgment was rendered.

This construction of the statute may certainly be the occasion of much delay and inconvenience to a prisoner in obtaining his discharge for want of prosecution. But if it be, as we think, the proper construction, it must prevail, notwithstanding the objection *ab inconvenienti*. A literal construction of the statute, which would embrace every term of the court, whether it be a grand jury term or not, might entitle a

was anxiously considered by the executors. They refer especially to the three debts before mentioned, of Bradford, Morris, and the ground rent due from the Exchange Hotel Company, and say these debts were all tendered in bankable funds to these executors by the parties owing them, or bound for them, and entitled to pay them. They refer to the action of the Virginia legislature, intended to compel the receipt of Con-

federate treasury notes by the people
453 of the State, and to *the revenue laws of the Confederate congress, designed to effect the same object, which, if their investments had been made in any other securities, or if they had refused to take these treasury notes in payment of debts, would have absorbed in taxes all the interest, and much of the principal, of the estate, leaving no income for the objects of the testator's bounty.

With respect to the charge in the bill that the "Reed's plantation" had been mismanaged, they say—It will hardly be contended that the testator's will required the executors to go personally on the plantation and manage it. None of them were fitted for such duties. Charles S. Mills did what his father had been doing; he gave such time and attention to the plantation as he could; and he did this cheerfully without compensation, for the benefit of his nephews and nieces interested. The slaves were not a part of the testator's estate; they were held under a trust in which Messrs. Macfarland and Rhodes were trustees for Mrs. Corbin and her children. After Mr. Mills' death Mr. Macfarland requested Charles S. Mills to continue to act as agent for the trustees, as his father had done. This he did. He retained the same overseer who had been there for ten years, and he received and disbursed such funds as came to his hands, without charging a commission. And he filed his account showing his receipts and disbursements; and showing a small balance in his hands in Confederate money, which was in bank to his credit at the time of the fall of Richmond. They state the settlement of their accounts by a commissioner of the court of probate and their confirmation by the court; and they exhibit copies of them.

The executors submit to the court the question, whether an afterborn grandchild will take as a residuary legatee; and whether the legacy to Mrs. Robinson and her children, &c. was adeemed pro tanto by the receipt by the testator in his lifetime,
454 of part of the *debts mentioned in the bequest. Believing that it was not, they have paid to Mrs. Robinson her annuity. They unite in the prayer of the bill for a distribution of the estate according to the rights of the parties.

In May 1866, Thomas V. Robinson, the other executor, answered separately. He says that as soon as he heard that the other executors had advertised the lot on Leigh street for sale, he wrote to his mother, from whom he had received the information, protesting against the right of his co-exec-

utors, before allowing him a reasonable time to qualify, and without any notice to him, to sell, within so short a time after the testator's death, the large and valuable real estate of the testator; whose estate was free from debt, and was possessed of the most ample means of supplying all the demands which could properly be made against it under the will or otherwise; and of this his co-executors were informed before the said sale was made. He says he was never consulted by his co-executors in regard to any act pertaining to the administration of the estate until after the fall of Richmond and the surrender of the army of Northern Virginia. That he has always protested against their unauthorized acts in proceeding to exercise the discretion and power vested by the testator jointly in his three executors, without consulting him in the exercise thereof; and he submits to the court whether their acts can be ratified or approved. And he presents to the judgment of the court the question whether sales of real estate for investment in Confederate securities, and collections of good debts secured on real estate, for such investments, by two of the testator's executors in spite of the solemn protests and objections of the third, where the execution of the powers and duties conferred by the will are confided to the joint discretion of these executors, will be ratified and confirmed by a
455 court of equity, especially *when such action is attended, as in this case, with the loss and ruin of the estate.

In August 1866, Mrs. Robinson also answered the bill. She insists that the legacy to herself and her children is not specific but demonstrative, and that she is entitled to have it satisfied out of the general estate. She denies that the executors were authorized or justified in taking any thing but specie or its equivalent for debts due the estate. She insists that the sale of the real estate by two of the executors was invalid, and was a violation of the will of the testator; and so also was their deed to Lancaster and others, granting and releasing the real estate and ground rent therein mentioned. And she prays that the principal sum out of which her annuity is to be paid may be taken out of the hands of the said executors, and that the same may be invested under the directions of the court.

On the same day, Mrs. Robinson filed a cross-bill in the foregoing suit, referring to and adopting her answer as a part of her cross-bill, and praying that the said answer and the statements and averments thereof, may be taken and treated as a cross-bill exhibited by her in this suit against the plaintiff and her co-defendants.

To this bill, Charles S. Mills and R. R. Howison put in their answer, filing their answer to the bill of Corbin as a part of their answer to the cross-bill. They made farther statements as to the sale of the real estate. They comment also on the answer filed by their co-executor, Thomas V. Robinson, filed in the original cause, and contest his statements as to their treatment of

him, and file letters and papers to sustain them; but it is not necessary to say more on that subject.

On the 21st of May 1866, upon the filing of the answer of Thomas V. Robinson, the court made a decree—That Charles S. Mills and Robert R. Howison, executors of Nicholas Mills, deceased, and trustees under his

will, render an account of all their 456 transactions as such *executors and trustees, before one of the commissioners of the court; and that Thomas V. Robinson do render the like account. In taking which accounts, the commissioner will regard as prima facie correct, the settled accounts of the executors; but subject to be surcharged and falsified by any other party. To report whether the land called the Reed's plantation can be divided among the devisees thereof; and also what constitutes the residuary estate of the testator, Nicholas Mills, devised and bequeathed to his grandchildren, after providing for the annuities and special legacies bequeathed by the will; how said annuities and special legacies have been provided for by the executors; and of what said residuary estate and its accumulations consist; with what amount the executors are justly chargeable on account of the estate of their testator; and whether distribution of the residuary estate is proper and practicable.

In November 1866, commissioner Pleasants filed his report. He says, the stated accounts of the executors are sought to be surcharged and falsified before your commissioner in respect of large sums which were received by the executors in payment of debts due to their testator's estate, or as proceeds of the sale of real estate sold by them under the will. These sums, it appears, were invested by them in Confederate States bonds. The question is raised by the pleadings, whether credits should be allowed the executors for these investments. This, the commissioner says, is a question to be decided by the court before he can state the accounts of the executors.

That it cannot be ascertained what is the residuary estate until it is decided whether the legacy to Mrs. Robinson and her children is specific, of the bonds and stocks mentioned in the fourth clause of the will, or is a demonstrative legacy. And he asked

the court further to decide whether 457 the interest of the children of *Mrs.

Robinson is vested or contingent. It appears that one of these children intermarried with Edward T. Robinson after the death of the testator, and has died without issue; her husband surviving her. It is a question therefore to be decided, whether the interest of this child of Mrs. Robinson has passed to her husband, or will pass to such of the children of Mrs. Robinson as may survive her, or will then fall into the residuary estate.

As to the enquiry directed in relation to the Reed's plantation in Caroline; in order to pass upon this enquiry, it is first necessary to determine whether the partition will not violate the rights of Robert B.

Corbin, the son-in-law of the testator. The testator, by the eighth clause of his will, gives to said Corbin an annuity for life of three hundred dollars, and directs that he shall have the privilege of residing at the said plantation during his life, and of having whatsoever is necessary for his comfortable boarding supplied by the farm.

In October 1865, Nicholas Mills Corbin instituted another suit in equity in the Circuit court of the city of Richmond against Robert A. Lancaster, E. O. Nolting, Samuel W. Harwood, Samuel J. Harrison, Wm. A. Stuart, Charles S. Mills and Robert R. Howison, executors of Nicholas Mills, deceased, and as trustees under his will, and all the parties in interest under the said will. In his bill he charged that very large sums of money, well secured upon real estate, and which were owing to the testator at his death, were shortly thereafter collected by Charles S. Mills and Howison, two of his executors, in a depreciated currency at its full value, when the same was not a legal tender for the payment of said debts, and was well known by the parties paying the same, and to the said executors, to be worth in value nothing like a fair equivalent for the value of said debts. He

then sets out the facts in relation 458 *to the lease by Mr. Mills to Fry and others, and the subsequent conveyances of the Exchange Hotel property, as herein before given, and the receipt of the money by the said executors from Lancaster and his associates, and the release and conveyance of the property as before stated. He charges that it was an unjust and unlawful exercise of the power and discretion vested in the executors. That said release and conveyance was made by the said executors, and obtained by the said purchasers under such circumstances, and for a consideration so grossly inadequate, as to render the transaction a fraud upon the rights of the plaintiff and the other parties entitled under the will of Mr. Mills to beneficiary interests in said debt. And he charges that it was not a release, but a sale of the said lease to Stuart and Nolting. The prayer of the bill is, that the transaction may be declared a breach of trust by the executors, in which the alienees participated, and was fraudulent: That the real estate embraced in the deed from Mills and wife to Fry and others, may be charged in equity with the payment of the debt and interest thereon, or that the said sum of \$1,600 per annum, with interest, shall be paid as provided in said deed; and for general relief.

Charles S. Mills and Robert R. Howison answered the bill. They exhibit a copy of their answer to the first bill, and pray that it may be taken as a part of their answer to this bill. They deny that they have committed any breach of trust, or abused their power or discretion in relation to the said lien; and they deny that the debt secured on the Exchange Hotel property was purchased from them by Stuart and Nolting. They never sought the collection of this lien, never applied for, or desired it. They

were content to let it remain on the property, and to receive the annual rent of \$1,600 for the purposes of the estate. But

when the payment of the principal
459 was tendered by, or *on behalf of Lancaster and his associate purchasers, who were the grantees of the Exchange Hotel Company, and therefore by law in privity with the estate of their testator, the respondents were compelled to act upon it. Only two courses were open to them; either to refuse the payment, and thereby to subject the estate of the testator to a crushing taxation, which would extinguish the whole income, and gradually extinguish the principal itself, thereby leaving the annuitants and beneficiaries entirely unprovided for; or to receive the payment as tendered; to increase the investment from a six per cent. to an eight per cent. fund, and thereby to increase the income, and save the infant beneficiaries from the heavy taxation which they would otherwise endure. They refer to the deed of Mills to Fry and others, authorizing the payment in current money of the United States. They say that at the time they were called upon to accept or refuse the payment offered, the congress of the United States had authorized the issue of the National Bank notes as currency. The legislation of the Confederate States forbade the use and circulation of United States currency. That gold had ceased to be currency, either in the United States or Confederate States; that the currency of the United States had greatly depreciated below the value of gold, and was to gold about as two to one; and a still further depreciation was feared by the prudent and cautious. And thus the funds in which the deed authorized payment to be made, might well have been considered of less value for the purposes of the testator's estate than the current funds actually received.

Lancaster and the other purchasers of the property, also answered the bill. They say they bought the property at public auction, and in the announcement of the conditions of sale, the auctioneer referring to the rent charge, of \$1,600 per annum, stated that
460 under a covenant running with the land, the owners of the *property had the privilege of discharging the rent charge, by paying a principal sum equal at six per cent. to its production; the same being in accordance with the provisions of the lease from Mr. Mills, and being recognized by his executors so to be; one of whom was present. But whilst E. O. Nolting was desirous to discharge the said rent charge, his associates, Lancaster, Harrison and Harwood were not, and the privilege was not availed of. Afterwards the defendants Lancaster and Harrison proposed to sell their interest to Wm. A. Stuart, and he expressed a preference to have the property free from incumbrance; whereupon Lancaster, &c. payed off the requisite principal sum, viz. \$26,666, to lift the same, which was done with the money of Lancaster, Harrison and Nolting—the two first

being reimbursed by their sale to Stuart. Harwood was still indifferent to the transaction, and contented himself with reserving the privilege at a future time if he should desire it; and he has not yet availed himself of the privilege.

They refer to the accounts of the executors to show that they credited the estate with the amount paid for the rent charge, and that C. S. Mills and T. V. Robinson, two of the executors, and the plaintiffs took large sums of money as specific and residuary legatees under the will; and that neither they or any one else ever excepted to the accounts. And they further say that since April 1863, the owners of the hotel have remained in possession without any demand of rent by the executors, and without an intimation from them, or the plaintiff or any one else, of any objection that the rent charge had been paid off, or any desire that the transaction should be cancelled, until the downfall of the Southern Confederacy.

Thomas V. Robinson also answered, referring to and filing a copy of his answer in the first suit, and insisting upon the views and grounds therein presented.

461 *The three causes came on to be heard together on the 14th day of June 1867, when the court without deciding any of the questions made by the pleadings and the proofs, directed that commissioner Pleasants ascertain and report to the court, what constitutes the estate of the testator Nicholas Mills at this time in the hands of his executors; and how the said special legacies and annuities have been provided for by them, and of what the said residuary estate, with its accumulations, now consists, and what is the value thereof.

In November 1867, the commissioner returned his report. He gave a statement of all the estate in the hands of the executors, showing in what it consisted, and the par value thereof; and also what part of it was invested for the special legatees. He reported further that the pecuniary legacies and annuities had been paid up to the time of the report; and the future provision for their payment proposed by the executors was by setting aside certain specified public bonds, and Bradford's bond for \$7,000; which bonds were worth at par \$76,186 50; and the annual interest thereon was \$4,752 65. He reported the value of the residuary estate, after deducting the special investments, the real estate devised and the securities above mentioned, which it is proposed to set aside for the payment of the annuities, at \$45,958 60. The report shows that the amount of Confederate bonds invested in trust for the special legatees was \$28,300; and the amount of said bonds constituting a part of the residuary estate was \$191,500.

The plaintiffs and the defendants, the grandchildren of Nicholas Mills, other than the children of Charles S. Mills, excepted to the report: 1st. Because it shows the investment by the executors of \$191,500 of the trust funds in Confederate bonds. 2d. Be-

cause the specific legacies to the six grandchildren of \$2,000 each were invested in these bonds. 3d. Because the provision *for the payment of the bequest to Mrs. Robinson and her children was not adequate or suitable for the purpose. There were other exceptions which need not be stated.

On the 14th March 1868, the three causes came on again to be heard together, when the court held: First. That the executors C. S. Mills and R. R. Howison acted within the scope of the authority vested in them by the will of their testator, Nicholas Mills, deceased, and bona fide in selling the real estate, and investing the proceeds of the sale in Confederate bonds; and were not to be held responsible for the loss which has resulted from said sales and investments. Second. But that the said executors were not authorized by law nor by the will of their testator, to collect any part of the principal of the investments which had been made by him secured upon real estate, receiving the nominal amount thereof and investing it in Confederate bonds; and that the payments made to them by Bradford and Morris, were received by the said executors and trustees in the said currency in violation of the rights and interests of the cestuis que trust, and of their duties as executors and trustees under said will. But the court forbore to express any opinion whether the said executors and trustees were primarily liable for the loss of the said trust fund so collected, as the said Bradford and Morris were not parties in either of these suits. Third. That the receipt by said executors from Lancaster and others of the sum of \$26,666 67 in said Confederate currency, and in releasing in their favor and for the consideration aforesaid, the deed from Mills and wife to Fry and others, was a breach of trust on the part of the said executors and trustees, in which the said Lancaster and his associates actively participated; and that Wm. A. Stuart and others claiming the benefit of said deed of release, are affected by actual or constructive notice of the said breach of trust.

And that the real estate embraced *in the said deed of lease of Mills and wife to Fry and others, is liable to the satisfaction of the said annual charge of \$1,600 as provided by the said deed, from and after the 30th day of April 1863, in quarterly payments, for the purposes of the will of said Nicholas Mills, deceased, with legal interest on the deferred instalments, in the same manner the same would be liable therefor if the said deed of release had not been made. And the said deed of release and the subsequent deeds from Lancaster and Harrison to Stuart, from Stuart to Nunnally and from Harwood to Stuart and Nolting, were set aside and annulled. And liberty was reserved to the parties beneficially interested in the payment of the said annual charge, to apply to the court for further relief, &c.

Fourth. That the legacy and bequest made in the 4th clause of the will for the

benefit of Mrs. Robinson and her family, was not a specific legacy of the particular debts and State stocks therein mentioned, but merely demonstrative, and the payment of said legacy or bequest is charged upon the testator's estate by the 14th clause of the will. And that the children of Mrs. Robinson, living at the testator's death, whether they had attained lawful age or not, did not take any vested estate in the fund provided by the said 4th clause for the benefit of herself and her family. And that the defendant, Edward T. Robinson, adm'r of his deceased wife, Nannie M. Robinson, who had arrived at lawful age, at the testator's death, is not entitled, in right of his said wife, to any interest in said fund. And commissioner Pleasants, in executing the duties required of him by the interlocutory decree of the 21st of May 1866, was to conform to this opinion and decree.

Lancaster and his associate purchasers, and Stuart, applied for an appeal from so much of this decree as referred to the question involved in the case of Corbin against Lancaster and others; Nicholas Mills 464 Corbin, *and the other grandchildren of Nicholas Mills, deceased, except the children of Charles S. Mills, applied for an appeal from the decree in the case of Corbin v. Mills' ex'ors and others; and Edward T. Robinson, adm'r of Nannie M. Robinson, deceased, applied for an appeal from so much of said decree as held that the legacy to the children of Mrs. Robinson was not a vested legacy. All of which applications were granted.

The cases were argued by J. Alfred Jones and Conway Robinson, for Lancaster and his associates, and E. T. Robinson; by Howison and R. T. Daniel, for the executors; and by Macfarland & Roberts, N. Howard and Wm. Daniel, for the grandchildren, and for Mrs. Robinson and her children.

JOYNES, J. The original bill prays that the executors of Nicholas Mills, deceased, may be required to render an account of all their actings and doings as such executors, and that all questions arising upon the construction of the will of the said testator may be adjudicated and settled by the court; and for general relief, &c.

The bill specifies but one complaint against the conduct of the executors: that is contained in the allegation, that the estate in Caroline has been neglected and mismanaged. This complaint is made the subject of comment in the answer of the executors; but after that, we see no more of it throughout the whole progress of the case. The executors exhibit with their answer accounts of their transactions, which had been duly settled, returned, and recorded according to law. Anticipating, however, as it would seem, what parts of their administration were to be made the subject of complaint, though none of them, with the unimportant exception already mentioned, had been specified in the bill, the executors

proceed in their answer to give a minute history of those transactions, and to make a general vindication of their administration.

465 *The executors might have objected to an overhauling of the transactions embraced in their settled accounts, except so far as they might have been open to objections apparent on their face, on the ground that there was no specification of errors in the bill. It is a familiar principle, that the accounts of an executor, which have been regularly settled in the mode provided by law, are to be taken as prima facie correct. They are liable to be impeached on specific grounds of surcharge or falsification to be alleged in the bill, but the court will not decree an account upon a general allegation that the settled accounts are erroneous. This rule not only results from the presumption which the law makes in favor of the correctness of a settled account, but it is necessary to prevent surprise to defendants, and to give them the advantage of their answer, to which they are entitled, on the principles which govern equity practice. When an account has been ordered upon a proper bill, an additional objection to the settled accounts may be discovered in the progress of the case. It would be attended with inconvenience and delay to require the plaintiff in any such case to amend his bill for the purpose of alleging the additional objections. It will save time and expense, and generally be attended with no inconvenience to allow the plaintiff to raise the objection before the commissioner with a proper specification in writing, and to allow the defendant to meet the objection by an affidavit, giving to the affidavit the same weight which would have been given to an answer if the matter had been alleged in the bill. This is the full extent to which the settled rule of practice can be safely and conveniently relaxed, and this is the extent to which, as I understand it, Judge Stanard meant to go in *Shugart's adm'r v. Thompson's adm'r*, 10 Leigh 434.

The executors, however, made no objection in the Circuit court to the decree for an account. In the argument here by one of the executors, he insisted that
466 *all the allegations in the answer of the executors, should be taken to be true, unless disproved, and alleged that such was the understanding in the Circuit court. This was not assented to by the counsel for the plaintiff, and there is no evidence in the record of any agreement to that effect. The counsel for the plaintiff insisted that the affirmative allegations of the answer could not be received as true, unless sustained by proof. When this ground was taken by counsel for the plaintiffs in the argument, the counsel for the executors raised an objection, for the first time, to the sufficiency of the bill.

The bill, however, calls upon the executors to render an account of all their actings and doings as executors, and the allegations of their answer, though affirmative, must

be taken as true unless disproved, so far as they relate directly to the account which they are there required to give. *Fant v. Miller & Mayhew*, 17 Gratt. 187. There are allegations in the answer, however, which relate to matters not directly involved in, or explanatory of, this account, and therefore, perhaps, not within the scope of the discovery sought by the bill, though having a relation to the subject matter of the account, and important to a correct understanding of the motives of the executors and of the circumstances under which they acted. It may be doubtful how far such allegations of collateral matter ought to be received as true, within the rule laid down in *Fant v. Miller & Mayhew*.

But even if we should give credit to any allegation of matter of fact contained in the answer, the state of the case will still be deficient in some important particulars. Thus it is important that we should know what was the real value of the Leigh street lots. The appraisement put the value at \$68,000 in Confederate money. But obviously, the appraisement cannot be relied upon, for at the sale made about two weeks afterwards, the lot brought \$128,000. The conclusion must be, either that the property

467 *was worth, which is not probable, or that the appraisement was far below the true value. So it is important to know what was the value of Confederate treasury notes when the collections of principal money were made from Morris and Bradford, and also to what extent such notes were then available, according to the common usages of business in Richmond, for the payment of debts payable in specie, and well secured on real estate, or for the purchase of property or otherwise. The court cannot take judicial notice of such facts, and there is no proof in respect to them.

The purchasers of the Leigh street lots, as well as Morris and Bradford, should also have been made parties to the bill, in the absence of any declaration on the part of the plaintiff that he did not intend to hold them responsible. It is the policy and practice of courts of equity not to do justice by piecemeal.

The case must, therefore, go back for the purpose of making these parties, and of ascertaining the facts suggested. When the case comes on to be heard, all the allegations of fact in the answer, whether bearing directly upon the matter of the account or not, should be taken to be true, so far as they may not be disproved, unless the plaintiff shall elect to amend his bill by, alleging his objections to the settled accounts, with proper specifications, according to the established course of pleading in such cases. If he does that, the weight due to the answer which may be filed can be easily estimated. If he chooses not to amend his bill by setting out the specific objections, he cannot complain if the answer is taken as true in all its parts unless disproved, or require the court to make nice

discriminations between those allegations which, by the rules of evidence, are to be taken as true and those which are not. He will have no right to hold the defendants to the rules of pleading, when he has disregarded them himself.

468 I proceed now to consider the questions raised upon the construction of the will of Nicholas Mills, dec'd, as far as they were decided by the Circuit court, not including, of course, any question relating to matters in respect to which the case is to go back.

The Circuit court held that the bequests made in the 4th clause of the will in favor of the testator's daughter, Sarah Ann Robinson and her family are to be regarded as demonstrative, and not specific. The distinctions between these two descriptions of legacy are well understood, but it is often very difficult to determine whether a particular case belongs to one class or to the other. The cases present very nice distinctions, but they need not be discussed. It will be sufficient to refer to them as collected and classified in 1 Roper on Legacies, in 2 Redfield on Wills, and in the notes to Ashburner v. Macguire, 2 Lead. Ca. Eq. Referring to these books for the cases and doctrine laid down by them, I will mention only one rule, which is important to be borne in mind, namely, that a legacy will not be construed to be specific unless it appears clearly to have been so intended.

The first bequest made in this clause is of "the sum of \$1,080 per annum, payable semi-annually, being the interest on the purchase money of the real estate on Main street, Richmond, sold by me to Charles Y. Morris." This language does not import a bequest of the annual interest of a debt due to the testator from Morris. It imports, in express terms, a bequest of a sum of money. It refers to the purchase money of the sale to Morris as a fund whose annual interest will provide for the annual payment. It could not be discovered from the will that the money was still due from Morris. It was, in point of fact, still due from him at the date of the will, but if the whole of it had been subsequently collected by the testator, as part of it was, the fund

might still have been described as 469 "the *purchase money" of the lot sold to Morris. The description employed did not have reference to the existing shape of the fund, but to the source from which it arose. The collection of the whole of Morris' debt, therefore, would not have extinguished the fund described, and therefore the collection of part did not extinguish it pro tanto. Precisely the same remarks apply to the succeeding bequests of \$450 and \$540 per annum. And in relation to the bequest of \$1,080 per annum, it is to be remarked that it is directed to be paid semi-annually, while the bonds of Morris, which are in the record, contain no provision for semi-annual payments of interest. The testator may have forgotten at the moment of making the will that Morris' bonds did not provide, as Hyman's seem to have

done, for semi-annual payments of interest. If he did not then labor under a false impression, the circumstance referred to is conclusive to show that he did not intend a bequest only of the interest on Morris' debt.

The deeds show that the consideration of the sale to Hyman, on the 25th day of September 1861, was \$8,000, while the sum secured by the deed of trust of the same date is only \$3,000; so that \$5,000 of the purchase money must have been paid. These deeds were executed only three weeks before the date of the will, and such facts were not likely to escape the memory of the testator. If \$3,000 was the whole amount due from Hyman at the date of the will, as seems to have been the case, the fact is conclusive to show that the interest on Hyman's debt was not the subject of the bequest.

The same observations apply to the bequests, after the death of Mrs. Robinson, of the principal sums of \$18,000, \$7,500 and \$9,000. The legacies of these several sums, therefore, as well as of the several annual sums of \$1,080, \$450 and \$540, during the life of Mrs. Robinson, are not specific, but demonstrative; that is to say, they are

470 general legacies, with reference to certain *particular subjects as the primary fund to satisfy them. The subsequent collection by the testator of a large part of these funds did not have the effect of diminishing the provision made for Mrs. Robinson and her family, as it would if the bequests were held to the specific. It could hardly have been the intention of the testator that by these subsequent collections the provision made for this branch of his family, which seems to have been wholly dependent upon his bounty, should be diminished.

Then, as to the bequest of the "sum of \$300 per annum, payable semi-annually, being the interest on \$5,000 of State stock of Virginia," and the subsequent bequest of "\$5,000 in Virginia State stock."

These bequests do not apply to any particular "\$5,000 of State stock," nor are they made dependent upon the testator's being possessed of that amount of State stock at the time of his death. The bequests are therefore not specific. See the cases collected in 1 Roper on Leg., 205-210. They are general legacies, but they are not demonstrative, because no particular fund is referred to for their satisfaction.

The bequest, after the death of Mrs. Robinson, of "\$5,000 in Virginia State stock," is a little ambiguous, and the question arises whether the testator intended to give \$5,000 worth of State stock, or as much State stock as \$5,000 would buy, or only to give a quantity of State stock of the nominal value of \$5,000. The intention seems to be rendered plain by construing this bequest in connection with the previous bequest of "\$300 per annum, being the interest on \$5,000 of State stock of Virginia." The \$5,000 in State stock given over after the death of Mrs. Robinson is the same fund referred to in the previous clause as producing \$300 per annum interest. This

shows that the intention was to give stock of the nominal value of \$5,000, according to its face, and not give as much stock as would amount in real value to \$5,000 in money.

Then a further question arises, whether Mrs. Robinson and family are entitled to receive the sum of \$300 per annum for life, whether the \$5,000 of State stock will yield it or not.

I infer that the testator had, in the arrangement of his testamentary plans, appropriated in his mind, as the portion of Mrs. Robinson and her family, the three houses in Richmond, which he sold shortly before the date of his will to Morris, Hyman and Bradford, together with \$5,000 of State stock. In his will, therefore, he appropriates to them \$5,000 in stock, and also the funds arising from the sales of three houses. The interest on the stock and the interest on these funds are given to Mrs. Robinson and family for life, and the stock and funds are to go over after her death. The \$5,000 of State stock is the fund which is to produce the \$300 per annum. Mrs. Robinson and her family, therefore, cannot get the \$300 per annum unless the \$5,000 of State stock will yield that sum in interest. They will receive whatever interest the stock may pay, which cannot exceed six per cent., and any arrears unpaid will be due to them, to be received whenever the State may be able to pay them. The fund here referred to, though spoken of as stock, consists of bonds or certificates of debt of the State of Virginia, bearing six per cent. interest. It doubtless never entered into the mind of the testator that any contingency would happen in which this interest would not be regularly and fully paid.

In the execution of this clause of the will, therefore, it will be the duty of the executors to invest the sum of \$34,500 (being the aggregate of the several sums of \$18,000, \$7,500 and \$9,000) out of the general assets, and to set apart out of the Virginia State stock left by the testator as much as, on its face, represents the nominal amount of \$5,000. This money and stock will
472 *constitute the fund, of which the interest will be applicable to the support, &c., of Mrs. Robinson and her children, &c., during her life, and the capital divisible among her children and descendants after her death. For the raising of the said sum of money, the several funds of purchase money mentioned in the will, will be primarily liable, if that should become important.

It appears from the report of the commissioner, that Nannie M., a daughter of Mrs. Robinson, intermarried with Edward T. Robinson after the death of the testator, and has since died without leaving issue, and leaving her husband surviving. The Circuit court held that the children of Mrs. Robinson, living at the death of the testator, did not take vested interests in remainder in the fund provided by the fourth clause, and that Edward T. Robinson in the right of his wife, of whom he is ad-

ministrator, is not entitled to any interest in the said fund. That is the question raised by the second appeal.

It is a familiar principle, that the law favors the vesting of estates, and where a legacy is given, which is not to be enjoyed in possession until some future period or event, it will, where no special intent to the contrary is manifested in the will, be held to be vested in interest immediately on the death of the testator, rather than contingent upon the state of things that may happen to exist at the period of payment or distribution. *Catlett & ux. v. Marshall & als.*, 10 Leigh 79; *Martin v. Kirby*, 11 Gratt. 67; *Brent v. Washington's adm'r*, 18 Gratt. 526; *Doe v. Considine*, 6 Wall. U. S. R. 458. And the question is, whether a special intent is manifested in this will, that the legacy in remainder, after the death of Mrs. Robinson, shall vest only at her death in such children and descendants of deceased children as may happen to be then living.

I think that no such special intent is manifested in the will, and that the children of Mrs. Robinson, who
473 *were living at the death of the testator, took immediate vested interests subject to be divested in the events described. See *Skey v. Barnes & als.*, 3 Meriv. R. 335; *Leeming v. Sherriatt*, 2 Hare's R. 14; *Salisbury v. Petty*, 3 Hare's R. 86; *Sturgiss v. Pearson*, 4 Madd. R. 411; *Brent v. Washington's adm'r*, 18 Gratt. 526; *Parker v. Golding*, 13 Sim. R. 418.

The interest of Mrs. Nannie M. Robinson was not divested in favor of descendants, because she left none. It was not divested in favor of the surviving brothers and sisters, because she did not die under age and unmarried, and without issue. An estate once vested will not be divested, except upon the occurrence of the very event described. *Harrison v. Foreman*, 5 Ves. R. 207; *Sturgiss v. Pearson*, 4 Madd. R. 411. The provision in favor of the surviving brothers and sisters, imports, according to the natural sense of the words, that all three of the conditions must exist in order to entitle them to take; and such is the settled construction in such cases. *Doe v. Cooke & al.*, 7 East R. 269; *Doe v. Rawding*, 2 Barn. & Ald. R. 241.

The construction which I put upon the 4th clause is sustained by the 6th clause. This clause provides that, upon the marriage or attaining to the age of twenty-one of any child of Mrs. Robinson in her lifetime, she may make an advancement to such child, not exceeding "such child's portion of the said trust fund." This recognizes the title of such child to a portion of the fund, which could not be if the interest is to vest only on the death of Mrs. Robinson in such of her children as may be then living. The provision authorizing Mrs. Robinson to prescribe "terms, trusts, conditions and limitations" to such advancement, only indicates the prudent forecast of the testator, and his desire that such arrangements might be made for the benefit

and protection of the child as Mrs. Robinson should think necessary *or expedient. This construction makes the 6th clause entirely consistent with the 4th.

It follows, therefore, that Edward T. Robinson, as adm'r of his deceased wife, Nannie M. Robinson, is entitled to her interest in remainder after the death of her mother, in the fund created by the 4th clause of the will.

The decree should be reversed, and the cause remanded for further proceedings.

The other judges concurred in the opinion of Joynes, J.

The decree in the first two causes was as follows:

The court is of opinion, for reasons stated in writing, and filed with the record, that the said Circuit court, instead of proceeding to make a decree upon the merits of the said first mentioned cause of Corbin v. Mills' ex'ors & als., should have required the plaintiff to amend his bill, so as to make Charles Y. Morris and Thomas Bradford, and the purchasers of the Leigh street lot, parties defendant; and after the said parties had been brought before the court, should have allowed all the parties to take new evidence, and should, if the state of evidence made it proper, have directed an enquiry by a commissioner to ascertain what was the true value of the Leigh street lot at the time of the sale thereof by the executors, and what was the average value of said property, in fee simple, in ordinary times, before the commencement of the late war; and also to ascertain what was the value of Confederate treasury notes, as compared with specie, at the several dates at which the executors received from Charles Y. Morris and Thomas Bradford payments in said notes on account of the principal money due from them respectively to the testator at the time of his death; and to what extent said treasury notes were at said several times available, according to

the common usages of business in
475 *Richmond, for the payment of debts payable in specie, and well secured on real estate, or for the purchase of property or otherwise.

The court is further of opinion that, according to the true construction of the fourth clause of the will of Nicholas Mills, deceased, the bequest therein of the several sums of \$1,080, \$450 and \$540 per annum to Sarah Ann Robinson for life, were not specific legacies of the interest, payable on certain debts, but were demonstrative legacies; that is to say, they were general legacies, payable out of the general assets, but with an appropriation of certain subjects as the primary fund for their satisfaction; and that the bequest of the several sums of \$18,000, \$7,500 and \$9,000, after the death of said Sarah Ann Robinson, were in like manner demonstrative and not specific legacies.

The court is further of opinion that the bequest, after the death of the said Sarah Ann Robinson, of \$5,000 in Virginia State

stock is a general legacy of bonds or certificates of debt of the State of Virginia, of the nominal amount of \$5,000 on their face, and that the bequest of \$300 per annum to said Sarah Ann Robinson for life, is a bequest of the interest payable on said \$5,000 of bonds or certificates, and that in case of any failure of the State to pay interest on said bonds or certificates, the said annual sum of \$300 is not to be made up out of the general assets.

The court is further of opinion that the children of Sarah Ann Robinson, who were living at the death of the testator, took immediate vested interests in remainder, after the death of the said Sarah Ann Robinson, in the property mentioned in said clause; and that the share thereof, which so vested in Nannie M. Robinson, who intermarried with Edward T. Robinson, passed on her death to her said husband surviving, as her administrator. Therefore, it is decreed and ordered, that the

decree in each of these causes be re-
476 versed and annulled, *and that the appellants, in the first of the said causes, do pay unto the appellees therein, respectively, their costs by them expended in the cause; and that the executors of Nicholas Mills, deceased, out of the assets in their hands, pay to the appellant in the second cause his costs expended in the prosecution of the appeal here. And it is ordered that these causes be remanded to the said Circuit court for further proceedings, in accordance to the foregoing opinion and decree.

The decree in the third cause was as follows:

The court is of opinion that, while the court will take judicial notice of the fact, that on the thirtieth day of April 1863, the date of the transaction which is the subject of controversy in this cause, the treasury notes of the United States, and also the treasury notes of the Confederate States, were greatly depreciated in value, as compared with specie, it is not competent for the court to take judicial notice of the rate of depreciation of either currency at any particular time, nor of the extent to which, at any particular time, the treasury notes of the Confederate States were available, according to the common usages of business, for the payment of debts contracted before the war and payable in specie, or in current money of the United States, or for the purchase of property or otherwise.

The court is further of opinion, that inasmuch as the record in this cause contains no evidence upon these points, or either of them, it does not contain sufficient materials to enable the court to make a proper decision upon the questions in controversy. The court is therefore of opinion that the said Circuit court, instead of proceeding to make a decree upon the merits of the controversy in the existing state of the record, should have directed an enquiry by a commissioner, to ascertain what was, on the thirtieth day of April 1863, the value, as compared with specie, of the treasury notes

of the United States, and also of the treasury notes of *the Confederate States, and to what extent, at that time, the treasury notes of the Confederate States were, according to the common usages of business in Richmond, available for the payment of debts contracted before the war and payable in specie or in current money of the United States, and well secured on real estate, or for the purchase of property or otherwise, with leave to any of the parties to file additional evidence, as they may be advised, upon any matter involved in the cause, and that the said decree is therefore erroneous.

Therefore, it is decreed and ordered that the said decree be reversed and annulled, and that the appellees, the executors of Nicholas Mills, dec'd, out of the assets in their hands, pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And the cause is remanded to the said Circuit court for further proceedings to be had therein, in conformity with the foregoing opinion and decree.

Decrees reversed.

478 *Jones v. The Commonwealth.

October Term, 1868, Richmond.

1. Criminal Law—Failure to Indict—Habeas Corpus.—

In September 1867, J. is committed to be tried for a felony at the October term of the County court, and at that term of the court an information is filed against him, and he elects to be tried in the Circuit court and is remanded for trial in that court. He remains in jail until the April term of the court, 1868, no indictment having been found against him. The grand jury terms of the County court are November and June. At the April term of the Circuit court after the grand jury has been discharged, he applies for a writ of *habeas corpus* to obtain his discharge. HELD:

1. Same—Prisoner Remanded to Circuit Court—Indictment.—Having been committed for trial in the County court, that is the court in which he is held to answer, in the sense of the statute, though he had been remanded for trial in the Circuit court; and he should be indicted in the County court.*

2. Same—Statute—"Second Term"—What It Means.—The second term of the court, spoken of in the statute, is the second term at which a grand jury is directed to be summoned.

3. Same—Same—Same.—If it was so that the prisoner was held to answer in the Circuit court, that would not be until he was remanded to that court; and therefore, though the prisoner was committed for trial in the County court, before the September term of the Circuit court, that could not be one of the two terms spoken of by the statute.

4. Same—Same—Same—Term Must Be Ended.†—And if the November term in the County could be connected with the April term in the Circuit

*See the opinion, for the statute.

†See principal case cited in *Glover v. Com.*, 86 Va. 388, 10 S. E. Rep. 420.

court, still though the grand jury at the April term had been discharged before the application for the writ, the judge might have ordered another grand jury to be summoned during the term, and therefore the term could not be counted as one of the terms until it was ended.

5. Felony—Information of No Avail—Indictment.—

The filing of the information being unauthorized in the case of a felony, is of no avail, and an indictment must be found within the time prescribed by the statute.

479 *The prisoner was committed to the jail of the county of Rockbridge in September 1867 upon the charge of felony in stealing a horse, the property of Wm. M. Harvey of Botetourt. In April 1868, being still in the jail, he applied to the judge of the Circuit court of Rockbridge, for a writ of habeas corpus, in order to obtain his discharge. The facts are stated by Judge Moncure in his opinion.

J. B. Dorman & Letcher, for the prisoner.
The Attorney General, for the Commonwealth.

MONCURE, P., delivered the opinion of the court:

This is a writ of error to a judgment of the Circuit court of Rockbridge county, on a writ of habeas corpus. The plaintiff in error was committed to the jail of said county, under a warrant of a justice of the peace dated the 7th day of September 1867, for trial in the County court of said county, on the first day of October court 1867, for the offence of horse stealing. On that day an information was filed against him in the said County court for the said offence, and being thereupon arraigned, he demanded to be tried in the Circuit court of said county; whereupon he was remanded to jail for trial in that court. Afterwards, to wit: On the 18th day of April 1868, he presented his petition for a writ of habeas corpus to the said Circuit court, then in session, stating in the petition that three grand juries for the said county, had been impaneled and discharged during his imprisonment, one at the September term 1867 of the said Circuit court, one at the November term 1867 of the said County court, and the other at the then present term of the said Circuit court, and that no indictment had been found against him for the said offence by either of the said grand juries, and therefore claiming to be entitled to immediate discharge from further imprisonment.

The writ was accordingly awarded, and *the case coming on to be heard during the same term of the said Circuit court, to wit: On the 20th day of April 1868, upon the said writ and the return thereto, the court was of opinion that the petitioner was not illegally detained in the custody of the jailor, and therefore ordered that he be remanded to jail. A bill of exceptions was taken to the said opinion and judgment of the court, in which, among other things not material to be here mentioned, it is stated that "it was further

proved that a grand jury for Rockbridge county was impaneled at the term of this Circuit court, on Sept. 12th, 1867, after the commitment of said Jones as aforesaid, and that said grand jury was discharged without finding an indictment for said offence against said Jones; that a grand jury for said county was also impaneled at the November quarterly term of said County court and was also discharged without finding such indictment; that a quarterly term of said County court was held in March 1868, but under the order of said court made several years ago there was no grand jury at said March term; that the grand jury terms of said County court of Rockbridge county are held in the months of November and June; that a grand jury was impaneled at the present term of this Circuit court of April 13th, and was finally discharged several days previous to this petition, without finding any such indictment as aforesaid; and that therefore, the petitioner then claimed to be "entitled to his discharge from further imprisonment. But it appearing to the court that the attorney for the Commonwealth had, through misapprehension of the effect of the criminal procedure act of 1867, which had not then been expounded by the Supreme Court of Appeals, filed an information against the petitioner at the October term of said County court, and that said petitioner, when arraigned for trial on said information, had demanded to be tried thereon in this court at its present term; and this court having held

481 *the proceedings irregular, and refused to permit a trial on said information, and thereupon the court being of opinion that there had been no such failure to prosecute as under section 13, chapter 207 of the "act 'to revise and amend the criminal procedure,' passed April 27th, 1867, entitled the prisoner to his discharge;" therefore "the court ordered the petitioner to be remanded to jail." And this is the judgment to which the writ of error in this case was awarded.

This court has recently decided, that according to the true construction of chapter 207 of the Code, as amended and re-enacted by the act passed April 27, 1867, entitled "an act to revise and amend the Criminal Procedure" (Acts of Assembly 1866-67, pp. 915, 926, § 2), a person cannot be put upon trial for any felony unless an indictment shall have first been found against him therefor by a grand jury in a court of competent jurisdiction; and cannot therefore be put upon trial for a felony upon an information. *Matthews v. The Commonwealth*, 18 Gratt. 989. The Circuit court therefore rightly "held the proceedings irregular, and refused to permit a trial on said information." But did the court rightly hold "that there had been no such failure to prosecute as under section 13, chapter 207," aforesaid (Acts of Assembly 1866-'7, p. 928-9), "entitled the prisoner to his discharge." We are of opinion that it did.

That section, or so much of it as is ma-

terial to be here set forth, is in these words: "A person in jail on a criminal charge shall be discharged from imprisonment if a presentment, indictment or information be not found or filed against him before the end of the second term of the court in which he is held to answer, unless it appear to the court," &c. The attorney general argued, that an information was filed against the prisoner in due time, the requisition of the statute was strictly complied with, and he was therefore not
482 entitled *to his discharge. But we are clearly of opinion that the statute should be construed distributively—redendo singula singulis; and that "presentment" and "information" refer to misdemeanors only, while "indictment" refers to felonies also. A misdemeanor may be tried on a presentment or information, as well as on an indictment, while a felony can be tried on an indictment only; and that kind of accusation must be made within the period limited by the statute, which the nature of the offence requires. The offence in this case being a felony, it was therefore necessary that an indictment should be found against the prisoner "before the end of the second term of the court, in which he is held to answer, unless," &c. Had there been any failure or default in this respect when the judgment in this case was rendered?

It is true that no indictment had been found against the prisoner; but is it true that there had been two terms "of the court in which he was held to answer," within the true intent and meaning of the statute? We think not.

The court in which he was held to answer was the County court, and that is the court therefore in which the indictment ought to be found. Had there been two terms of that court, within the meaning of the statute, when the judgment in this case was rendered? We think that the "term of the court," in the meaning of the statute, is a "grand jury term," at which only an indictment could be found. The record shows that there are during a year but two grand jury terms of the County court of Rockbridge, which are held in the months of November and June, and that one only of them was held, to wit: in November, after the commitment of the prisoner for trial in October 1867, and before the judgment in this case was rendered in April 1868. It follows, therefore, that there had not been
483 two terms of the court in which he was held to answer, *within the meaning of the statute, when the said judgment was rendered.

This construction of the statute may certainly be the occasion of much delay and inconvenience to a prisoner in obtaining his discharge for want of prosecution. But if it be, as we think, the proper construction, it must prevail, notwithstanding the objection *ab inconvenienti*. A literal construction of the statute, which would embrace every term of the court, whether it be a grand jury term or not, might entitle a

prisoner to be discharged from imprisonment before there had been any term at which he could be indicted; whereas, the plain reason of the statute is, that the prisoner is entitled to his discharge on account of the default of the prosecutor in twice failing to have an indictment found, when it was in his power, and he ought to have done so. Such a construction is therefore wholly inadmissible. The inconvenience of delay arising from our construction may be remedied by an increase of the grand jury terms of the County court, which the court itself is authorized to order. Chapter 206, § 1, of the Code, as amended by the act of April 27, 1867, Acts of Assembly 1866-'7, p. 925. Though a better remedy, perhaps, would be by an amendment of the law requiring the clerk of the County court, when a person is held to answer therein for felony, forthwith to issue process to the sheriff, commanding him to summon a grand jury to attend the next term of the court, unless it be a grand jury term, in which case, of course, such process will be unnecessary.

But it is argued, that while, when the said judgment was rendered, there had not been two grand jury terms of the County court there yet had been one term of the Circuit court, to wit: on the 12th of September 1867, which was after the commitment of the prisoner, and one grand jury term of the County court, to wit: in November 1867; and also a grand jury
484 had been *impaneled and discharged at the same term at which, but before, the said judgment was rendered; that an indictment might have been but was not found against him on either of these three occasions; and that therefore he is entitled to be discharged under the statute.

We have already shown that the court in which he was held to answer was the County court, which therefore is the court in which the indictment is to be found, in the meaning of the statute. It cannot be said that he was held to answer in both courts, County and Circuit; and that there having been a term of the latter and a grand jury term of the former, at neither of which he was indicted, he is therefore entitled to his discharge. If it can be said, which we do not admit, that after the October term of the County court when the prisoner demanded to be tried in the Circuit court and was remanded for that purpose, the Circuit court was thenceforward the court in which he was held to answer in the meaning of the statute, still it was not such court at the previous term in September, which therefore cannot be one of the two terms at which a failure to find an indictment would entitle the prisoner to his discharge. And even if it could be one of such terms, the next term of the Circuit court, to wit, the April term 1868, had not ended when the said judgment was rendered. And though a grand jury had previously, during that term, been impaneled and discharged, yet it was competent for the court, during the same term, to order another grand jury

to be summoned to attend at that term. Code, chapter 206, § 10; Acts of Assembly 1866-7, p. 926.

In every view of the case, therefore, we think there is no error in the judgment, and that it be affirmed.

Judgment affirmed.

485 *Philips v. The Commonwealth.

October Term, 1868, Richmond.

1. **Criminal Law—Murder—Jurisdictions of Circuit Court.**—On the 24th of June 1867 P. was committed by a justice of the peace, for examination, upon a charge of murder. The examining court commenced on the 2nd of July, and sent him on for trial before the Circuit court, of the county. At the October term 1867, of the Circuit court, he was indicted for murder, and when he was arraigned he tendered a plea to the jurisdiction of the Circuit court. The court had jurisdiction to try the prisoner.

2. **Criminal Proceedings—Objection to Jurisdiction.***—Though the plea tendered by the prisoner was informal and properly rejected by the court, yet the objection to the jurisdiction, being a mere question of law, however made, whether by suggestion or motion *ore tenus*, should be considered and decided by the court.

3. **Statute—Repeal of Law as to Examining Courts—Prospective.†**—The act passed 27th April 1867, Sess. Acts 1866-67, ch. 118, p. 915, to revise and amend the criminal procedure, provided that it should go into operation on the 1st of July 1867, and it repeals the law in relation to examining courts. Still a prisoner committed on a charge of murder on the 24th of June 1867, must be committed for examination; and it is proper to proceed, under the former law, in the examination of the prisoner before an examining court, and his trial before the Circuit court.

***Criminal Proceedings—Objection to Jurisdiction—How Raised.**—In *Ryan v. Com.* 80 Va. 386, the court said: "This instruction raises the question of the jurisdiction of the corporation court of Roanoke City to try and determine the offence, which is charged in the indictment to have been committed on the 27th day of January, 1884. Such question of jurisdiction may be appropriately raised by a motion for instruction; by demurrer; by motion in arrest of judgment on general issue; or by writ of error; the evidence showing that the deceased died on the 27th of January, 1884, as alleged in the indictment. *Harris' Cr. Law*, 306; *Philips' Case*, 19 Gratt. 519."

†**Statute—Repeal of Law as to Examining Court.**—In *Chahoon's Case*, 20 Gratt. 733, the court, at p. 785, citing the principal case as authority, said that the only change made by the repeal of the law providing an examining court was, that after the repeal the commitment was for *trial* whereas before it was for *examination*.

Statutes—Prospective.—"It is a sound rule of construction, that a statute should have a prospective operation only, unless its terms show clearly a legislative intention, that it should operate retrospectively." The court, in *Tennant v. Brookover*, 12 W. Va. 343, citing the principal case. See also, on this point, *Richmond v. Henrico Co.*, 83 Va. 204, 2 S. E.

4. **Judge—Authority over Jury—After Daily Adjournment.**—The authority of a judge who presides at a criminal trial, extends over the jury not only during the day whilst they are in court, but after the adjournment for the day; and it is not illegal or improper for the judge to take charge of a juror in the temporary absence of the sheriffs to whom the jury has been committed.

5. **Separation of Jurors from Control of Officer—Prima Facie Vitiates Verdict.**†—Separation of a juror out of the custody and control of the officers having charge of the jury, is *prima facie* sufficient to vitiate the verdict; and it is incumbent on the commonwealth to refute that presumption, by disproving all probabilities or suspicions of tampering.

6. **Statute—To What It Applies.**§—The act, Code, ed. of 1860, ch. 16, § 18, upon the construction of statutes applies to cases of repeal of statutes in express terms, as well as to repeals by implication; and it preserves the rights which are inherent in the proceedings; and the proceedings are to conform *to the new law, only when the change would not affect or impair these rights; and this whether the change in the proceedings is criminal or civil.

At the October term of the Circuit court of Henrico county for 1867, James Jeter Philips was indicted for the murder of his wife, Mary Emily Philips. After the prisoner was arraigned, and was called upon to answer the indictment against him, he tendered a plea to the jurisdiction of the court, because he says "that by the law of the land, and the statutes in such case made and provided, this honorable court hath no jurisdiction for the trial of said indictment, protesting that he has not, in any manner whatsoever, demanded or assented to such trial, and that he has never been in any manner before this court until the finding of said indictment; and this he is ready to verify," &c. This plea the attorney for the Commonwealth moved the court to reject, upon the ground that it did not state what court had jurisdiction to try the accused for the offence charged, and for other grounds apparent in said plea; and the court sustained the motion; whereupon, the prisoner excepted.

Rep. 26; Murdock v. Franklin Insurance Co., 33 W. Va. 407, 10 S. E. Rep. 777; Stewart v. Vandervort, 34 W. Va. 524, 12 S. E. Rep. 736; Fowler v. Lewis, 36 W. Va. 112, 14 S. E. Rep. 447; Duval v. Malone, 14 Gratt. 24.

†**Separation of Jurors from Control of Officer—Prima Facie Vitiates Verdict.**—To the same effect as the fifth headnote, see Barnes' Case, 92 Va. 803, 23 S. E. Rep. 784; State v. Cartright, 20 W. Va. 40; Flesher v. Hale, 22 W. Va. 49; State v. Harrison, 36 W. Va. 73, 13 S. E. Rep. 983; Bennett v. Com., 8 Leigh 745. See also, Epes' Case, 5 Gratt. 676; Tooele v. Com., 11 Leigh 714; Jones v. Com., 79 Va. 218.

§**Statutes—Penalties, Forfeitures, Punishments—Applies to Civil and Criminal Cases.**—The proposition laid down in the principal case by RIVES, J., that the enumeration "penalties, forfeitures and punishments" is not to be restricted to criminal cases but refers as well to civil cases, has been expressly sustained in Mosby v. St. Louis Mutual, etc., Co., 31 Gratt. 634, and *foot-note*.

After the prisoner had pleaded not guilty, he, by his counsel, moved the court to quash the venire facias upon which the jury, about to be called, was summoned. The writ bore date the 30th day of September 1867; was issued by the clerk of the County court of Henrico, and directed to the sheriff of the county, directing him to summon twenty-four freeholders of the county to appear at the next October term of the Circuit court for the trial of the prisoner. The attorney for the Commonwealth offered in evidence the record of the examining court, by which the prisoner had been sent on for trial. From this record it appeared that on the 24th of June 1867, the prisoner had been committed to the jail of the county by a justice of the peace of Henrico county, that he might be examined before the
487 *County court of said county, for the murder of Mary Emily Philips. That the said County court met for the trial of the prisoner on the 2d of July 1867, when the trial commenced, and progressed from day to day until the 13th of the month, when the County court sent him on for trial to the Circuit court of the county. The prisoner objected to the introduction of this record, but the court admitted the evidence, and overruled the motion to quash the venire facias. And the plaintiff excepted to both the opinions of the court.

After a very protracted trial, the jury could not agree upon a verdict, and were discharged by the court, and the case was continued. It again came on for trial at a special term of the court, which commenced on the 15th of June 1868, and progressed until the 9th day of July following, when the jury found the prisoner guilty of murder in the first degree, as charged in the indictment.

Several exceptions were taken by the prisoner to rulings of the court; but only one of these was the subject of consideration in this court. This was upon a motion for a new trial, upon the ground of irregularity in the treatment of the jury, and that after the evidence had been fully heard, and before the verdict had been rendered, there had been a separation of said jury, and the absence of one of them from the control and custody of the officers having them in charge.

It appears from the record, that the jury was made up of persons brought from the counties of Albemarle and Alexandria. When the court adjourned for the day, during the trial, the jury were committed to the charge of the high sheriff and of two of his deputies, who were sworn each day. During the adjournment of the court, the jury were kept in a room in the Exchange hotel, where the judge was staying. On the 3d of July one of the jurors was unwell, and on the morning of the 4th of July
488 the judge called at the jury room *to enquire after him. A juror, Thomas A. Walters, complained to the judge that the excessive heat had produced a sick headache, and asked his permission to sit in the open air on the porch. This was

granted, and the juror proceeded in charge of John Smith, one of the deputy sheriffs, to the back porch of the hotel, and whilst they were sitting there the judge took a chair near them. The hotel is built on four sides of a square, with a large vacant space in the centre, and the portico runs along three sides of this square; the juror and the sheriff were seated some fifty yards from the room where the jury were kept, and there were other persons sitting about on the portico, but nothing was said by them.

A short time after the judge took his seat, as before stated, a portion of the jury came with W. M. McGruder, another sheriff, who complained of being lame, and requested Smith to take charge of those who desired to take a walk. Smith accordingly went with these jurors, and the judge directed McGruder to return to the jury room, where he had left three of the jurors locked up, saying that he would take charge of Mr. Walters; and McGruder accordingly returned. In a few minutes thereafter—the juror estimated them at from three to four—the judge went with the juror, Walters, to the jury room. No conversation in relation to the trial took place between the judge and the juror; and the prisoner, through his counsel, says in his petition for a writ of error to this court, that he does not mean in the slightest degree to impugn the integrity of the judge, for whose fairness and impartial candor he entertains the highest respect. He is advised, however, that an error in law was committed, and he so assigns it for error.

The court having sentenced the prisoner in pursuance of the verdict, he applied to this court for a writ of error; which was awarded.

489 *The case was argued by Guigon, M. Johnson and Crump, for the prisoner; and the Attorney General and Young, for the Commonwealth.

Guigon for the prisoner:

In June 1867, James Jeter Philips was arrested in the county of Henrico, charged with the murder of his wife. In the month of June, he was examined by a single magistrate and sent on for examination to the next County court, whose term commenced on the 1st Monday of July, that being the 2nd day of the month. His examination before the County court commenced on the 2nd of July and was continued until the 13th, when he was remanded by the examining court to the next term of the Circuit court, which met in October. On the 26th of October an indictment was found, and to this indictment, he tendered a plea to the jurisdiction, which set forth that he had not demanded or assented to be tried in that court, and had never been before the court until the finding of the indictment. This plea, the court below rejected, upon the ground that while denying its jurisdiction, the plea set up no other jurisdiction. The prisoner thereupon demurred generally to the indictment and each count, and the court overruled the demurrers. He then

moved to quash the indictment, which motion the court also overruled. After pleading to the indictment he moved the court to quash the venire facias, and the attorney for the Commonwealth offered to supplement the record with the record of the examining court; which was objected to, and objection overruled, the record of examining court admitted, and motion to quash the venire facias overruled, and exception taken.

At the October term, the jury empaneled failed to agree, and the case was continued to a special term in June 1868, when the accused was convicted.

After the verdict, a motion for new 490 trial was made *on the ground of separation of jury and irregularity in their treatment. The ground of the motion for new trial was, that after the evidence in the case was closed and the argument had begun, one of the jurors who were lodging at the same hotel with the judge, complaining of sickness, asked permission of the judge, who had gone to the room where the jury were, to sit in the open air in the porch of the hotel; that the juror went into the portico with one of the deputy sheriffs, and while they were sitting there, the judge took his seat near them, the deputy sheriff returned to the jury room, leaving the juror and the judge in conversation together, where they remained for about five minutes, when the juror returned to the jury room. It appeared by the affidavit of the jurymen that nothing was said about the trial except a compliment by him to the speech of one of the counsel. The place where the judge and jurymen were sitting, was a place frequented by the guests and visitors of the hotel, and there were several persons sitting around.

1st, as to question of jurisdiction. By Sess. Acts 1866-7, pp. 915-946, the whole system of criminal proceedings is changed. Before those acts went into operation (1st July 1867), all felonies were examined by an examining court and tried by the Circuit court. By these acts, examining courts were abolished, § 1, p. 915; and by § 1, p. 931, it is expressly declared that trials for felony shall be in a County or Corporation court. They further provide, that the accused, when before the County court, may elect to be tried before a Circuit court, p. 931. There are also some exceptional cases, where it is provided the Circuit court may try, but they do not apply to the case at bar. By § 16, p. 929, it is also provided that when a prisoner is indicted before a Circuit court by a grand jury, the proceedings must be certified to the County court.

By the constitution of this State, 491 the Circuit courts *have such jurisdiction only as is given them by the legislature.

By the provisions of the law just cited, the Circuit courts are disrobed of the power to try felonies, except: 1st. When pending in court on the 1st July 1867; 2nd. When the prisoner elects to be tried there. These are the only classes of cases in which felo-

nies can be tried by the Circuit court since the 1st of July. The record shows: 1st. That this case was not pending in the Circuit court on the 1st of July, or until October. 2nd. The plea in abatement and his affidavit show that he never elected to be tried in the Circuit court.

If then, the Circuit court had no jurisdiction to try this case, the only remaining question to be considered, is: has the question of jurisdiction been properly raised, and is it properly before this court?

We maintain upon authority that the question of the jurisdiction of a court to try a criminal case may be raised in any of the following forms: 1st. By motion to quash the venire facias; 2nd. Demurrer to the indictment and motion to quash; 3d. Plea to jurisdiction; 4th. General issue; 5th. On motion for a new trial; 6th. On motion in arrest of judgment. In fine that the authorities fully maintain the proposition that whenever it appears in any manner in a criminal cause, that the court has not jurisdiction, the question of jurisdiction arises and will be considered and decided, and no technical presentation is necessary.

In this case, the question of jurisdiction first arises on the motion to quash the venire facias, sent forward by the clerk of the examining court to the Circuit court. It may be objected that this motion to quash the original venire facias was on the first trial. The answer to this is, that it stood at the threshold of all trials, shewing that the case was sent up from an impossible tribunal—an examining court, which had been abolished—for trial in a court from which the authority to try had
492 been expressly *taken away by statute. It was not like a bill of exceptions taken during a trial. It was upon a necessary preliminary to any trial and to all trials.

Objection to jurisdiction, if apparent on record, may be taken advantage of at any stage of proceedings. *Martyn v. Com.*, 1 Mass. R. 347; *Lawrence v. Smith*, 5 Mass. R. 362; *State v. Turner*, Wright's R. 21; *Humphrey v. State*, Minor's R. 64; *Capron v. Van Noorden*, 2 Cranch's R. 126; *Killand v. Capriess*, 2 Dall. R. 368.

2d. On demurrer to indictment, where a court is of limited, local or inferior jurisdiction, the face of the pleadings must show the jurisdiction. *Kemp v. Kennedy*, 5 Cranch's R. 172; *Albre v. Ward*, 8 Mass. R. 86; *Powers v. People*, 4 Johns. R. 292; *Den v. Turner*, 9 Wheat. R. 541; *Hill v. Pride*, 4 Call 107; *State v. Hardy*, 2 Mass. R. 303. In the last mentioned case the prisoner was arraigned before a single judge, the statute requiring him to be heard and tried before three judges. There was no plea entered except "not guilty;" only a memorandum of the fact that one judge was present at arraignment by the clerk on the indictment. The Supreme court set aside the judgment.

In *Capron v. Van Noorden*, it was decided that a court of limited jurisdiction must see that it has jurisdiction. Unless it appear,

the Supreme court will reverse, even on application of the plaintiff who sought its jurisdiction. In *Lord Coningsby's case*, 9 Mod. R. 95, where there is limited jurisdiction, demurrer will lie. In *Queen v. Serra et als.*, 61 Eng. C. L. R. 53, where there was no plea to jurisdiction or in abatement, after full discussion by common lawyers and civilians, the court held that the Stat. 7 & 8 Vic. ch. 2, which gave the courts jurisdiction of felonies committed at sea, did not authorize a conviction for homicide committed by a foreigner on a vessel captured as a slaver.

3d. Plea to jurisdiction. It is objected that this plea is bad because it does not show jurisdiction elsewhere.

493 *This doctrine only applies to the Courts of Westminster, which, says Bacon, of the King's Bench, "hath so sovereign a jurisdiction that an act of parliament appointing all crimes of a certain denomination to be tried before certain judges, doth not exclude the jurisdiction of this court, without express words." Bacon's Abr., Court of K. B. vol. 2, 690. In *Doctrina placitendi* 295, "Courts of Westminster must ever be esteemed the Superior courts of the realm; and the supposition is that every thing is done within their jurisdiction unless the contrary especially appears. On the other hand not any thing shall be intended within the confined jurisdiction of an inferior court but what is expressly alleged. In the *Earl of Derby v. Athol*, 1 Ves. sr. R. 202, Lord Hardwicke said: "Nothing is out of the jurisdiction of this court unless another jurisdiction is shown; but in an inferior court of limited, local jurisdiction, nothing shall be intended to be, which is not alleged to be within its jurisdiction." So in *Bishop of Sodor v. Earl of Derby*, 2 Ves. sr. 338, Lord H. referring to his decision in *Athol v. Derby*, says, "where a plea to the jurisdiction is to a court of general jurisdiction, you must show where the jurisdiction is, but if it is an inferior court, you need only plead thereto and not show where it is." *King v. Hon. Robt. Johnson*, 6 East's R. 583, follows the last named cases.

Upon these authorities (and many more might be cited) if the Circuit court is a court of inferior, limited, local, or circumscribed jurisdiction, it is not necessary to show another jurisdiction, and the plea which simply denies the jurisdiction is good. By the constitution, the jurisdiction of the Circuit court is not inherent—not original—not absolute, but to be prescribed by law. Such jurisdiction as the law gives it, it has, and no other. Whenever the law changes, its jurisdiction is modified, enlarged or diminished. What was its jurisdiction after the 1st of July 1867, limited or unlimited—general or special?

494 *The law, after that date, made its jurisdiction limited and special. The same power that had given it jurisdiction, had taken away its jurisdiction and given it to another court. The jurisdiction which this court assumed had been given by per-

empty language to the County court. This plea, therefore, contains all the requirements of the law and it was error in the court below to reject it.

4th. The courts have also held that where there is no jurisdiction, "not guilty," or plea in bar is sufficient. *Nabob of Carnatic v. E. India Co.*, 1 Ves. jr. 372; *West v. Turner*, 6 Ad. & El. R. 614.

2nd. Upon the question of separation of jury and power of judge.

The judge who tries a case has no power by statute over the jury. The sheriff has by law control of the jury.

Riotous conduct in the presence of a judge, during recess of court, is no contempt. *Stuart's case*, 2 Va. Cas. 320.

In *Dandridge's case*, 2 Va. Cas. 408, it was held to be contempt to offer insult to the judge for an opinion expressed in a case tried by him and on the docket for trial again. All the judges base their opinion upon the public policy, which requires that the judge shall be unbiased and free to decide. Judge Dade in his opinion declares that *Com. v. Stuart* decides that in intervals of adjournment, during the term, the court is not to be regarded as sitting, so as to subject one to the process of attachment for such conduct to the judge as would have amounted to contempt during the session of the court.

In *Sargeant v. Roberts*, 1 Pick. R. 337, the Supreme court of Massachusetts decided, unanimously, that "when the court is adjourned, the judge carries no power with him to his lodgings, and has no more au-

thority over the jury than any other person." This was a civil case, and the court say "it is impossible to complain of the substance of the communication made by the judge to the jury: and, nevertheless, they reversed the judgment of the court below and set aside the verdict.

In *Cochran v. State*, 7 Humph. (Tenn.) R. 544, the facts attending the going at large of the jury are not stated; but the court say "too much strictness cannot be used to keep a jury charged with the life and liberty of a citizen, from mingling with the community during their deliberations; more especially where there is any excitement against a prisoner."

In *Jones v. State*, 2 Blackf. (Ind.) R. 475, the verdict was set aside, and a new trial granted, because the record did not show affirmatively, that during adjournment from day to day the jury had been placed in the custody of the proper and sworn officers.

In *McCann v. State*, 9 Smedes & Mar. R. 465, held that if the jury, or any part of it, are with an officer not specially sworn, or have intercourse with third persons, the possibility of influence must be wholly negatived.

In *Moody v. Pomeroy*, 4 Denio R. 115, (N. Y.) a civil case, the judge went into the jury room while they were deliberating, and gave instructions, which were correct, but without express consent of parties; though they knew he was going and did not object.

New trial was awarded. So in the case of *Taylor v. Betsford*, 13 John. (N. Y.) 487.

Hines v. State, 8 Humph. R. (Tenn.) 597, the fact of a separation of a juror being established, the possibility of tampering exists, and prima facie the verdict is vicious; and the affidavit of the juror is not sufficient to show that he had not been tampered with. In this case, the jurors had not been sworn, but had been selected and placed in the hands of an officer. The juror swore he was taken suddenly ill, and conversed with no one; and when the officer found him immediately afterwards he was ill. But the court set the verdict aside for this separation.

Wesley v. State, 11 Humph. R. 502, decides that in case of capital felony, the judge has no power to authorize separation of the jury even with consent of the accused.

It seems that by the New York statutes, constables are required to take charge of the juries in civil cases. A person other than a constable being sworn in to take charge of the jury by the judge, the Supreme court (*Staley v. Barhite*, 2 Caines' R. 221), set aside the verdict on that ground. In *State v. Shippen*, Drayton's R. 169, the Supreme court of Vermont set aside the verdict because of the temporary separation of a juror from his fellows. In *Hare v. State*, 4 How. Miss. R. 187, the Supreme court of Mississippi, Justice Shakey delivering the opinion of the court, set aside a verdict because a person not sworn, was permitted to remain in the jury room for a few minutes in the absence of the sheriff, though it appeared nothing was said about the case.

When there is a temporary separation of a jury, it is not necessary for the accused to offer any further evidence; the verdict will be set aside because there is a possibility of tampering.

Chief Justice Shaw, delivering the opinion of the Supreme court of Massachusetts in *Commonwealth v. Roby*, 12 Pick. R. 406, 519, after commenting on all the authorities, says: "The result of the authorities is, that when there is an irregularity which may affect the impartiality of the proceedings," as "when the jury have improperly separated themselves or have had communications not authorized, or have been exposed to the effect of influence, there, inasmuch as there can be no certainty that the verdict has not been improperly influenced, the proper and appropriate mode of correction or relief is by undoing what is thus improperly, and may have been corruptly, done."

Following up the Virginia decisions, it was held in Mississippi (*Organ v. State*, 26 Miss. R. 78), that where a juror separated himself for a few minutes from his fellows, this of itself vitiates the verdict; and the affidavit of the juror is inadmissible to justify his conduct during his absence.

Eastwood v. People, 3 Parker's R. 25, relies upon *McCaul's case*, and after full examination of all the authorities, lays

down the rule that any separation of the jury is sufficient to vitiate a verdict, unless it is shown by incontrovertible testimony, that no injury could have been done; and the oath of the juror is not to be received for that purpose.

In California, where by statute the jury may separate by leave of court, it was held, *People v. Backus*, 5 Calif. R. 275, that any separation of the jury, without such leave, vitiated the verdict; and the affidavit of the juror cannot be received to purge his conduct.

The Supreme court of Minnesota, *Hoberg v. State*, 3 Minn. R. 262, decided that after the jury have retired to consider of their verdict, the judge has no more right than any other person to communicate with them, without the consent of the accused and his counsel; and this even where the communication from the judge to the jury was merely to inform them that if they wished any information on matters of law they should come into court and ask for it. Because of this communication the verdict of the jury in the case was set aside.

In Virginia, *McCaul's case*, 1 Va. Cas. 272, the General court decided that a temporary separation of a juror, though his affidavit showed that there was no tampering and no conversation about the case, vitiated the verdict; and it was also held that where a juror visited his family in charge of the officer and went up stairs to see his sick child for a few minutes, though

he testified that nothing was said during his absence *about the trial,

that this was proper cause for setting the verdict aside. In *Mills' case*, 7 Leigh 751, the jury brought in an imperfect verdict and were dismissed, but immediately called back before they had left the court room, except one who had gone a short distance with the sheriff; and they then returned and corrected their verdict; this was ground for new trial.

On the strength of these authorities we submit—

1st. That except while the court is in session, the judge has no more to do with the jury than any indifferent person.

2nd. That if there be a separation of a juror from his fellows, not in charge of an officer sworn to keep him in charge, so that there is a possibility he may have been tampered with, it vitiates the verdict, unless by independent testimony it is shown that nothing wrong was done during such separation.—That there was a separation in this case of a juror from his fellows, and from the proper and sworn officers, is clearly proved; and there is no evidence of what transpired during that separation, except the affidavit of the juror himself, who states that the argument of one of the counsel was alluded to. If this be not good ground for a new trial, then this court must not only disregard the adjudicated cases from the highest tribunals of nearly every State of the Union, but must disregard the former decisions of our own highest court—decisions which have been followed and canonized as

law by the Supreme courts of many States.

Young, with whom was the Attorney General, for the Commonwealth:

The first and most difficult question which is presented in the consideration of this case, is the question of jurisdiction. And while it might be well contended, on behalf of the Commonwealth, that in no one of the numerous modes, in which 499 the point is sought to be *raised by the prisoner, has it been so presented that this court can consider it; nevertheless in view of the fact that the court has, particularly in its recent decisions, evinced a strong inclination to consider and give full weight to objections to the jurisdiction in criminal cases, no matter how or when raised, the case will be treated in the argument as if the record of the examining court, upon which alone the question of jurisdiction can be raised, was fully open to the inspection of this court at any and all of the stages of the prosecution in the court below.

The solution of the question depends upon the proper construction to be given to the act of April 27th, 1867, entitled "an act to revise and amend the Criminal Procedure." *Sess. Acts of 1866-'7*, p. 915. Was this act intended to be prospective in its character, and to apply to prosecutions after the 1st of July 1867, the day on which it went into operation; or was it intended to apply in all its provisions to prosecutions originating as well before as after that day?

In this case, the prisoner was arrested in the month of June, and had his examination before a justice, who determined, on the 24th day of June 1867, to commit for further proceedings. As the law was on that day, the justice had no alternative but to send him to an examining court; and there not being time to call a special session of such court, he was necessarily remanded for examination before the County court at its next regular term, which commenced on the 2d of July: and he acted accordingly. From the date of this commitment, his case was no longer within the power of the justice, but was pending in the examining court. See *Hamlett v. Commonwealth*, 3 Gratt. 82.

And the question presented is, whether the repeal of chapter 205 of the Code, authorizing examining courts, applies to this case, so as either to destroy the prosecution entirely at that stage, or to require 500 that it be thereafter *proceeded with, if at all, under the act of the 27th April 1867. Now this is a question of legislative intention, and this intention, according to the cardinal rules of construction, is the great point to be arrived at. No law will be so construed as to defeat the legislative intent; but to carry it out. The purposes of this act, as declared in its title, were "to revise and amend the Criminal Procedure." Its avowed object was the promotion of justice; to recognize and punish crimes; not to repeal the statutes concerning them. It recognized an existing status of criminal proceedings, which it

sought to revise and amend, for the furtherance or supposed furtherance of justice. From its very nature it must be regarded as a prospective statute. Its operation was postponed until a future day. It recognized an existing state of criminal proceedings, which, until it went into active operation, its framers must have known and expected would furnish the rule of proceeding against persons charged with crime. Nor could they have rationally expected any change to take place in these proceedings until the new law went into effect. They must, necessarily, have known that criminal proceedings would be in existence and progress in many cases and in various stages, at the time fixed upon for the new law to go into operation; and it cannot be presumed that it was the intention of the legislature by this new act to nullify all or anything that might have been done, and legally done, in any case under the old law towards the trial of a person charged with crime. And if such a result is produced by any given construction of any portion of the new law, that fact of itself would afford the very strongest reason for not adopting any such construction.

An examination of the structure of the new act will render it manifest that the changes proposed were intended to be prospective in their character and operation.

Such is, moreover, the general rule of construction. *1 Bishop on Criminal Law, §§ 66 and 170; Sedgwick on Stat. and Const. Law, pa. 190, 191. The proceedings for the prevention of crime and for the arrest of a person charged therewith, are the same as those contained in the former law. The first step, however, taken by the justice looking to the trial of the accused, is, in cases of felony totally changed. The commitment, which before was for examination, is under the new law a commitment for trial. The examining court which was under the former law a step between the commitment by the justice and the trial of the accused, fell as a necessary consequence of the change in the form of commitment. It is no longer a commitment for examination, but for trial. It is thus apparent that this new system must have contemplated future prosecutions, at least from the period of commitment. It could not have been intended to apply to those prosecutions in which the very first step taken by the justice was in a totally different direction. The prosecutions intended to be embraced within it, were those in which the commitment could, under the law in force at the time, only be a commitment for trial. Hence, the abolition of the examining court could only with reason be applied to the class of prosecutions in which the commitment was and could only be for trial; in other words to prosecutions in which the commitment was made under the new law and after it went into effect on the 1st July. For to apply this repeal of the examining court to cases of prior commitment for the avowed object of examination, would be to make the legislature intend

to nullify the prior act of commitment, and declare it inoperative as to its ultimate object. When, therefore, the repeal of the charter concerning examining courts, went into effect on and after the 1st July 1867, it so went into effect as a part and as a part only of the new system of commitment for trial in the County court; and such repeal must be intended to apply to those cases, and to those cases only, which could have been legitimately initiated by a commitment for trial; in other words to those cases only in which the commitment took place after the new law went into effect, or after the 1st July 1867. It thus would appear that this repeal had no application to or effect upon the functions of the County court in cases where those functions had been called into existence legitimately by a commitment for examination made prior to the 1st July 1867; and such repeal could not, therefore, suspend or otherwise affect the exercise of those functions in the present case. That court, so far as the present case is concerned, which was then pending in it, remained in existence notwithstanding the repeal, and properly convened and proceeded to examine the accused.

The provisions of § 18, chapt. xvi., p. 115, of the Code of 1860, concerning the construction of statutes, fully harmonize with and sustain this view. Criminal prosecutions, as well as civil suits, are embraced within its manifest scope and purpose. It contemplates the existence of former proceedings, inasmuch as it speaks of "proceedings thereafter had," of convictions and judgments thereafter to be obtained. It plainly intended to leave, unaffected by the repeal of any law, all offences committed before the law passed, all "acts done, rights accrued, or claims arising" before the new law takes effect. These it intends to preserve, not to impair and defeat.

By reference to the Report of the Revisors, 1847-'8, p. 75, § 21, it will be seen that this section, as originally reported by them to the legislature, contained after and in connection with the words, "save only that the proceedings thereafter had," the words "in any prosecution, suit or proceeding, whether brought before or after the new law takes effect;" and thus demonstrating that the section intended to refer to and preserve *all proceedings in prosecutions taken under the old law. These last words are omitted in the section as it finally passed; but manifestly omitted in pursuance of the system of brevity attempted by the Code, and because their omission did not affect the meaning of the section. In the note of the revisors to this section, as proposed by them, it is declared that their object was to avoid the repetition of the repealing and saving clauses which occur in the Code of 1819, by enacting a general clause applicable to all statutes. So the effect of this section upon the Code, and upon all future amendments of it, is the same as if its provisions were repeated at the end of every new statute. The court is

referred upon this point to Acts of 1847-'8, ch. 27, p. 164; Code of 1849, ch. 216, § 2; Rev. Stat. of Massachusetts of 1836, p. 800, ch. 146, and notes; Genl. Stats. Mass. of 1860, p. 880.

But it is insisted on the other side, that under the above provision, the proceedings in this case should have conformed to the new law, after the 1st of July 1867. While it may be true that this conformity should take place "so far as practicable," yet the question arises was it practicable in the present case? On the 1st July, when the new act took effect, it found the prisoner's case pending in the examining court, upon a perfectly valid commitment for examination, under the laws in force at the time it was made. Now, by what process can this commitment for examination under the existing law, be converted subsequently into a commitment for trial under a law not in force at the time it was made? Would not this be practically to invalidate a perfectly valid act of commitment for examination, and to enable the justice to commit for trial under a law which had not gone into effect at the time of commitment? Thus the new law would be made, as to this prosecution, to take effect before the 1st of July

504 instead of on that day. Moreover the very character *of the examining court forbade any such moulding of the prosecution. It was a special tribunal with peculiar functions. It might be convened independently of the regular term of the County court, and consisted of a special number of justices, with a jurisdiction of a peculiar character. After a discharge by it, the prisoner could not be thereafter questioned or tried for the offence. By what process then, could the prisoner, without his consent and without any waiver on his part of its advantages, have been transferred to the County court for trial? Would not such a step on the part of the Commonwealth have furnished just ground of complaint to the prisoner, and have probably been a fatal blow to the whole prosecution? The requirement of conformity to the new law, "so far as practicable," in its very terms contemplates a condition of things in which such a conformity is not practicable. There was, therefore, no course open for the Commonwealth, particularly in the absence of any motion or objection by the prisoner in the examining court, but to treat the case as unaffected by the new law, and to proceed with the examination.

The construction contended for by the counsel for the prisoner is liable to the objection that under it the act which went into force on the 1st July 1867, abated all prosecutions then pending at any stage in an examining court. Cases may have been pending in examining courts at the preceding May or June terms, indeed even before April 27th, 1867, the date of the passage of the act, which on account of the absence of witnesses, or other sufficient cause, had been continued from time to time without the examination having taken place. The day the new law took effect might have

found an examining court in actual progress of the examination of an accused. In all such cases the prisoner would have been actually at the bar of the examining court. The construction contended 505 for *would in all such cases destroy the prosecution by abolishing the court in which the case was pending, deprive the prisoner of the benefits of the examining court, undo all that had been properly done by the Commonwealth towards his trial, and require and subject the prisoner to a prosecution de novo! There would thus be practically an interregnum established for the benefit of crime; an interval between the old and the new systems, during which felons could be effectually proceeded against under no law; but in which the justice would be compelled to resort to such devices as that suggested in the petition, the adjournment of the case from one system to the other, from the 24th June to some period in July, though on the first named day he had completed a protracted examination and was ready to commit the prisoner; thus, for the purposes of this construction, perverting the power of adjournment given to him, to purposes foreign to those for which it was obviously conferred. This court will not easily be persuaded that the legislature contemplated a state of things like this; or that such a result is the necessary consequence of the change in the law of criminal procedure which they have made.

Perry's case, 3 Gratt. 632, cited by the other side, is not analogous to the case at bar. The change in the mode of summoning and empanneling a jury made during the pendency of the prosecution, in no wise affected any of the previous steps taken in the case. It did not arrest the prosecution or take the case out of any tribunal or jurisdiction in which it was before the change took place. It was a proceeding in the case in the same court and could be conformed to without any difficulty upon the trial.

Ewing's case, 5 Gratt. 701, also cited for the prisoner, is in fact authority for the Commonwealth, and is in accord with our construction of the law. It shows that the mode of proceeding in the case turns 506 upon the time *and mode of the commitment. The commitment in that case was under the new law, and after it had gone into effect, and the inference is irresistible that if the commitment in that case had been under the old law, the examining court would have been held and the prisoner remanded under that instead of under the new. The case of Ashlock v. Commonwealth, 7 B. Monr. R. 44, is conclusive against the proposition that this act takes away jurisdiction already conferred and acquired in pending prosecutions. Its reasoning applies with full force to cases pending in an examining court, which had then jurisdiction to hear and determine them upon the principles of that court.

All the authorities cited on the other side, among them, 1 Bishop's Crim. Law, § 100-103 and notes; State v. Slave King,

12th Louisiana Annual Rep. 593; *Regina v. Inhabitants of Denton*, 14 Eng. L. & E. R. 124, to show that prosecutions have been arrested by the repeal of the law punishing the offence or prescribing and regulating the mode of proceeding, are answered by the fact, that in none of the repealing statutes affecting them, was there any reservation such as is contained in chapter 16, § 18, of the Code of 1860, before cited, either as to the offence committed or the proceedings had and taken under the old law.

But it is argued for the prisoner, that even conceding the authority of the examining court to sit in this case after the 1st July, still the Circuit court had no power to try him, because by chapter 208, § 1, Session Acts of 1866-'7, p. 931, it is provided that "trials for felony shall be in a County or Corporation court," except in certain cases, in which the prisoner may demand to be tried in the Circuit court. But this language, comprehensive as it is, by no means necessarily imports that all trials for felony shall thereafter take place in those courts. It must, in the very nature of things, be held to refer to and include

only trials in those prosecutions, 507 *which had their inception under this new law. Every such trial must, of necessity, presuppose a commitment for trial by a justice, under the previous provisions of the law, and an indictment found upon such commitment. Now no commitment for trial could have taken place prior to July 1st, 1867; and consequently the trials for felony, which are to take place in the County courts under this section, must be those and those only which take place under commitments made since that day. The indictments under which such trials are to be had, whether found in the Circuit or County courts, must be those referred to in § 16, of chap. 207, Sess. Acts of 1866-'7, p. 929, which, it will be presently shown, are indictments found in prosecutions originating since the new law went into effect. If the proceeding of the examining court was proper in this case, it follows, as a necessary consequence, that the prisoner must be remanded for trial in the Circuit court under the old law, as that was the only court to which an examining court could remand him. This provision of chapter 208, as to trials for felony in a County court, is, in truth, as much prospective in its operations as any other portion of the new act. It is a part of the new integral system of criminal procedure, and embraces only those cases in which there has been a commitment for trial in the County court. All cases of commitment for examination under the old law must go to the Circuit court for trial, or they go nowhere.

It is moreover argued for the prisoner, that the indictment in this case when found in the Circuit court should have been immediately certified to the County court under the provisions of § 16 of ch. 207 above referred to. The language of this section is comprehensive enough to include, in its

literal terms, all indictments found in a Circuit court since the first of July 1867. It is nevertheless apparent that there are classes of cases which cannot be embraced in 508 it. Take the *case of a prisoner examined for murder and sent on to a Circuit court for trial in the month of May or June 1867. His case is confessedly from that time pending in the Circuit court, but he cannot be indicted until the next term of the Circuit court, which does not occur until after the 1st July 1867. Must a copy of the indictment so found be certified to the County court? Obviously not; for it was a prosecution pending in a Circuit court at the time the act of 1866-7 took effect, and was therefore within the literal terms of § 4, ch. ccxi., Sess. Acts 1866-7, p. 945, which is so much relied upon on the other side. Moreover, in such case, a capital felony, the Circuit court has no power under this section to send the case down to the County court, but must retain it for trial. Moreover, if in the case at bar, the court following the theory of the defence, had certified a copy of the indictment to the County court, it would have been the plain right of the prisoner to have elected to be tried in the County court, or to demand a trial in the Circuit court; in which latter case, it would have been the duty of the court to certify back to the Circuit court, not a copy of an original indictment found in the County court under § 1 of ch. 208 of Acts 1866-7, before referred to, but a copy of a copy of an indictment originally found in the very Circuit court to which this copy of a copy would have been sent for his trial! A proceeding so incongruous could surely not have been within the contemplation of the legislature. Moreover, it is fair to infer that when the prisoner has properly had the benefit of an examination before the County court, it could never have been intended that he should go back again to that court, with the privilege of an election between that and the Circuit court as the place of his trial. The provisions of § 16 of ch. 207, must, therefore, have been like all the other provisions of the act, intended as prospective in their operation, and only 509 to apply to indictments found in prosecutions originating *in commitments for trial since the 1st July 1867. It has been argued for the defence, that the Circuit courts have, since the passage of the new law, no further jurisdiction over criminal trials than is specified in § 4, of ch. ccxi., Acts of 1866-'7, p. 245. But it is apparent that this section was not intended to confer jurisdiction on the Circuit courts in pending cases. This jurisdiction they already had, and the repeal of the former law would not, under the operation of § 18 of ch. 16, of the Code, have prevented them from disposing of all the cases, whether of felony or misdemeanor, pending in or cognizable by them at the time the new law took effect. Indeed, but for the provisions of § 4, those courts would have been obliged to have gone on and tried all such cases. The true object of that section

was therefore simply to authorize those courts to transfer all misdemeanors and all felonies, except capital ones, to the County courts, to which such jurisdiction had been confided by the new law; thus harmonizing the proceedings in the old cases as far as possible with the new system.

II. Was any error committed by the court below, in rejecting the plea to the jurisdiction, tendered by the prisoner? It is insisted on his behalf that this was a good plea, and that even if the Circuit court had jurisdiction to try the case, nevertheless the prisoner had the right to raise the question of jurisdiction by a plea, and that its rejection was an error, which should reverse the judgment. But if the question of jurisdiction has been shown to be in favor of the Commonwealth, it cannot be proper to reverse the judgment, even if the plea be a good one. If the plea had been filed, the Commonwealth would necessarily have replied by vouching the record of the examining court, which is the foundation of the court's jurisdiction; and it cannot be proper to reverse the judgment, merely to allow the question to be presented in a different form, *if this court is of opinion

510 that the record of the examining court sustains the jurisdiction of the Circuit court; for, in that case, the prisoner could have sustained no possible injury by the rejection of the plea. But the plea is not good upon its face, and was properly rejected. The indictment avers, that the offence was committed within the jurisdiction of the court. The plea is, in effect, a simple denial of jurisdiction, without any averments traversing any of the sources of jurisdiction. In its very nature it must state the objections to the jurisdiction, so that the Commonwealth might reply to the specific ground taken, and thus an issue be arrived at. If the indictment alleges jurisdiction, and the plea simply denies it, it in effect amounts to a demurrer. It is impossible in such case to say whether the jurisdiction is denied because the prisoner did not commit the offence in Henrico, or because he had not had accorded to him some privilege to which he was entitled as a prerequisite to the jurisdiction of the Circuit court. The matters of the plea contained under the protestation cannot be considered as averments under any just principles of pleading. The protestation in no manner adds to a plea; it merely excludes the conclusion of the admission of a fact from the failure to deny it. It is a declaration purely collateral to the main pleading, and intended to enable the party to dispute the fact not traversed in another action or proceeding. Stephen on Pleading, p. 235-237. Of so little real substance is it now regarded, that it has been dispensed with by § 25, of ch. 171, Code of 1860.

But, even if the matters stated under the protestation be treated as averments, the plea is wholly irresponsive as a denial of the jurisdiction claimed. It was manifest upon the face of the indictment, that the jurisdiction claimed did not arise under the

new law; for the record shows that the indictment was not found in and did not come from the County court. It is no

511 *copy of an indictment found in the County court and certified to the Circuit court, upon a removal on the demand of the prisoner. On the contrary, it is an original indictment found in the Circuit court. The Circuit court was bound judicially to notice the fact that there was a pending prosecution for murder in it against the prisoner, which had been remanded to it, whether rightfully or wrongfully, from the County court, as a court of examination. If the prisoner desired by a plea to test the legality of this source of apparent jurisdiction asserted under the old law, he should have conformed to the mode in which such objection was invariably raised. He should have pleaded that he had never been duly and legally examined by a competent examining court and remanded for trial in the Circuit court. This he did not do, but confined himself to what was at most a denial of jurisdiction under the new law. It was obvious to the Circuit court that no such source of jurisdiction was claimed by the Commonwealth, and his plea of totally irresponsive and immaterial facts, was properly rejected. Upon the form of pleas to the jurisdiction, the court is referred to 4 Chitty's Cr. Law, ed. of 1819, p. 506 to 515; 1 Wentworth's Pl. p. 51; 4 Ib. 63; 1 Robinson's Forms, p. 16; Horton's, &c. v. Townes, 6 Leigh 47.

III. The only remaining question of difficulty in the case, arises upon the objection of the prisoner that there was irregularity in the treatment of the jury, and a separation of one of the jury from his fellows and from the sheriff. The alleged irregularity in the treatment of the jury consisted in the fact that on one morning of this protracted trial, a juror, oppressed by the heat of the jury room, was permitted by the judge to sit on the portico of the hotel in the company of one of the deputy sheriffs, and that while there, the judge himself took a seat near them with the evident purpose of guarding against any im-
512 proper communication being had *with the juror. This deputy having been called to walk out with a portion of the jury, and the rest of them being in their room on the opposite side of the portico, attended by another of the deputies, this juror was thus left for a few moments alone with and in charge of the judge himself. This occurred on the 4th July, on which day, the court, for obvious reasons was not in session. We insist that the control of the judge over the jury does not cease for all purposes with the adjournment of the court for the day. In legal contemplation, the jury are, during the whole period of the trial, in the custody and under the control of the judge. And while their actual custody during the recesses which necessarily occur during the day for refreshment, and the adjournments for rest at night is under long established practice, entrusted to the sheriff and his deputies; still this temporary

custody is subordinate to and in aid of the controlling authority of the court and of the judge. While out of court, and in the absence of the prisoner, it would be a gross abuse for the judge to interfere with the deliberations of the jury upon the case by any communication touching the trial; but it cannot be improper for him to supervise the conduct of the officers in charge of them, and even to aid those officers in reference to the personal comfort and health of the members of the jury, and for the prevention of any improper outside influences. The case of *Sargent v. Roberts, &c.*, 1 Pick. R. 337, and other cases cited for the prisoner on this point, were all cases of interference by the judge out of court with the jury, by instructions or other communications in reference to their duties in the pending trial, and are not authority against the positions maintained on behalf of the Commonwealth.

Nor was there any separation of the jury in any just sense of that term, which can vitiate the verdict. In *Thompson's case*, 8 Gratt. 637, all the prior cases in our Appellate courts are reviewed, and the

513 result deduced, *that the question whether separation per se vitiates a verdict in a case of felony had never been authoritatively decided in this State at that period. *Wormley's case*, 8 Gratt. 714, did not settle it; for that was a case of total abandonment of the whole jury by the sheriff to the company of unsworn and irresponsible citizens. This court can now lay down a rule which is consistent with reason and with the overwhelming weight of authority. There can be no just reason for setting aside the verdict in this case, when there is not even an intimation of any improper influence upon the jury. They were held by the sheriff and his deputies during this trial, extending through three weeks, save that one of them was for a few moments in the immediate charge of the judge himself. Here was no abandonment of the whole jury or any part of it, to the society of unsworn persons, but at most the assumption by the judge for a few moments and for a temporary purpose connected with the comfort of the jury, of the custody of one member of it, under all the sanction which the official oath and high character of that officer can afford. Such a circumstance can justly constitute neither "Irregular treatment" nor "Separation" of the jury.*

Crump for the prisoner, reviewed the former constitutions and laws of the State on the subject of the jurisdiction of the courts, and deduced from them the conclusion, that at the present day no court in Virginia has jurisdiction in any case except as it is conferred by the statute. He then proceeded: The common law, with some restrictions, was adopted by statute; but no court derives its jurisdiction from the common law. And now there is no court

in Virginia which is not a court of 514 limited jurisdiction. *The idea of superior and inferior courts, in the English sense, is abolished. In 1799 the question came up, 4 Dall. R. 8, where it was held, that though not inferior in the English sense, yet the Circuit courts of the United States having jurisdiction on a few subjects, it is therefore to be presumed that the court has not jurisdiction in a case unless it is shown on the record. To the same effect is the case of *Shedden v. Custis*, 6 Call 241. And to show how carefully the court watches this limited jurisdiction, I refer to the case of *Railroad Company v. Rock*, 4 Wall. U. S. R. 177.

An acquittal before a court which has no jurisdiction is a nullity. *Ryan & Moody* 175; 1 Arch. Crim. Pr. 112, 115; 1 Bish. Cr. L., § 666. Then if the examining court had no jurisdiction to examine and remand the prisoner for trial in the Circuit court, the judgment of this court, if it had acquitted the prisoner, would have been a nullity; for the law is express, that he shall be examined before he is tried in the Circuit court. *Hurd's case*, 5 Leigh 715. For the distinction between a void and a voidable jurisdiction, I refer the court to *Griffith v. Frazier*, 8 Cranch U. S. R. 23.

Then how shall the question of jurisdiction be made? I shall not now go behind the plea. Where the plea to the jurisdiction is to the person, or that the cause of action is out of the territorial jurisdiction, then the plea must give a better writ. But in a plea to the jurisdiction in a criminal court, because the law has not given to the court the power to try the case, this is all that is necessary to be stated. 3 Chit. Pl. 895, marg. Pleas to the jurisdiction, and pleas in abatement, are always distinguished. *Starkie Cr. Pl.* 342; 2 Hale P. C. 256; *Foster's Cr. L.* 18.

There is this great distinction between the former and the present law in relation to the jurisdiction of the Circuit courts in the trial of felonies. By the former, the presumption was that the Circuit court 515 had jurisdiction *of the case; and it was for the prisoner to show grounds for ousting that jurisdiction. By the present law, the presumption is against the jurisdiction of the Circuit court; and the Commonwealth must show the grounds of jurisdiction; and the record must show it. If the cause is sent there from the County court, it, of necessity, shows the fact, because only a copy of the indictment is sent up.

Then, does it appear on this record that the Circuit court had jurisdiction to try the prisoner. It is not questioned on the other side, that if the provisions of law for proceedings in the trial of felonies, as they existed before the 1st of July 1867, were repealed on that day, that the Circuit court did not have jurisdiction to try the prisoner. Were they not then repealed? There is no doubt that the act of April 27, 1867, to revise and amend the criminal procedure does repeal, in direct and explicit terms, ch. 205

*The reporter is indebted to Messrs. Guilgon and Young for the note of their arguments.

of the Code of 1860; which contains the whole law in relation to examining courts. Then, is that law continued, notwithstanding this explicit repeal, so as to authorize this prosecution. It is not pretended that there is any provision of the act of April 27, 1867, which continues this ch. 205 in operation. On the contrary, the object in fixing a future day for this act to go into operation, was to prevent the inconvenience which might have arisen if it went into operation at once. It was put into operation at a day when there was not a Circuit court in session. The object of this law was to change the whole procedure in criminal cases; to revise and amend the whole law on the subject. Now when the legislature revises a law, and omits a clause of it, you cannot revive it by construction. *Pingree v. Snell*, 42 Maine R. 53; *Ellis v. Paige*, 1 Pick. R. 43.

But it is said you must construe these laws in the light of the provision in the Code, ch. 16, § 18, for the construction of statutes. In passing the act of April 27th, 1867, the legislature had before it, nothing but the system of criminal proceedings. It was no part of their work, nor was it in their contemplation to alter the law in relation to crimes; and no part of the law defining or creating criminal offences is repealed or altered. The statute, ch. 16, § 18, does not give a rule of construction or remedial statutes, nor was it intended it should do so by the revisors. See their 1st report, p. 8. It was intended to preserve the rights as they were, and leave the remedies to the law in existence when the right was sought to be enforced. Then what application can this law have to that of April 27th, 1867, which repeals no law creating or defining a criminal offence, but is confined entirely to the providing the modes of proceeding in the prosecutions of offences. And is it not a reflection upon the legislature to suppose that in revising the law and providing a whole system of criminal procedure, they should have left it so imperfect as to require a resort to another statute, to aid in carrying out their purpose? There are many instances in the statutes in which, when it was designed to continue the old remedy, it is expressly so provided. And if the laws in force at the time of enacting the new law, are stricken dead how can you proceed under it? See *United States v. Fisher*, 2 Cranch U. S. R. 358; *Wilkinson v. Leland*, 2 Peters' U. S. R. 627; *Minor v. Mechanics Bank of Alexandria*, 1 Id. 46; *The People v. Livingston*, 6 Wend. R. 526; *Beebee v. O'Brien*, 10 Wisc. R. 481.

M. Johnson, Esq., also argued the case for the prisoner; but the reporter was absent, and has no note of his argument.

RIVES, J. The question of jurisdiction presented by this record is the leading one, and is not without difficulty. It grows exclusively out of the state of the law which is to govern the trial. It is not pre-
517 tended that *it rests upon facts ex-

traneous to the record, which ought to be pleaded so as to lead to some distinct issue of law or fact; but simply that such is the law of the land; that the court is not competent to try the cause, and has no cognizance of it. The challenge of jurisdiction on this score is fundamental. It is so vital, that I presume the objection, however made, whether by suggestion or motion ore tenus, should be at once entertained by the court, and decided upon the law. I cannot conceive of a judge permitting a prosecution to go on before him when satisfied in any way that he was forbidden by statute to try it. The examination of the laws which he administers, and which he is bound to know, is alone sufficient to determine such a question of jurisdiction. But it is otherwise where the jurisdiction is traversed by facts out of the record, such as relate to residence, the venue, &c., and under our statutes as they were aforetime, the lack of an examining court. Such a defence is appropriate to a plea, as tending by its averments to lead to some distinct issue of law or fact, and admitting of replication and issue. The plea, however, in this record is not of that description. It contains but one direct averment, and that is, that "by the law of the land, and the statutes in such case made and provided, this honorable court hath no jurisdiction for the trial of this indictment." The protestation I presume can, upon no principle of pleading, stand in the place of an issuable averment. Had it been designed for such an office, the plea would naturally have taken another form, and first denied demand of, or assent to, such trial, by reason whereof this court had no jurisdiction, &c. Even in this form it would have been irrelevant to the indictment. The purport of it could only be, that the accused having been arraigned in the County court had not demanded his trial in the Circuit court: whereas, the prosecution in the latter court
518 was not predicated of such a state of facts, but *rested on the finding of the indictment in the first instance in this latter court; so that such an averment would have been wholly immaterial, and should not have been received. The true point to be made under the circumstances, if the accused had wished to bring his case under the proceedings required by the act of 27th April 1867, would have been to ask to be sent back along with the indictment to the County court, to be tried there. But he refrained from any such request or intimation.

But I do not think this plea is susceptible of this interpretation. Its only intelligible traverse is simply of the jurisdiction under the statutes of the Commonwealth. In truth it is a demurrer, though, in form, a plea. As such it seems to me an anomaly. I have not been able to find a precedent for it; nor have the learned and industrious counsel for the plaintiff in error been able in their researches to find any. Now ought the Commonwealth's attorney to have been required to take issue upon it? If he had

been, had he not the right to put in a general replication; namely, that the court had jurisdiction under the laws of the Commonwealth? If so, we should have had the singular spectacle of a legal enquiry into the actual state of the law, made and pursued under the forms of pleading, and that, too, when it is admitted there were other obvious and more appropriate ways of raising such an issue.

From this view, I conclude the plea was not a proper one in that form; and there was no error in rejecting it. But if I be mistaken in this view, and the plea was a good one and should have been received, is there any substantial error in its rejection to the injury of the prisoner? It seems to me not, and for this reason—that the rejection must be taken as tantamount to a finding of the jurisdiction. It was appropriate for the judge on the submission of the plea,

519 seeing that it purported alone to deny the jurisdiction on the grounds *of law, to refrain from requiring of the Commonwealth's attorney the formality of a general replication, and to reject the plea because he was satisfied of his jurisdiction. What advantage would it have been to the prisoner to have had this anomalous issue of "jurisdiction or no jurisdiction" formally joined, provided the judge should find against him upon it? And shall we now send it back for this replication and issue, when we must know that the court expressed its adverse finding upon such issue by the rejection of the plea? Such a course, I think, would be frivolous. But still, while I deem the plea informal and improper, I am disposed to accord to the prisoner the full benefit of it in this sense; that however informal or irregular, the judge was called upon by it to consider and decide the question of jurisdiction upon the motion to reject. I also construe its rejection, as a decision against the prisoner on the issue of law which it purported to raise. When this is done, I think, he cannot ask more. The rejection of the plea for matter of form shall not, and ought not to be allowed to put aside this question of jurisdiction. The absolute want of jurisdiction in any form or upon any condition, is confessedly good cause of arrest of judgment, and the execution of the sentence in this case, provided no jurisdiction be found, would be properly characterized, as in such event it was indignantly denounced by the concluding counsel for the plaintiff in error, as judicial murder. This important and interesting question, therefore, lies at the threshold of our enquiries; cannot be evaded, and must be solved by us some way or other.

It clearly and solely depends upon the effect and application we shall give to the act of 27th April 1867, Sess. Acts 1866-7, ch. 118, p. 915. It is entitled "an act to revise and amend the criminal procedure." It doubtless grew, in a great measure, out of the emancipation of negroes, and
520 the policy of obliterating the *pre-existing differences in the mode of prosecuting criminal offences when com-

mitted by white or free persons on the one hand, and slaves on the other. Accordingly, it commences with the repeal of chap. 212 of the Code, respecting "proceedings against negroes." See Code, p. 847. It was doubtless apprehended that the multiplication of criminal trials incident to this policy, if cognizable, as before, in the Circuit courts, might abstract too much time from their civil dockets; and this apprehension doubtless led to the transfer of criminal jurisdiction in the main to the County courts. But this transfer did not grow out of any legislative mistrust of these higher courts, but carried with it a distinct recognition of their superior adaptability to such trials, in giving the accused the right, in all the graver enumerated felonies, to demand a trial in them. With this new policy of making all felonies triable, in the first instance, in the County courts, necessarily fell the structure of examining courts; for as they were composed of justices, who also composed the court having original jurisdiction, this preliminary examination was superseded as cumbersome, and inapplicable to the new order of things. Besides, there was another recommendation of the new system in lessening criminal charges; expediting trials for felony, by ordaining them to be had at "any term" of the County courts, which sit monthly. That such was the main design of this act, is shown by its first clause; at the outset, it repeals without qualification chapter 205, entitled "of examining courts," and chapter 212, entitled "of proceedings against negroes"; and then proceeds to amend and re-enact by the same titles, and numbers, the chapters of the Code (with these two exceptions), from 201 (inclusive) to 211 (inclusive) concerning criminal proceedings; thereby conforming to these prominent changes, the existing provisions of law in the Code.

This act does not, as is usual, take
521 effect from its *passage; but its operation is postponed by its commencing clause to the 1st of July 1867. What effect it is to have upon prosecutions began before its commencement, nowhere appears in the body of the statute, except in sec. 4 of chap. 211, whereby a discretion is given to the Circuit court, in which any prosecution for a misdemeanor or for any felony not punishable with death, pending therein when this act takes effect, to try it or transfer it to the County court, &c., and a peremptory requirement is made of the Circuit courts to retain trials of all pending prosecutions for capital felonies. Sess. Acts 1866-7, p. 945, § 4. What, therefore, was the intent of the legislature in this repeal, must be gathered from the act itself, and the inducements to it. It is to be construed as a whole, and all its provisions must be taken together to arrive at its proper interpretation. The fact that its commencement was appointed for a future day, so far as this enquiry is concerned, in no wise distinguishes it from an act taking effect upon its passage; for it is manifest that at either

date the probability would be equal of pending prosecutions at various stages, where the necessity would arise of determining how far they were affected by the repealing law. The design and operation of this postponement was merely to give a proper notice of the introduction of the new system; it can have, therefore, no bearing upon our present enquiry.

There are two views to be taken of this question, either of which would be decisive of it:

I. First. As to the character of the act, whether prospective or retrospective. This, again is a question of legislative intent, for it is not doubted that it is in the competency of the legislature to make its laws retroactive wherever it does not conflict with the sanctity of contracts under the restrictions of the Federal and State constitutions, nor with the prohibition of ex post facto laws; but the courts uniformly refuse to give statutes a retroactive construction unless the intention is so clear and positive as by no possibility to admit of any other construction. Such a retrospective interpretation is greatly discouraged, and the desire and effort of the courts is to give a statute a prospective operation only. Sedg. on Stat. and Const. Law, p. 193. It is admitted that the repeal of chap. 205 is absolute; and if it stood alone, there is ample authority and reason for asserting that all proceedings under the old law, would be instantly abrogated and annulled by the repeal. But this repeal does not stand alone; but is, as I have endeavored to show, part and parcel of a new system of criminal procedure, ordained to go into effect on the 1st July 1867. This repeal is plainly consequent upon the change of the commitment; whereas, under the old law, it was a commitment for examination; now, under the repealing law, it is supplanted and superseded by a commitment for trial. Chapter cciv. of the Code, so far as pertains to the process of arrest, bail, examination or trial before the justice, is literally copied and re-enacted down to the 16th section. There occurs the first and fundamental departure from the old procedure. This 16th section is new in its provisions, while the succeeding sections of the same chapter are again copied from the Code. The change effected by this 16th section, is the substitution of the commitment for trial in place of the previous commitment for examination. It is the key to unlock the meaning of this statute. It is the initial point from which the old and new proceedings diverge. And the moment the legislature decided to commit for trial and not for examination, examining courts were to be dispensed with, and not sooner. The abrogation of them, and the institution of the new mode of commitment are contemporaneous in enactment, and inseparable parts of the new law. Whenever this law was to take effect as to the commitment, it also took effect as to examining courts; and so long as this law could not affect or alter the

commitment for examination, its legal concomitant or incident—the examining court—was unrepealed. Upon what commitment, then, was this act of April 27, 1867, designed to operate? There seems to me but one reasonable answer—upon commitments occurring on or after the 1st day of July 1867. Any other answer would seem to involve the absurdity of conforming by way of anticipation to a law not in operation. And if it does not apply to an anterior commitment for examination, it would be incongruous and inconsistent to attribute to it a retroactive repeal of the legal consequence of such commitment in the appointment of the examining court. In conformity with this reasoning, it was very forcibly urged by Mr. Young for the Commonwealth, that chap. ccviii. in ordaining that “trials for felony shall be in a County or Corporation court,” applied only to trials originated by, and through, this new form of commitment, and not to trials growing out of the pre-existing commitment for examination. This interpretation has certainly the merit of reconciling apparent conflicts between separate provisions of the statute, and relieving it of all possible embarrassments in its operation upon pre-existing prosecutions. I am therefore of opinion that in this view of the act we are justified in restricting its operation to cases of commitment after its commencement, and excluding therefrom pre-existing cases of commitment for examination.

II. As already intimated, there is another view of this question, which may be legitimately taken. It conducts to the same conclusion, and fortifies it, though from another aspect and by a different line of argument. It is not to be imagined, or believed, that the legislature in repealing chapter 205 of the Code, failed to contemplate or provide for the operation of such repeal upon pending prosecutions. It would scarcely consist with a proper respect for that body to suppose them ignorant of the fact, that this repeal would catch criminal prosecutions in various stages of progress, where it might be neither expedient nor practicable to abandon them and adopt the new proceedings in their stead; or to accuse this body of indifference to the obvious difficulties against which it was their province to provide. They had before their eyes, in the Code they were revising in part, the general chapter of Repeal, ccxvi., p. 861, whereby such repeal was not allowed “to affect any prosecution, suit or proceeding pending on the day of its commencement, except that the proceedings thereafter shall conform, as far as practicable, to the provisions of this act. The 4th section of chapter ccxi., it is contended by petitioner’s counsel, is the only provision that was intended to be made for pending prosecutions; but its inadequacy to that end, and its failure to provide for any other cases but those pending in the Circuit courts, are conclusive to rebut and disprove this pretension. Why is it then that this act contains none of the usual provisions for preventing con-

flict or embarrassment naturally growing out of the substitution of a new criminal procedure in place of the old, repealed; while at the moment of the change, it must have been foreseen that prosecutions would be pending in every conceivable stage? The answer is easy and ready; it was because there was embodied in the Code a canon of statutory construction, which directly applied to this case, and was designed to remove all such difficulties. It was designed to meet contingencies ensuing upon repeals, and superseded the necessity for future legislatures undertaking to prescribe or limit the operation of repealing laws. After its adoption in the Code, it was thenceforth to be taken as a part and limitation of every repealing statute, as much so as if it had been therein re-enacted, unless, indeed, a contrary intent should appear from the statute itself. We are therefore bound to construe the operation of this repeal as governed by this prescribed rule of construction. It will be found in chapter xvi., § 18, p. 115, under the head of "Construction of Statutes."

I shall quote only so much of its language, as I design applying to our present enquiry, omitting for the sake of brevity and perspicuity its reference to "offences, acts, penalties, forfeitures, or punishments under the former law." Thus abridged, it reads, "No new law shall be construed to repeal a former law, as to any right accrued or claim arising under the former law, or in any manner whatever to affect any right accrued or claim arising before the new law takes effect; save only that the proceedings thereafter had, shall conform, so far as practicable, to the laws in force at the time of such proceedings," &c. This rule, however, is not to be observed, "where such construction would be inconsistent with the manifest intent of the legislature." It has been contended that this rule was meant to apply to cases of "repeal by implication," or constructive repeals; but I submit that its language is too broad and comprehensive to admit of this restricted sense. Its language embraces every "new law," repealing, whether in terms or by implication, a former law. Some stress is laid on the term "construed," as if it contemplated a case, where the fact of repeal was doubtful and therefore a matter of construction; but this restriction conflicts with the broad design of this section, which was to fix and limit the effect of repealing laws. Again, it is urged that this section served only to perpetuate the right, &c., while it changed the proceedings; but this cannot be so; for if the right were independent of, and separate from, the proceedings, why should there be this saving of the proceedings? The meaning evidently was, that the rights which were inherent in the proceedings should be preserved at all hazards; and the proceedings only to conform to the new law, when such change would not affect or impair these rights. The provision made in the Code, ch. 216, p. 861, § 2, for

the general repeal of previous acts, throws light upon this subject, and explains the intention of the legislature. This general repeal was not thereby allowed to affect "any prosecution, suit or proceeding pending on that day, except," &c. The Report of the Revisors (p. 75-6, and note), and the action of the legislature thereon, shows that this 18th clause of chapter xvi. was designed as a general provision to the same end, and though abbreviated, was meant to have the same operation with the limitation in the general repealing act of the Code. The history therefore of this provision, shows that it was designed to meet the contingencies upon a change of proceedings, whether criminal or civil, so as to furnish a rule by which prosecutions or suits might proceed under a former law, though repealed, with the special saving therein stated. It is not unworthy of note, that while in other respects discarding tautologous terms from this clause, so as to render it as concise as possible, the legislature for the first time in this section enlarged the enumeration by adding "claims" to "rights."

I am not unaware that, in the construction of this clause, it is usual to contend for a distributive rendering of its language, so as to refer these two terms to civil suits alone. I am not prepared to assent to this, and would beg leave to express my individual views of it, upon which my brothers express no opinion. In the first place, it is clear that the preceding enumeration of "offences, acts, penalties, forfeitures and punishments," is not, on the other hand, to be restricted to criminal cases alone, because the terms, "acts, penalties and forfeitures," are referable to many civil remedies or proceedings. It seems to me that both classes are treated interchangeably; and the intent is to save from the operation of a repealing law "the rights or claims" of parties either in a public

527 *prosecution or private suit pending under the former law, with the exception indicated. I concede that we cannot well conceive of an accused having such a right to a particular mode of trial as to make a legislative change thereof an ex post facto law, and therefore unconstitutional. The bare statement of such a pretension, is sufficient to refute it. This was Perry's case, 3 Gratt. 632, that has been, in this connection, relied on by the counsel of the plaintiff in error. All that it decided was that a change in the mode of selecting venires introduced in a pending prosecution, was not ex post facto; and that the constitutional inhibition applied to crimes and punishments and not to criminal proceedings. While this case negatives the idea of any right of the accused to any pre-existing mode of trial so as to divest the legislature of the power to alter it in consequence of the constitutional prohibition of ex post facto laws, it by no means goes to the extent of denying that there may be "rights or claims" of the accused that are to be preserved and respected under this rule of construction. It is one thing to as-

sert a right for the accused by virtue of this constitutional provision; and quite another to contend in his behalf for rights or claims secured in pre-existing proceedings by virtue of this rule of statutory construction. The question is not whether the legislature has the power to divest such rights, but on the contrary, whether conceding the power, it has exercised it, or refrained from it by leaving them to be adjusted by the former law in spite of its repeal, and through the effect to be given by construction to the repealing law. Hence, it does not conflict with the decision in Perry's case to hold that this 18th section preserves privileges, rights or claims arising out of and attached to proceedings under the former and repealed law.

Now at the time of the arrest in this case, the justice was necessarily governed
528 by the old law; he was bound *to conform to it. It was not for him to anticipate an enactment to take effect at a future day. It will not do to say, that by his authority to adjourn the trial for a period not exceeding ten days, he could conveniently have passed over the expiring days of the old law. Such a device with such a purpose would have been justly reprobated, as an evasion of official duty and an abuse of official power. It was incumbent on the justice and so made by the 12th section of chap. 204, &c., to proceed "so soon as may be" with the examination of witnesses, &c.; so that, in my view, it would have been reprehensible and unjustifiable in the justice to have delayed the trial before him for any such purpose. If the old and the new law could not be dove-tailed together, and there was likely to be embarrassment or difficulty in reconciling them, one to another, it was plainly no business of the justice; the consequences, let them be what they might, rested with the law makers. He could not go out of or beyond the existing law. That required him to commit for examination. The act of the justice, then, in sending the prisoner to an examining court, was plainly regular and unexceptionable. But it seems this court convened on the 2d of July 1867, after the repeal of the chapter authorizing such a court or such a trial. How, then, was the prisoner affected by this state of things? While I do not pretend that it was incumbent on him to assume any, the slightest responsibility in giving a direction to his trial, I do hold that this examination was an advantage or privilege to him, which in a certain event he was allowed to waive. It was a substantial one. Besides the promptness of the trial, it was attended with this advantage, that upon his discharge by this court, "he could never thereafter be questioned or tried for the same offence." This view is, I need not say, predicated of the validity and legal existence of this examining court.

With the advantage, however, of trial,
529 the accused *necessarily took the chances and incurred the risk of being remanded for further trial.

In this posture of affairs, the question

arises whether the abrogation by repeal of examining courts should be allowed to affect the rights or claims of the accused to such trial, arising from his commitment for examination under the former repealed law. I have already endeavored to show that, in my view, these "rights or claims" might attach to criminal as well as civil proceedings. If so, they were preserved from the operation of the repealing law. The only difficulty is, whether the claim of the accused to this preliminary examination is such a right or claim as was meant to be preserved to him by this rule of statutory construction. I am of the opinion, for the reasons already given, that it is. If then the prisoner had insisted on the 2d of July to his claim to this trial, by virtue of the former law, could it have been legally or rightfully refused to him? If the Commonwealth had chosen to disband the examining court, because annulled by the act of 27th April 1867, would it not have violated this principle of construction, and injuriously affected the claims of the prisoner? These were grave and difficult questions. My course of reasoning has sufficiently indicated how I would have solved them. It was for the Commonwealth, without any appeal to the prisoner, or any presumption from his silence, to take her own course with his trial. She has done so; she has accorded to him the privilege of this trial, and has thus resolved whatever doubt rested upon the case in the prisoner's favor; as she was bound to do. The case would have been different if the accused had chosen to deny the authority for this examination, and asked to be committed for trial in the County court; and in such event, doubtless, the same consideration would have dictated compliance with his request, and displayed the propriety of conforming the pro-
530 ceeding to the new law. But no *such step was taken by him or his counsel; and the Commonwealth was left free to resolve whatever doubt might be alleged to exist in the matter in favor of the prisoner as she did. Hence, though my view be incorrect as to his title to this examination, it must be admitted that he has no cause to complain of the course that was taken under the circumstances. The result therefore is, that he was legally remanded to the Circuit court for trial.

But when he got there, did the requirement of conforming to the laws, then in force, demand his remitment to the County court? I will not say that his silence or acquiescence in the examining court estopped him from thereafter objecting to its jurisdiction, or the legality of his remanding. But in pronouncing upon the rightfulness of his arraignment in the Circuit court, I do insist that it is material to consider that he raised no question by habeas corpus as to the legality of his imprisonment, or before his arraignment challenged the validity of the sentence through which he reached the Circuit court. Being there then by virtue of a proceeding, the benefit of which he had, and in conformity as I

think with the law as it should be construed, he was bound to answer to the indictment in that court. Had he made a demand upon the finding of the indictment to be remitted to the County court for trial, the question would have arisen whether the proceeding could be so far conformed at that stage to the new law. But he made no such demand. It seems on the contrary, from the character of the plea, that the prisoner's counsel avoided the averment of any wish or demand on his behalf for a trial in the County court. Perhaps it may have been inconvenient to distinctly prefer such a demand, as, it might be foreseen, it would most probably have been soon followed, if granted, by a return on his motion to the same court for final trial. Therefore the silence of the record on this point denotes

531 *no little forensic strategy, of which none can complain, or refuse to allow the prisoner the benefit, if any can be derived from it. But it was the province of the judge to forecast and to avoid, if proper, any unseemly shifting of the judicial scenes. The duty of conforming to the laws then in force pertained to his judicial discretion, into the proper exercise whereof it is, however, our business to enquire. The existence of such discretion is sufficiently indicated by the express qualification, "so far as practicable." If the Circuit court were rightfully in possession of the case, where the propriety or necessity of sending it back? As the prisoner had the benefit of the examining court, without any challenge of its validity or authority, it was in consequence thereof he was triable before the Circuit court; and in that sense it was not practicable to conform to the new law in this particular.

But it is said that it was incumbent upon the court, under the 16th section of chapter 207, of this late act to "certify the indictment as soon as found to the Court of the county in which the offence is charged to have been committed."

Without pausing to solve the doubts that have been suggested upon the construction of this section, it is sufficient to say, that it does not embrace all cases. For instance, it is obviously qualified by the 4th section of ch. 211, retaining for trial in the Circuit court, pending prosecutions for capital felonies. We must, therefore, construe this provision in connection with other parts and the general frame of the act, from which I infer it does not embrace a case like this emanating from an examining court, and thus being a proceeding protected from the operation of the repeal. Had this examination transpired in June, the case would thereafter have been pending in the Circuit court, and as such, not liable to the operation of the 16th section. The examining court upon remanding was

532 functus officio; *and the case must thereafter have been in the Circuit court, to which it was remanded, unless indeed there be some sort of judicial limbo for the receptacle of such cases. This then would have been a case, where this direction

broad as its language is, would not have applied because of its conflict with the required trial in the Circuit court. By parity of reasoning it should not be construed as applicable wherever the Circuit court is authorized to try. Besides, I have endeavored to show that it is quite immaterial in what stage the repeal should happen to catch the proceedings upon a commitment for examination. They are, thenceforth, to follow the old law, except so far as the court shall find it practicable to conform them to the new.

Further it has been asked, what function does the 4th section of chap. 211, respecting prosecutions pending in the Circuit court, perform: or is it not superfluous, if this rule of construction is to have the effect attributed to it? There is another and distinct operation for this section; it is by no means superfluous. The first part of it, confers in cases of misdemeanors, &c., a discretion to try, &c., and the concluding sentence, if not used *ex abundanti cautela*, has the effect and was so designed, to take prosecutions for capital felonies out of the saving of the 18th section of chap. xvi. of the Code; so as to relieve the court of any necessity of seeking to conform the proceedings to the new law. Besides, it has been seen that this 4th section of chap. 211, of the late act, is limited to the Circuit courts; whereas, this statutory construction has a wider scope and embraces proceedings elsewhere.

From this two-fold consideration of this question of jurisdiction, I feel warranted in concluding that the Circuit court, to which the prisoner had been remanded for trial, had jurisdiction to try his case, notwithstanding the repeal of examining courts by the late act.

I have thus endeavored to dispose 533 of the only question *brought up to us as a matter of pleading from the record of the first trial, which owing to the disagreement of the jury, was a mistrial. I come now to consider the only remaining assignment of error upon the record of the second trial, which eventuated in conviction and sentence. This grows out of the seventh and last bill of exceptions to the refusal of the court to grant a new trial for irregularity in the treatment of the jury and for a separation of the jury. The separation consisted in this, that the judge having allowed a sick juror accompanied by a sheriff, to leave the rest of the jury and sit upon the portico of the hotel, where the judge joined them, and soon sent the sheriff back to the jury room, saying he would take charge of the juror; and that accordingly the judge in some few minutes accompanied and saw the juror back to the jury room and delivered him over to the sheriff. I presume the charge of "irregularity in the treatment of the jury" is limited to this temporary custody of the juror which the judge assumed; and has no reference to the frequent kind and considerate visits he made to the jury room, in the presence of the sheriffs, to look after the com-

fort of the jury, enquire after the sick, and accompany physicians who were called in to their treatment. Such attentions were altogether proper, and have not been challenged, in the argument of the counsel for the plaintiff in error; so that in view of the generality of the charge and the evidence in this point in the record, it is proper to state that this objection of irregularity is confined, as I understand it, to the temporary charge which the judge under the circumstances took of the juror.

This brings me to consider what are the powers and duties of a judge respecting a jury in a criminal cause under trial before him, both in and out of court. It is his appropriate function to preside over the jury while empaneled in court. He 534 literally has the custody and *oversight of them while sitting, and has no need of a sheriff save to attend a juror, who may be called off, or to conduct the jury to their room. So when he leaves the bench for a recess during the day, it is not usual, I believe, to swear the sheriffs in charge of them, because in contemplation of the law, the court is still in session; there is no record made of the adjournment; and the jury is still under the charge and supervision of the judge. The whole term is in like contemplation of law but one day; and if it were possible to hold a continuous session, there would be no necessity of confiding the jury to any one but the judge. He is the high and responsible functionary entrusted with the conduct of criminal trials, and bound to preserve the purity of jury trial and place it beyond suspicion of all improper interference. It would be well for the protection of prisoners and the behaviour of juries if it were possible for the judge to keep them. Instead of its being said, he is the last man who should have charge of a jury, he is the first and best, and the very one to whom the charge is confided by law. But it is not possible for him to discharge the functions at all times; hence, has grown up the custom of committing the jury on the adjournment of the court for the day, to the sheriff sworn to "keep them, and neither speak to them nor suffer any other person to speak to them touching any matter relative to the trial until they return into court." By whom are they thus committed? assuredly, by the judge, "with the consent of the prisoner and for reasons appearing to the court." At all times, in and out of court, the judge is constructively presiding over the jury and protecting their deliberations from all improper influence. No one but he, has charge of them in court; and upon adjournment, it is his order by which they are committed for the night or interval between the adjournment and sitting, to the sheriff; 535 and it is by his authority the oath *is required of the officer who is to keep them. It is only from the necessity of the case and the fitness of things they are taken from him during the adjournment of his court. From this theory of his office in jury trials, it can scarcely be that his over-

sight and superintendence are suspended by the adjournment of the court. He has many legitimate modes while in session, through instructions and charges to influence their finding, but no semblance of authority to approach them corruptly; so in his recess, he can have his eye upon them and exert a superintendence over them and their custodians so as to maintain the purity of the trial and the sanctity of their deliberations; but by no means to tamper with their verdict or seek privately to influence them. The possibility that such abominable practices may occur on or off the bench, cannot be accepted as a reason for doubting or impairing the authority which the law gives a judge for quite a different purpose, namely, to advance rather than pervert the course of justice. I am, therefore, of opinion that it is in the competency of a judge out of court as necessity or occasion may require, to direct, superintend and charge jurymen and other officers of the court in matters pertaining to their official conduct and behavior out of court; so that a disobedience of his lawful commands, in such respect, would be an obstruction to the business of the court, and a contempt thereof. Nor is there anything in the decisions of this court that have been quoted to that end, calculated, when rightly considered, to impugn this position. These views are sustained and strongly presented in a case from Wisconsin (*Barrett v. State, &c.*, 1 Wisc. R. 181), which I quote not as authority, but for its apposite reasoning on this point. The question was, whether the court having adjourned to the next day, the judge upon being informed at night by the sheriff that the jury had agreed, could presume the business of the court, and receive 536 *the verdict in open court, in the usual presence of the prisoner, &c., but in the absence of his counsel during the night of such recess. It was decided that he could; and I now quote a passage from the opinion of the court as apposite to this case and corroborative of my position. "For all general purposes, the court is considered in session from the commencement till the close of the term. The jurors, officers and parties, are all under its direction. To hold that an adjournment for refreshment suspends the functions of the court during the term of such adjournment, would be to open the door to a multitude of evil practices, and to throw off all those salutary restraints which have been found necessary to the due and solemn administration of justice. Even in this case, the jury were as much under the control and protection of the court after its adjournment for the night as they were before it. It was the authority of the court, which kept them together; and that authority continued from the time they were empaneled till they were discharged; as much during the recess as during the active labors of the court. Suppose between the hours of seven and eleven o'clock of the evening of the 30th of March, the room in which the jury were deliberating had been surrounded by rioters

or tumultuous persons for the purpose of influencing their deliberations, or of interrupting their discussions, would not such persons be punishable for contempt of court? Yet they could not be guilty of contempt if the functions of the court were altogether suspended."

From this reasoning, which I fully sanction, I infer with much confidence, that upon any emergency or occasion occurring out of court, whereby the judge is properly or by necessity left in charge of a juror without the presence of the sheriff, it is within his official province to take such charge; and that the propriety of
537 *his conduct in this instance, as in others, is to be determined by the evidence.

Let us now apply this view of the law to the actual conduct of the judge, which is impeached in this case. The trial was a very protracted one. The jury was empaneled on the 23d day of June, and not discharged till the 9th day of July. It was composed of men drawn from distant homes, many of whom fell sick during the progress of the trial. The evidence upon the application for a change of venue, shows that they were surrounded by a population whose minds were inflamed against the prisoner. There had already been one mistrial. There was every thing, therefore, in the situation of the judge, presiding over such a trial, to admonish him to unusual vigilance in watching over the health and comfort of the jury, and to repeat his cautions to the sheriffs to keep the jury together, and guard them against all extraneous influences, or the slightest impropriety of behavior. Hence, the interests of the Commonwealth and the prisoner, the cause of justice, and his own sense of convenience and duty, all conspired in requiring of the judge in this remarkable trial the frequent precautions he took in visiting and enquiring after the sick jurors, and enjoining on the sheriffs the utmost strictness and care in guarding them while out of court. This was highly commendable and natural. It has no semblance of a hanging about the jury room to pry into their deliberations, or drop some guilty whisper to influence their verdict.

The consideration of these circumstances also serves to explain and justify the conduct of the judge in this instance. When in pursuance of the indulgence given the sick juror, the judge found him with the sheriff on the public portico of the hotel where others were sitting, he takes a seat by them as if by his presence to keep off
538 intruders and prevent all improper approach *to or interference with the juror. But after the two sheriffs keeping the jury, had withdrawn from the jury room and left a part of them locked up, the judge's solicitude for their wants or careful custody, was again aroused, and he directs the sheriff sitting with him and the sick juror, to go back to the jury room, and he would take charge of the sick juror. I cannot think that for this object and with this motive, the judge was thereby out of

the line of his official duties, or usurping any authority that did not belong to him out of court. The case would be very different if this were corruptly contrived to gain the opportunity of conversing with the juror upon the subject of the trial; but when it is not pretended or suspected that such was the case, and that nothing transpired in the interview to raise the slightest conjecture of the sort, his momentary charge of the juror was a matter of strict propriety and necessity. Far distant be the evil day, when corruption shall have so soiled the bench and tainted the streams of justice as that the accidental or necessary presence of the judge with a juror shall not be received as a fair presumption that no wrong was done or permitted, but on the contrary, shall be accepted as proof of tampering! When that state of opinion shall prevail, all respect for the courts, all confidence in the administration of justice, all reverence for authority will have forsaken that department of the public service, usually deemed the last and best bulwark of public virtue and morals.

But it is said to be dangerous to confide to a judge such power and discretion, so liable to be perverted to the pollution of jury trial. This, however, is true of all discretionary power. I cannot better express my view than in the language of a recent case in the Queen's Bench, (*Wanser v. The Queen*, 1 Law Rept's Q. B. 309), upon the authority of the judge on a trial of felony, under certain circumstances,
539 to discharge a jury *for disagreement, &c. Sir Alexander Cockburn, C. J., said: "I agree that our rules are to be framed to keep the administration of justice beyond the possibility of corruption. On the contrary, if a rule is essential for the convenient working of the administration of justice, we must trust to the honesty of those to whom we commit that most important department of the State. We must trust to the means we have of punishing corruption and dishonesty if we find it operating on the minds of our judicial officers. I cannot help thinking that this discretion is of a very useful and salutary character. We must trust it will never be abused, or if unhappily it should be abused, we must trust to the power of parliament and the executive for punishing the judge who would act so dishonestly and corruptly."

It is proper to take some notice of the cases that are supposed to show that the judge has not the power out of court, which the view I have taken ascribes to him. These cases are *Sargent v. Roberts*, 1 Pick. R. 337; *Fish & another v. Smith*, 12 Indi. R. 563; and *Crabtree v. Hazenbaugh*, 23 Ill. R. 349. The first was a case of a virtual instruction sent in the form of a letter by the judge to the jury in the recess; the second, of the judge visiting the jury in their room and giving them instructions in the absence of the parties and without their consent; and the third, of a judge, who upon being sent for by the jury, repaired to

their room, and declined, when asked, to explain the meaning of his written instructions. The true principle of these decisions, is thus expressed by Catron, C. J., in the last case: "The policy of the law requires that all the proceedings of the court should be open and notorious and in the presence of the party, so that if he is not satisfied with it he may take exceptions to it in the mode pointed out in the law; and not
540 be put to extraneous *proof to show that an error had been committed in a secret proceeding and in fact out of court."

These cases do not, therefore, at all militate against the view I have taken of this case.

But suppose I am wrong in this view of the judge's authority out of court over his officers and jurors, and that we are to consider this case as one purely of the separation of the jury, and as if the juror had been left with some other person but the judge presiding over the trial. Upon this question, there are a great number of cases abroad, and in the States of the Union. Their name is "legion;" and we are indebted to the research and industry of counsel for a particular reference to them. I cannot be expected to review them. I am more particularly interested in the state of our own adjudications, so that I may not run counter to them, or unsettle the law with us. If it be conceded to the counsel for plaintiff in error that McCaul's case, 1 Va. Cas. 271; and Overbee's case, 1 Rob. R. 756, are authority for their position that separation per se vitiates a verdict in a criminal cause, it must be allowed that Martin's case, 2 Leigh 745; McCarter's case, 11 Leigh 633, and Thompson's case, 8 Gratt. 637, are to the contrary. I do not interpret Wormley's case, 8 Gratt. 712, as settling, as it is contended, this conflict of authority. There is no reference to the prior cases, and it is manifest that that case was decided on the misconduct of the sheriff, which is specially animadverted upon, and censured. In this unsettled and indeterminate condition of our cases, I think we are authorized to deduce and lay down a rule not in conflict with them, as a whole; and in harmony with the general current of decisions elsewhere. And that rule seems to me to be this: that separation out of the custody and control of the officer is prima facie sufficient to vitiate a verdict; and that it is incumbent upon the Common-

541 wealth *to refute that presumption by disproving all probabilities or suspicions of tampering; unless, indeed, the prisoner's own testimony, as in Thompson's case, should be sufficient to that end. This principle, I think, reconciles our own cases, and comports with the general current of the cases to which we have been referred. It is an ample safeguard of the purity of jury trial, for which I entertain habitual reverence; and I do not think we thereby impair the weight to be attached to our earlier decisions.

In the application of this principle to the case at bar, I do not think there is a rational doubt that the Commonwealth has by the testimony of the juror and sheriffs most satisfactorily repelled any, the slightest presumption of unfairness or tampering in the transient interview of the judge with the sick juror; and, indeed, the counsel of the plaintiff in error distinctly disclaimed any suspicion of it. On the contrary, the complaint is of the separation by itself, and the danger of such a precedent. It is also alleged that there is a peculiar hardship in this case, as the judge is required to pronounce on his own conduct. This, however, is not so. It would be the same if the judge were to misbehave towards the jury in open court, as by instructing them on the weight of testimony, or indecorously betraying to them his leaning in the cause.

This case has been argued at great length, and with eminent ability. I have not been able to notice all the points of the argument, or comment upon the many pertinent authorities that have been laid before us. I desire to acknowledge my obligations to counsel for their researches, and the benefit I have derived from their arguments. It is not that I slight either the one or the other, that I do not specially notice them; but because they lay outside of the immediate discussions that I have been pursuing, and a part from the view that I have been led to take of this case.

542 *It only remains for me to announce my opinion that this record does not furnish ground sufficient to set aside the verdict and award the new trial asked for.

The other judges concurred in the opinion of Rives, J.

Judgment affirmed.

J U D G E S

OF THE

MILITARY COURT OF APPEALS.

HORACE B. BURNHAM, PRESIDENT.

O. M. DORMAN.

W. WILLOUGHBY.

Attorney General:

CHARLES WHITTLESEY.

545 *A. C. Smith v. R. P. Smith.

October Term, 1869, Richmond.

(Absent, BURNHAM,* P.)

1. Foreign Deed of Assignment—Attachment—Priority.†

—On the 16th of March 1867, H. & P. merchants in New York execute a deed by which they convey to S. all their effects in trust to pay their debts, with directions to take possession at once and proceed to execute the trust. Part of the effects are goods shipped to A. and W., commission merchants in Richmond, Va., to be sold for and on account of H. & P. On the same 16th of March R. sues H. & P. in Richmond, and sues out an attachment which is served on A. & W. as garnishees. A. is not in advance to H. & P. when the attachment is served. W. has advanced on the goods, but afterwards sells them, and has a balance in hand after paying himself. The attachment has preference over the deed, and is to be first satisfied out of the proceeds of the sale of the goods in the hands of A. & W.

On the 16th of March 1867, R. P. Smith sued out of the clerk's office of the Hustings court of the city of Richmond, a summons against Halsted & Putnam, partners, in an action of assumpsit, damages \$1,200; and on the same day, upon an affidavit made before the clerk of the said court, that the defendants were justly indebted to the plaintiff in the sum of eight hundred dollars, with interest thereon from the 1st of March 1867 till paid, and that the defendants were non-residents of the State of Virginia, and that they had estate or debts due them in the city of Richmond, Smith obtained an attachment against such estate and debts. And on the same day, the attachment was served upon H. J. Stone, of the firm of Stone, Wilson & Foster and

546 *A. Y. Stokes of the firm of A. Y. Stokes & Co.; and they were summoned as garnishees.

The cause was regularly proceeded in by publication against Halsted & Putnam. And in February, A. C. Smith, Jr., was permitted to interplead in the cause, he claiming the effects in the hands of the garnishees under a deed of trust from Halsted & Putnam, which he claimed gave him priority of claim over the plaintiff.

There was a judgment against the defendants at the April term 1868 of the court, for six hundred and ninety-one dollars and twenty cents, with interest thereon at six percent. per annum from the 13th of March 1867, till paid. At the July term the parties dispensed with a jury and submitted the whole matter, as well of fact as of law upon the interpleader, to the decision of the court; and the court rendered a judgment in favor of the plaintiffs. A. C. Smith thereupon filed a bill of exceptions to the judgment of the court; and spread the evidence upon the record.

It appears from the evidence, that on the 15th of March 1867, Halsted & Putnam, who

were partners and merchants doing business in the city of New York, executed a deed in that city by which they conveyed to A. C. Smith all their partnership property of every kind, including debts due to them, and wherever it might be, in trust to pay first, all their partnership creditors; putting all of them on the same footing. And they authorized and directed him forthwith to take possession of the premises and property, and to proceed to sell the same; and also, that he should, as soon as possible, collect the debts, &c.; and out of the proceeds of the trust property, pay first, the partnership debts, and then, if any thing remained, the individual debts of the partners as directed in the deed. And to enable the trustee to execute the trust, they constituted him their attorney in fact, with full powers. This deed was admitted to record in New York, on the 16th of March.

547 *It appears further, that prior to the 16th of March 1867, Halsted & Putnam had consigned to A. Y. Stokes & Co., and Stone, Wilson & Foster, merchants in Richmond, merchandise, to be sold by these firms upon commission for account of the consignors. A. Y. Stokes & Co. had settled their account of sales about the 11th of March, and had then paid over the money in their hands to Halsted & Putnam. They then had other merchandise so consigned to them, which, or nearly the whole of which, was unsold on the 16th of March, when the attachment was served upon them; upon which they had made advances to Halsted & Putnam. These they afterwards sold; and their account showed that the net amount of sales was \$2,149 57, on which they had advanced \$1,314 10 before the service of the attachment, leaving the net balance in their hands \$835 47. Stone, Wilson & Foster were in advance to Halsted & Putnam on the 16th of March, when the attachment was served, \$1,078 18; but on that day they had in their hands merchandise, which they afterwards sold for \$1,863 65, which was more than sufficient to repay their advances and charges, and which left a balance of \$512 58 due to Halsted & Putnam. Both these firms considered that they had a lien upon the goods consigned to them, for advances made by them; but that Halsted & Putnam were entitled to the goods upon repayment of these advances.

Upon the application of A. C. Smith, jr., a supersedeas to the judgment was awarded.

N. Howard, for the appellant.

A. Johnston and Williams, for the appellee.

WILLOUGHBY, J. The statute of Virginia prescribes (Acts of 1866-7, chapter 75,) that "every deed of trust conveying real estate or goods and chattels, shall be void as to creditors and subsequent purchasers for valuable *consideration without notice, until and except from the time that it is duly committed to record in the county or corporation wherein the

*He decided the cause in the court below.

†See monographic note on "Attachment" appended to Lancaster v. Wilson, 27 Gratt. 624.

property embraced in such contract or deed may be."

This statute must control the decision of this case; for although the deed in controversy was executed in New York by parties residing there, there being no evidence of any difference between the law of New York and our own, the law is presumed to be the same as here.

If this is a deed of trust contemplated by the statute, conveying the goods and chattels attached by creditors, it is, by the terms of such statute, void as to such creditors, until the time it is duly admitted to record as prescribed.

The first question suggested is, whether the deed in this case is one contemplated by the statute. It differs from many deeds of trust, in the fact, that it required the trustees to take possession forthwith of the property conveyed.

One object of requiring deeds of trust to be recorded, no doubt, is to preclude the danger that otherwise might exist, that third persons might be led to trust and deal with the party in possession as if he were the real owner, when, in fact, there is a deed in existence showing that he was not. But I think we cannot say, especially where a statute is so broad and imperative as this, that it is the only object.

It applies to all creditors, whether they have notice or not; 4 Rand. 208; and whether the credit was obtained on the fact of such possession or not. It is true, that in most of the States it has been held that possession of goods thus transferred is equivalent to a record of the deed; but this may be, because either that their statutes permit this to be so, or because such possession gives notice to creditors as well as others of such transfer; neither of which reasons is applicable here.

549 *It is urged that an assignment might have been made of these goods and chattels by writing without seal; that if it had been so made it would not have been required to be recorded because not a deed, and there can be no reason why the mere addition of a seal should render it necessary to have it recorded.

Whether it would be required that an assignment without seal should be recorded it seems to me hardly necessary to enquire. The case before us is that of a deed. That and that only is the foundation of the appellant's claim. The statute says that a deed, to have effect against creditors, must be recorded. If the parties had elected to make a mere assignment instead of a deed, we might have had a different question. I do not see how the argument can have any force, except to show that no deed of trust conveying goods and chattels need be recorded, notwithstanding the statute, for the same thing may be accomplished by a mere assignment of goods and chattels, or a transfer without seal, as by a deed, in almost any case.

In Clark v. Ward & others, 12 Gratt. 440, a deed similar to this was executed, which was recorded; but a question was made as

to the sufficiency of the acknowledgment to allow it to be recorded. The trustees had taken possession of the goods, had held possession for several months, and had partially executed their trust, when an attachment was levied upon them.

This court, without passing upon the question of the sufficiency of the certificate, held—"As it appeared from the evidence, that the execution of said deed was accompanied, or in good faith soon followed, by a delivery of the personal property in said deed mentioned, there was a complete and valid transfer of said property to the trustees, and that the recording of the deed was in no wise essential to the protection of said property against the demands of 550 creditors who had not *acquired liens upon the same before the said transfer was consummated."

It is easy to imagine cases in which it would work manifest injustice, and be against the policy of the statute, to insist upon its interpretation according to its strict letter. This is so with almost any statute.

It may be supposed that a storehouse full of different articles, may have been, under such a deed, taken possession of by the trustees, and have been sold to a great many different purchasers, and have passed through the hands of several bona fide purchasers, and have been scattered far and wide; that such trustees have fully completed their trust, and years have elapsed since the execution of the deed, the creditors all the time making no opposition to their proceedings.

Such a case might show us the propriety of construing such a statute according to its spirit and policy rather than to insist upon its strict letter. But the fact that under such circumstances a deed might not be required, I do not think would compel us to hold that where no actual possession had taken place, when there is no possession except what might be regarded a technical possession gained by a delivery of this very deed, where nothing whatever had been done under it, and the rights of no third party could be affected thereby, in the face of this statute no record would be required. Now, in the case of Clark v. Ward, although the circumstances were not as extreme as the case supposed, yet the reasons for varying from the letter of the statute were much stronger than in the case at bar. I do not think that it, as a precedent, requires us to deviate from the letter in this case.

It cannot be denied that the principle of such decision as there stated, logically carried out, without reference to the facts of the case before the court very strongly supports the position of the appellants; but the fact that the court went beyond 551 the letter to a certain extent, *does not, I think, require us to go a good deal farther than they did in the same direction. There is a limit beyond which, even elastic substances ought not to be extended; and it seems to me a statute so

inflexible as this, was sufficiently extended in that case.

Suppose that it be admitted that actual possession and other circumstances sufficient to show a sale and delivery of the goods assigned, will be sufficient as against creditors. And perhaps it may be that the principle of the case of *Clark v. Ward*, was, that circumstances such as possession and a partial action on the part of the trustee with the acquiescence of the assignor were sufficient to consummate a transfer of the title which ought not to be avoided because there was also a void deed; yet, even this would not sustain the claim of the appellants in this case. There is nothing on which to stand except this deed. Even the technical possession which they may claim is founded upon this deed and upon this alone. Nor can I see upon what principle it can be held, that because the trustee is required to take possession forthwith, the deed need not be recorded. It would have been the duty of the trustee to take immediate possession if this provision had not been inserted.

If these views be correct, it may be admitted that there was no negligence on the part of the trustee in taking possession, and that he had sufficient excuse for not taking actual possession. The want of diligence on his part might have been a circumstance to show a fraud as against creditors; but it is not on the ground of fraud that this deed is sought to be impeached.

The circumstances of this case, no doubt, do show sufficient diligence on his part, and a sufficient excuse for his not taking actual possession forthwith, and the utmost good faith on the part of all the parties to the deed. Were these the questions in the case, they would very likely be decided

552 in his favor. But the question *is, should this deed, to be valid as against the creditors, have been recorded?

Even if it be admitted that he had the technical possession by a delivery of the deed to him, whilst such a possession might do away with the *prima facie* presumption of fraud, it would not help him upon this question. All these circumstances would not make a case nearly as strong as those of *Clark v. Ward*, upon which such reliance is placed by the appellants. The cases of *Wilt v. Franklin*, 1 Binn. R. 502; *Gibson v. Stevens*, 8 How. U. S. R. 384; and other cases to the same effect, cited by the counsel for appellants, present the questions rather of diligence and good faith, and were decided upon the ground that there was sufficient evidence of both in those cases to do away with the presumption of fraud. As this is not the question before us, I do not think that those cases are applicable to this enquiry.

Another view of this case was very ingeniously taken and very elaborately argued by the counsel for appellants. It was urged that the goods having been consigned to commission merchants under a contract on their part to sell the same and account to

the consignors for the proceeds, such consignors had an election either to demand that the consignees fulfil such contract and render such account, or to consider the goods as their own subject to the lien of the consignees for advances, commission, &c.; that if they elected the former, they had merely a chose in action against such consignees, which does not come within the definition of goods and chattels according to the statute; and that the creditors had no right, by a levy of an attachment upon these goods, to deprive the consignors or their trustee of such right of election.

There is no evidence in the case that any such right of election, if it existed, had been exercised before the levy of the attachment, or at least that it had been determined to consider the claims upon the

consignees as merely a chose in action. 553

*On the contrary, the evidence tends to show that this was not the case. The affidavit of Thomas Potts is, that such consignees had on hand the said property "belonging to Halsted & Putnam," the consignors.

But it was claimed that the petitioner had the right, which had passed to him by the assignment or deed, to make such election even after the levy of the attachment, and that he could not be deprived of such right of election by such attachment.

Now without passing upon the question whether a chose in action comes within the meaning of the terms goods and chattels, according to the statute, let us examine the situation of the property levied upon by the attachment, which certainly were goods and chattels, and the relation of the parties to the property. So far as they were concerned, the deed not having been recorded, no title passed by such deed as against the creditors, to the trustee, at the time of the attachment. Whatever title the grantors had to these goods and chattels still remained in them; and the nature of such title depended upon the understanding or contract between them and the commission merchants.

Now what is the general understanding when goods are consigned to commission merchants, to be sold and an account to be rendered of the proceeds? Is it not plainly that no title passes so long as they remain in the hands of such merchants? Such merchants act as agents with power to sell the goods and transfer the title of the owner. Even if this relation is such that they are bound to make such sale, this does not transfer to them the legal title to the goods.

Nobody would think of undertaking to hold such goods as the property of the commission merchants while in this condition.

I think it very plain, therefore, that at the time of the levy of the attachment the legal title to these goods was, so far as the creditor is concerned, in the consignors.

554 *It seems to me too very doubtful whether under such circumstances the consignors had a right to elect to consider the goods as belonging to the consignees

without their consent, and to be in a position to claim that they account for the proceeds whether there is a sale or not. Even if they had such right, it is very clear that the title to the goods would not pass, nor could an action be maintained until such an election was made known to the commission merchants. And I think it equally clear, that before an action could be maintained, the merchants, after such election should be made known to them, have a reasonable time to make sale of the goods and account for the proceeds.

But again: suppose, for the sake of the argument, that at the time of the levy of the attachment, the consignors had the peculiar position contended for. They then have the right, of course, to have the title of the goods in them of their own volition, even if it is not in them; and thereupon, upon paying the advances and commissions which may be a lien upon the property to take it into their possession. Even this right would amount, to say the least of it, to a special or qualified property in the goods, which I think, is clearly the subject of attachment. The officer acquires the right to transmit, first, the property he seizes, and has just such property in the goods as the debtor had. If the debtors had the right of election, then the officer seizes upon and acquires this right, and stands in their places, and can assert the right to elect to consider the goods as his property, and to sell them subject to the lien, as he has done. In no possible aspect, it seems to me, can these goods be considered to be in such a situation as to deprive creditors of the right of levying upon them by attachment; and I cannot see upon what principle it can be held, that because thereby the debtors may be deprived of some privileges that they may claim to have had

concerning such property, this should
555 deprive *the creditors of such right.

The judgment of the court below should therefore be affirmed.

DORMAN, J., concurred in affirming the judgment.

Judgment affirmed:

556 *Devaughn v. Devaughn.

January Term, 1870, Richmond.

1. **County Courts—General Jurisdiction—Statute.**—The County courts are courts of general jurisdiction, and in proceeding under the act, ch. 110, § 9, Code of 1860, for the assignment of dower, it is to be presumed, in the absence of proof to the contrary, that the court had jurisdiction of the case, and proceeded regularly in it.
2. **Assignment of Dower*—On What Based.**—In the assignment of dower to the widow, the assignment should be based upon both the annual and fee simple value of the property.
3. **Same—Right of Widow to Mansion House.**—The widow is not entitled, as of right, to have the mansion house included in the dower assigned to her.

*On the subject of "Dower" see monographic note appended to Davis v. Davis, 25 Gratt. 587.

At the January term of the County court of Alexandria county for 1864, on the motion of James H. Devaughn, one of the heirs of William Devaughn, deceased, Wm. B. Price and two other persons were appointed by the court commissioners to assign dower to Susan Devaughn, widow of William Devaughn, deceased, in the real estate of which said William Devaughn died seized in the county of Alexandria, Va. And at the February term the commissioners returned their report; and it was ordered to lie one month for exceptions.

At the March term of the court Susan Devaughn filed exceptions to the commissioner's report. Of these the only one which need be stated is, that the commissioners did not assign to her the mansion house of the deceased, then occupied by her as a dwelling house; as stated in the report.

It appeared from the report and the schedule and valuation of property made by the commissioners, and returned with the report, that the property consisted
557 of *a number of small houses in Alexandria, or near it; all of which was valued at \$14,700; and that the commissioners assigned to the widow four houses and lots valued at \$4,900: the dwelling house was valued at \$1,500.

At the April term of the court the exceptions were overruled, and the report of the commissioners was confirmed, and ordered to be recorded.

In August 1867, the judge of the Circuit court granted a supersedeas to this order; and at the November term of the Circuit court, the order of the County court was reversed, and the assignment was changed, giving to the widow the dwelling house, instead of two of the tenements allotted to her by the commissioners. From this order James H. Devaughn obtained a supersedeas to the District Court of Appeals at Fredericksburg; where it was reversed. And then Mrs. Devaughn brought the case up to this court.

Brent and Wattles, for the appellant, insisted:

1. The order of the County court was not the judgment of a court of competent jurisdiction.

The authority of the County court, as conferred by the Code, is special and summary, and being ex parte, every fact essential to the exercise of its jurisdiction should appear affirmatively on the record.

The Code requires that the "Court of the county in which the will is admitted to record, or administration of his estate is granted," shall appoint the commissioners. Now, this important jurisdictional fact is not disclosed by the record. To escape this, the court must presume two things: that administration was granted on the estate of William Devaughn, and that also it was granted by the County court of Alexandria.

In Stevens v. Stevens, 3 Dana's R. 371, it was held that "the jurisdiction of the County courts (in Kentucky), in allotting
558 dower is special, and their records must *show every fact required by the

statute. *Thatcher v. Powell*, 6 Wheat. U. S. R. 119.

2. The order of the County court appointing the commissioners, and the report of the commissioners, are defective on their face, and therefore invalid.

a. The order directs the commissioners to assign dower to Susan Devaughn, in the real estate of which her husband died seized in the county of Alexandria. The order should have been to assign dower in all his real estate in Virginia. The commissioners, in accordance with the order, assigned dower only in the real estate in Alexandria. It may be that this was all. But it ought to appear so affirmatively on the record.

b. The commissioners assigned dower with reference to the fee simple value of the real estate, in entire disregard of the annual rental or productive value.

In *Smith v. Smith*, 5 Dana's R. 179, the court says, that "in assigning dower, regard should be had, not only to the value of the estate, but also to the annual productiveness of the several parcels, and equal justice in all respects, done to the widow and heirs as near as may be." *Leonard v. Leonard*, 4 Mass. R. 533; *Miller v. Miller*, 12 Id. 454; *Cox v. McMullin*, 14 Gratt. 82. 2 Daniel's Ch. Pr. 133, 136.

3. The County court erred in not assigning to the widow the mansion house.

Park on Dower says the widow is not entitled to dower of the capital or chief mansion: Marg. p. 250. But this applies only to a baronial castle, constructed for public defence.

If there were no other residence, the heir at common law was bound to furnish her with one.

Park on Dower, marg., p. 224, n. x., referring to the *Woman's Lawyer*. *Gerrard v. Gerrard*, 1 Ld. Ray. 72, 5 Mod. 64.

Comyn's Dig., 3 vol. 574, we find the following:

559 "So a wife shall be endowed of the chief mansion or messuage of her husband."

"Tho' it be a castle; for Magna Charta, sec. 7, shall be understood only of a castle for the defence of the realm."

"Tho' it be the capital seat, where her husband was a baron of the realm; for caput baroniae, is understood of the principal seat of feudal baronies given by the king to be held for the defence of the realm."

In *Jiggets v. Jiggets*, 40 Miss. R. 718, Handy, C. J., delivering the opinion of the court, says: "There is no error in the decree in allotting to the widow the exclusive possession of the dwelling house, and other improvements attached to it, in which the deceased resided, at the time of his death."

"There appears to be no sufficient proof in the record that manifest injustice would be done to the children of the deceased by giving the dwelling house and premises to the widow. Prima facie it is her legal right to have possession of them."

Beach, for the appellee, referred to the

opinion of Tucker, P., in *Fisher v. Bassett*, 9 Leigh 119, to show that where a court has jurisdiction generally over any subject matter, and its jurisdiction in a special instance depends upon particular facts, the presumption is that the court, in assuming jurisdiction, determined these particular facts correctly. He insisted that the County court has general jurisdiction over the subject matter of appointing commissioners to assign dower. Its jurisdiction in any case depends upon a question of fact, viz: whether it has granted administration, &c., on the decedent's estate. Before determining its jurisdiction in the particular case, it must decide this fact; and if it takes jurisdiction, it must have decided the case affirmatively; and all presumptions are in favor of that decision. For a full discussion of the character of Virginia 560 *County courts, he referred to *Harvey v. Tyler*, 2 Wall. U. S. R. 328.

2. He insisted further:—That if the decedent had not, in fact, any real estate out of Alexandria county, the order is confessedly good in form and effect. That it did not appear he had any other real estate; that there is nothing to justify the presumption, in the absence of all proof, against the validity of the order in this particular; and an order is not to be reversed because it possibly might have been, but only when it clearly is, erroneous.

He insisted further, that it does not appear that the commissioners acted in disregard of the annual value of the property. It is true they regarded the fee simple value of the property, but there was no impropriety in their so doing. The court will not presume any unfairness in this respect; especially in the absence of any exception on this point by the widow, at a time when it was competent to show the truth of the case by proof.

3. He insisted further, that the widow was not entitled to claim that the mansion house should be allotted to her as a part of dower. That the heir has a right to make the assignment where he pleases, provided it be full and fair. Tuck. Com., Book 2, ch. 6, p. 64, title Dower.

DORMAN, J., delivered the opinion of the court:

On the application of James H. Devaughn, one of the heirs of William Devaughn, and one of the appellees in this cause, the County court of Alexandria county, under the ninth section of chapter 110, of the Code of 1860, appointed commissioners to assign to the appellant, her dower in the estate of which her husband, William Devaughn, died seized. Under this order of appointment, the commissioners set off to the appellant as such widow, four houses and 561 lots in the city of *Alexandria, which four houses and lots constituted exactly one third part of the appraised value of the whole estate, of which William Devaughn was seized at his death. To this report and assignment of dower by the commissioners, the appellant excepted in

the said County court, on the grounds presented on page twelve of the printed record; which exceptions, at a subsequent term, the said court overruled, and confirmed the commissioner's report and ordered it to be recorded. From this order of the County court, the appellant took an appeal to the Circuit court of Alexandria county, on the grounds stated on the third page of the printed record. After hearing the cause, the said Circuit court reversed and annulled in part, the order of the County court, and proceeded to make another assignment in part, giving the widow the mansion house in lieu of two houses and lots assigned to her by the commissioners under the order of the County court. From this judgment of the said Circuit court, the appellees took their appeal to the District court for the fifth district; which judgment of the Circuit court the District court reversed and annulled, and affirmed the judgment of the County court, and the assignment of dower made by the commissioners under its order.

By appeal from this judgment of the District court, the case is brought to this court, and, in the printed statement, the following grounds of appeal and error are assigned:

First. The order of the County court was not the judgment of a court of competent jurisdiction.

Second. The order of the County court, appointing the commissioners and the report of the commissioners are defective on their face and therefore invalid.

Third. The County court erred in not assigning the widow the mansion house.

In determining the validity of the first ground of alleged error, it becomes
562 necessary to enquire into the *jurisdiction of the County courts in this State. In examining the judiciary system of Virginia, it at once becomes apparent, that from its earliest history, the County court was an especial favorite of the people, and their legislators invested it with the most extensive powers. In the minds of the people, it early became identified with their highest interests. It was esteemed a sort of palladium of their liberties; a tower of safety for the deposit of their most sacred rights; and was endeared to them by association with the proudest names in their history, names familiar to them, and in honoring whom the nation exalted itself.

Hence, as early as 1792, an act passed the general assembly, "reducing into one, the several acts concerning the County and other inferior courts of this Commonwealth." The extent of the powers thus conferred is fully presented in that act, the fifth section of which, reads: "The justices of any such court, or any four of them as aforesaid, shall and may take cognizance of, and are hereby declared to have power, authority and jurisdiction, to hear and determine all causes whatsoever now depending, or which shall hereafter be brought in any of the said courts at the common law or in chancery, within their respective counties or corporations, and all such other

matters, as by any particular statute is, or shall be made cognizable therein;" and in the seventh section, the act further provides: "The said courts shall be held at their several respective places, in every year, except as hereinafter excepted, for the trial of all presentments, criminal prosecutions, suits at common law and in chancery, when the sum exceeds twenty dollars or eight hundred pounds of tobacco, now depending, or which shall hereafter be brought in any of said courts." In section five of the above named act, criminals of a specified class are exempted from trial before these courts.

In the several Codes of 1819, 1849
563 and 1860, even *down to the acts of 1866-7, this same extended jurisdiction is continued and confirmed to the County courts in all civil causes. So partial has the Virginia legislation been to this County court system, as to have made it the general depository, the fountain head of power, from which, from time to time, they have diverted some streams into other seemingly less favored channels. And it is a noticeable fact, that in the last acts of 1866-7 the general assembly conferred upon the Circuit courts concurrent jurisdiction with the County and Corporation courts, "in all cases in chancery and all actions at law."

From these numerous acts, thus continued from its existence as a State, it is apparent that the County courts of this State are courts of the most general jurisdiction in all civil causes; inferior only because their judgments can be reviewed by an appellate tribunal, and in no sense courts of special and limited powers, and wholly differing from the County courts of most of the States. From the earliest time to the present, they have been invested with the most extensive powers, such as are elsewhere conferred upon courts of Common pleas, Circuit and Chancery courts. See *Harvey v. Tyler*, 2 Wall. U. S. R. 328. In courts of general jurisdiction, the rule of law is, "that every presumption, not inconsistent with the record, is to be indulged in favor of the jurisdiction."

But by the counsel of the appellant, it is urged that "the authority of the County court in this case is special and summary, and being ex parte, every fact essential to the exercise of its jurisdiction must appear affirmatively upon the record." The statute authorizes the assignment of dower to the widow by the heir, or by application to the court in which the will is admitted to record, to have the same assigned by commissioners. The County court has general jurisdiction over the probate of wills, and admits them to record. Though
564 the *power to appoint these commissioners for the assignment of dower was conferred by statute, yet the rule of law is still applicable. In the case of *Harvey v. Taylor*, the court declare, "in all those cases where the new powers thus conferred are to be brought into action, in the usual form of common law or chancery proceedings, we apprehend there can be little

doubt that the same presumptions, as to the jurisdiction of the court and the conclusiveness of its action, will be made, as in cases falling more strictly within the usual powers of the court."

In the case of *Voorhees v. The Bank of the United States*, 10 Pet. U. S. R. 449, the validity of a sale of certain property in Ohio, under a foreign attachment was questioned, on the ground, that the record of the court, in which the attachment proceedings were, did not show, that the steps required by the statute prior to a sale, were taken. In that case the defendant was a non-resident. His land was levied on, condemned and sold, as far as it appeared by the record in the cause, without an affidavit, without notice by publication, without his being called at three different terms of the court, and without waiting twelve months from the execution of the writ before the sale; all of which were required by the statute authorizing the proceedings. In the absence of jurisdiction over the person of the defendant, the record did not show, that these important provisions for the protection of his rights were performed. Counsel contended, that all these requisitions of the statute must not only have been carried out before the court had power to order a sale of the property attached, but that the record must show their performance. In reply to this position the court said, "The provisions of the law do not prescribe, what shall be deemed evidence that such acts have been done; or direct that their performance shall appear upon the record." They proceed to

565 state, "We *do not think it necessary to examine in the attachment suit, for evidence that the acts alleged to have been omitted appear therein to have been done. Assuming the contrary to be the case, the merits of the present controversy, are narrowed to the single question, whether the omission invalidates the sale. The several courts of Common pleas of Ohio, at the time of these proceedings, were courts of general jurisdiction; to which was added by the act of 1805, the power to issue writs of attachment, and order a sale of the property attached, on certain conditions; no objection, therefore, can be made to their jurisdiction over the case, the cause of action, or the property attached."

The court adds this general proposition: "There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears." In the case of *Grignon's lessee v. Astor et al.*, 2 How. U. S. R. 319, the validity of a sale of land, under an order of the County court of Michigan, by an administrator for the payment of debts, was called in question. The court says, "After the court has passed upon the representation of the administrator, the law presumes, that it was accompanied by the certificate of the judge of probate, as that was requisite to the action of the court; their order of sale is evidence of that or any fact which was nec-

essary to give them power to make it; and the same remark applies to the order to give notice to the parties. This is a familiar principle in ordinary adversary actions."

"And the principle is of more universal application in proceedings in rem, after a final decree by a court of competent jurisdiction over the subject matter."—"These principles are settled as to all courts of record, which have an original general jurisdiction over any particular subjects: they are not courts of special or limited jurisdiction; they are not inferior courts in the technical sense of the term, because 566 *an appeal lies from their decisions."

"These principles have been applied by this court to sales made under the decisions of Orphans courts; where they have power to judge of a matter of fact, they are not required to enter on record the evidence on which they decided that fact." Such has been the uniform current of adjudications in the Supreme court of the United States, and, it is believed, those of most of the States have maintained the same doctrine.

If such is the law of this State, it certainly determines the point taken by this exception. In the case of *Fisher v. Bassett et al.*, 9 Leigh 119, Judge Tucker says: "The County court is a court of record, and its judgments or sentences cannot be questioned, collaterally, in other actions, provided it has jurisdiction of the cause." "And this is to be understood as having reference to jurisdiction of the subject matter; for though it may be, that the facts do not give jurisdiction over the particular cause, yet, if the jurisdiction extends over that class of cases, the judgments cannot be questioned, for then the question of jurisdiction enters into and becomes an essential part of the judgment of the court." Judge Parker, in the same case, says: "The distinction between the acts of a court having jurisdiction over the subject matter under some circumstances, and those of one which, in no possible state of things can take jurisdiction over the subject, is a sound and sufficiently intelligible one to guide our judgments in the present case. If, under any circumstances, the Hustings court could grant administration to Scott, it had jurisdiction of the subject and must judge of those circumstances." These opinions of Judges Tucker and Parker are referred to by the court in a case, reported in 10th Grattan, and there approved and confirmed.

In the statement of errors, we are referred, by the counsel for the appellant, to the case of *Stevens v. Stevens*, 3 Dana's Ken. R. 371, as sustaining this excep- 567 tion. *In reference to that case, it is sufficient to remark, that the rule of law, applicable to the County courts of Kentucky and to those of this State, is totally different. It has been seen, that the latter are courts upon which have been conferred the most general powers, possessing all those usually given to courts of Common pleas, Circuit and Chancery courts. Whereas, the former have no general juris-

diction, and merely a limited and special one. See 2 Wall. U. S. R. 328, 341; and all the authorities herein cited, show that adjudications as to courts of a general jurisdiction, are not applicable to courts possessed of only a special and limited one.

As to the second ground of error assigned in the printed statement, so far as this exception relates to the defective order of the County court and the report of the commissioners, the adjudications above cited would seem to furnish a sufficient answer, even conceding the interpretation of that order claimed by the counsel for the appellant. On the strength of those authorities, it must be presumed, in the absence of all proof, that the real estate appraised and embraced in the report of the commissioners, was all the real estate of which William Devaughn died seized, and in which the widow was entitled to dower. It no where appears to have been otherwise. Till that is shown, the action of the County court must be held correct. In the exceptions filed in the court and which were overruled, there is not even a suggestion of there being other property, either within or beyond the limits of the county of Alexandria, of which the appellant was dowable. That there was none seems to have been admitted. It is certainly a fact, upon which the judgment of the court must have passed in appointing commissioners and confirming their report.

By the counsel for the appellant, in his statement it is further urged under this head that the commissioners assigned the dower in reference to fee simple value, 568 *and in entire disregard of the annual rental or productive value. That an assignment of dower should be made in reference to the annual profits, no less than to the fee simple value, is a proposition well settled by repeated adjudications from the earliest times in this country and in England, and the rule has its foundation in the plainest principles of right and justice. The support of the widow in her station is the main purpose of the law, for which an income is requisite. Often the infant heirs need a like support. And the intent of the law manifestly is, that this division between the widow and heirs shall be based upon annual profits as well as value. It would be a dereliction in duty to act otherwise. How has this well settled and righteous principle of law application to the case at bar? Though alleged in the statement of the appellant's counsel, it no where is shown or appears that the commissioners did disregard either the annual profits or the fee simple value in the assignment reported by them. In the exceptions to the report of the commissioners, filed by the appellant in the County court, this charge against the commissioners is not made or suggested, where, had it been made, the wrong, if done, could have been corrected. In the cases cited in his statement by the appellant's counsel, it was agreed, or otherwise established, that the assignments of dower in those cases were

made without reference to the annual profits, and were therefore unequal and oppressive on the widow or the heir. Here no such inequality is admitted or proved to exist; on the contrary, the reverse must be presumed from the whole record and the judgment of the court.

The third and last ground of error presented in the printed statement is, that "the County court erred in not assigning to the widow the mansion house." Unless injustice will thereby be done to the heirs,

it is usual to assign to the widow the 569 home or residence of *the deceased.

In this practice, there is a manifest propriety, which commends itself to all. Why, in this case, the residence was not thus assigned to the appellant, does not appear. We are, however, authorized to conclude that there was a reason deemed by the commissioners and the court satisfactory.

While such is the general practice in assigning to the widow her dower rights, we find no law by which she can claim the mansion house in all cases as a right; nor any adjudication, unless given by statute, annulling an assignment of dower, otherwise proper and equitable, for the failure alone to give to the widow the mansion house of the deceased. The reason for assigning as dower the mansion house in a city, is believed to be less potent than in the country, where this practice had its origin. In *Park on Dower*, page 254, the law is believed to be accurately stated thus: "that the heir is not compellable to assign unto his mother in dower the capital message which was his father's or any part thereof, although she be dowable of the same. But he may assign unto her other lands and tenements of which she is dowable, in allowance of the capital message. See also *Tucker's Commentaries*, Book 2, chap. 6, page 64. In the case of *Jiggets v. Jiggets*, cited by the counsel of the appellant from the 40 Miss. R. 718, it is asserted that prima facie it is her legal right. But on examining that case, it is found merely to determine the principle, that if the mansion house be thus set off to the widow, when no injustice is done the heirs, there is no error in thus giving it to her. Certainly this decision furnishes no authority for annulling and setting aside an assignment, otherwise just and equitable to the widow and the heirs.

But it would seem that the statute law of this State furnishes the law, and must determine our decision. After enacting in the first section of chapter 110 of the Code of 1860, "that the widow shall be en- 570 dowed of one-third *of all the real estate, whereof her husband, or any other for his use, was, at any time during the coverture, seized of an estate of inheritance, it proceeds, in the eighth section of the same chapter, to further provide, that "until her dower is assigned, the widow shall be entitled to demand of the heirs or devisees one-third part of the issues and profits of the other real estate, which was

devised or descended to them, of which she is dowable; and in the meantime may hold, occupy and enjoy the mansion house and curtilage without charge."

After dower is assigned to the widow, this statute seems clearly to exclude any right on her part to the exclusive use of the mansion house of her husband, unless the same be set off to her as a portion of her dower, and also all right on her part to have the same assigned to her as dower. Entertaining these views of the law applicable to this case, no error is found in the judgment of the District court, and the same must be affirmed with costs to the appellees.

Note.—After the opinion in this case was delivered and filed, the attention of the court, in a subsequent case, was called to the opinion in manuscript of Judge Joynes, in *Ballard et al. v. Thomas & Ammon*, in which the jurisdiction of County courts is determined. Had that case been before us, that portion of the foregoing opinion relating to the powers of the County courts would have been less elaborately presented, being *res adjudicata*.

Order affirmed.

571 *Griffin's Ex'or v. Cunningham.

January Term, 1870, Richmond.

1. Contract of Sale—Bill for Specific Performance—Must Show Good Title.*—A vendor of real estate seeking to enforce specific performance of the contract of sale, must not only have a good title, but he must show it.

***Contract of Sale—Specific Performance—Record Must Show Ability and Willingness of Plaintiff to Do His Part.**—One who asks for a specific performance of a contract must show himself prompt and willing to comply with the contract on his part. See *Bowles v. Woodson*, 6 Gratt. 78. The record in a suit by the vendor must show that the vendor could convey good title. In *Hendricks v. Gillespie*, 25 Gratt. 197, the court, citing the principal case, said: "The record does not show that the vendor could convey a clear, unquestionable title to the heirs of the vendee, even at the date of the decree. The burden is on the vendor to show that the title is free from reasonable doubt, and that the vendee will not be exposed, by taking it, to litigation." In *Wood v. Walker*, 92 Va. 24, 22 S. E. Rep. 523, there was a bill for specific performance of contract of sale of land. The bill did not allege that the vendor had done all that was required of him, nor the ability and the willingness to convey by sufficient title the property agreed on, nor had he tendered sufficient deed. The vendee demurred to the bill and the court of appeals held that the vendor's bill had not made a case which entitled him to specific performance.

As authority for the proposition that a court of equity will not generally decree a specific execution of a contract for the sale of land unless the vendor can make a good title thereto, see *Linkous v. Cooper*, 2 W. Va. 67; *Middleton v. Selby*, 19 W. Va. 168; *Boggs v. Bodkin*, 22 W. Va. 566, 9 S. E. Rep. 891.

Same—Same—Same—When the Ability Must Exist.—In *Garnett v. Macon*, 6 Call 335, the court said: "A

2. Same—Same—Same.—Executors sell a house and lot in R. As to five-sixths the title of their testator is clear; for the other sixth no deed can be found after diligent search in the clerk's office where it should have been recorded, and among the testator's papers. The former owner is dead, and her husband testifies that she did make a deed for it; but there is doubt whether he is not mistaken as to the property conveyed. The purchaser will not be required to complete the purchase.

3. Same—Same—Adversary Possession.—In this case the testator went into possession of the lot in 1846, and built upon it and held possession until his death, and authorized his ex'ors to sell it; but it appeared that in 1849, he built upon the lot under an agreement with the owner of the one-sixth, as to their respective interests in the property. He cannot be held to have had adversary possession, so as to entitle the executor to enforce specific performance of the contract of sale.

4. Same—Same—Decrease in Value before Good Title Shown.—In fact the owner of this sixth had conveyed the property to the testator and the deed was of record in the clerk's office, though the parties had failed to find it; but before it was found the property had greatly decreased both in its annual and fee simple value. The purchaser will not be compelled to take it.

This was a suit in equity in the Circuit court of the city of Richmond, brought by Fendall Griffin's ex'ors against Edward Cunningham, to enforce the specific performance of a contract for the sale of a house and lot in the city of Richmond, known as the Wall street hotel. Fendall Griffin died after the 19th of October 1865, the date of his will, which was admitted to probate in

court of equity compels the specific performance of contracts, because it is the intention of the parties that they shall be performed. But the person who demands it, must be in a capacity to do, substantially, all that he has promised, before he can entitle himself to the aid of this court. At what time this capacity must exist, whether it must be at the date of the contract, at the time it is to be executed, or at the time of the decree, depends, I think, upon circumstances which may vary with every case. There is no subject which more requires the exercise of a sound discretion. The enquiry in every case of the kind, must be, whether the vendor could at the time, have conveyed such a title, as the vendee had a right to demand? If he could not then, whether he can now? And if he can, whether there has been such a change of circumstances, that a court of equity, ought not to compel the vendee to receive it?"

Again, in *Tavener v. Barrett*, 21 W. Va. 656, the court said, on p. 680: "Generally time is not considered of the essence of the contract; and accordingly it is not generally regarded as material, whether the title of the plaintiff was a good title, when he made the contract of sale or when he brought his bill for a specific performance, and he is permitted by the court to make out his title at any time before the report on his title, and if he can do so though his title was imperfect when the bill was filed, he will be entitled to a decree for a specific performance." See also, on this point, *Core v. Wigner*, 33 W. Va. 277, 9 S. E. Rep. 86.

Same—Same—Kind of Contract Necessary.—Again

the court of Hustings of the city of Richmond *in April 1866. On the 3d of May 1866, the executors sold at auction the Wall street hotel, when Edward Cunningham became the purchaser, at the price of \$9,900, on the terms of one-fifth cash, and the balance on a credit of six, twelve, eighteen and twenty-four months, interest added. After the sale Cunningham employed counsel to examine the title, who gave a written opinion setting out the title. It seems that the property was derived from William Cook deceased. As to four-sixths of it, the title in Griffin was perfect. As to one-sixth it appeared that John Shore, who had title to it, conveyed it to C. J. Griswold, in trust to secure a debt which he owed to Griffin; and he afterwards, conveyed it to Griffin; but the deed to Griswold was not released. As to the other sixth it was owned prior to 1846, by Martha E. Shore, who afterwards, but prior to 1850, married Joseph M. Marvin of New York. Martha E. Shore, prior to her marriage, conveyed this one-sixth as well as other property, by two deeds, to C. J. Griswold, in trust to secure to Griffin two debts of \$300 each, which she owed to Griffin; but after a diligent search of the records of the clerk's office of the Hustings court of the city, and of the County court of Henrico, by the counsel employed by Cunningham, and by counsel employed by Griffin's executors, no deed could be found from Martha E. Shore, for this sixth. And the counsel reported that as to this sixth the title was

the bill must show that there was a contract written and signed, and that it was definite, certain, equal and fair. *Edichal Bullion Co. v. Columbia etc., Co.*, 87 Va. 641, 18 S. E. Rep. 100. In *Graham v. Call*, 5 Munf. 401, it was said: "The court is of opinion that, although the appellant and the testator of the appellee had, the one agreed to sell, and the other to buy, the lot in controversy, such agreement was subject to a condition (* * *) that the price thereof was to be thereafter agreed upon by and between the said parties respectively and the said price having never been so agreed upon by them; and it being now rendered impossible by the death of the appellee's testator; the court is of opinion that the said agreement was not so complete and perfected an one, as that it should be carried into execution by a court of equity, even if the possession of the said lot had been delivered to the said testator, in pursuance thereof, which is not shown to have been done." See also, *Buck v. Copland*, 2 Call 218; *Creigh v. Boggs*, 19 W. Va. 240; *Steenrod v. W. P. & B. R. Co.*, 27 W. Va. 1; *Boggs v. Bodkin*, 32 W. Va. 566, 9 S. E. Rep. 891.

Same—Same—Must Be Consideration.—Where there is neither meritorious nor valuable consideration to support the contract, equity will not decree specific performance. *Darlington v. M'Coole*, 1 Leigh 36; *Reed v. Vannorsdale*, 2 Leigh 569.

Same—Same—Same—Inadequate Consideration.—But mere inadequacy of consideration is not a valid objection to the specific execution of a contract. See *Ambrose v. Keller*, 23 Gratt. 769, and *foot-note*; *Talley v. Robinson*, 23 Gratt. 888, and *foot-note*; *Conaway v. Sweeney*, 24 W. Va. 643. Nor a price double

defective; that as to John Shore's sixth, the legal title was outstanding in the trustee; and he also expresses a doubt whether under the provisions of the will of Fendall Griffin, the sale by the executors was not premature. But it is unnecessary to notice this objection further.

Cunningham having received this opinion, declined to take the property; and on the 21st of May the executors filed their bill to enforce the contract. They set out the will of their testator, state the sale, and *their tender to Cunningham of a deed for the property, and his refusal upon various false pretenses, to comply with his contract; and pray for a specific execution of it; and that in the meantime the property may be placed in the hands of a receiver; and for general relief.

Cunningham answered, and said, he was somewhat excited by stimulants at the time he bid for the property. That after the auction, he having examined his condition, found that he had acted imprudently in bidding, and that immediate compliance with the terms of sale was impossible. That he therefore went to the auctioneer and told him that he could not comply with the terms, and he wished the sellers to keep the property; but that the auctioneer informed him a short time afterwards, that the vendors would not release him. That he thereupon employed counsel to examine the title, who reported it defective; and he files the report of the counsel as a part of his answer. That he immediately handed the re-

the value of the property in absence of fraud. *White v. McGannon*, 29 Gratt. 511, and *foot-note*.

Same—Same—Same—Meritorious Consideration.—As to whether meritorious consideration is sufficient to justify a decree for specific performance there is conflict. See *Keffer v. Grayson*, 76 Va. 517; *Halsey v. Peters*, 79 Va. 60; 2 Min. Inst. (4th Ed.) 883 *et seq.* But the weight of authority in such case seems to favor specific performance.

Same—Same—Doubtful Title Referred to Commissioner.—As said above, the vendor in a suit for specific performance must show that he can convey that title he agreed in the contract to convey. If the purchaser objects to the title which the vendor proffers and it appears doubtful whether the vendor can convey such title as would authorize a decree for specific performance, the title should be referred to a commissioner to be examined and reported on, before a decree is made. *Beverley v. Lawson*, 3 Munf. 817; *Smith v. Parsons*, 33 W. Va. 649, 11 S. E. Rep. 70.

Same—Same—Defective Title—Vendor Compelled to Convey.—"While a purchaser, however, cannot be compelled to take a defective title, but has a right to insist upon a clear legal title, on the other hand, though the vendor cannot make the title he contracts to make, yet he may be compelled to convey such title as he has, and to compensate for the defect; nor does it lie for him to object for the want of a complete title in him." *Dunsmore v. Lyle*, 87 Va. 393, 12 S. E. Rep. 610.

Same—Same—Jurisdiction of Equity to Give Damages.—The court, having jurisdiction to specifically enforce a contract, has, as ancillary, the jurisdiction to give damages. See *Nagle v. Newton*, 22

port to the auctioneer, that he might communicate it to the vendors. That they have done nothing to remove the defects in the title; and he therefore refuses to take the property.

At the June term of the court, a receiver was appointed to take possession of the property, and preserve the rents of the same until the further order of the court. And one of the commissioners of the court was directed to enquire whether the title to the property, as tendered by the plaintiffs to the defendant, was good and sufficient in law and equity; and report to the court with any matters specially stated, &c.

On the 20th of October commissioner Pleasants made his report; in which he set out the title of Fendall Griffin to the Wall street hotel. As to four-sixths of it there was no difficulty. He reported that the title to the one-sixth derived from John Shore was good, though perhaps not strictly and regularly the legal title; 574 *and that might be corrected by requiring the trustee to execute a release. He reported the two deeds of trust executed by Martha E. Shore to secure two debts due Fendall Griffin. That she by deed dated November 3d, 1849, conveyed to Griffin her interest in the other property coming to her as this did; but that no deed had been found on the records or exhibited to him, by which she conveys her interest in this Wall street property absolutely to Griffin. And he reports that as to five-sixths of the property Griffin's title is good; that he has no deed for the remaining sixth; but that the legal title to that is outstanding in the trustee Griswold; but that Griffin's estate is entitled to have discharged out of that sixth the two debts of \$300 each, secured by the deed of trust, with interest; which lien, it appears, Griffin has not released. He therefore reports that the title to the property tendered by the plaintiffs to the defendant, is not sufficient in law and equity, except and until the one-sixth of Martha E. Shore, then vested in Griswold the trustee, be transferred to Griffin. And he reports that he has understood that Martha E. Shore is now living in New

York, and has intermarried with one Marvin.

On the 5th of December 1866, and after the return of the commissioner's report, the deposition of Joseph M. Marvin was taken, and was filed in the cause. He says that Martha E. Shore was his first wife; that she was indebted to Griffin; and that the debt was paid by her selling to him her interest in the Wall street property; and he thinks her interest also in all other property to which she had a right in Virginia. And that the conveyance of the Wall street property to Griffin was made in the spring or summer of 1850.

On the 17th of December 1866 one of the plaintiffs made and filed an affidavit, in which he stated that the former residence of Fendall Griffin, and where his business papers were deposited, was consumed 575 *by fire on the 25th of March 1865, and that a majority of said Griffin's papers were consumed and destroyed by said fire. And there was filed in the cause a paper signed by Martha E. Shore, dated November 3d, 1849, in which she admits that the buildings erected on the Wall street lot by Fendall Griffin, were erected with her assent, and that he was to receive the rents until he was paid the cost of the building; and then the whole property to be shared by those entitled to the lots according to the respective proportions.

On the 20th of December 1866, the court recommitted the report to commissioner Pleasants, with instructions to enquire among other things:

1st. Whether Martha E. Shore ever conveyed her share of the lot in controversy to the testator of the plaintiffs; and if she did, when, and upon what consideration; as well as for what consideration she conveyed to him her property in the county of Henrico? 2d. When Fendall Griffin acquired possession of the lot in controversy; when he erected the buildings thereon; and whether or not one-sixth of the same remains unoccupied by buildings? 3d. Whether since the sale by the plaintiffs to the defendant, this Wall street property has diminished in market value; what is the present value thereof; and whether there be any circum-

plaintiff is not entitled, *ex debito iustitie*, to a decree for specific performance. As to whether there shall be such a decree rests with the sound discretion of a court of equity. If specific performance would be unreasonable, or work injustice then the party will be left to his action at law. *Shenandoah, etc., Co. v. Lewis*, 76 Va. 885; *Chilhowie Iron Co. v. Gardiner*, 79 Va. 311; *Edichal Bullion Co. v. Columbia, etc., Co.*, 87 Va. 645, 13 S. E. Rep. 100; *Kenny v. Hoffman*, 31 Gratt. 442; *Edwards v. Van Bibber*, 1 Leigh 194.

Same—Same—Contract by Husband and Wife.—"A court of equity will not decree a specific performance of a contract by a husband and wife for the sale of the wife's land, at the suit of the vendee, the wife refusing to execute the contract." *Clarke v. Reins*, 12 Gratt. 98.

See principal case cited and approved in *Max Meadows, etc., Co. v. Brady*, 93 Va. 84, 23 S. E. Rep. 845, and *Middleton v. Selby*, 19 W. Va. 174.

Gratt. 814, and *foot-note*, where some of the cases on this point are collected.

Same—Same—Same—How Damages Ascertained.—As to how the damages are ascertained, see *Nagle v. Newton*, 22 Gratt. 814, and *foot-note*.

Same—Same—Purchaser Compelled to Accept Less.—"Where a purchaser cannot get a title to all he contracted for, if he can get the substantial inducement to the contract, he may insist upon taking, or he may be compelled to accept, a title to so much as the other party can give a good title to, with a reasonable compensation for what the party cannot effectually convey." *Evans v. Kingsberry*, 2 Rand. 120. Of course, the latter portion of the above stated proposition depends on the facts and circumstances of each case and as to whether the purchaser will be injured by compelling specific performance against him in such case. See also, *Tavener v. Barrett*, 31 W. Va. 680.

Same—Same—Discretion of Court of Equity.—A

stances which would make the said property less advantageous to the defendant than it would have been if a complete title thereto had been made immediately after the sale?

On the 20th of May 1867, commissioner Pleasants returned his report. He reports the evidence of Marvin; but says that no deed has been found or exhibited to him by which Martha E. Shore conveyed to Griffin, her interest in the Wall street property. That the deed of the 3d of November 1849,

from her to Griffin, does not embrace
576 her interest in this property, *but is confined to her property in Henrico county; and purports to be in consideration of \$333 34, in hand paid her by Griffin. That Griffin acquired possession of the lot in controversy, some time prior to the year 1846; and in that year, he had possession of the whole of said lot, and then erected buildings on it, and that he added other buildings in 1849; and that one-sixth of said lot does not remain unoccupied by buildings. That the property had diminished in market value since the 3d of May 1866; that its present market value was between six and seven thousand dollars; and it would not rent for as much then as at the time of the sale; the business on that street being less than at that time; and that these circumstances would make the property less advantageous to the defendant than it would have been if a complete title had been made immediately after the sale. The commissioner thinks that the deed referred to by the witness, Marvin, is the deed of 3d of November 1849, which does not embrace this property. And he reports it as his opinion that the title is not sufficient. That it did not appear that Griffin had possession under color of title; or that his possession was adverse, or not the possession of his co-tenants; nor that it was against parties who were under no disabilities; nor that it was sufficient in length of time, since the statute of limitations may not have continued to run after April 1861.

The plaintiffs excepted to the report on the grounds: 1st. That Griffin had been in possession of the property ever since 1846. 2d. That in 1850, Griffin had purchased the share of Martha E. Shore, and she and her husband conveyed it to him, and he died in possession of it in April 1866; all the while claiming it as his own and building upon it; and therefore, if there was no conveyance, his title was perfect. 3d. That there is no proof that the property has diminished
577 in value. But if it has it was the loss of the defendant and not of the *plaintiffs, because the title was good, and the defendant should have executed his contract.

On the 10th of August 1867, the cause came on again to be heard on the papers formerly read, and the report of comm'r Pleasants, with the exceptions thereto, and also the report of the receiver in the cause; whereupon, the court being of opinion that specific performance of the contract ought not to be decreed against the defendant, dismissed the bill with costs; and directed

the receiver to pay over the rents to the plaintiffs, and return the property. And the cause was retained on the docket for a further report of the receiver, and for a settlement of his account.

On the 30th of November 1867, the two surviving executors of Fendall Griffin, presented their bill to the Circuit court of Richmond, praying that the decree rendered on the 10th of August preceding, might be reviewed, reversed and annulled, and asked leave to file the same; which was allowed.

The bill states the sale of the Wall street hotel property to Cunningham, and his refusal to take it on the ground that the title was defective, in that Martha E. Shore was the owner of one-sixth of the lot and tenement, and had never conveyed it to Griffin. That Martha E. Shore married Joseph M. Marvin. and plaintiffs employed counsel to examine the records of Henrico county for a conveyance from Marvin and wife to Griffin; but after diligent search, he was unable to find it. And the commissioner reported against the title. That since the decree dismissing the bill was rendered, one of the plaintiffs discovered, accidentally, among the papers of his testator, the fee bill of L. N. Ellett, late clerk of Henrico court, for recording a deed from Marvin and wife to Fendall Griffin, which they exhibit. That a new search was made in the clerk's office of Henrico County court; and the original deed from Marvin and wife

to Griffin, for the property was found
578 which *was also exhibited with the bill. They make Cunningham a defendant, and pray that the decree aforesaid may be reversed, and that the relief prayed for by their original bill may be granted to them.

Cunningham demurred to the bill, and also answered. After referring to what he said in his answer to the original bill, and the proceedings in the cause, and to the admission of the plaintiffs that their counsel had failed to discover the missing link of the title, he said that the defendant's counsel and the commissioner of the court, after laborious examination, could not discover it; and reported the title defective. He insisted that the laches in making out the title was not his, but was that of the plaintiffs; and that if they had used any diligence they could have found the fee bill immediately after the auction sale of the property. And he insisted further, that the circumstances of the property, and of the country, and also of himself, had so changed since the sale that it would be inequitable now to enforce the contract. That if he could have gotten a good title at once he could have sold or otherwise have disposed of the property to advantage. That more than a year had occurred since the sale; the property has depreciated thousands of dollars in value; the rent has sunk from \$1,800 to \$600 per annum, and the value of real estate in that part of the city had greatly depreciated; and the defendant has been deprived of the ability to bear the loss on this depreciated property.

On the 20th of May 1868, the court directed a commissioner to enquire whether the property had depreciated since the sale; and if so to what extent; whether before or since the institution of this suit; whether in fee simple or annual value; and whether the depreciation was temporary or permanent; whether any change in the condition of the defendant and in his relations to said property had occurred since the said sale,

579 which would render the property less advantageous *to him, than if a good title had been tendered to him, by the executors of Griffin with due diligence after the sale; whether the title of said Griffin was or was not a good title to said lot; and whether that title was tendered to the defendants with the muniments or deeds evidencing such title; and whether any adverse title to the lot had been asserted by any person; whether the executors of Griffin have been guilty of any laches in tendering a title to said lot; and that he report all the evidence showing such laches.

On the 28th of May 1868, the commissioner made his report. He says: 1st. That the property has depreciated in market value since the sale to the defendant, about fifty per cent.; and that it has depreciated since the institution of this suit, both in its fee simple and annual value; and that this depreciation seems to be permanent. 2d. That it would be less advantageous to the purchaser than if a good title had been tendered by the executors with due diligence after the sale, both on account of its depreciation and of a change in the circumstances of the defendant that has occurred since the sale. 3d. That the title of Griffin, it now appears, was a good title to the lot; but that the title was not tendered by the ex'ors of Griffin, as far as the interest of Martha E. Shore or Marvin, therein, amounting to one-sixth part was concerned. That the commissioner searched carefully himself in the clerk's office of Henrico County court, and also in the clerk's office of the Richmond Hustings court, for the deed from Martha E. Shore to Griffin, and for a deed from Martha E. Marvin and her husband to Griffin; and that the counsel for the executors did the same thing; but that the deed was not found by either of them, although it had been recorded in Henrico; and that the failure to find it arose, as the comm'r supposed, from its not having been indexed. 4th. That no adverse title to the

580 lot has been asserted by any person so far as appears to the *commissioner.

5th. That the ex'ors of Griffin were guilty of laches in tendering a title to said lot. They should have found the fee bill of Ellett, which was among the papers of their testator, whilst the title was undergoing investigation before the commissioner under the decree of June 6th, 1866; that report was not made until the 20th of October, and not filed until the 3d of November 1866; if the fee bill had been found at any time before that day, the deed from Marvin and wife to Griffin, would have been found at that time, and the commissioner's report would have been different from that filed.

The plaintiffs excepted to the report of the commissioner:

1st. Because after stating that the title of Griffin to the lot was good at the time of the sale, he says the executors did not tender a good title to the purchaser, as far as the interest of Martha E. Shore was concerned. They insist that if the title was then good, a good title was tendered; and the only question was whether sufficient evidence of a good title was furnished. And they rely as conclusive on that question, upon the testimony of Marvin, the evidence of uninterrupted adverse possession by Griffin from 1846 until his death, and his dying in possession; and the absence of any adversary claim.

2d. Because it imputes laches to the executors of Griffin, when, as they insist, the evidence shows the utmost diligence in hunting up the title; and they were foiled, as the commissioner was foiled, by the failure of the clerk of the County court to record the deed to Griffin.

On the 1st of August 1868, the cause came on to be heard on the papers formerly read, the report of the commissioner Pleasants with the exceptions thereto, and the depositions, when the court confirmed the report, and dismissed the bill with costs.

581 And thereupon *the executors of Griffin obtained an appeal to this court.

Sands and Lyons, for the appellants.

Howison, for the appellee.

WILLOUGHBY, J., delivered the opinion of the court.

The facts appearing to be material to the decision of the questions in this case appear to be in substance as follows:

The appellants, as executors of the will of Fendall Griffin, deceased, sold at auction May 3d, 1866, certain real estate situated in Richmond, known as the Wall street hotel, to the appellee, who bid therefor the sum of \$9,900. The appellee claiming to have been excited by stimulants, on reflection and examination of his condition, became immediately dissatisfied with his purchase, and asked to be released. This being refused, he employed counsel to examine the title, who, on said examination, discovered the following apparent defects:

First. The property had originally belonged to one Wm. Cook, and from him descended to his heirs, and as one of said heirs, Martha E. Shore appeared to be the owner of one-sixth of the lot; and no record of any conveyance could be found from her to the testator.

Second. John W. Shore, another heir of one-sixth, appeared by the records to have executed two deeds of trust to a trustee to secure the payment of certain debts to the testator, and subsequently conveyed the same interest to the testator in satisfaction of said debts; but the trustee had not joined in the conveyance, thus leaving the legal title to such other sixth in said trustee.

Third. The will itself was claimed to be somewhat ambiguous in its terms, leaving

the power of the executors to sell somewhat in doubt.

In answer to these objections, it is claimed that the testator held the property adversely from 1846, for fifteen *years, and thus had a perfect title, which could not be disturbed. It appeared that he improved the whole lot in 1846. On the 3d of November 1849, Martha E. Shore seems, by writing filed in the cause, to have admitted that these improvements were made with her consent. Up to that time, at least, it appears that the possession of the testator was as a tenant in common with Martha E. Shore.

By deed of May 20, 1848, said Martha E. Shore had conveyed this one-sixth to a trustee, to secure the payment of \$300 to the testator; and by deed of June 22, 1849, she had made a similar deed of trust to secure another sum of \$300 to said testator. By deed of November 3, 1849, the same date of the writing relating to her consent to improvements, she conveyed other property absolutely to said testator; but no record could be found of an absolute deed of conveyance of this one-sixth.

The appellee, on receiving notice of these apparent defects, notified the appellant that, in consequence thereof, he should not perform the contract; and thereupon a bill for specific performance was filed on the 21st of May 1866, accompanied by a tender of a deed of the property by the executors.

On the 27th of November 1866, a deposition of Joseph M. Marvin, the husband of said Martha E. Shore, was taken, and he testified that a conveyance was made of this one-sixth interest to Mr. Griffin in the spring or summer of 1850. In his deposition he speaks of two notes of \$300 each, and says they were settled by her selling her interest in the Wall street property to Mr. Griffin; and also her interest in all other property to which she had a right in Virginia.

With this evidence before him, the commissioner, on the 20th of May 1867, reports that "it seems that the conveyance of which he speaks, from Martha E. Shore, was the deed of November 3, 1849, which does not embrace *her interest in the Wall street hotel; and no other conveyance from her has been shown."

From this it would appear that the commissioner, notwithstanding the evidence of Marvin, that such deed was made in 1850, believed from the facts that "no such deed could be found, and that some other deeds were made a short time before that; he was mistaken as to the absolute conveyance having been made. I think that an inspection of the whole record will show that this conclusion of the commissioner was not an unreasonable one; but, on the contrary, would very naturally have been inferred.

He also reports, that it does not clearly appear that Griffin had possession under color of title; nor that his possession was adverse or not the possession of his co-tenants; nor that it was against parties who were under no disabilities; nor that it

was sufficient in length of time, since the statute of limitations had commenced to run.

This report was confirmed, and a decree rendered August 10, 1867, dismissing the bill.

In November 1867, the executor of Fendall Griffin accidentally discovered a fee bill for recording a deed among the papers of Mr. Griffin, which led to a further search among the records; and thereupon an absolute deed of conveyance of the interest of Martha E. Shore in this property was found to have been made on the 28th of May 1850 to said Griffin. The failure to discover this deed appears to have arisen from the fact, that it was not found in the general index of the records.

The appellant immediately filed a bill of review, setting up these facts, and again claiming a specific performance. There is evidence in the case, showing that in March 1865 the residence of the testator was destroyed by fire, and with it a majority of his business papers were consumed.

The appellee resisted this bill of review, upon the *ground that there was laches by the appellant, and that during the delay which had taken place since the sale, the property had greatly depreciated in value, and his own circumstances had also so greatly changed as to render it impossible for him to comply with the terms of the contract.

I think the weight of the testimony is that the property had materially diminished in value during this time.

I do not consider it necessary in determining the questions in this case, to consider at length only the second apparent defect in the title; the want of evidence that the one-sixth interest of Martha E. Shore had been conveyed to the testator Fendall Griffin; as this appears to have been the principal and most material objection to the title. When the first decree was rendered, this defect did not appear to have been supplied, and the title was to that extent in doubt, notwithstanding the evidence of Marvin, as he might so easily have been mistaken, unless the facts of the case show that the testator had held possession adversely long enough to have perfected his title, notwithstanding this apparent defect. This question of adverse possession seems to have been the principal reliance of the appellant in opposition to the commissioner's report and to the first decree.

Now, in the first place, the commissioner has reported that there is no evidence of adverse possession. At that time the conveyance of Martha E. Shore did not appear and could not be found. I am unable to discover from an inspection of the record, that at that time there was any evidence that the testator claimed the possession of this one-sixth interest under color of title. True he was in the actual possession, but as a co-tenant with Martha E. Shore, as appears certainly as late as November 3rd, 1849, and, as to all that then appeared, so

continued. At that time although
585 other property *was conveyed by her
to Griffin this was not. So far as the
evidence showed at the time of the first
decree, except the very unsatisfactory depo-
sition of Marvin, because of his liability
to be mistaken under the circumstances, I
cannot find that Griffin claimed to hold
under color of title. Adverse possession
does not depend upon matters of record.
As against an older undisputed title such
adverse possession must be shown positively
by the party setting it up, and it may be
and often is quite a disputed question.

The claim of title by adverse possession
is rendered much more doubtful by the fact,
that in the legislature which assembled at
Wheeling, by the act of July 26, 1861, en-
titled "an act staying the collection of cer-
tain debts, it is provided that the time
during which this act is in force shall not
be computed in any case in which the stat-
ute of limitation, may come in question;"
and this provision is again found in the
act of February 8, 1862, relating to the same
subjects; and in the acts of the Alexandria
legislature of January 30, 1863, and January
23, 1865, to which may be added the act of
March 2, 1866 chap. 77; though if this
stood alone there might be doubts of its
application to this case, as it is claimed
that before that time the period of limita-
tion had expired and rights had already
vested; and also the acts of the body sitting
at Richmond, claiming to be the general
assembly of Virginia, of March 14, 1862,
and February 23d, 1864, upon the same
subject.

It is not for the purposes of this case nec-
essary perhaps to decide upon the force and
effect of these several acts, but they are
proper to be considered, as at least casting
a reasonable doubt upon the claim of the
appellant to have had full title to the prop-
erty in question by virtue of adverse pos-
session for the period required by the statute
of limitations.

This then, is, I think, quite plain:

First. That it was at least then
586 quite doubtful, whether *Martha E.

Shore had conveyed her interest to
the testator.

Second. That it was at least quite doubt-
ful whether her original title had been
overcome by an adverse possession of the
testator.

This being so, the title of the testator
was, at the time of the first decree, in a
state of at least reasonable doubt. It had
been held so by competent and careful
counsel after a thorough examination. The
commissioner had so twice reported it; and
the court below agreed with them upon this
point, and I do not feel warranted in saying
from the evidence, that such doubt was
without reasonable foundation; and noth-
ing occurred to change or clear up this
doubt up to the time of filing the bill of
review, November 30th, 1868.

It does not seem to me necessary to decide
whether as a matter of fact he was entitled
to the property by reason of adverse pos-

session. Indeed he does not now rest the
title upon adverse possession, but upon an
absolute conveyance. But this did not
then appear. If this conveyance is to be
regarded as an ouster by the testator of his
co-tenant, this ouster was not then shown.
If the adverse possession depended upon
this ouster, there was then no satisfactory
evidence of this fact. The question then,
was not whether there was a deed, or
whether there was adverse possession, but
were these facts shown to the satisfaction
of the court or to the reasonable satisfaction
of the appellee; and as the evidence then
stood, I do not think it was; and whatever
may be said as to the actual facts as they
now appear, they were then at least matters
of reasonable doubt, and so continued until
November 30th, 1868, the time of filing the
bill for review. In addition to this doubt,
it may be said that the power of the execu-
tors to sell at the time he sold, is not be-
yond all reasonable question according to
the terms of the will; nor would it have

587 been impossible that there could have
been something more than a *bare
legal title in the trustee of the deed
of trust executed by John W. Shore; for it
was not impossible that the debt secured
thereby, had been assigned to some other
person before the conveyance of John W.
Shore to Fendall Griffin absolutely; in
which case, such assignee would have an
equitable interest in that portion to the
amount of his claim.

While this reasonable doubt as to the title
to a material part of the property was in
existence and could not be removed, I do
not think the purchaser was compelled to
comply with the terms of purchase. In the
advertisement of sale, there was no intima-
tion but that the title was perfectly clear.
The bid must have been supposed to have
been made with such an understanding. In
Garnett v. Macon, 2 Brock. R. 185, 244, Ch.
J. Marshall says: "In a contract for the
purchase of a fee simple estate, if no in-
cumbrance be communicated to the pur-
chaser or be known to him to exist, he must
suppose himself to purchase an unincum-
bered estate; and a court of equity will not
interpose its extraordinary power of com-
pelling a specific performance, unless the
person demanding it can himself do all that
it is incumbent on him to do." On the
same page, he says: "Both on principle
and authority, I think it very clear, that a
specific performance will not be decreed on
the application of the vendor unless his
ability to make such title as he has agreed
to make, be unquestionable. See, also,
Marlow v. Smith, 2 P. Wms. R. 198. In
that case, the court say: "If there is the
least doubt of the title (which was made to
appear by the opinion of Sergeant Hooper
and Mr. Webb), it would, by no means, be
proper for the Court of chancery to compel
the party to accept the title." In Pincke
v. Curteis, 4 Bro. Ch. R. 329, the solicitor
general who was asking a specific perform-
ance, says: If there be a solemn doubt, I
agree that the court will not compel the

purchaser to take it." See, also, *Rooke v. Kidd*, 5 Ves. R. 647; *Stapylton v. Scott*, 16 Ves. R. 272. In *Sloper v. Fish*, 2 Ves. & Bea. R. 145, it was a doubtful question whether the deed was absolute or had been delivered as an escrow only. In *Jervoise v. The Duke of Northumberland*, 1 Jac. & Walk. R. 540, there was an uncertainty as to the nature of the estate. In *Lowes v. Lush*, 14 Ves. R. 547, it was a question of doubt whether the sale had been anticipated by an act of bankruptcy.

In all these cases, the question seems to have been, not what was the actual fact, but was there reasonable doubt about it; and in such cases, specific performance was not enforced. I would not hold that in a case where such doubt appears to be frivolous, or is set up as a mere pretext, when upon examination, there appears to be no foundation for such doubt, the contract would not be enforced; but only in a case of reasonable doubt either as to law or fact; and in this, I think, I am fully supported by all the authorities upon the subject.

But it is contended that such doubt might have been removed by a proper examination of the records. It is a fact that search was made by the appellee, and no deed of conveyance was found in the general index. The law requires that an index shall be made by the clerk of all deeds recorded; and I think if a deed is not found there, a party is authorized to presume that no such deed exists, or is recorded. I think that the index, in the contemplation of the legislature, in requiring it, was a general index, and not merely an index to each book. Besides, it does not appear that the deed was referred to in any index. The counsel says he examined the title, and searched the records of the Hustings court and the County court of Henrico, and he does not find this conveyance. It ought to be presumed that he made a proper search. He is shown to be competent and careful. This appears by

the opinion he gave; and he did all I think that could be reasonably expected of him as counsel for the vendee. He pointed out the apparent defects, and called upon the vendor to obviate these defects. But I think it may be said that it is the duty of the vendor, especially if he seeks a specific performance, and if apparent defects in the title are pointed out, to remove such defects, and to show that they are not so, and remove the doubts arising thereon. If, as he contends, this might have been done by a proper and lawful search, that is so much more reason why he should have done it. If he is unable to do it, it is not necessary to say that it is his laches or negligence, but it is his misfortune. If his private papers have been burned, that is his loss. If other papers of his cannot be found, that is his misfortune. He must be not only prompt, willing and eager, but he must be able to do all on his part. He must not only have a good title, but he must show that he has such title, especially in a case of doubt, and where

apparent defects are pointed out; and he must also show it beyond all reasonable doubt.

In *Lloyd v. Collett*, 4 Bro. Ch. R. 469, a purchaser, who had made a deposit on his purchase, was allowed to withdraw it, and abandon the purchase, because the vendor had neglected to give him an abstract of his title from August 18, 1792, to March 25, 1793; and in the meantime there had been a material depreciation in the value of the property. See, also, *Fordyce v. Ford*, Id. 494; *Seton v. Slade*, 3 Lead. Cases in Equity 377.

There is a very good reason why it should be incumbent upon the vendor to remove doubts, and furnish the evidence of his title. He must be supposed to have the means for so doing; at least much more so than the vendee. He must be supposed to know his own title, and the sources of it, while a vendee could not be supposed to know anything of it. This must have been peculiarly so in England, when they had no registry acts, and the muniments of title were to be found only in the possession of the vendor. Nor do I see why in this State, where we have these registry acts, the rule should be changed. It is true the records facilitate the enquiry very much, but they are not absolute evidence of title. A conveyance may be perfectly good, though not recorded, except as to creditors and bona fide purchasers. Besides, the title often rests upon matters in pais, which the records do not disclose. But as to these matters, the vendor must be presumed to be better informed than the vendee; and therefore I see no sufficient reason for adopting a different rule in this country from that which appears in the English reports. I will not say that it was the duty of the vendor in this case to furnish the evidence of his title, but that it was his misfortune that he could not do so. See, also, 4 Gratt. 253. This course of reasoning leads us to hold, that at the time of the first decree in this case, and with the facts then appearing, the vendee ought not to have been required to take the title as it then appeared; and the decree dismissing the bill was proper, and there were no circumstances changing this state of things until the filing of the bill of review in November 1868.

Then it appeared that a conveyance had actually been made by Martha E. Shore of her interest to the testator in May 1850, and then such deed was found to be upon the record though it had not been indexed. Then for the first time the doubt upon that subject is fully removed.

But in the meantime, as I have already said, the weight of evidence shows there was a material depreciation in the value of the property.

The decree shows also that his own circumstances had in the meantime changed so as to render it impossible for him to perform the contract; though as his own testimony upon this last point is quite contradictory, I do not give it much weight.

It is true that time is not, as a
591 general rule, regarded *as of the es-
sence of a contract in equity unless it
is so made. But if by the lapse of time
during the default of either party, circum-
stances have happened which materially
change the value of the contract as to the
other party not in default, then time is of
the essence of the contract. Garnett v.
Macon; Floyd v. Collett; and Seton v.
Slade; above cited; Story's Eq. Jur., sec.
776, and cases there cited.

Suppose that in the meantime the prop-
erty had greatly risen in value. Is it to be
supposed that the vendor would have filed
this bill of review? Or if the vendee had
in such case then asked for specific per-
formance on his part would not the vendor
have resisted it?

I do not give any weight to the fact that
the vendee at the time of making his bid
was excited by stimulants. This is no ex-
cuse for refusing to comply with the terms
of sale. It is no doubt true also that he
was eager and anxious to find excuses for
his non-performance. But this would not
preclude him from taking advantage of
any valid and lawful objection, if such could
be found; and it seems to me that they
were found in this case.

On the whole, I cannot come to any other
conclusion, than that under the circum-
stances of this case, the decree of the Cir-
cuit court was right and should therefore be
affirmed.

Decree affirmed.

592 *Washington, Alexandria & George-
town R. R. Co.

v.

Alexandria & Washington R. R. Co. & als.

January Term, 1870, Richmond.

1. Corporation—Suit to Declare Null—Proper Parties.*

—A corporation being a defendant to a suit in
equity, which seeks to have it declared null, the
holders of stock in it are not proper parties to de-
fend the suit.

2. Same—Same—Same.—In such a case the holders
of the stock claiming that if the corporation is
annulled they have equitable interests in the
property, may be admitted as parties defendants
to protect their interests.

3. Same—Non-Resident Stockholders—Removal of Cause
to Federal Court.*—The plaintiff and the defend-
ant corporation being corporations of this State,
the owners of the stock though non-residents, are
not entitled to have the cause removed to the
United States court, to have the question of the
validity of the corporation decided.

4. Deed of Trust—Substituted Trustee—Sale Vold.—The
A. & W. Railroad Co. make a deed on their prop-
erty to secure certain bonds; and it provides that
if the trustee becomes incapable of acting, any
court of record of A. county, upon the application
of three-fifths of the holders of the bonds, upon

*See monographic note on "Stock and Stockhold-
ers" appended to Osborne v. Osborne, 24 Gratt. 392.

notice to the president or any director of the com-
pany, may appoint another trustee. The trustee,
president and directors go into the enemy's lines,
and remain there during the war. An order of
the court of A. county, substituting another per-
son as trustee, without notice, is null and void;
and a sale made by such substituted trustee is
utterly null.

5. Same—Sale by Trustee to Himself—Invalid.—A trus-
tee in a deed to secure debts, who is the attorney
in fact and law of the creditor, cannot make a
valid sale at auction of the property to himself.

6. Liens on Property—Priorities Unascertained—Sale
Improper.*—Where there are various encum-
brances on property and the priorities are not
ascertained, a sale by a trustee under one of the
deeds is improper.

7. Statute—Sale by Trustee—Quære.—Quære. Whether
the act, Code, ed. of 1860, ch. 61, §§ 28, 29, applies to
a sale by a trustee of a mere equity, conveying
no legal title to the property of the corpora-
tion?

593 *The following statement of this
case was prepared by JUDGE WIL-
LOUGHBY:

The Alexandria and Washington Railroad
Company was chartered in February 1854,
by the legislature of Virginia, and was or-
ganized pursuant thereto; and James S.
French was made president. In August
1854, congress passed an act authorizing
said company to purchase and hold lands in
the District of Columbia, and to lay a track
through such streets as the corporate au-
thorities of Washington might approve. In
1855, the authorities of Washington author-
ized the company to lay its track on Mary-
land avenue, from the Long Bridge to the
Baltimore depot, and guaranteed their bonds
of \$60,000 to assist the company in the con-
struction of the road; for which, in April
1855, the company executed a deed of trust
to Joseph H. and A. T. Bradley, for the
benefit of the corporation, on all the prop-
erty of the company.

The track was laid from Alexandria to
the Long Bridge, and on Maryland avenue,
and cars and engines were obtained, and
the road operated until the spring of 1861,
up to the time of the breaking out of the
war.

On the 31st of December 1856, a second
deed of trust was made upon the property
of the company, to J. Louis Kinzer, trustee,
to secure Fowle, Snowden & Company
\$14,849 50, on which was paid \$8,348 14.

On the 16th of July 1857, a third deed of
trust was executed to Walter Lenox, trustee,
to secure the payment of \$30,000 in coupon
bonds, which the company had been au-
thorized to issue by an act of the legislature.
These bonds were payable July 22d, 1877,
with interest semi-annually at seven per
cent.; and it was provided, that in default
of payment of principal or interest, the
road might be sold by giving at least sixty
days' notice by publication in certain
newspapers. The deed further provides as
follows:

And it is mutually agreed, that in

*See foot-note to Crawford v. Weller, 23 Gratt. 835.

594 case of the death, incapacity *or resignation of the party of the second part (the trustee, Lenox), or of his successors in this trust, then the office of trustee filled by him shall become vacant, and such vacancy shall be filled by an appointment to be made by any court of record in the county of Alexandria, on the application of the parties of the first part, or of the holders of three-fifths of said bonds. Provided, however, in the last case, notice of the application of the parties making such request, be given to the president or one of the directors of said company; and all the rights, powers and authority hereby conferred on the original trustee shall then and there devolve upon and be invested in his successor or successors so appointed.

This deed of trust in terms recognizes the first deed of trust of \$60,000 as an existing and prior lien.

These bonds were sold to Benjamin Thornton, of England, for \$10,000, upon which was paid \$2,000 in cash; and notes were given for the balance; upon which was afterwards paid about \$3,500, making about \$5,500 paid in all; the balance still being due.

This company was authorized by its charter to issue stock to the amount of \$300,000, and issued stock only to the amount of \$200,000. There were various judgments and claims against the company, making the amount of the indebtedness, together with the sums secured by said deeds of trust, including interest on the 10th of April 1862, as reported by the commissioner, about \$195,000. Of these judgments, Alexander Hay claimed to be the owner of about \$40,000 in April 1861; but it seems that in August 24th, 1860, he had assigned these judgments which had been obtained by him long before, to James S. French, upon the payment to him of \$5,000, though it does not appear that this \$5,000 has been paid. By power of attorney executed at the same time, he authorized said French to deal with such judgments in the same manner as if the same were his individual property.

595 *On the occupation of the city of Alexandria by the United States troops, in May 1861, the rolling stock of the company was transferred to the Orange and Alexandria railroad, and taken beyond the Federal lines. The president, directors, and the trustee, Lenox, all went south at that time, and remained within the Confederate lines during the war; and the rolling stock was sold by said French to parties within said lines.

The United States government took possession of the road in 1861, and laid the track with heavy rails, and put it in good order, and used it till the close of the war, having exclusive possession thereof during that period, and leaving the road in good order and very valuable.

It is claimed by Hay that he took possession of the road early in 1861, and made a contract with the secretary of war, by which the war department was to repair the road;

and binding himself to defray the expense of such repairs which should not be discharged by the use of the road.

The government used the road long enough to pay its outlays upon the road, if the use thereof could be chargeable against the government.

The defendant, Joseph B. Stewart, an attorney at law, acted as attorney for Alexander Hay, and during the year 1861, either as such attorney, or on his own account, sold the iron of the company for something over \$10,000, and received the proceeds. No account has ever been made of this money by him or by Mr. Hay.

On the 28th of January 1862, Joseph Davison, who claimed to be the agent of Benjamin Thornton for the coupon bonds said to be held by him, made an agreement with said Stewart, authorizing him as attorney to take such steps as might be necessary to close out and perfect the interest of said bondholders in and to said road, and agreeing to give him a contingent fee

596 of one-half *of the whole amount received on said bonds in the sale of the same or of the said road over and above the sum of \$10,000, and all the interest that the said bondholders or any of them may have paid, or may have to pay on the said \$30,000 of bonds, at the rate of seven per cent. per annum; and on the next day, January 29, said Stewart, as attorney in fact for said Hay, gave to said Davidson an agreement in writing, that if a sale be made under said deed of trust, and the said road be purchased by himself or constituents, the said Thornton should have the right to continue his interest in the same according to the ratio of his present lien upon and demand against the same; and shall enjoy and receive a pro rata rate of all the appreciations of value or profits claimed from the future use or development of the same, and be created a stockholder accordingly.

On the 3d of February 1862, Davison filed a petition in the County court of Alexandria county, sworn to by him, stating that he is the attorney in fact of all the bondholders secured by the deed of trust to Walter Lenox, claiming that said trustee has become incapacitated from performing said trust; that he has made diligent search for the president, or some director or agent of said company, to whom he could give notice, but could find none upon whom notice could be served, and believed that they had abandoned the franchises of the road, and gone beyond the jurisdiction of the court, and asks that Joseph B. Stewart be appointed trustee.

Joseph Thornton also swears that he knows of his own knowledge that said Davison is the agent of said bondholder, Benjamin Thornton, and has authority to make the applications.

Upon these affidavits and application, the County court make an order substituting Stewart as trustee in said deed of trust in place of Walter Lenox, on the 3d day of February 1862.

On the 4th day of February 1862, 597 Davison requested *the trustee to make sale of said road, and thereupon, on the 10th day of February 1862, such sale was advertised to take place on the 10th day of April following, on which day it was sold at public auction, and bid off by Alexander Hay for the sum of \$12,500; and Hay having assigned one-half of his purchase to Joseph Thornton, and they having agreed to continue as a corporation under the name of the Washington, Alexandria and Georgetown Railroad Company, conveyance was made to them, and to such company of the road, and all the franchises and property of the Alexandria and Washington Company, by Stewart as trustee.

On the 3d day of May 1862, the organization of the new company was perfected by the appointment of officers; the stock having been divided between Hay, Stewart, Davison and Thornton, the same then being owned by them.

On the 3d of March 1863, congress extended the charter of the old company, so as to allow it to occupy its present location on Maryland avenue, in Washington, and to construct a bridge alongside of the Potomac bridge upon certain conditions named in the act. This charter is claimed to have been obtained at the instance of members of the new company, but it does not appear, and is not explained why, in terms it was granted to the "Alexandria and Washington Railroad Company."

By an act of the Alexandria legislature of January 23, 1864, the Washington, Alexandria and Georgetown Company, which is therein declared to be a corporation, lawfully succeeding by purchase to the old company, is authorized to issue stock to the amount of \$500,000, to sell its bonds to the amount of \$200,000, in addition to the \$100,000 allowed to the old company, and to borrow money upon its promissory notes to the amount of \$100,000 more. With the proceeds of such stock, bonds and notes, it is claimed by the defendants that a

598 *large portion of the indebtedness of the old company was paid; money was raised to procure the charter from congress, to build the bridge, repair and put the road in good order; and such stock is now held by various parties in Washington, New York and Baltimore.

The bill which was filed in April 1866, by James S. French as president of the Alexandria and Washington R. R. Company against the new company, charges, among other things, that the appointment of J. B. Stewart as trustee was, for many reasons alleged therein, null and void; and that the sale by him was consequently without authority; and that all the action of himself, Hay, Thornton, and Davison was the result of a fraudulent conspiracy on their part to obtain the road unlawfully; and that this, together with the conduct of said Stewart in making such sale, ought to make the sale void.

The answers were filed, accounts taken by the commissioner and filed, and various

other proceedings had up to the 22d of November 1867, when Coleman, Riddle, and others filed a petition representing that they were the owners of a large majority of the stock of the new company, and as such were deeply interested in the contest between the said companies, and asked that they be made parties defendants; which was allowed.

On the 23d day of December 1867, a decree was made adjudging that "the whole proceeding of the County court of Alexandria county at its February term, 1862, substituting Joseph B. Stewart as trustee in place of Walter Lenox, under the deed of trust of the 16th July 1857, was without authority of law, and null and void; and that all the subsequent proceedings of the said Stewart under said deed, his sale of the said road and its franchises to Alexandria Hay, and the incorporation of the said Washington, Alexandria & Georgetown Railroad Company growing out of the said sale, are null and void, and that the same should be set aside and annulled."

599 *By the same decree a reference was made to the commissioner to enquire into the interests of said Coleman and others, and make further report to the court.

On the 2d of June 1866, a petition was filed by the new company alleging that the corporation was the only party having any real interest in the suit, except Joseph B. Stewart; that Hay was a citizen of Pennsylvania, and Stewart a citizen of Kentucky; and on the same day a petition was filed by said Stewart alleging that he was a citizen of Kentucky; that the company was made a defendant for the purpose of preventing a removal of the same into the United States court; and upon said petitions motion was made by the petitioners to remove the cause into the Circuit court of the United States.

This motion was overruled.

On the 6th of December 1866, this motion was renewed by Stewart and Hay, each alleging their citizenship of another State; which was also denied.

In May 1868, two petitions for removal to the United States court were filed by the said Coleman and others, each alleging their citizenship of Maryland and other States; one claiming that the validity of orders made by the secretary of war and other military officers in relation to said road was involved in the suit; and the others, that they, holding the majority of the stock of the new company, the existence of which, as a company, was denied by the bill, were the substantial parties defendants, and alleging that from prejudice and local influence they did not believe they would be able to obtain justice in the State court. They also filed their answers at the same term. The motion upon these petitions was denied at the August term of 1868, and then, against the protest of Coleman and others, who claimed that they had had no opportunity to take testimony, a de-

600 cree was made again declaring said order *of the County court and the said bill null and void; and it appearing that large liabilities had been incurred by the old and the new companies; that under the authority to issue stocks and bonds to a limited amount, a large amount had been issued in excess of said authority, which have been sold, and are now in the hands of purchasers thereof, a reference was ordered to ascertain what equities might exist growing out of said transactions. From this decree an appeal has been taken to this court.

R. J. Brent, Jno. L. Brent, and Dulaney, for the appellants.

G. W. Brent, Bradley & Gilmer, for the appellees.

WILLOUGHBY, J. The two leading questions presented for our decision are:

First. Ought the case, under the circumstance thereof, to have been removed on the petitions, or either of them, for such removal to the United States Circuit court?

Second. Was the sale made by the trustee, Joseph B. Stewart, valid; and did it operate to extinguish the Alexandria and Washington Railroad Company, and divest it of its corporate rights and privileges?

It would seem to me, without reference to the validity or invalidity of such sale, and without now passing upon the question of its right to be regarded as a corporation, consistent with legal principles to regard for the purposes of the decision of the points before us, the Washington, Alexandria and Georgetown Railroad Company as a company capable of being sued, and of exercising certain powers.

This company certainly insists on being so regarded; it has acted as such with a full board of officers and directors; and as such, has issued stock, bonds and notes to a very large amount; it has been so
601 recognized by *the public; and transactions of great extent have taken place upon the faith of the existence of such company, and it was recognized as such by the act of assembly of January 23, 1864, by which large powers and privileges were granted to it "as a lawfully existing company."

The question regarding the petitions for removal seems to me to require our first consideration.

I will designate the two companies as the old and the new companies.

The bill, as at first presented, was brought by the old company against the new company, Hay, Stewart, Benjamin and Joseph Thornton, Davison, and the persons interested in the several deeds of trust.

Hay, in his answer, expressly waives all right to remove such cause as to himself, and Joseph Thornton and Davison protested against such removal.

The first petition was made by the new company. That this was properly overruled, it seems to me, there can be no question. The old and the new companies were both residents and citizens of the State of

Virginia; and I think it is equally plain that Stewart alone, under the law as it then existed, could not properly ask for a removal of such cause.

It has been settled that a suit could not be removed when a part of the plaintiffs or defendants are citizens of the State where the suit is brought, and a part of some other State (Wilson v. Blodget, 4 McLean's R. 363; Northern Indiana Railroad Company, 3 Blatchf. R. 82), and in order to remove such cause to the United States court, all the defendants must join in the petition for such removal. (See 2 Sumner 339.)

The motion to remove in December 1866 was also properly overruled.

The provision of the act of congress of July 1866, upon which the petitioner then relied, provided for a removal, in cases of

citizenship of different States, on

602 *the petition of a defendant, "if the suit is one in which there can be a

final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties to the cause." That this was not such a case is perfectly manifest from the slightest inspection of the pleadings and proceedings. Congress passed an act March 2, 1867, providing that where there was a controversy between citizens of different States, either party, plaintiff or defendant, might, on filing an affidavit in the State court that he has reason to, and does, believe that from prejudice or local influence he will not obtain justice in such State court, file his petition for such removal, and it was made the duty of the State court then to proceed no farther in the cause, but the cause should be removed.

This affidavit was made by Coleman and others, and also an affidavit that orders of the military authorities were involved, in May 1868. As to the validity of military orders being involved, it is perfectly manifest from all the pleadings, and from the answers of these parties, filed at the same time, that there is not the slightest foundation for removing the cause on that ground. No such questions are raised in any form whatever. This last mentioned act of congress, standing alone, might be regarded as sufficiently comprehensive to include this application. But a little consideration, I think, must show us that it was not intended by this to change the practice of the courts, and to override the decision of such courts, which had been repeatedly and uniformly made since the Judiciary Act of 1789, or to change the law of 1866, providing for such removal in a case where there could be a final determination of the controversy, so far as it concerned the applicant, without the presence of the other defendants. The act of 1866 is not repealed, nor are the provisions of this act at all repugnant to it.

The act of 1867 merely extends the
603 privilege of removal *to the plaintiff, as well as to the defendant, on making the required affidavit.

In Fox's adm'rs v. The Commonwealth, 16 Gratt. 1, Judge Moncure says, in deliv-

bring the opinion of the court: "The law does not favor a repeal by implication unless the repugnance be quite plain, and then only to the extent of such repugnance." Again he says: "It is, therefore, an established rule of law that all acts 'in paria materia' are to be taken together as if they were one law; and they are directed to be compared in the construction of statutes because they are considered as framed upon one system, and having one object in view. And the rule equally applies, though some of the statutes may have expired or are not referred to in the others."

The provision of the act of 1866, limiting the application to a case where the party can have the suit determined, so far as it concerns him, without the presence of the other parties on the same side, is an eminently wise and just one.

It would be manifestly unjust that one defendant out of a large number, should have the right to take a case from a court where all of the other parties wish it to be, without very strong and peculiar reasons. It is very easy to see how this might often work infinite mischief and confusion; and few cases can be found which would better illustrate this than this case.

This has been seen and acted upon by all courts without exception and also by congress certainly up to the passage of this act; and with this view, and looking at the great mischief that otherwise would ensue, I cannot believe, without explicit words to that effect, that it was intended to repeal the act of 1866; and, therefore, both must be taken together in construing the real intention of congress. I do not at all call in question the constitutionality of these acts; but construe them all together, as I think we are bound to do. (See American Law Register, January, 1870.)

604 *There are other reasons why, in this particular case, the removal should not have been made.

The substantial parties in this controversy are the old company on the one side, and the new one on the other.

These are both certainly citizens of Virginia. The individuals named derive all their rights in this cause through one or the other of these companies. As individuals, they are citizens of different States; but as members of the several companies, they are not. *The La Fayette In. Co. v. French and others*, 18 How. U. S. R. 404. These petitioners come in simply as stockholders in the new company; and while they allege that there can be a final determination of the controversy, so far as it concerns them, without the presence of the other defendants, parties in the cause, the petition itself, as well as their answers, show that this cannot be true. The new company, of which they were stockholders, was in court defending the case, and in such case they could not, as individuals, control the cause. (See *Angell and Ames on Corporations*, sec. 407, and cases there cited.) The power of stockholders to bring proceedings against the company for vio-

lation of the duty of such company is not denied; but I do not think that this was the way to come into court on such grounds. They had the power, holding, as they claim, the majority of the stock, to remove their officers and directors, if they were acting improperly, and put in their place those who would do their duty. Chap. 57, secs. 8 and 12, Code of 1860.)

These parties were allowed, at the discretion of the court, to be made defendants upon their petition representing that they had interests which would be affected. But at the same time a decree was made adjudicating the principles of the cause. True, they complained of this, but their answers did not set forth any new facts which could throw any additional light

605 upon the principles of such adjudication; and having just come in as *defendants with others, under such circumstances, why should the decision of this question be delayed? The court says: "With a view to the speedy determination of the cause, it is deemed proper to make this adjudication." Nor do I see that this case is one in which the parties who have not united in this last application for removal are mere formal or nominal parties, or parties without interest, in which cases the real and substantial parties have been held to have the right to remove the cause to the United States court. (See *Wood v. Davis*, 18 How. U. S. R. 467).

The action of the court below in making the decree adjudging the principles of the cause, at the November term 1867, has been so severely commented upon, that it seems proper to examine this action a little more critically.

The defendants, Coleman and others, then made a simple petition as stockholders of the new company, asserting that it was a legal corporation, and asking to be made parties, as they were interested in the decision of the case. They allege, it is true, they can successfully defeat the claims of the old company and establish the validity of the new company. Their petition is not sworn to, nor any new facts alleged.

The court, deeming their petition reasonable, allowed them to be made parties, and required the complainants to amend their bill so as to make them parties. It is evident, however, that the court did not intend to allow them to be made more than formal parties, and for the purpose only of establishing such equities as they might be able to show; for it seemed manifest that if the new company were adjudged void, still they, as individuals, had equitable claims upon the road. From the very position they occupied and placed themselves in, they could do nothing more than this in either event. If the new company were adjudged a valid

606 one, then this new company being properly in court, they, *as mere stockholders of that company as such, had no standing in court. But if on the other hand, the new company should be adjudged invalid, as it was, they then had nothing but equitable interests, which could

be preserved in no other way than as they were provided for in this very decree.

I do not see, therefore, how their rights were prejudiced. In fact, I do not see how the cause could properly proceed as to them until their precise position should be ascertained and adjudged; for as I have before said, if they were stockholders of a valid corporation, they had no standing in court; if individuals only, they had merely equitable interests, and could not then contest the validity of the old company. The same decree that admitted them as defendants adjudged the validity of the old company. The purpose of admitting them as defendants was thus manifestly only to allow them to establish such equitable interests as they might be able to establish; and the bill was required to be amended only for that purpose, and they were allowed to file their answers only for that purpose. They complained that they were not allowed to take testimony, and that they had not then filed their answers. But they have since, and before the final decree, filed their answers, and the right to take testimony for the purpose for which it was alone proper that they should take testimony, has not been denied, but, on the contrary, is expressly provided for in the decree from which the appeal was taken.

It may be remarked that the answers filed by them do not set forth any facts additional to those which were before the court, which could have affected the decision of the question which was then adjudicated. While, then, there seems to be an apparent inconsistency in allowing them to be made parties, and making the decree which was made before the filing of their answers and the production of their testimony, *a critical examination of the situation of the parties, and the real substance of the decree, and the intention of the court, shows, I think, that it acted with entire propriety.

The petition for removal was not made until the next term of the court, after there had been a decree in effect adjudicating the principles of the cause, and which even then might have been regarded as sufficiently final for the purposes of an appeal to an appellate court.

After their case is really decided, and this, too, without objection to the jurisdiction of the court, then they ask to have this cause removed, so that they can try the same question again in another forum.

To allow the removal of the cause under such circumstances would give them the chances of two courts, if the first decided against them, or, in other words, would be substantially allowing an appeal from a State to a United States court.

Under the act of 1867, the application must be made before final hearing. The substantial final hearing had been made, and though the parties call themselves defendants, and put in what they call answers, such answers are substantially nothing but petitions, or in the nature of cross-bills, setting up equitable interests,

which they claim should be protected. At least, they could not be otherwise regarded by the court after the decree which it has made at a previous term, fully adjudicating the principles of the cause.

In view of these considerations, I am very clear that there was no error in denying the motion for removal of the cause to the Circuit court of the United States.

There is another view which may be presented, which, if correct, is conclusive, as far as this court is concerned, upon this question. The appeal to this court is not made by these petitioners. It is made by the new company. *It was not the new company which presented this last petition for removal. It did not make the motion in the court below. In fact then, I very much doubt whether this question is properly before us. If there was an error in refusing the petition for removal, it was an error by which the petitioners, not the company, were aggrieved. In this case, it seems to me the petitioners should have taken the appeal, in order to have the error by which they were aggrieved corrected.

I very much doubt whether one defendant can allege as ground of error that a co-defendant is aggrieved by a decision of the court below. The co-defendant should make known his complaint for himself. For all that the record shows, these petitioners may now acquiesce in the decision of the court below. This view may be applicable also to some of the other grievances which it is claimed these petitioners have suffered by the final decree of the court below.

The conclusion we have come to necessarily brings us to the consideration of the next question, the validity of the sale.

The deed of trust, upon which the sale was founded, contains this provision: "And it is mutually agreed, that in case of the death, incapacity, or resignation of the party of the second part, or of his successors in this trust, then the office of trustee filled by him shall become vacant, and such vacancy shall be filled by an appointment to be made by any court of record in the county of Alexandria, on the application of the parties of the first part, or the holders of three-fifths of said bonds: Provided, however, in the last case, notice of the application of the parties making such request be given to the president or one of the directors of said company; and all the rights, power and authority hereby conferred on the original trustee, shall then and there devolve upon and be invested in his successor or successors so appointed.

*It also provides that in case at any time six months' interest becomes due and unpaid, the trustee "shall, upon the request in writing of the holders of at least three-fifths interest of said bonds," cause the property to be sold at public auction, after giving at least sixty days' notice of the sale by publication in certain newspapers therein named, and shall have authority thereupon to convey the said property to the purchaser.

This is a contract, the authority to make which is not disputed; and upon this depends the authority of proceedings in relation to the sale, but of course is to be construed with reference to the laws of the State then in force. The manner of serving this notice must then be supposed to be according to the law relating to such service. This notice is agreed to be the process upon which the jurisdiction of a court of record to appoint a trustee depends.

But we are met at the threshold of this enquiry into the validity of the order of the court, by the proposition, that as the court was one of general jurisdiction, its judgment cannot be assailed only upon the ground of want of jurisdiction, and the presumption is, that all the steps necessary to give it jurisdiction were taken by the court. It should be borne in mind that this is not a proceeding in which this judgment is collaterally assailed, but is a bill in equity, filed for the specific purpose of setting aside this judgment and attacking it directly. The bill sets out facts for the very purpose of showing that the court did not have jurisdiction. Although the distinctions made in different cases as to when the record of a court may or may not be contradicted, are very subtle, and somewhat difficult to reconcile, I do not think that any case can be found in which it is held that such record may not be assailed in a direct proceeding for that purpose in equity, by showing *fraud, or especially by showing that the court did not in fact have jurisdiction.

However this may be, I am sure that the defendant may be allowed to show that he had no notice, and that there was no process bringing him into court, by filing a bill in equity for this specific purpose, and by actually showing such want of jurisdiction. Any other construction of law would be the most apparent injustice, for there could be no other remedy. An appeal would not correct it, for on an appeal the party would be bound by the record as it is. A judgment of a court beyond its jurisdiction is plainly void; and to render a judgment in personam it must have jurisdiction of the person. If it be a judgment in rem, it must have jurisdiction of the thing. Every lawyer knows, for example, that a judgment in a case of attachment, if there is not also a service upon the person, is only a judgment against the property. Such a judgment does not authorize a levy of an execution upon other property, nor is it even evidence of a judgment against the person. This is not a proceeding in rem. In such cases courts acquire jurisdiction only by seizure of the thing, and even then, in most, if not all cases, notice is given in some way to parties interested, by publication or otherwise, and especially if it is agreed that jurisdiction shall attach only by giving a notice. See *Penobscot Railroad Company v. Weeks*, 52 Maine R. 456; *Hollingsworth v. Barbour*, 4 Pet. U. S. R. 466; *Harris v. Hardeman*, 14 How. U. S. R. 334; *Webster v. Reid*, 11 How. U. S. R. 437.

In *Harris v. Hardeman*, the court says: "In all judgments by default, whatever may affect their competency or regularity—every proceeding, indeed, from the writ and endorsements thereon, down to the judgment itself inclusive—is part of the record, and open to examination.

Applying this principle to the present case, on the examination of the affidavit of Joseph Davison, we find 611 *that the record itself shows that there was no notice. This would make it void upon its face. I can see no escape from this conclusion, and I do not see how it can be seriously questioned. In the case of *Vorhees v. The Bank of the United States*, 10 Pet. U. S. R. 449, the court say: "There is no principle of law better settled than that every proceeding of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appear." This is a case strongly relied on by the appellants, and is perhaps one of the strongest cases on record upholding the validity of judgments of a court. But this was a case in ejectment, and a judgment of a court showing a sale by attachment was put in as defence; and in such a case the court say, though the record does not show the proper steps to have been taken, or even that the steps necessary to give jurisdiction were taken, it must be presumed that they were taken, and the facts could not be controverted in this collateral manner.

The cases of *Harvey v. Tyler*, 2 Wall. U. S. R. 328; *Florentine v. Barton*, 2 Wall. U. S. R. 210; and *Comstock v. Crawford*, 3 Wall. U. S. R. 304, so strongly relied upon by the appellants, were all actions of ejectment, and the records were all sought to be set aside, by showing facts aliunde; and the court held that this could not be done. The case of *Devaughn v. Devaughn*, supra, decided by us at the present term, was a decision upon an appeal from a judgment of the County court, in which it was claimed that the record did not show affirmatively that it had jurisdiction; and we held only that it was to be presumed that the steps necessary to give jurisdiction were taken, and that the presumption must be that the court had evidence sufficient to justify the order which was made.

But it is easy to see the difference between these cases and the one under consideration. Besides, in these cases the records did not disclose the want of jurisdiction on their face.

612 *But it is urged by the appellants that they had a sufficient excuse for not giving a notice, from the fact that the persons entitled to such notice had all left the country, had gone beyond the Federal lines into the lines of a public enemy; that they had abandoned the property, and were traitors to the United States government, and engaged in war upon that government, and that it was impossible to give them notice; and the law does not require impossibilities. This presents a strong appeal to all those who were loyally disposed to the United States, especially when presented, as it is

in the answer, in the fiercest language and in the most glowing terms. Still, we must not be misled by such an appeal, and must subject it to the test of legal principles. These facts were certainly not shown to the County court. Nothing of them appears in the affidavits upon which the order was founded. If they could be regarded as an excuse for not bringing the person within the jurisdiction of the court, such excuse was certainly not made the basis of such jurisdiction, and it seems to me rather late to offer such excuse before another court to bolster up a jurisdiction which otherwise would fail. But suppose all this were true, and then shown to the court, it cannot really be seriously contended that if the parties were the greatest criminals on earth, if they had left their property without any one to attend to it, that therefore they can be deprived of their rights or their property, except by the law of the land, or, in the language of the constitution, "by due process of law." Certainly this does not give to individual citizens the right to deprive them of such rights or property. Nor can I see how it matters whether such property were valuable or nearly worthless, or whether it had been properly or improperly managed.

But was it a sufficient excuse for not serving a notice that the persons entitled to such notice could not be found? When a condition precedent becomes impossible
613 ble *of performance, a person may be excused from performing it; but it does not therefore always follow that because it is impossible the right or privilege depending upon such condition precedent can be maintained, not even if this is made so by the acts of the other party entitled to such condition precedent.

Where a court has no jurisdiction of a person, it does not follow that because a party has done all that he could do to bring such person within such jurisdiction, and has failed, that therefore the court can proceed without obtaining jurisdiction. I cannot say, however, that in this case this impossibility was caused by the act of the party entirely. He went south, it is true voluntarily, but he went expecting to return soon; but he could not return. This was a misfortune for him; and it was also a misfortune, perhaps, for those whose rights were affected by his not being able to return. But it was a misfortune, which resulted for the most part, at least, from the war in which the nation was unfortunately engaged, and by reason of which, thousands of others, in common with the parties to this cause, unavoidably suffered, and for which courts and the usual legal proceedings could not afford an adequate remedy.

But it does not seem to me that the parties asking for the appointment of a trustee did, in fact, all that they might have done. The president of the old company still had a residence in Alexandria.

The deposition of E. S. Boynton, a witness for defendant, shows that he had residence with his family until April 1861, and he himself resided there until May,

leaving his house and furniture in charge of said Boynton, and declaring that he expected to return in sixty or ninety days. We can readily infer, from the facts of his history within judicial cognizance, why he could not have returned if he had wished. I cannot discover from the records how there is any proper evidence of his having engaged in arms against the govern-
614 ment, *for the answer stating such fact could not have been given upon any knowledge by the affiant, and this is not to be presumed; nor is there any sufficient evidence showing that he did not, at all times, intend to return to his place of residence. In fact, the affidavit of Davison, upon which the order of the court was made, does not state that he had no residence in Alexandria, and is defective on that ground. This, at least, should be shown positively in any aspect of the case.

I cannot see what excuse can be rendered for not serving the notice by leaving a copy at his residence as the statute prescribes.

Besides all this, the deed of trust itself shows that Lenox, who was an officer and director of the company, and the trustee in the deed of trust, was a non-resident. Notice to him could certainly be given by publication in accordance with the statute. Why could not this have been done?

It was said that he received notice as trustee. But this would not prevent notice to him as director. What excuse can be offered for not notifying him by publication? This would have brought them within the provisions of the deed of trust.

If the facts, as alleged in the answer, were all true, and it appeared that the road and all the property were abandoned, and it was absolutely impossible to give any notice to anybody, and in the meantime creditors had no other means of saving their rights, while such a state of facts might be urged with great force for a court of equity to assert jurisdiction for the protection of all parties interested, upon all these facts being brought before such court, I think it very clear that a single creditor, without regard to the rights of others, without showing the court this state of facts, cannot, upon a single affidavit or petition, ask a court to make an order to protect his rights, and without really taking into its own hands the property itself for the benefit of all parties, owners as well as creditors.

615 *Cases have been produced to us to show that a corporation by abandonment and nonuser of its franchises forfeits those franchises. Suppose this to be so; I cannot see how it would help these appellants. To whom would such franchise be forfeited? Evidently to the sovereignty from which they emanated. This would not allow individuals to seize upon them. They could not take advantage of such forfeiture. The new company could not derive its existence from such a source.

It is objected that the application for the order was not made by a person authorized to do so by the holders of three-fifths

of the bonds. I very much doubt whether the evidence fully establishes that any other than the person named, Benjamin Thornton, was the holder at the precise time.

It is very evident that Charles M. Wilkes was the holder, and entitled to hold within a very few days thereafter and sometime before the sale, whether he was the owner or not, and entitled, as such holder, to determine whether he would allow them to be converted into cash or to remain on interest at 7 per cent., or whether they should become extinguished in his hands by the conversion of the security into cash to go into the hands of a trustee not required to give security, and with whose appointment he has had nothing to do, and whom he might not be able to compel to pay to him the money to which he was entitled.

Suppose, however, that we are wrong in coming to the conclusion that this order appointing the trustee should be set aside, the admitted facts of this case show very plainly, I think, that the sale should be set aside on the ground of facts occurring after such order. Suppose that Stewart were the proper trustee, invested with all the power of the original trustee. He has simply a naked power to sell. His authority is based only upon the deed of trust, and he must pursue the provisions of the deed strictly. He must be able to
616 *justify his act, not by any presumption or inference, but positively and necessarily. The divesting of the franchises and property of a railroad company is not to be permitted upon a doubtfully exercised power of a mere naked trustee.

The first step taken is, to say the least of it, a very doubtful one. Sale can be made only on the request, in writing, of the holders of at least three-fifths of the bonds. Now the request in writing was, as specified by Davison, as agent and attorney in fact of the owners of more than three-fifth of the bonds. This is liable to two objections: first, there was no writing then produced from even the owners of the bonds. There was a writing from Davison, but this was not founded upon a writing from the owner. There is not, to this day, written evidence that the owner then, at that time, had ever authorized this demand; second, even if Davison was the agent of the owners, this does not necessarily imply that he was the agent of the holder. An owner may, and often does, divest himself for a time of the possession and right to hold his property; and for all that appears in this written notice, this may have been done.

More than this: the reasonable probability from the evidence is, that this was actually done at the time of giving this notice. While this fact may not appear to be sufficiently established to set aside an order of court it does appear sufficiently to throw great doubt upon the power of the trustee to proceed to the sale.

Certainly, at the time of the sale, Thornton was not in a position to deliver up the bonds or to require the delivery.

But let us look further at the subsequent conduct of this trustee and the circumstances of the sale.

A trustee is the agent of both parties. He is especially of the party constituting him such trustee. His duty is to be perfectly fair in all his conduct and
617 *especially to see that the interests of the party who has conferred upon him this power are protected to the fullest extent. His action has, therefore, been held to be especially the subject of enquiry by a court of equity; *Gibson's heirs v. Jones*, 5 Leigh 370; and as such it is his duty to do all that can reasonably be done to effect the most advantageous sale possible. It has, therefore, been the common practice of our courts to require that in all such sales, if there are prior liens, either contested or doubtful, or not precisely ascertained, such liens shall be ascertained, so that they may be made known to the purchaser. *Cole's adm'r v. McRae*, 6 Rand. 644; *Rossett v. Fisher and others*, 11 Gratt. 492; 15 Gratt. 83 and 103. Otherwise, how is it possible that there could be anything like a fair sale of the property? Now, what were the facts in this case? The affairs of the road were confessedly, and in fact charged to be by the defendants themselves in a most complicated condition. There were numerous judgments and two deeds of trust. Most of the judgments, it is true, were in fact subsequent to the deed of trust. But the fact should have been well ascertained as to which were prior and which were subsequent. There were a large number of liabilities of the company, and as the defendants themselves allege, persons owning these liabilities were making them known even at the sale. The question of the validity of the two prior deeds of trust was openly made at the sale. The trustee of the deed of trust for \$60,000 was present at the sale asserting its validity, while Stewart says in his deposition, "I at the same time saw fit openly to dispute the validity of both the deeds of trust of the corporation of Washington, and Fowle, Snowden & Co. as valid liens upon the road;" and the record shows that there is at this time a contest in the courts concerning the validity of this first deed of trust.

Now, under such circumstances, was
618 it possible that *there could be anything like a reasonable sale? How could a purchaser have any knowledge of what he was buying? The Code provides (ch. 61, sec. 29) that when a purchase is made of the works and property of a corporation, the purchaser shall not be entitled to the debts due to the first company, nor be liable for any debts of or claims against the company "which may not be expressly assumed in the contract of purchase."

The defendants contend that by this sale a new company was formed. If this be so, ought not the contract of purchase to show whether the debts and liabilities of the old company were assumed? Ought there not to have been at the sale an understanding whether it was sold subject to the debts and

liabilities of the old company or not? If not then the purchaser should know it, for it would make a material difference in his bid. Certainly this ought not to be left to the mere will of the purchaser, after he has made his bid. The matter ought to have been clearly and plainly understood at the sale, and I think it would have been proper, if not necessary, that the advertisement of the sale should have stated how the sale would be made. It should, at least, have been made known generally, as well as to the purchaser, Hay, whether the sale was subject to the debts and liabilities of the old company or not.

Again, the record discloses that Stewart, who all the time professed to act in the capacity of attorney for the purchaser, Hay, had already in his hands more than sufficient money, the property of the company, to pay all that was then due upon the bonds. This fact Hay must be presumed to have known, and to have purchased with this knowledge. That the interest of the seller was not properly attended to is further seen by the fact that the United States government had possession of the road during all this time, and it was a well known fact that possession could not then be delivered: and

no one could tell when it would be, 619 or *what claims the government would have upon it when so delivered. It was impossible that, under such circumstances, a sale could be made otherwise than at a ruinous sacrifice. The position of Stewart was, to say the least of it, a peculiar one. He was, if properly appointed, the trustee to make the sale, and as such, in duty bound to effect the best possible sale, and the attorney-at-law and in fact of Hay, the purchaser, and as such interested to procure the sale on the lowest possible terms. More than this, he had made an agreement in writing with Davison, in which he stipulates what he will do, "on behalf of himself and constituents," in case the road be purchased by himself or constituents; showing that he was then contemplating a purchase by himself, as well as by his principal and client. Can he be said to have been perfectly impartial and disinterested?

Is it possible that a trustee for sale can at the same time be attorney at law and in fact for the purchaser, and acting in his interests?

Stewart, in fact, did immediately become interested in the purchase.

He had also previously been appointed, by writing, the attorney for Davison, the agent of the bondholders, and as such was to receive from him a large contingent fee in case of a sale of the road; he to use all diligence in the closing out and perfecting the interest of said bondholders in and to said road. (What interest had the bondholders in the road, except to receive the money which might be realized from the sale?)

On this writing there was endorsed by Joseph Thornton, May 3, 1862, "There will go to Mr. Stewart \$35,000 of stock out of

the \$142,000 set over to me, his \$35,000 being subject to a pro rata deduction in making up the \$50,000, or whatever may be used of that amount, which is set apart." This 620 \$50,000, it otherwise appears, *was to be set apart for procuring a charter from congress. It is true that Stewart testifies that no agreement was effected with Davison and Thornton before the sale. But these papers appear to have been executed; and he himself testifies that the probabilities and feasibilities of forming a new company were much discussed, and, as he says, "in the event that either Thornton or Davison became the purchaser, the question of who would take an interest, and how, was much figured over as a thing entirely prospective, and it was agreed, if I saw fit to do so, I could be one of the parties forming the new company."

These facts show, I think, that Stewart was at least so far interested in the purchase as to render it impossible for him to act as trustee with that propriety which a court of equity requires.

It further appears that no money was ever paid to the holder of the bonds from the proceeds of the sale, but they were still, by the permission of said trustee, and at the request of Joseph Thornton, allowed to remain in the bank of Riggs & Co., at Washington, as the basis of a loan to Benjamin Thornton from one Wilkes, of something over two thousand pounds, and a portion of the proceeds were used in re-organizing the new company. A company was immediately organized, of which Stewart was the secretary and a large stockholder, and stock was issued to the amount of \$300,000.

This fact tends strongly to show that the object of the sale was not so much to satisfy the amount due upon the bonds, and in accordance with the real wish of the older of the bonds, as it was to get the title of the old company into the hands of these parties, who were devising a plan by means of which they could form a new company, and which had been much "figured over" by all these parties, including the trustee.

By special act of assembly, this new company was soon after authorized to 621 issue stock to the amount of *\$500,000, besides bonds to the amount of \$200,000, and notes to the amount of \$100,000.

Stock has been issued to a large amount in excess of the amount authorized, as the decree states, and bonds, &c., have also been issued, and out of this money has been raised and in part expended for the benefit of the road; so that it will be seen that other parties have equities in the road which should be provided for.

This history of the transactions connected with the sale must show, I think, that even if the order appointing Stewart was perfectly valid, yet the sale was conducted in such a manner, and shows such a state of actual fraud, that it cannot be sustained by a court of equity.

It is urged upon us with great earnestness and force, that even if such order were void,

and the sale was an illegal and fraudulent one, yet that the company, taking no steps for a period of four years, and allowing the stockholders of the new company to invest large sums of money on the faith of the validity of such sale, without being cognizant of such fraud, the old company should be considered as having acquiesced in such sale, and should now be estopped from contesting such validity as against them.

There are cases which show that acquiescence in sales made by order of a court of competent jurisdiction for a long period, shall be regarded as a waiver of the right to contest the validity of such sales. In extreme cases, where there has been long acquiescence, sales made by order of the court have been sustained on the ground that judicial sales ought to receive the highest possible sanction, and should be regarded as giving the utmost possible protection to the purchaser.

But, in the first place, the acquiescence which is shown in this case is not of such a character as I think should be regarded as an estoppel.

The parties who alone could object 622 for the old company *were in such a situation that, so far as they were concerned, it was for nearly the whole period a forced acquiescence. True, they had gone into the lines of public enemies against the United States, and had gone voluntarily; but whatever may be said of the wrongful nature of said acts, yet they were in such a situation that it cannot be said that, during this period, they voluntarily acquiesced in the disposition of their property. Besides, up to August 1865, the government was in actual and exclusive possession and control of all this property; and while it was so, I do not think any party could be justified in claiming to act in entire ignorance of all claims that might be brought against it. I cannot give any countenance to the claim that the government held, as a tenant of Hay under a contract made by him, as a mere creditor and with no claim upon the road, except such as might have been satisfied by the payment of \$5,000.

Again, so far as the sale was concerned, it was not a judicial one. The court had nothing whatever to do with the sale. The court simply substituted one trustee in the place of another. The court did not direct the sale. The sale was not professed to have been made by any other authority than that of a trustee, with no power to guarantee the title, who did not profess to guarantee the title, and the purchaser was bound to make enquiry and to fully investigate the sources of his authority, and if he neglected to do so, it was his own negligence. And such a sale is not at all like one where a purchaser has an order of a court of competent jurisdiction, and which he is authorized to presume to be correct.

Again, a corporation cannot be created by mere acquiescence. This can be done only by positive act of legislation, or by

some power authorized by some legislative act.

Still, under the circumstances of this case, the new company ought to have reimbursed to it the money *which it has 623 actually expended for the benefit of the road, which ought to go to its stockholders.

A very large portion of the money invested by the stockholders seems to have been upon representations for which the old company could be in no wise responsible, and it certainly could not be regarded as having acquiesced in them. Much of it has been upon false and spurious certificates of stock, issued by the new company; but the remedy of those who have thus been deceived is upon those whom they have trusted. Their case is an extremely hard one, and appeals strongly to our sympathies, and so far as they can be lawfully protected they should be.

They claim that a very large amount (several hundred thousand dollars) has been expended for the benefit of the road, and provision should be made for the repayment of so much of this as they can establish; and this can be done under the decree as it now stands, and such further orders as may be made by the court upon a consideration of the evidence which may be produced.

The new company procured a special act to be passed by the Alexandria legislature, February 5th, 1863, declaring this sale to be a valid one.

This act was in plain violation of the constitution, and therefore void.

It was an assumption of judicial power by the legislature.

Art. II, constitution of Virginia, declared "the legislative, executive and judicial departments shall be separate and distinct, so that neither shall execute the powers properly belonging to either of the others.

Art. IV, section 35, provides that the general assembly shall not, by special legislation, grant relief in a case of which the courts or other tribunals may have jurisdiction.

Besides, it attempts to divest antecedently vested rights, and also to impair the 624 obligation of the contracts *between the parties. (See Taylor v. Stearns & als., 18 Gratt. 244, 274.)

I can see no necessity for giving a construction to the statute relating to the sale of the works and property of a corporation, and the powers and privileges of the purchaser at such sale. (Sections 28 and 29, ch. 61 of Code of 1860.) This is a matter rather for the new company and those connected therewith to settle among themselves, and suits are now pending, as I am informed, to determine the questions between them.

The decree of the court below very properly provides for an investigation into the equitable interests of the several parties to this controversy, and for security for their protection, and I see no reason why it should not be fully affirmed.

DORMAN, J. Concurring in the result reached in the above opinion, it seems proper to say that the concurrence is much more readily yielded from the views entertained on another point, presented by the record, which was elaborately argued by the counsel on both sides, but not considered in the opinion of Judge Willoughby. It has been impossible to arrive at the conclusion, that in § 28-29, chapter 61 of the Code of 1860, it was the intention of the legislature, that a sale by a trustee of a mere equity, conveying no legal title, was such a sale and conveyance of the property and rights of the old company as to "pass to the purchaser at the sale not only the works and property of the company as they were at the time of making the deed of trust or mortgage, but any works which the company may after that time and before the sale have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due to it;" and also ipso facto to dissolve the company, and at the same time to constitute the purchaser forthwith a corporation, succeeding

625 to all the privileges and franchises of the original *company. The comprehensive terms of the law seem to preclude the supposition, that anything short of the sale and transfer of the legal title, together with the property, privileges and franchises, can merge the old company in a new corporation under the statute.

BURNHAM, P., dissented.

Decree affirmed.

626 *Wright v. The Commonwealth.

January Term, 1870, Richmond.

Indictment for Felony—Jurisdiction of Circuit Court.—

A prisoner is indicted for felony in the Circuit court, he being in custody at the time. The Circuit court has no jurisdiction, to try him on this indictment, but he must be sent before a justice for examination and commitment for trial in the County court.*

At the June term 1869 of the Circuit court of Northampton county, Spencer Wright was indicted for the murder of Joshua P. Wescoat. When the prisoner was brought into court, and before the jury were selected and sworn to try the cause, he moved the court to certify his case to the County court of the county for his arraignment and election as to whether he would be tried in said County court or in the Circuit court of the county. But the court overruled the motion, and directed that the trial should be proceeded with, because the indictment was found in the Circuit court for felony; where, in the opinion of the court it might be tried, the accused being in custody, having been heretofore arrested, and being actually in jail when the indictment was found. To which opinion and decision of the court the prisoner excepted.

*The statute is quoted in the opinion of the judges.

The prisoner was then put upon his trial, and the jury found him guilty of murder in the first degree; and the court sentenced him to be hung. To which judgment of the court the prisoner obtained a writ of error from a judge of this court.

Daniel, for the prisoner. There is but one point in the case; and that is whether the prisoner should have been
627 *sent to the County court for trial.

The Circuit court does not claim a common law right to hang a man; but relies upon the statute. Then if there is no right in the court to take a man's life, but by statute law, this right must be shown in the statute; and it is not to be found there. The statute says he shall be tried in the County court; and only in special cases when the prisoner is arraigned in the County court, he may elect to be tried in the Circuit court. If a prisoner is indicted in the Circuit court, the indictment is to be sent to the County court.

The object of the act of 1866-67 was a speedy trial, and not to require a prisoner to lie six months in jail until a term of the Circuit court came round. Formerly there was an examining court, to prevent a long, unjust imprisonment; and when this court was abolished, trial in the County court was provided; and it was optional with the prisoner, charged with a high offence, to incur the delay of a trial in the Circuit court.

Then, I say, the law is express, that a prisoner shall be tried in the County court; and the law gives to the Circuit court no authority to try a felony, except in two cases: 1st. Where he elects in the County court to be tried in the Circuit court; and 2d. Where the case was pending when the law took effect.

In fact, under the statute, the Circuit court is but an accusatory body. By § 15, ch. 207, p. 929, Sess. Acts of 1866-67, upon a presentment, indictment or information of a felony, for which a party charged has not been arrested, the presiding judge or justice shall issue a warrant to any sheriff, sergeant or constable, commanding him to arrest such party, and carry him before a justice of the county or corporation in which he ought to be tried; and to summon the witnesses, &c. And the justice is to proceed in the case as if the warrant was issued by himself. And § 16 provides, that when an

628 indictment is in a case other than that provided for in the *preceding section, if it be in a Circuit court, a copy of the indictment, and of all papers relating to the case, shall be certified to the court of the county or corporation in which the offence is charged to have been committed. Upon such indictment, and upon like indictment in the County or Corporation court, process shall be awarded by the court, or be issued by the clerk thereof in vacation. This § 16 includes the case of a prisoner who is in custody at the time the indictment is found; and is the case now before the court. It includes all cases not embraced in § 15, and the case of a prisoner in cus-

today at the time the indictment is found is not included in the § 15.

Wells, for the Commonwealth. The brief of the attorney general suggests that § 1, of ch. 208, p. 931, does not expressly repeal the statute vesting jurisdiction to try felonies in the Circuit courts; and that repeals of statutes by implication is not favored by the courts. This § 1 says:—Trials for felony shall be in a County or Corporation court; but in the larger number of felonies it gives the accused an election to be tried in the Circuit court. It is difficult to conceive any object which the law can contemplate as important, in sending a person who is already in the Circuit court to the County court, that he may elect to go back to the Circuit court. The theory of the statute was the utmost expedition in the trial of such cases; and if the prisoner is then in a court where he may be tried, the delay which was intended to be avoided will not be incurred.

If this § 1 does not take away the jurisdiction of the Circuit court, then clearly by § 2 the prisoner might be tried in that court. That section says:—When an indictment is found, or other accusation filed against a person for felony, in a court wherein he may be tried, the accused, if in custody, or if he appear according to his recognizance,

shall, unless good cause be shown for
629 *a continuance, be arraigned and tried at the same term. The statute in relation to criminal procedure retains to the Circuit court the same power of finding an indictment as it possessed under the former law. Then can it be supposed that when an indictment is found in the Circuit court, § 15 requires that a prisoner shall be arrested and taken before a committing magistrate, with the witnesses, there to go through the same process, which had been already passed through in the court.

Wise, for the prisoner, in reply. The judge below puts his jurisdiction to try the prisoner, on the grounds that he was in custody. This could only be by the warrant of the committing magistrate; and that would send him to the County court.

As to the repeal of the former law giving jurisdiction to the Circuit court to try felonies, if the § 1, of chap. 208, could leave any doubt upon the question, how can the attorney general get over § 18, of ch. 211, which provides that any prosecution for a capital felony pending in a Circuit court at the time the act goes into effect, shall remain and be tried therein. If the jurisdiction had not been taken away by § 1, of ch. 208, the Circuit court could have proceeded to try pending cases without the aid of this § 18. But this § 18 shows the Circuit court could not proceed to try such cases without it. If the jurisdiction of the Circuit court is not taken away by § 1, of ch. 208, then that court has authority to try all cases of felony, though not one of the cases specified in that section.

It is only necessary to look to the object of the different sections of the statute in order to ascertain their meaning. The § 2,

of ch. 208, has reference to the time of trial, and not to the court which is to try the case. § 1 of that chapter, and § 15 and 16 of chapter 207, has reference to the court which is to try the prisoner. § 1
630 *declares that a prisoner shall be tried in the County or Corporation court; and § 15 and 16 directs how he shall be brought into the court for trial. The § 2 only directs when he shall be tried.

WILLOUGHBY, J. In this case, the prisoner being indicted for murder by the grand jury of the Circuit court, and being in custody of the court, before his trial, demanded to have his cause remanded to the County court of the county, in order that he might there have the privilege, when arraigned, of electing whether he would be tried there or in the Circuit court. This being refused, and he then being immediately tried and convicted, a writ of error was awarded upon the ground of the refusal of this demand.

The question is, whether the Circuit court had, under such circumstances, jurisdiction to proceed with the trial, and is to be determined by a construction of the act of assembly of April 27th, 1867, entitled "an act to revise and amend the criminal procedure."

Under the law as it stood previous to the act of April 27th, 1867, trials of felony of white persons were all to be had in the Circuit court, and by such act, the felony of all persons was to be tried in the Circuit court. The result of this was, that a very large portion of the time of Circuit courts was taken up by the trial of criminal causes, and in many counties often almost to the exclusion of civil business. Besides, such court holding in most of the counties but twice a year, the trial of felonies was liable to be long delayed to the great hardship of the accused, especially if he could not give bail, (and those cases were very frequent), and to the great expense of the Commonwealth by being obliged to provide for such accused persons who could not give the required security for their appearance.

These were no doubt the principal reasons for the changes made in the act under consideration.

631 *The act therefore provides that "trials for felony shall be in a County or Corporation court, and may be, at any term thereof, except that a person to be tried for" certain enumerated offences, among which, is murder, "may, upon his arraignment in the County or Corporation court, demand to be tried in the Circuit court having jurisdiction of the said county or corporation." Witnesses are to be then recognized, and papers transmitted, &c.

On page 929, of Acts of Assembly of 1866 and '7, section 15, provides what course is to be taken "upon a presentment, indictment or information of a felony for which the party charged has not been arrested."

The next section, sec. 16, provides that "when a presentment is made or indictment found in a case other than that provided

for in the preceding section, if it be in a Circuit court, a copy of such presentment or indictment and of all papers relating to the case, shall be certified by the clerk of the court of the county or corporation in which the offence is charged to have been committed."

If the prosecution be for a felony, process shall be awarded, which shall be a *capias*, &c.

These sections, unless modified by some other section, would show, it seems to me, as plainly as language can show, that the Circuit court has no power to proceed originally with the trial of any criminal offence; and no power to try in any event, except as such cases may be removed to it from the County or Corporation court, according to the first section herein quoted.

But the authority to try a case as this was tried is claimed to be founded upon the section next succeeding the one first herein quoted, page 932, sec. 2, which provides:

"When an indictment is found or other accusation filed against a person for felony in a court wherein he may be tried, 632 the accused, if he is in custody, *or if he appear according to his recognizance, shall, unless good cause be shown for a continuance, be arraigned and tried at the same term."

The fact that he is in custody of a court in which he may be tried is made the basis of jurisdiction.

According to this two things must concur: He must be in custody: The court must be one in which he may be tried.

The mere fact of being in custody cannot alone determine in what court a prisoner is to be tried for felony: He must be in custody to be tried any where as a matter of course.

The important enquiry then is, what is the court in which he may be tried. How are we to ascertain this?

This section does not show or profess to show. We are then to enquire elsewhere.

Now the court in which murder may be tried depends upon circumstances connected with the case. It may be in the County court, if the prisoner upon his arraignment so elects.

It may be in the Circuit court, if the prisoner, upon his arraignment so elects. The important fact, then, is this election. If it is to be tried in the County court, the Circuit court is not one in which he may be tried. This is a privilege given to the prisoner. Such privilege ought not to be taken from him by a doubtful construction of another section. He is entitled to a liberal construction of such other section, and in case of reasonable doubt, he should be entitled to the benefit. The legislature having just before, in the preceding section, given him this privilege in the plainest terms, it must not be presumed that in the next breath, they meant to deprive him of it without any substantial reason therefor; and it is difficult to see why the mere fact of his being in custody should constitute such a reason.

Now, what is the leading idea of the clause in dispute? Has it not plainly reference more to the time of *trial; that is, that there shall be an immediate trial and no continuance without good cause? Do not the qualifications of this clause refer to this leading idea, rather than to the question of jurisdiction? The words, if in custody, are there because such must be an obviously necessary fact which must exist in order to enable the court to proceed to an immediate trial in any court. The immediate trial is the controlling thought. All others are accessory to it.

The language of this section is precisely the same as it stood before, except the insertion of the words "or other accusation filed." ("Code of 1860, chap. 208, sec. 2.) Under the law, as it then stood, if a person was indicted for felony in the Circuit court, he had the right to be sent to the County court for examination; or if he chose, he might be immediately tried. He was then in a court in which it could be said he may be tried. More than this, he must be tried there. But did anybody ever argue, that because of this section he should be immediately tried without the privilege of going to the County court for examination? And yet, it might have been argued with the same propriety as now.

It is argued that it is an absurdity to allow the prisoner to have his cause remanded to the County court only to allow him the privilege of having his cause certified back to the court from which he started.

We have nothing to do with this if it be the law. But how can we say that this is the object of the accused. Perhaps it may be to have his cause tried in the County court. The law gives him the privilege of trying his cause there if he wishes it; and what is the absurdity of allowing him to avail himself of this privilege.

Besides, I think that there can be said to be another reason for it; and that is that it carries out, or tends to carry out, one of the main objects of the change of 634 *trial from Circuit to County courts; and that is to relieve the Circuit court of all such trials possible.

The 15th and 16th sections above quoted of the preceding chapter strengthen this view very much. According to the 15th section the court is instructed to take certain steps where a person is indicted for a felony and is not arrested. According to the 16th section, in all other cases (and a person who is arrested is another case), if in a Circuit court, the papers shall be certified to the County or Corporation court. Could there be a more positive command?

It is argued that the old act is not expressly repealed, and that the object of this law is merely to enlarge the jurisdiction of the County court. I do not think that this view can be maintained. The language of this act is too explicit and too inconsistent with the former one to allow this interpretation. I think it quite plain that the act, as it now stands, was to take the place en-

tirely of the former one; and that we are to look to this alone to determine in what courts cases of felony are to be tried.

I can therefore come to no other conclusion than that the court below erred in refusing to allow the prisoner to have his case remanded to the County court for trial, and that therefore the judgment of the Circuit court must be reversed.

BURNHAM, P. The accused was tried in the Circuit court of Northampton county, upon a charge of murder in the first degree, and being in custody, he was indicted, arraigned, convicted and sentenced in said court, in disregard of his motion, "to certify his case to the County court, in order that he might have his election as to which court he would be tried in." This may be deemed substantially a claim for certification under the 16th section, chapter 207, of act of 1866-7. It is claimed by the accused, that "the County court was the
635 "only court having jurisdiction to try the case," and in support of such theory, is cited the before mentioned act of assembly of Virginia, passed April 27, 1867, entitled "an act to revise and amend the criminal procedure," and amending and re-enacting the several chapters of the Code of Virginia, edition of 1860, from 201 to 211 inclusive, except chapter 205. The 1st section of chapter 208, p. 931-2, provides, and is as follows: "Trials for felony shall be in a County or Corporation court, and may be at any term thereof, except that a person to be tried for rape, arson, malicious shooting, cutting, stabbing or wounding, with intent to maim, disfigure or kill; for forgery, or uttering as true, forged paper; for passing counterfeit money, or for a felony which may be punishable with death; may, upon his arraignment in the County or Corporation court, demand to be tried in the Circuit court having jurisdiction of the said county or corporation; but no such demand shall be allowed in any Corporation or Hustings court held by a judge, and in which, by especial statute, capital felonies may now be tried. Upon such demand, the accused shall be remanded for trial in the said Circuit court, and all the material witnesses desired for the prosecution or the defence, shall be recognized for their attendance at such trial." The farther provisions of this section direct the acts to be done, in order to such removal of the cause, and of the custody of the accused, to the Circuit court, and are not important as affecting the points presented in this case. It may be observed that the first clause of the section above cited confers jurisdiction of felonies upon the County or Corporation courts, and does not exclude the jurisdiction of other courts over the same crime, but expressly allows persons charged with certain felonies, upon arraignment in the county court, to elect to be tried in a Circuit court; thus recognizing the continuance of jurisdiction in, and the full competency
636 "of, Circuit courts, to try persons charged with felonies. It does not

exclude the jurisdiction of other courts, beside the Circuit courts, but recognizes and names them as "Corporation or Hustings courts, held by a judge." The removal of cases provided for by this section, is to carry them from the County or Corporation court to the Circuit court, and does not authorize the remanding contrariwise.

The 2d section of the same chapter is as follows:

When an indictment is found, or "other accusation filed, against a person for felony, in a court wherein he may be tried, the accused, if in custody, or if he appear according to his recognizance, shall, unless good cause be shown for a continuance, be arraigned and tried at the same term." The remaining part of this section is not material to the question under consideration. It thus appears that where a person charged with felony is in custody, or appears in a court wherein he may be tried, he shall, upon indictment found, be arraigned and tried "at the same term," unless good cause be shown for a continuance. An immediate trial in the court, where the prisoner is under indictment, or appears in custody, is clearly guaranteed to him and the Commonwealth, and is to be avoided or prevented in but the way and for the cause named in the same section. The Circuit courts for many years had jurisdiction of cases of felony. They were presided over by gentlemen learned in the law, and of eminent ability and purity of character; and it is certainly not to be deemed the intent of the legislature to destroy by implication the safeguards to personal life and liberty thus provided, or a hearing before such court, simply in order to facilitate the trials of questions of financial interests only. Jurisdiction once existing, is removed only by positive provision; and no legislative intent can be supposed against it that is not plainly expressed. It being conceded that the Circuit courts had power at the time of the passage of the act of 1866-7 to try all felonies,
637 "every presumption is in favor of the continuance of such jurisdiction.

If it be not removed by legislative enactment, or if such power remain in them under laws not repealed, it is sufficient.

It is urged, however, that the 16th section of chapter 207, p. 929, authorizes and requires the certifying and forwarding by the clerk of any indictment for felony found in the Circuit court; and that therefore the accused was entitled, upon demand of the Circuit court, to be sent to the County court of the county "for his arraignment and election as to whether he would be tried in said County court or in the Circuit court of said county;" and that the refusal of the Circuit court so to direct was erroneous.

There seems no room to dispute that the accused was in custody for murder in the first degree (a capital felony), at the time when the motion was made to certify, &c.; nor that an indictment was legally and duly found and returned against him for said

be preserved in no other way than as they were provided for in this very decree.

I do not see, therefore, how their rights were prejudiced. In fact, I do not see how the cause could properly proceed as to them until their precise position should be ascertained and adjudged; for as I have before said, if they were stockholders of a valid corporation, they had no standing in court; if individuals only, they had merely equitable interests, and could not then contest the validity of the old company. The same decree that admitted them as defendants adjudged the validity of the old company. The purpose of admitting them as defendants was thus manifestly only to allow them to establish such equitable interests as they might be able to establish; and the bill was required to be amended only for that purpose, and they were allowed to file their answers only for that purpose. They complained that they were not allowed to take testimony, and that they had not then filed their answers. But they have since, and before the final decree, filed their answers, and the right to take testimony for the purpose for which it was alone proper that they should take testimony, has not been denied, but, on the contrary, is expressly provided for in the decree from which the appeal was taken.

It may be remarked that the answers filed by them do not set forth any facts additional to those which were before the court, which could have affected the decision of the question which was then adjudicated. While, then, there seems to be an apparent inconsistency in allowing them to be made parties, and making the decree which was made before the filing of their answers and the production of their testimony, *a critical examination of the situation of the parties, and the real substance of the decree, and the intention of the court, shows, I think, that it acted with entire propriety.

The petition for removal was not made until the next term of the court, after there had been a decree in effect adjudicating the principles of the cause, and which even then might have been regarded as sufficiently final for the purposes of an appeal to an appellate court.

After their case is really decided, and this, too, without objection to the jurisdiction of the court, then they ask to have this cause removed, so that they can try the same question again in another forum.

To allow the removal of the cause under such circumstances would give them the chances of two courts, if the first decided against them, or, in other words, would be substantially allowing an appeal from a State to a United States court.

Under the act of 1867, the application must be made before final hearing. The substantial final hearing had been made, and though the parties call themselves defendants, and put in what they call answers, such answers are substantially nothing but petitions, or in the nature of cross-bills, setting up equitable interests,

which they claim should be protected. At least, they could not be otherwise regarded by the court after the decree which it had made at a previous term, fully adjudicating the principles of the cause.

In view of these considerations, I am very clear that there was no error in denying the motion for removal of the cause to the Circuit court of the United States.

There is another view which may be presented, which, if correct, is conclusive, so far as this court is concerned, upon this question. The appeal to this court is not made by these petitioners. It is made 608 by the new company. *It was not the new company which presented this last petition for removal. It did not make the motion in the court below. In fact, then, I very much doubt whether this question is properly before us. If there was an error in refusing the petition for removal, it was an error by which the petitioners, not the company, were aggrieved. In this case, it seems to me the petitioners should have taken the appeal, in order to have the error by which they were aggrieved corrected.

I very much doubt whether one defendant can allege as ground of error that a co-defendant is aggrieved by a decision of the court below. The co-defendant should make known his complaint for himself. For all that the record shows, these petitioners may now acquiesce in the decision of the court below. This view may be applicable also to some of the other grievances which it is claimed these petitioners have suffered by the final decree of the court below.

The conclusion we have come to necessarily brings us to the consideration of the next question, the validity of the sale.

The deed of trust, upon which the sale was founded, contains this provision: "And it is mutually agreed, that in case of the death, incapacity, or resignation of the party of the second part, or of his successors in this trust, then the office of trustee filled by him shall become vacant, and such vacancy shall be filled by an appointment to be made by any court of record in the county of Alexandria, on the application of the parties of the first part, or the holders of three-fifths of said bonds: Provided, however, in the last case, notice of the application of the parties making such request be given to the president or one of the directors of said company; and all the rights, power and authority hereby conferred on the original trustee, shall then and there devolve upon and be invested in his successor or successors so appointed.

609 *It also provides that in case at any time six months' interest becomes due and unpaid, the trustee "shall, upon the request in writing of the holders of at least three-fifths interest of said bonds," cause the property to be sold at public auction, after giving at least sixty days' notice of the sale by publication in certain newspapers therein named, and shall have authority thereupon to convey the said property to the purchaser.

This is a contract, the authority to make which is not disputed; and upon this depends the authority of proceedings in relation to the sale, but of course is to be construed with reference to the laws of the State then in force. The manner of serving this notice must then be supposed to be according to the law relating to such service. This notice is agreed to be the process upon which the jurisdiction of a court of record to appoint a trustee depends.

But we are met at the threshold of this enquiry into the validity of the order of the court, by the proposition, that as the court was one of general jurisdiction, its judgment cannot be assailed only upon the ground of want of jurisdiction, and the presumption is, that all the steps necessary to give it jurisdiction were taken by the court. It should be borne in mind that this is not a proceeding in which this judgment is collaterally assailed, but is a bill in equity, filed for the specific purpose of setting aside this judgment and attacking it directly. The bill sets out facts for the very purpose of showing that the court did not have jurisdiction. Although the distinctions made in different cases as to when the record of a court may or may not be contradicted, are very subtle, and somewhat difficult to reconcile, I do not think that any case can be found in which it is held that such record may not be assailed in a

610 direct proceeding for that purpose in equity, by showing *fraud, or especially by showing that the court did not in fact have jurisdiction.

However this may be, I am sure that the defendant may be allowed to show that he had no notice, and that there was no process bringing him into court, by filing a bill in equity for this specific purpose, and by actually showing such want of jurisdiction. Any other construction of law would be the most apparent injustice, for there could be no other remedy. An appeal would not correct it, for on an appeal the party would be bound by the record as it is. A judgment of a court beyond its jurisdiction is plainly void; and to render a judgment in personam it must have jurisdiction of the person. If it be a judgment in rem, it must have jurisdiction of the thing. Every lawyer knows, for example, that a judgment in a case of attachment, if there is not also a service upon the person, is only a judgment against the property. Such a judgment does not authorize a levy of an execution upon other property, nor is it even evidence of a judgment against the person. This is not a proceeding in rem. In such cases courts acquire jurisdiction only by seizure of the thing, and even then, in most, if not all cases, notice is given in some way to parties interested, by publication or otherwise, and especially if it is agreed that jurisdiction shall attach only by giving a notice. See *Penobscot Railroad Company v. Weeks*, 52 Maine R. 456; *Hollingsworth v. Barbour*, 4 Pet. U. S. R. 466; *Harris v. Hardeman*, 14 How. U. S. R. 334; *Webster v. Reid*, 11 How. U. S. R. 437.

In *Harris v. Hardeman*, the court says: "In all judgments by default, whatever may affect their competency or regularity—every proceeding, indeed, from the writ and endorsements thereon, down to the judgment itself inclusive—is part of the record, and open to examination.

Applying this principle to the present case, on the examination of the affidavit of Joseph Davison, we find 611 *that the record itself shows that there was no notice. This would make it void upon its face. I can see no escape from this conclusion, and I do not see how it can be seriously questioned. In the case of *Vorhees v. The Bank of the United States*, 10 Pet. U. S. R. 449, the court say: "There is no principle of law better settled than that every proceeding of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appear." This is a case strongly relied on by the appellants, and is perhaps one of the strongest cases on record upholding the validity of judgments of a court. But this was a case in ejectment, and a judgment of a court showing a sale by attachment was put in as defence; and in such a case the court say, though the record does not show the proper steps to have been taken, or even that the steps necessary to give jurisdiction were taken, it must be presumed that they were taken, and the facts could not be controverted in this collateral manner.

The cases of *Harvey v. Tyler*, 2 Wall. U. S. R. 328; *Florentine v. Barton*, 2 Wall. U. S. R. 210; and *Comstock v. Crawford*, 3 Wall. U. S. R. 304, so strongly relied upon by the appellants, were all actions of ejectment, and the records were all sought to be set aside, by showing facts aliunde; and the court held that this could not be done. The case of *Devaughn v. Devaughn*, supra, decided by us at the present term, was a decision upon an appeal from a judgment of the County court, in which it was claimed that the record did not show affirmatively that it had jurisdiction; and we held only that it was to be presumed that the steps necessary to give jurisdiction were taken, and that the presumption must be that the court had evidence sufficient to justify the order which was made.

But it is easy to see the difference between these cases and the one under consideration. Besides, in these cases the records did not disclose the want of jurisdiction on their face.

612 *But it is urged by the appellants that they had a sufficient excuse for not giving a notice, from the fact that the persons entitled to such notice had all left the country, had gone beyond the Federal lines into the lines of a public enemy; that they had abandoned the property, and were traitors to the United States government, and engaged in war upon that government, and that it was impossible to give them notice; and the law does not require impossibilities. This presents a strong appeal to all those who were loyally disposed to the United States, especially when presented, as it is

in the answer, in the fiercest language and in the most glowing terms. Still, we must not be misled by such an appeal, and must subject it to the test of legal principles. These facts were certainly not shown to the County court. Nothing of them appears in the affidavits upon which the order was founded. If they could be regarded as an excuse for not bringing the person within the jurisdiction of the court, such excuse was certainly not made the basis of such jurisdiction, and it seems to me rather late to offer such excuse before another court to bolster up a jurisdiction which otherwise would fail. But suppose all this were true, and then shown to the court, it cannot really be seriously contended that if the parties were the greatest criminals on earth, if they had left their property without any one to attend to it, that therefore they can be deprived of their rights or their property, except by the law of the land, or, in the language of the constitution, "by due process of law." Certainly this does not give to individual citizens the right to deprive them of such rights or property. Nor can I see how it matters whether such property were valuable or nearly worthless, or whether it had been properly or improperly managed.

But was it a sufficient excuse for not serving a notice that the persons entitled to such notice could not be found? When a

condition precedent becomes impossible
613 of performance, a person may be excused from performing it; but it does not therefore always follow that because it is impossible the right or privilege depending upon such condition precedent can be maintained, not even if this is made so by the acts of the other party entitled to such condition precedent.

Where a court has no jurisdiction of a person, it does not follow that because a party has done all that he could do to bring such person within such jurisdiction, and has failed, that therefore the court can proceed without obtaining jurisdiction. I cannot say, however, that in this case this impossibility was caused by the act of the party entirely. He went south, it is true voluntarily, but he went expecting to return soon; but he could not return. This was a misfortune for him; and it was also a misfortune, perhaps, for those whose rights were affected by his not being able to return. But it was a misfortune, which resulted for the most part, at least, from the war in which the nation was unfortunately engaged, and by reason of which, thousands of others, in common with the parties to this cause, unavoidably suffered, and for which courts and the usual legal proceedings could not afford an adequate remedy.

But it does not seem to me that the parties asking for the appointment of a trustee did, in fact, all that they might have done. The president of the old company still had a residence in Alexandria.

The deposition of E. S. Boynton, a witness for defendant, shows that he had residence with his family until April 1861, and he himself resided there until May,

leaving his house and furniture in charge of said Boynton, and declaring that he expected to return in sixty or ninety days. We can readily infer, from the facts of history within judicial cognizance, why he could not have returned if he had wished. I cannot discover from the records how there is any proper evidence of his having engaged in arms against the govern-
614 ment, *for the answer stating such fact could not have been given upon any knowledge by the affiant, and this is not to be presumed; nor is there any sufficient evidence showing that he did not, at all times, intend to return to his place of residence. In fact, the affidavit of Davison, upon which the order of the court was made, does not state that he had no residence in Alexandria, and is defective on that ground. This, at least, should be shown positively in any aspect of the case.

I cannot see what excuse can be rendered for not serving the notice by leaving a copy at his residence as the statute prescribes.

Besides all this, the deed of trust itself shows that Lenox, who was an officer and director of the company, and the trustee in the deed of trust, was a non-resident. Notice to him could certainly be given by publication in accordance with the statute. Why could not this have been done?

It was said that he received notice as trustee. But this would not prevent notice to him as director. What excuse can be offered for not notifying him by publication? This would have brought them within the provisions of the deed of trust.

If the facts, as alleged in the answer, were all true, and it appeared that the road and all the property were abandoned, and it was absolutely impossible to give any notice to anybody, and in the meantime creditors had no other means of saving their rights, while such a state of facts might be urged with great force for a court of equity to assert jurisdiction for the protection of all parties interested, upon all these facts being brought before such court, I think it very clear that a single creditor, without regard to the rights of others, without showing the court this state of facts, cannot, upon a single affidavit or petition, ask a court to make an order to protect his rights, and without really taking into its own hands the property itself for the benefit of all parties, owners as well as creditors.

615 *Cases have been produced to us to show that a corporation by abandonment and nonuser of its franchises forfeits those franchises. Suppose this to be so; I cannot see how it would help these appellants. To whom would such franchise be forfeited? Evidently to the sovereignty from which they emanated. This would not allow individuals to seize upon them. They could not take advantage of such forfeiture. The new company could not derive its existence from such a source.

It is objected that the application for the order was not made by a person authorized to do so by the holders of three-fifths

of the bonds. I very much doubt whether the evidence fully establishes that any other than the person named, Benjamin Thornton, was the holder at the precise time.

It is very evident that Charles M. Wilkes was the holder, and entitled to hold within a very few days thereafter and sometime before the sale, whether he was the owner or not, and entitled, as such holder, to determine whether he would allow them to be converted into cash or to remain on interest at 7 per cent., or whether they should become extinguished in his hands by the conversion of the security into cash to go into the hands of a trustee not required to give security, and with whose appointment he has had nothing to do, and whom he might not be able to compel to pay to him the money to which he was entitled.

Suppose, however, that we are wrong in coming to the conclusion that this order appointing the trustee should be set aside, the admitted facts of this case show very plainly, I think, that the sale should be set aside on the ground of facts occurring after such order. Suppose that Stewart were the proper trustee, invested with all the power of the original trustee. He has simply a naked power to sell. His authority is based only upon the deed of trust, and he must pursue the provisions of the deed strictly. He must be able to

616 *justify his act, not by any presumption or inference, but positively and necessarily. The divesting of the franchises and property of a railroad company is not to be permitted upon a doubtfully exercised power of a mere naked trustee.

The first step taken is, to say the least of it, a very doubtful one. Sale can be made only on the request, in writing, of the holders of at least three-fifths of the bonds. Now the request in writing was, as specified by Davison, as agent and attorney in fact of the owners of more than three-fifth of the bonds. This is liable to two objections: first, there was no writing then produced from even the owners of the bonds. There was a writing from Davison, but this was not founded upon a writing from the owner. There is not, to this day, written evidence that the owner then, at that time, had ever authorized this demand; second, even if Davison was the agent of the owners, this does not necessarily imply that he was the agent of the holder. An owner may, and often does, divest himself for a time of the possession and right to hold his property; and for all that appears in this written notice, this may have been done.

More than this: the reasonable probability from the evidence is, that this was actually done at the time of giving this notice. While this fact may not appear to be sufficiently established to set aside an order of court it does appear sufficiently to throw great doubt upon the power of the trustee to proceed to the sale.

Certainly, at the time of the sale, Thornton was not in a position to deliver up the bonds or to require the delivery.

But let us look further at the subsequent conduct of this trustee and the circumstances of the sale.

A trustee is the agent of both parties. He is especially of the party constituting him such trustee. His duty is to be perfectly fair in all his conduct and

617 *especially to see that the interests of the party who has conferred upon him this power are protected to the fullest extent. His action has, therefore, been held to be especially the subject of enquiry by a court of equity; Gibson's heirs v. Jones, 5 Leigh 370; and as such it is his duty to do all that can reasonably be done to effect the most advantageous sale possible. It has, therefore, been the common practice of our courts to require that in all such sales, if there are prior liens, either contested or doubtful, or not precisely ascertained, such liens shall be ascertained, so that they may be made known to the purchaser. Cole's adm'r v. McRae, 6 Rand. 644; Rossett v. Fisher and others, 11 Gratt. 492; 15 Gratt. 83 and 103. Otherwise, how is it possible that there could be anything like a fair sale of the property? Now, what were the facts in this case? The affairs of the road were confessedly, and in fact charged to be by the defendants themselves in a most complicated condition. There were numerous judgments and two deeds of trust. Most of the judgments, it is true, were in fact subsequent to the deed of trust. But the fact should have been well ascertained as to which were prior and which were subsequent. There were a large number of liabilities of the company, and as the defendants themselves allege, persons owning these liabilities were making them known even at the sale. The question of the validity of the two prior deeds of trust was openly made at the sale. The trustee of the deed of trust for \$60,000 was present at the sale asserting its validity, while Stewart says in his deposition, "I at the same time saw fit openly to dispute the validity of both the deeds of trust of the corporation of Washington, and Fowle, Snowden & Co. as valid liens upon the road;" and the record shows that there is at this time a contest in the courts concerning the validity of this first deed of trust.

Now, under such circumstances, was

618 it possible that *there could be anything like a reasonable sale? How could a purchaser have any knowledge of what he was buying? The Code provides (ch. 61, sec. 29) that when a purchase is made of the works and property of a corporation, the purchaser shall not be entitled to the debts due to the first company, nor be liable for any debts of or claims against the company "which may not be expressly assumed in the contract of purchase."

The defendants contend that by this sale a new company was formed. If this be so, ought not the contract of purchase to show whether the debts and liabilities of the old company were assumed? Ought there not to have been at the sale an understanding whether it was sold subject to the debts and

liabilities of the old company or not? If not then the purchaser should know it, for it would make a material difference in his bid. Certainly this ought not to be left to the mere will of the purchaser, after he has made his bid. The matter ought to have been clearly and plainly understood at the sale, and I think it would have been proper, if not necessary, that the advertisement of the sale should have stated how the sale would be made. It should, at least, have been made known generally, as well as to the purchaser, Hay, whether the sale was subject to the debts and liabilities of the old company or not.

Again, the record discloses that Stewart, who all the time professed to act in the capacity of attorney for the purchaser, Hay, had already in his hands more than sufficient money, the property of the company, to pay all that was then due upon the bonds. This fact Hay must be presumed to have known, and to have purchased with this knowledge. That the interest of the seller was not properly attended to is further seen by the fact that the United States government had possession of the road during all this time, and it was a well known fact that possession could not then be delivered: and

619 no one could tell when it would be, or *what claims the government would have upon it when so delivered. It was impossible that, under such circumstances, a sale could be made otherwise than at a ruinous sacrifice. The position of Stewart was, to say the least of it, a peculiar one. He was, if properly appointed, the trustee to make the sale, and as such, in duty bound to effect the best possible sale, and the attorney-at-law and in fact of Hay, the purchaser, and as such interested to procure the sale on the lowest possible terms. More than this, he had made an agreement in writing with Davison, in which he stipulates what he will do, "on behalf of himself and constituents," in case the road be purchased by himself or constituents; showing that he was then contemplating a purchase by himself, as well as by his principal and client. Can he be said to have been perfectly impartial and disinterested?

Is it possible that a trustee for sale can at the same time be attorney at law and in fact for the purchaser, and acting in his interests?

Stewart, in fact, did immediately become interested in the purchase.

He had also previously been appointed, by writing, the attorney for Davison, the agent of the bondholders, and as such was to receive from him a large contingent fee in case of a sale of the road; he to use all diligence in the closing out and perfecting the interest of said bondholders in and to said road. (What interest had the bondholders in the road, except to receive the money which might be realized from the sale?)

On this writing there was endorsed by Joseph Thornton, May 3, 1862, "There will go to Mr. Stewart \$35,000 of stock out of

the \$142,000 set over to me, his \$35,000 being subject to a pro rata deduction in making up the \$50,000, or whatever may be used of that amount, which is set apart." This 620 \$50,000, it otherwise appears, *was to be set apart for procuring a charter from congress. It is true that Stewart testifies that no agreement was effected with Davison and Thornton before the sale. But these papers appear to have been executed; and he himself testifies that the probabilities and feasibilities of forming a new company were much discussed, and, as he says, "in the event that either Thornton or Davison became the purchaser, the question of who would take an interest, and how, was much figured over as a thing entirely prospective, and it was agreed, if I saw fit to do so, I could be one of the parties forming the new company."

These facts show, I think, that Stewart was at least so far interested in the purchase as to render it impossible for him to act as trustee with that propriety which a court of equity requires.

It further appears that no money was ever paid to the holder of the bonds from the proceeds of the sale, but they were still, by the permission of said trustee, and at the request of Joseph Thornton, allowed to remain in the bank of Riggs & Co., at Washington, as the basis of a loan to Benjamin Thornton from one Wilkes, of something over two thousand pounds, and a portion of the proceeds were used in re-organizing the new company. A company was immediately organized, of which Stewart was the secretary and a large stockholder, and stock was issued to the amount of \$300,000.

This fact tends strongly to show that the object of the sale was not so much to satisfy the amount due upon the bonds, and in accordance with the real wish of the older of the bonds, as it was to get the title of the old company into the hands of these parties, who were devising a plan by means of which they could form a new company, and which had been much "figured over" by all these parties, including the trustee.

By special act of assembly, this new company was soon after authorized to 621 issue stock to the amount of *\$500,000, besides bonds to the amount of \$200,000, and notes to the amount of \$100,000.

Stock has been issued to a large amount in excess of the amount authorized, as the decree states, and bonds, &c., have also been issued, and out of this money has been raised and in part expended for the benefit of the road; so that it will be seen that other parties have equities in the road which should be provided for.

This history of the transactions connected with the sale must show, I think, that even if the order appointing Stewart was perfectly valid, yet the sale was conducted in such a manner, and shows such a state of actual fraud, that it cannot be sustained by a court of equity.

It is urged upon us with great earnestness and force, that even if such order were void,

and the sale was an illegal and fraudulent one, yet that the company, taking no steps for a period of four years, and allowing the stockholders of the new company to invest large sums of money on the faith of the validity of such sale, without being cognizant of such fraud, the old company should be considered as having acquiesced in such sale, and should now be estopped from contesting such validity as against them.

There are cases which show that acquiescence in sales made by order of a court of competent jurisdiction for a long period, shall be regarded as a waiver of the right to contest the validity of such sales. In extreme cases, where there has been long acquiescence, sales made by order of the court have been sustained on the ground that judicial sales ought to receive the highest possible sanction, and should be regarded as giving the utmost possible protection to the purchaser.

But, in the first place, the acquiescence which is shown in this case is not of such a character as I think should be regarded as an estoppel.

The parties who alone could object
622 for the old company *were in such a situation that, so far as they were concerned, it was for nearly the whole period a forced acquiescence. True, they had gone into the lines of public enemies against the United States, and had gone voluntarily; but whatever may be said of the wrongful nature of said acts, yet they were in such a situation that it cannot be said that, during this period, they voluntarily acquiesced in the disposition of their property. Besides, up to August 1865, the government was in actual and exclusive possession and control of all this property; and while it was so, I do not think any party could be justified in claiming to act in entire ignorance of all claims that might be brought against it. I cannot give any countenance to the claim that the government held, as a tenant of Hay under a contract made by him, as a mere creditor and with no claim upon the road, except such as might have been satisfied by the payment of \$5,000.

Again, so far as the sale was concerned, it was not a judicial one. The court had nothing whatever to do with the sale. The court simply substituted one trustee in the place of another. The court did not direct the sale. The sale was not professed to have been made by any other authority than that of a trustee, with no power to guarantee the title, who did not profess to guarantee the title, and the purchaser was bound to make enquiry and to fully investigate the sources of his authority, and if he neglected to do so, it was his own negligence. And such a sale is not at all like one where a purchaser has an order of a court of competent jurisdiction, and which he is authorized to presume to be correct.

Again, a corporation cannot be created by mere acquiescence. This can be done only by positive act of legislation, or by

some power authorized by some legislative act.

Still, under the circumstances of this case, the new company ought to have reimbursed to it the money *which it has
623 actually expended for the benefit of the road, which ought to go to its stockholders.

A very large portion of the money invested by the stockholders seems to have been upon representations for which the old company could be in no wise responsible, and it certainly could not be regarded as having acquiesced in them. Much of it has been upon false and spurious certificates of stock, issued by the new company; but the remedy of those who have thus been deceived is upon those whom they have trusted. Their case is an extremely hard one, and appeals strongly to our sympathies, and so far as they can be lawfully protected they should be.

They claim that a very large amount (several hundred thousand dollars) has been expended for the benefit of the road, and provision should be made for the repayment of so much of this as they can establish; and this can be done under the decree as it now stands, and such further orders as may be made by the court upon a consideration of the evidence which may be produced.

The new company procured a special act to be passed by the Alexandria legislature, February 5th, 1863, declaring this sale to be a valid one.

This act was in plain violation of the constitution, and therefore void.

It was an assumption of judicial power by the legislature.

Art. II, constitution of Virginia, declared "the legislative, executive and judicial departments shall be separate and distinct, so that neither shall execute the powers properly belonging to either of the others.

Art. IV, section 35, provides that the general assembly shall not, by special legislation, grant relief in a case of which the courts or other tribunals may have jurisdiction.

Besides, it attempts to divest antecedently vested rights, and also to impair the
624 obligation of the contracts *between the parties. (See Taylor v. Stearns & als., 18 Gratt. 244, 274.)

I can see no necessity for giving a construction to the statute relating to the sale of the works and property of a corporation, and the powers and privileges of the purchaser at such sale. (Sections 28 and 29, ch. 61 of Code of 1860.) This is a matter rather for the new company and those connected therewith to settle among themselves, and suits are now pending, as I am informed, to determine the questions between them.

The decree of the court below very properly provides for an investigation into the equitable interests of the several parties to this controversy, and for security for their protection, and I see no reason why it should not be fully affirmed.

DORMAN, J. Concurring in the result reached in the above opinion, it seems proper to say that the concurrence is much more readily yielded from the views entertained on another point, presented by the record, which was elaborately argued by the counsel on both sides, but not considered in the opinion of Judge Willoughby. It has been impossible to arrive at the conclusion, that in § 28-29, chapter 61 of the Code of 1860, it was the intention of the legislature, that a sale by a trustee of a mere equity, conveying no legal title, was such a sale and conveyance of the property and rights of the old company as to "pass to the purchaser at the sale not only the works and property of the company as they were at the time of making the deed of trust or mortgage, but any works which the company may after that time and before the sale have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due to it;" and also ipso facto to dissolve the company, and at the same time to constitute the purchaser forthwith a corporation, succeeding to all the privileges and franchises of the original *company. The comprehensive terms of the law seem to preclude the supposition, that anything short of the sale and transfer of the legal title, together with the property, privileges and franchises, can merge the old company in a new corporation under the statute.

BURNHAM, P., dissented.

Decree affirmed.

626 *Wright v. The Commonwealth.

January Term, 1870, Richmond.

Indictment for Felony—Jurisdiction of Circuit Court.—

A prisoner is indicted for felony in the Circuit court, he being in custody at the time. The Circuit court has no jurisdiction, to try him on this indictment, but he must be sent before a justice for examination and commitment for trial in the County court.*

At the June term 1869 of the Circuit court of Northampton county, Spencer Wright was indicted for the murder of Joshua P. Wescoat. When the prisoner was brought into court, and before the jury were selected and sworn to try the cause, he moved the court to certify his case to the County court of the county for his arraignment and election as to whether he would be tried in said County court or in the Circuit court of the county. But the court overruled the motion, and directed that the trial should be proceeded with, because the indictment was found in the Circuit court for felony; where, in the opinion of the court it might be tried, the accused being in custody, having been heretofore arrested, and being actually in jail when the indictment was found. To which opinion and decision of the court the prisoner excepted.

*The statute is quoted in the opinion of the judges.

The prisoner was then put upon his trial, and the jury found him guilty of murder in the first degree; and the court sentenced him to be hung. To which judgment of the court the prisoner obtained a writ of error from a judge of this court.

Daniel, for the prisoner. There is but one point in the case; and that is whether the prisoner should have been
627 *sent to the County court for trial.

The Circuit court does not claim a common law right to hang a man; but relies upon the statute. Then if there is no right in the court to take a man's life, but by statute law, this right must be shown in the statute; and it is not to be found there. The statute says he shall be tried in the County court; and only in special cases when the prisoner is arraigned in the County court, he may elect to be tried in the Circuit court. If a prisoner is indicted in the Circuit court, the indictment is to be sent to the County court.

The object of the act of 1866-67 was a speedy trial, and not to require a prisoner to lie six months in jail until a term of the Circuit court came round. Formerly there was an examining court, to prevent a long, unjust imprisonment; and when this court was abolished, trial in the County court was provided; and it was optional with the prisoner, charged with a high offence, to incur the delay of a trial in the Circuit court.

Then, I say, the law is express, that a prisoner shall be tried in the County court; and the law gives to the Circuit court no authority to try a felony, except in two cases: 1st. Where he elects in the County court to be tried in the Circuit court; and 2d. Where the case was pending when the law took effect.

In fact, under the statute, the Circuit court is but an accusatory body. By § 15, ch. 207, p. 929, Sess. Acts of 1866-67, upon a presentment, indictment or information of a felony, for which a party charged has not been arrested, the presiding judge or justice shall issue a warrant to any sheriff, sergeant or constable, commanding him to arrest such party, and carry him before a justice of the county or corporation in which he ought to be tried; and to summon the witnesses, &c. And the justice is to proceed in the case as if the warrant was issued by himself. And § 16 provides, that when an indictment is in a case other than that

628 provided for in the *preceding section, if it be in a Circuit court, a copy of the indictment, and of all papers relating to the case, shall be certified to the court of the county or corporation in which the offence is charged to have been committed. Upon such indictment, and upon like indictment in the County or Corporation court, process shall be awarded by the court, or be issued by the clerk thereof in vacation. This § 16 includes the case of a prisoner who is in custody at the time the indictment is found; and is the case now before the court. It includes all cases not embraced in § 15, and the case of a prisoner in cus-

tody at the time the indictment is found is not included in the § 15.

Wells, for the Commonwealth. The brief of the attorney general suggests that § 1, of ch. 208, p. 931, does not expressly repeal the statute vesting jurisdiction to try felonies in the Circuit courts; and that repeals of statutes by implication is not favored by the courts. This § 1 says:—Trials for felony shall be in a County or Corporation court; but in the larger number of felonies it gives the accused an election to be tried in the Circuit court. It is difficult to conceive any object which the law can contemplate as important, in sending a person who is already in the Circuit court to the County court, that he may elect to go back to the Circuit court. The theory of the statute was the utmost expedition in the trial of such cases; and if the prisoner is then in a court where he may be tried, the delay which was intended to be avoided will not be incurred.

If this § 1 does not take away the jurisdiction of the Circuit court, then clearly by § 2 the prisoner might be tried in that court. That section says:—When an indictment is found, or other accusation filed against a person for felony, in a court wherein he may be tried, the accused, if in custody, or if he appear according to his recognizance,

shall, unless good cause be shown for
629 *a continuance, be arraigned and tried at the same term. The statute in relation to criminal procedure retains to the Circuit court the same power of finding an indictment as it possessed under the former law. Then can it be supposed that when an indictment is found in the Circuit court, § 15 requires that a prisoner shall be arrested and taken before a committing magistrate, with the witnesses, there to go through the same process, which had been already passed through in the court.

Wise, for the prisoner, in reply. The judge below puts his jurisdiction to try the prisoner, on the grounds that he was in custody. This could only be by the warrant of the committing magistrate; and that would send him to the County court.

As to the repeal of the former law giving jurisdiction to the Circuit court to try felonies, if the § 1, of chap. 208, could leave any doubt upon the question, how can the attorney general get over § 18, of ch. 211, which provides that any prosecution for a capital felony pending in a Circuit court at the time the act goes into effect, shall remain and be tried therein. If the jurisdiction had not been taken away by § 1, of ch. 208, the Circuit court could have proceeded to try pending cases without the aid of this § 18. But this § 18 shows the Circuit court could not proceed to try such cases without it. If the jurisdiction of the Circuit court is not taken away by § 1, of ch. 208, then that court has authority to try all cases of felony, though not one of the cases specified in that section.

It is only necessary to look to the object of the different sections of the statute in order to ascertain their meaning. The § 2,

of ch. 208, has reference to the time of trial, and not to the court which is to try the case. § 1 of that chapter, and § 15 and 16 of chapter 207, has reference to the court which is to try the prisoner. § 1
630 *declares that a prisoner shall be tried in the County or Corporation court; and § 15 and 16 directs how he shall be brought into the court for trial. The § 2 only directs when he shall be tried.

WILLOUGHBY, J. In this case, the prisoner being indicted for murder by the grand jury of the Circuit court, and being in custody of the court, before his trial, demanded to have his cause remanded to the County court of the county, in order that he might there have the privilege, when arraigned, of electing whether he would be tried there or in the Circuit court. This being refused, and he then being immediately tried and convicted, a writ of error was awarded upon the ground of the refusal of this demand.

The question is, whether the Circuit court had, under such circumstances, jurisdiction to proceed with the trial, and is to be determined by a construction of the act of assembly of April 27th, 1867, entitled "an act to revise and amend the criminal procedure."

Under the law as it stood previous to the act of April 27th, 1867, trials of felony of white persons were all to be had in the Circuit court, and by such act, the felony of all persons was to be tried in the Circuit court. The result of this was, that a very large portion of the time of Circuit courts was taken up by the trial of criminal causes, and in many counties often almost to the exclusion of civil business. Besides, such court holding in most of the counties but twice a year, the trial of felonies was liable to be long delayed to the great hardship of the accused, especially if he could not give bail, (and those cases were very frequent), and to the great expense of the Commonwealth by being obliged to provide for such accused persons who could not give the required security for their appearance.

These were no doubt the principal reasons for the changes made in the act under consideration.

631 *The act therefore provides that "trials for felony shall be in a County or Corporation court, and may be, at any term thereof, except that a person to be tried for" certain enumerated offences, among which, is murder, "may, upon his arraignment in the County or Corporation court, demand to be tried in the Circuit court having jurisdiction of the said county or corporation." Witnesses are to be then recognized, and papers transmitted, &c.

On page 929, of Acts of Assembly of 1866 and '7, section 15, provides what course is to be taken "upon a presentment, indictment or information of a felony for which the party charged has not been arrested."

The next section, sec. 16, provides that "when a presentment is made or indictment found in a case other than that provided

for in the preceding section, if it be in a Circuit court, a copy of such presentment or indictment and of all papers relating to the case, shall be certified by the clerk of the court of the county or corporation in which the offence is charged to have been committed."

If the prosecution be for a felony, process shall be awarded, which shall be a *capias*, &c.

These sections, unless modified by some other section, would show, it seems to me, as plainly as language can show, that the Circuit court has no power to proceed originally with the trial of any criminal offence; and no power to try in any event, except as such cases may be removed to it from the County or Corporation court, according to the first section herein quoted.

But the authority to try a case as this was tried is claimed to be founded upon the section next succeeding the one first herein quoted, page 932, sec. 2, which provides:

"When an indictment is found or other accusation filed against a person for felony in a court wherein he may be tried, 632 the accused, if he is in custody, *or if he appear according to his recognizance, shall, unless good cause be shown for a continuance, be arraigned and tried at the same term."

The fact that he is in custody of a court in which he may be tried is made the basis of jurisdiction.

According to this two things must concur: He must be in custody: The court must be one in which he may be tried.

The mere fact of being in custody cannot alone determine in what court a prisoner is to be tried for felony: He must be in custody to be tried any where as a matter of course.

The important enquiry then is, what is the court in which he may be tried. How are we to ascertain this?

This section does not show or profess to show. We are then to enquire elsewhere.

Now the court in which murder may be tried depends upon circumstances connected with the case. It may be in the County court, if the prisoner upon his arraignment so elects.

It may be in the Circuit court, if the prisoner, upon his arraignment so elects. The important fact, then, is this election. If it is to be tried in the County court, the Circuit court is not one in which he may be tried. This is a privilege given to the prisoner. Such privilege ought not to be taken from him by a doubtful construction of another section. He is entitled to a liberal construction of such other section, and in case of reasonable doubt, he should be entitled to the benefit. The legislature having just before, in the preceding section, given him this privilege in the plainest terms, it must not be presumed that in the next breath, they meant to deprive him of it without any substantial reason therefor; and it is difficult to see why the mere fact of his being in custody should constitute such a reason.

Now, what is the leading idea of the clause in dispute? Has it not plainly reference more to the time of *trial; that is, that there shall be an immediate trial and no continuance without good cause? Do not the qualifications of this clause refer to this leading idea, rather than to the question of jurisdiction? The words, if in custody, are there because such must be an obviously necessary fact which must exist in order to enable the court to proceed to an immediate trial in any court. The immediate trial is the controlling thought. All others are accessory to it.

The language of this section is precisely the same as it stood before, except the insertion of the words "or other accusation filed." ("Code of 1860, chap. 208, sec. 2.) Under the law, as it then stood, if a person was indicted for felony in the Circuit court, he had the right to be sent to the County court for examination; or if he chose, he might be immediately tried. He was then in a court in which it could be said he may be tried. More than this, he must be tried there. But did anybody ever argue, that because of this section he should be immediately tried without the privilege of going to the County court for examination? And yet, it might have been argued with the same propriety as now.

It is argued that it is an absurdity to allow the prisoner to have his cause remanded to the County court only to allow him the privilege of having his cause certified back to the court from which he started.

We have nothing to do with this if it be the law. But how can we say that this is the object of the accused. Perhaps it may be to have his cause tried in the County court. The law gives him the privilege of trying his cause there if he wishes it; and what is the absurdity of allowing him to avail himself of this privilege.

Besides, I think that there can be said to be another reason for it; and that is that it carries out, or tends to carry out, one of the main objects of the change of 634 *trial from Circuit to County courts; and that is to relieve the Circuit court of all such trials possible.

The 15th and 16th sections above quoted of the preceding chapter strengthen this view very much. According to the 15th section the court is instructed to take certain steps where a person is indicted for a felony and is not arrested. According to the 16th section, in all other cases (and a person who is arrested is another case), if in a Circuit court, the papers shall be certified to the County or Corporation court. Could there be a more positive command?

It is argued that the old act is not expressly repealed, and that the object of this law is merely to enlarge the jurisdiction of the County court. I do not think that this view can be maintained. The language of this act is too explicit and too inconsistent with the former one to allow this interpretation. I think it quite plain that the act, as it now stands, was to take the place en-

tirely of the former one; and that we are to look to this alone to determine in what courts cases of felony are to be tried.

I can therefore come to no other conclusion than that the court below erred in refusing to allow the prisoner to have his case remanded to the County court for trial, and that therefore the judgment of the Circuit court must be reversed.

BURNHAM, P. The accused was tried in the Circuit court of Northampton county, upon a charge of murder in the first degree, and being in custody, he was indicted, arraigned, convicted and sentenced in said court, in disregard of his motion, "to certify his case to the County court, in order that he might have his election as to which court he would be tried in." This may be deemed substantially a claim for certification under the 16th section, chapter 207, of act of 1866-7. It is claimed by the accused,

635 that "the County court was the *only court having jurisdiction to try the case," and in support of such theory, is cited the before mentioned act of assembly of Virginia, passed April 27, 1867, entitled "an act to revise and amend the criminal procedure," and amending and re-enacting the several chapters of the Code of Virginia, edition of 1860, from 201 to 211 inclusive, except chapter 205. The 1st section of chapter 208, p. 931-2, provides, and is as follows: "Trials for felony shall be in a County or Corporation court, and may be at any term thereof, except that a person to be tried for rape, arson, malicious shooting, cutting, stabbing or wounding, with intent to maim, disfigure or kill; for forgery, or uttering as true, forged paper; for passing counterfeit money, or for a felony which may be punishable with death; may, upon his arraignment in the County or Corporation court, demand to be tried in the Circuit court having jurisdiction of the said county or corporation; but no such demand shall be allowed in any Corporation or Hustings court held by a judge, and in which, by especial statute, capital felonies may now be tried. Upon such demand, the accused shall be remanded for trial in the said Circuit court, and all the material witnesses desired for the prosecution or the defence, shall be recognized for their attendance at such trial." The farther provisions of this section direct the acts to be done, in order to such removal of the cause, and of the custody of the accused, to the Circuit court, and are not important as affecting the points presented in this case. It may be observed that the first clause of the section above cited confers jurisdiction of felonies upon the County or Corporation courts, and does not exclude the jurisdiction of other courts over the same crime, but expressly allows persons charged with certain felonies, upon arraignment in the county court, to elect to be tried in a Circuit court; thus recognizing the continuance of jurisdiction in, and the full competency of, Circuit courts, to try persons

636 *charged with felonies. It does not

exclude the jurisdiction of other courts, beside the Circuit courts, but recognizes and names them as "Corporation or Hustings courts, held by a judge." The removal of cases provided for by this section, is to carry them from the County or Corporation court to the Circuit court, and does not authorize the remanding contrariwise.

The 2d section of the same chapter is as follows:

When an indictment is found, or "other accusation filed, against a person for felony, in a court wherein he may be tried, the accused, if in custody, or if he appear according to his recognizance, shall, unless good cause be shown for a continuance, be arraigned and tried at the same term." The remaining part of this section is not material to the question under consideration. It thus appears that where a person charged with felony is in custody, or appears in a court wherein he may be tried, he shall, upon indictment found, be arraigned and tried "at the same term," unless good cause be shown for a continuance. An immediate trial in the court, where the prisoner is under indictment, or appears in custody, is clearly guaranteed to him and the Commonwealth, and is to be avoided or prevented in but the way and for the cause named in the same section. The Circuit courts for many years had jurisdiction of cases of felony. They were presided over by gentlemen learned in the law, and of eminent ability and purity of character; and it is certainly not to be deemed the intent of the legislature to destroy by implication the safeguards to personal life and liberty thus provided, or a hearing before such court, simply in order to facilitate the trials of questions of financial interests only. Jurisdiction once existing, is removed only by positive provision; and no legislative intent can be supposed against it that is not plainly expressed. It being conceded that the Circuit courts had power at the time of the passage of the act of 1866-7 to try all felonies,

637 *every presumption is in favor of the continuance of such jurisdiction.

If it be not removed by legislative enactment, or if such power remain in them under laws not repealed, it is sufficient.

It is urged, however, that the 16th section of chapter 207, p. 929, authorizes and requires the certifying and forwarding by the clerk of any indictment for felony found in the Circuit court; and that therefore the accused was entitled, upon demand of the Circuit court, to be sent to the County court of the county "for his arraignment and election as to whether he would be tried in said County court or in the Circuit court of said county;" and that the refusal of the Circuit court so to direct was erroneous.

There seems no room to dispute that the accused was in custody for murder in the first degree (a capital felony), at the time when the motion was made to certify, &c.; nor that an indictment was legally and duly found and returned against him for said

offence, and that the said cause was then pending in the Circuit court of Northampton county. The power of the grand jury of a Circuit court to find an indictment for felony is expressly recognized by section 16 before cited; and the 2d section of same chapter, p. 926, says, that "no person shall be put upon trial for any felony unless an indictment shall have been first found by a grand jury of a court of competent jurisdiction," &c. If a Circuit court is competent to find an indictment for felony, can there be any doubt of its competency to try it? It is believed the "act to revise and amend the criminal procedure," before cited, does not remove original jurisdiction of cases of felony from the Circuit courts of the Commonwealth. The 16th section of chapter 207, before cited, directing the clerk of the said court to copy and certify the indictment and papers connected therewith

in certain cases, applies only to cases
638 other *than felony, and does not provide for the transfer of causes for trial, or the custody of the person, nor seem to contemplate such a contingency as possible; and it is obviously qualified by the 2d section of chapter 207, p. 926-7, the 1st and 2d sections of chapter 208, p. 931-2, and by the 4th section of chapter 211, p. 945; and its provisions should be considered, with such other parts of the act, as a general system, to be taken together and so interpreted.

Thus construing the amendatory acts, it is clear that any felony might have been tried in the Circuit court having jurisdiction of the place at which the same was committed; and that although such courts might transfer certain felonies which are named, they were prohibited from transferring prosecutions for capital felonies, to the County or Corporation courts. Such prosecutions "pending in a Circuit court," are directed by the statute to remain and be tried "therein," without restriction of the word pending, to the time when such act should take effect, as is provided and allowed of other prosecutions in the earlier part of the same section. That this was the intent of the legislature, is shown by the words of the section. The first part and provision of § 5, Acts 1866-7, p. 945, explicitly indicates the time certain classes of causes may be removed, to the date "when such act shall take effect;" which, by the 6th section of same chapter, is stated to be July 1st thereafter; while the last and distinct portion of the same section, says: "Any prosecution for a capital felony pending in a Circuit court shall remain and be tried therein." No restriction as to time of trial, or the date when pending. The prosecution for such crime, so pending in a court "in which the case may be tried," by original jurisdiction or otherwise, and the accused being in custody, he is entitled to, and may be tried in, such Circuit court as a court of "competent jurisdiction;" and
639 the court is required then and there to try him. The *magnitude of the offence for which trial is to be had,

and the gravity of the consequences which may follow a conviction, all approve the humanity and wisdom of the legislature, who thus, it is believed, ensured a speedy trial before a court of the highest qualities, and secured, to the accused, under such circumstances, an early and exhaustive trial of his cause, by a court which had been approved by long years of experience as the safe custodian of right and the protector of the most momentous interests. This, too, without subjecting him to the delay, expense, anxiety and suffering, inseparably entailed, by having his cause certified and sent down to another court to await a convenient time to present a demand to be returned to the court from which he had just come, then again to await time for the hearing of his cause.

In my opinion, which is expressed with great respect for the majority of the court, from whom I dissent, the true and proper construction of said statute of 1866-7, and of the law theretofore existing, is, that the judgment of the court below should be approved and affirmed.

DORMAN, J., concurred in the opinion of Willoughby, J.

Judgment reversed.

640 *Whitehead v. The Commonwealth.

January Term, 1870, Richmond.

1. **Criminal Law—Arraignment—Plea—Distinct.**—The arraignment of a prisoner and his plea are distinct parts of the proceeding; and therefore upon his arraignment and without pleading he may elect to be tried in the Circuit court.
2. **Two Prisoners Arraigned Together—Separate Pleas.**—Two prisoners may be arraigned together. This does not prevent their pleading separately; and electing to be tried separately.
3. **Indictments by Grand Jury—Question Whether "True Bill" Found—How Ascertained.**—The record of the court states that the grand jury presented the following indictments as "true bills," viz. one against M. N., one against &c. setting out eight names, and then one against Thomas and Richard Whitehead, and one against R. H. and G. C. not true bills. Though it is doubtful whether the indictment against Willis and Whitehead, belongs to the first or last class, the court may look to the indictment and the indorsement upon it by the foreman to ascertain the fact.
4. **Statute—Venire Facias—Mandatory.***—The act, Sess. Acts 1866-67, ch. 208, § 4, p. 932, directs that the writ of venire facias shall command the officers charged with its execution, to summon twenty-four persons freeholders of his county or corporation, "residing remote from the place where the offence is charged to have been committed." This direction is mandatory, and the writ is defective and should be quashed if it is omitted. And it is not in violation of the bill of rights.

At the quarterly term of the County court of Chesterfield for March 1869, the record

*See foot-note appended to Poindexter v. Com., 33 Gratt. 766.

states that the grand jury came into court and presented the following indictments as "True bills," to wit, one against Marcellus Nunnally, one against Lewis Mason, one against Ben Gray, one against Lawson Burfoot, one against Rachael Carr, one against Daniel Johnson, one against Thomas Brown, one against Lewis Johnson, one against Thomas Willis and Richard Whitehead, and one against R. Harris and Giles Coggins not true bills. Among the indictments which were returned 641 *by the grand jury, is an indictment against Thomas Willis and Richard H. Whitehead for the murder of James Rodgers: but the only record evidence that this indictment was found a true bill by the grand jury is the entry hereinbefore given, and the indictment itself; if that may be looked to on that question.

At the April term of the court Willis and Whitehead were brought into court, and set to the bar, and the attorney for the Commonwealth called for the arraignment of the prisoners jointly, to which the prisoners by their counsel objected, and moved the court that they might be arraigned separately; which motion the court overruled; and the prisoners excepted.

The prisoners were then arraigned jointly; and refusing to plead to the indictment, elected to be tried before the judge of the Circuit court of the county; which was ordered to be certified to that court. In the Circuit court the prisoners pleaded "not guilty," and elected to be tried separately. And at the June term 1869 of the court, the prisoner R. H. Whitehead having been set to the bar, moved the court to quash the venire facias issued by the clerk; which motion the court overruled; and the plaintiff excepted. The venire facias is set out in the exception, and is as follows: The Commonwealth of Virginia, To the sheriff of Chesterfield county, greeting: We command you that you cause to come before the Circuit court of Chesterfield county, at the courthouse thereof, on the 24th day of June 1869 (special term) twenty-four good and lawful men, freeholders of your county, each one of whom is twenty-one years of age, to recognize on their oaths whether Richard H. Whitehead be guilty of the felony of which he stands indicted or not. And have then there the names of the said freeholders and this writ. Witness, &c.

Upon the trial the jury found the prisoner guilty of murder in the second degree, 642 and fixed the term of *his imprisonment in the penitentiary at eighteen years; and the court sentenced the prisoner according to the verdict. The prisoner thereupon applied to a judge of this court for a writ of error to the judgment; which was awarded.

Crump, for the prisoner.

Wells, for the Commonwealth.

WILLOUGHBY, J., delivered the opinion of the court:

The first point in this case arises upon a construction of the "act to revise and amend the criminal procedure." Section first of chap. 208, page 931, of Sess. Acts of '66 and '67. This provides that trials for felony shall be in a County or Corporation court, &c., except that a person indicted for an offence punishable with death, "may, upon his arraignment," demand to be tried in the Circuit court, &c., and he shall, thereupon, be "remanded for trial in the Circuit court," &c., and copies of the proceedings in the County court shall be certified to the clerk of the Circuit court.

The second section of that chapter further declares that, under certain circumstances, a person shall be "arraigned and tried." It is contended that, because the accused did not enter his plea, and refused so to do, and because the court did not thereupon, enter for him the plea of not guilty, according to the third section of this act, the arraignment was not complete in the County court, and the Circuit court having jurisdiction only to try, and to try only after the completion of the arraignment, it had not, under such circumstances, jurisdiction of this case. Our attention is called to the fact that the Circuit court has no inherent jurisdiction, and no such jurisdiction as was formerly had by the General court, and still later by the County court; and that it has no jurisdiction except such as is expressly conferred; that the jurisdiction 643 to try felonies having been *taken away from the Circuit court, except in certain cases enumerated by the act under consideration, it follows that its authority is based upon the circumstances attending such excepted cases and upon these alone. I think that these are propositions that may be admitted, and that they are in fact established by a consideration of the history of our courts.

The prisoner is allowed, "upon his arraignment" in the County court to elect in what court he shall be tried. The precise point is at what time is this election to be made; whether before or after pleading. Do the words upon his arraignment mean, at the time of or after his arraignment; and does an arraignment necessarily include the plea? This leads us to enquire what is an arraignment?

Blackstone says, book 4, page 322: "To arraign is nothing else but to call the prisoner to the bar of the court to answer the matter charged upon him in the indictment." On page 324, he says: "When a criminal is arraigned, he either stands mute or confesses the fact, which circumstances we may call incidents to the arraignment, or else he pleads to the indictment, which is to be considered as the next stage of the proceedings."

A whole chapter is devoted by this author to the subject of arraignment and its incidents. The next chapter is upon the subject of plea and issue. It is evident, therefore, I think, that he regards an arraignment and the plea of the accused as separate stages of the proceeding. The ar-

raignment is the act of the court; the plea is the act of the accused. It is true, that by the third section of the act, the court may, upon the refusal of the accused to plead, enter for him the plea of not guilty; but this is done in his behalf. It is an act performed for the accused.

It is true that in the forms of proceedings, what is called an arraignment, generally includes the pleading of the accused; but I think that the more strict meaning
644 *of the word is confined to the action of the court. It is expressed in Latin, as Lord Hale says, "ad rationem ponere." And this I think, too, accords more with the general idea of the word arraign, which is regarded as meaning to accuse, to charge, &c. If this be correct, it follows that there is no error in the plea not being put in in the County court. The prisoner is to make the election at the time of his arraignment; or if it should be said after his arraignment it would not necessarily mean after his plea.

Such a construction is plainly the most liberal one for the accused. The election given to him is a privilege. The sooner he is allowed to avail himself of this privilege, the more extended it is. Any other construction would tend to abridge and restrict this privilege. Upon being called upon to plead, there are several courses which he may take. He may move to quash the indictment. He may plead to the jurisdiction in abatement, or a special plea in bar, such as former conviction or acquittal. He may demur, or he may plead not guilty. All these present questions for some court to decide. Right here may be the turning point of his case. Here may arise the most important questions to be determined. The law gives him the privilege of electing in what court he will be tried upon his arraignment. He may wish to have these important questions determined by the Circuit court; and would it not be depriving him of a liberal construction of this law to say that he shall continue in the County court until the issue is fully made up?

It would seem to me that the prisoner could object with better grace that he is not allowed to plead; that is, to select in what court he might plead. But he is now complaining that he did not plead, when he refused to plead. He complains that the court did not do for him what he refused to do for himself, and what it is apparent he did not wish the court to do for him.

645 This looks *almost like one seeking to take advantage of his own wrong, if it be a wrong.

By construing the word upon, as meaning at the time of, we give it a signification, which is a very common one, and thus give to the accused the benefit of a liberal construction of the law in cases generally, whatever may be the effect of such construction in this particular case.

It is claimed that the language of the act restricts the Circuit court to the mere trial of the cause. I think, however, that this construction, if it precludes the accused from the benefit of having the usual inci-

dents of a trial in the Circuit court, is too strict. Such a construction would imply that nothing could be done but by an issue. But suppose the accused pleads in abatement, and then elects to go to the Circuit court, and there his plea is not sustained; or suppose he demurs, and his demurrer is overruled in the Circuit court, what would have to be done? Evidently he would be required to plead again, and this, too, in the Circuit court. He would have to be arraigned again. To restrict the Circuit court to a mere trial of an issue, in the sense contended for, would render it almost impossible to proceed in many criminal cases.

If these views be correct, I think no substantial error was committed by arraigning the accused jointly with his co-defendant. This did not compel them to plead the same plea. Nor did it compel them to be tried jointly. It would no doubt have been proper to arraign them separately. But in either event, I cannot see how any rights were put in jeopardy or any harm done. It is not such a substantial error as would compel a reversion of the judgment.

Another ground of error as assigned is that it does not sufficiently appear from the record as is claimed, that an indictment for murder was presented by the grand
646 jury. *The language upon the order book is as follows:

"At a quarterly court held for Chesterfield county, at the courthouse thereof on the 9th day of March, A. D. 1869, and in the 93rd year of the Commonwealth.

Edward A. Johnson, gentleman, foreman, W. G. Clarke, Joseph D. Ellett, Joseph H. Wilkinson, Saml. Chetham, Joseph H. Rowlett, Ajax Gary, Andrew Howison, John W. Lipscomb, Geo. S. Adkinson, Geo. C. Gregory, Joseph Vest, Augustus Talbot, Jno. W. Beasley, Saml. Taylor, Richard Gill, Thos. O. Wilson and Wm. Walker were sworn a grand jury of inquest for the body of this county, and having received their charge withdrew, and after some time returned into court and presented the following indictments as "true bills," to wit, one against Marcellus Nunnally, one against Lewis Mason, one against Ben Gray, one against Lawson Burfoot, one against Rachael Carr, one against Daniel Johnson, one against Thos. Brown, Jr., one against Lewis Johnson, one against Thomas Willis and Richard Whitehead, and one against R. Harris and Giles Coggins not true bills, and the jury was adjourned over until to-morrow at 11 o'clock.

It is claimed that it cannot be determined from this to which class the indictment against Richard Whitehead belongs, whether to that of "true bills" or "not true bills." It is apparent from a fair reading of this that Thomas Willis and Richard Whitehead are included in the same indictment.

The words "one against" are prefixed to each name before these, and between these is only the word "and." After Whitehead is a comma, and again we have "one

against" R. Harris and Giles Coggins. A perfectly unbiassed reading of this would, I think, show that the words "not true bills" appertain only to the last two persons named, though it must be confessed that it is quite obscure and perhaps somewhat ambiguous.

647 *In Cawood's case, 2 Va. Cas. 527, 542, the court say: "We admit that after a grand jury have found a bill and reported it, and their finding is placed on the record, that the indictment so found and endorsed becomes as much a part of the record as if it were spread in extenso upon the order book; but in order to give it that character we deem it essential that a record should be made of the finding upon the order book."

This would seem to imply that if the grand jury present an indictment, and the fact appears from the record that they acted upon it, we may look to the indictment to see what it was and what was the action of the grand jury upon it. The indictment then, though not spread upon the record, is a part of the record: And this, I believe, has been almost the universal usage of the courts of Virginia. It is certainly evident from the record on the order book, that the indictment against Richard Whitehead was presented either as a true bill or as not a true bill. But if such indictment is a part of the record, we may look to the indictment itself, I think, to explain this apparent ambiguity and obscurity. In other words, we may look to the whole record in construing an uncertainty in any part of it. *Goodwyn v. State*, 4 Smede & Marsh. Miss. R. 520.

If we are permitted then to look to the indictment, as I think we are, there is no difficulty in coming to a conclusion as to whether the indictment against Richard Whitehead comes under the class of "true bills" or "not true bills;" and the endorsement signed by the foreman shows that it belongs to the former.

But it is claimed that the clerk should have further identified this indictment by describing it as an indictment "for murder."

If we are authorized to look to the indictment as part of the record, this cannot be a substantial reason for holding that the failure to do so, is error for which

648 *the judgment should be reversed.

Suppose these words had been inserted, they would not then have necessarily shown that this indictment is the identical one referred to by such words. The record shows that an indictment was found. This speaks for itself and shows for itself what it is. There would be no more difficulty in substituting one indictment for murder for another for murder, or a defective one for a good one, than there would be in substituting an indictment for manslaughter for the one for murder. It would not be contended, I presume, that either party would be bound by such words; certainly not the accused. If on inspection of the indictment, it should turn out to be totally defective as

an indictment for murder, certainly these words would have no bearing whatever to show it to be a sufficient indictment.

The accused would claim, and rightfully, to be governed by the indictment itself, and I think the Commonwealth must have the same privilege. This view is fully substantiated by the case of *Goodwyn v. The State*, above referred to, in which case there was no description whatever of the offence in the minutes of the court.

In Cawood's case there was no reference whatever to any indictment against the accused. There was, therefore, no evidence whatever, that such indictment had been presented in open court, or that it was ordered to be made a part of the record. An indictment to be complete must be presented in open court. In Cawood's case there was no evidence whatever, that this essential fact existed, or that any action whatever was taken upon it. On the contrary, the record in that case expressly negatived such fact. No action by the court was taken upon it. But in this case, there is evidence that some action was taken, and the only difficulty is to determine what such action was; which, however, is solved by an inspection of the whole record. Even

649 in Cawood's *case the decision was by a divided court; Judges Barbour and Daniel dissenting; though we do not dispute its authority on that ground.

Another error assigned is the denial of the Circuit court to quash the *venire facias* on motion, made on the ground that it was not in conformity to the law. This *venire facias* is in these words, to wit: "The Commonwealth of Virginia to the sheriff of Chesterfield county, greeting: We command you that you cause to come before the Circuit court of Chesterfield county at the courthouse thereof, on the 24th day of June 1869 (special term), twenty-four good and lawful men, freeholders of your county, each one of whom, is twenty-one years of age, to recognize on their oaths, whether Richard H. Whitehead be guilty of the felony of which he stands indicted or not. And have then there the names of the said freeholders and this writ. Witness," &c.

The statute already referred to, section 4, chapter 208, page 932, Acts of 1866-7, requires that this writ "shall command the officer charged with its execution to summon twenty-four persons freeholders of his county or corporation residing remote from the place where the offence is charged to have been committed," &c.

The language of the acts relating to this subject previous to 1846, 1 R. C., p. 601, sec. 9, is, "Freeholders of his county or corporation of the neighborhood of the place where the fact shall have been committed." The language of the act of February 24, 1846, Sessions Acts, p. 62, and again of 1847-8, page 148, sec. 5, is, who reside remote from the place where the offence is charged to have been committed."

The Revisors of the Criminal Code in 1849 recommend these words in the act of 1846 and 1847-8 to be stricken out, and report

the section with such words stricken out, remarking, that thus all foundation is taken away, for the objection that the section is in conflict with the Bill of Rights.

650 (Report of Revisors, page *1018.) The Bill of Rights declares that the accused is entitled to a speedy trial by an impartial jury of twelve men of his vicinage. But the legislature disregarded this recommendation of the revisors, and directed the words to be again inserted; and so they have continued to 1867, and were then again upon a revision of the criminal procedure re-enacted.

This history shows that the legislature did not act unadvisedly upon this subject; that their attention was called to the apparent conflict with the Bill of Rights; but notwithstanding this, and in opposition to the recommendation of the revisors, they deliberately and advisedly inserted these words. In 4 Bl. Com. 350, it is said the sheriff of the county must return a panel of "jurors liberos et legales homines de vicineto; that is, freeholders without just exception, and of the visne or neighborhood, which is interpreted to be of the county where the fact is committed." It is in accordance with this that the accused is entitled by the Bill of Rights to "an impartial jury of his vicinage;" that is, to the jury of his county. The language of the act, requiring persons remote from the place where the offence is charged to have been committed, then, is not really in conflict with the Bill of Rights; but means in a remote part of the county. Such a construction is not an unreasonable one, and relieves us from charging the legislature with having deliberately violated the Bill of Rights—an interpretation which ought to be given to any act of the legislature, if consistent and reasonable.

This history of the legislation upon the subject shows us also that this requirement was deemed an essential one. They command not that this shall be one of the qualifications of a juror, not that the sheriff shall summon such men, but that "the writ itself shall command the officer to summon such men. This, it seems to me, constitutes an important difference between our statute

651 and those upon which decisions have been made in *some of the States, holding that the words, "good and lawful men" in the writ of venire facias, imports men who have the requisite qualifications. Did not the statute expressly command, that the writ itself shall contain these words, "residing remote," &c., and were this a qualification of a juror otherwise defined, I should be inclined to hold that the words, "good and lawful men" in the venire, were sufficient.

As has been well said, it is often the most difficult thing that arises in the construction of statutes, to determine whether provisions of time and form are directory or mandatory. Sedgwick says, in his work on Statutory and Constitutional Law, page 368, that it depends upon whether a strict compliance with them appears essential to the

judicial mind. If so, they are mandatory.

It does appear to me, on looking at the history of the legislation upon this subject, that this requirement to have these words in the writ itself, was deemed essential in the legislative mind; and if so, it must be so in the judicial mind. The object of this must have been to obtain men upon the jury who are supposed not to be so immediately familiar with the fact charged in the indictment, and consequently more unbiassed and better qualified to give an impartial decision. With this view, it must have been intended to confer upon the accused a right or privilege; and therefore, if there is reasonable doubt upon the construction, the accused is entitled to the benefit of such doubt.

In the Commonwealth v. Wash, 16 Gratt. 530, it was held that a writ of venire facias, which directed the officer to summon freeholders, who owned "property to the value of one hundred dollars at least," ought to have been quashed on motion, as it contained a qualification which the law did not require. It was there held, that it was not material to the question whether this man-

652 date of the writ was regarded by the officer or *not. Nor was the accused required to show that he had been injured by the error of the officer issuing the writ. It is true, that in that case the error was, that it contained more than the law allows, and in this case it contains less. But the principle of the case seems to be, that the writ itself must be one according to the law; that is, that the requirements of the writ are essential, and cannot be dispensed with, though the officer might in fact have summoned only the proper persons.

It follows, therefore, that the court erred in denying the motion to quash the writ of venire facias; that the judgment must be reversed, and a new trial awarded to the accused.

Judgment reversed.

653 *Shelly v. The Commonwealth.

January Term, 1870. Richmond.

Prisoner in Custody—Indicted—Examination before Justice.*—A prisoner in custody is indicted in the Hustings court of L. held by a judge. He is not entitled to be sent before a justice for examination; but the court may proceed to try him upon the indictment.

At a quarterly term of the court of Hustings of the city of Lynchburg, held by the judge thereof, in August 1869, an indictment was found against William Shelly for grand larceny. And at the same term of the court the prisoner was brought to the bar, and before being arraigned in his proper person tendered a special plea in writing, which he swore to in open court. The point made in the plea was, that he should not be called upon to answer the in-

*See Chahoon's case, 20 Gratt. 776.

dictment, but the same should be quashed or abated, because he had not been examined before the mayor or any alderman of the city of Lynchburg, and remanded for the trial of the offence charged in the indictment. The court excluded the plea; and the prisoner excepted.

The prisoner thereupon was arraigned and pleaded "not guilty;" and upon his trial the jury found him guilty of the grand larceny charged in the indictment, and fixed the term of his imprisonment in the penitentiary at five years; and recommended him to the mercy of the court; and the court sentenced him accordingly. To this judgment the prisoner obtained a writ of error from a judge of this court.

Garland and Christian, for the prisoner.

The Attorney General, for the Commonwealth.

654 *WILLOUGHBY, J. The prisoner having been indicted for felony in the court of Hustings, for the city of Lynchburg, and being "led to the bar in the custody of the sergeant," tendered a special plea in writing, alleging that coming "in his own proper person," that he ought not to be tried because he had never been arrested and examined before the mayor or any alderman of the said city. The court refused to receive this plea, and exception was taken to such refusal; and having been tried and convicted, the prisoner obtained a writ of error to this court.

I do not think that any error was committed by the court in this refusal. The record shows that the accused was in custody of the court. This also appears by the plea itself, the accused making this plea "in his own proper person." I do not, therefore, think that this case comes within the provisions of the fifteenth section of ch. 207, as amended by the "act to revise and amend the criminal procedure," passed April 27th, 1867. By the 2nd sec. of ch. 208, as amended by the same act, the trial of a case like this is to proceed immediately, if the accused is in custody in a court wherein he may be tried, unless good cause is shown for a continuance. The object of the said 15th section is no doubt the same as that of section 15, chapter 207, of the Code of 1860. The language is the same, except that the words "indictment or information" are interpolated, and which do not change the object in this respect. This object is, as it was under the former act, to provide for the accused the right to appear before some tribunal in order that he might have an immediate hearing; so that he might, if the charge should turn out to be entirely unfounded, be discharged; or that he might have some means provided for giving bail for his appearance to the court. If such means were not provided, and the court in which the accused may be tried is

655 rest, he would *have to be taken to jail, however unfounded and frivolous the charge against him might be; where

he would be obliged to remain until the sitting of the court. But if the accused is in custody, and the court is in session, there can be no such reason for sending the accused before a justice or other officer, for he can be immediately heard by the court in whose custody he is, as well as by such magistrate or other officer.

The examining court provided for by ch. 205, Code of 1860, was abolished, and with it all its incidents. I can find nothing in the act as amended, which leads me to think that it was intended to confer upon a magistrate or other conservator of the peace, the powers of such examining court, or to grant to accused persons the privileges of such a court.

The judgment of the court below must be affirmed.

BURNHAM, P., concurred in the judgment.

DORMAN, J., dissented.

Judgment affirmed.

656 *Jackson v. The Commonwealth.*

January Term, 1870, Richmond.

1. **Trial for Felony—Prisoner Must Be Present—The Right Cannot Be Waived.**†—Upon a trial for felony it is the right of the prisoner, a right which he cannot waive, to be present from the arraignment to the verdict. And if the evidence of a witness on the trial, which has been reduced to writing, or any part of it, is read to the jury in the absence of the prisoner, it is error, for which the verdict will be set aside.

2. **Evidence—Dying Declarations—Inadmissible if Hope of Recovery.**—Though the deceased may have expressed himself and have acted in such way as to indicate that he had no hope or expectation that

*For monographic note on Dying Declarations, see end of case.

†**Trial for Felony—Prisoner Must Be Present—The Right Cannot Be Waived.**—The rule is well established that a person on trial for a felony must be present in person, and not by attorney, from the arraignment to the verdict and the record must show his presence, nor can he waive the right. See *Sperry v. Com.*, 9 Leigh 623; *Hooker's Case*, 13 Gratt. 763; *Lawrence's Case*, 30 Gratt. 845; *Bond's Case*, 83 Va. 587, 3 S. E. Rep. 149; *Snodgrass v. Com.*, 89 Va. 688, 17 S. E. Rep. 238; *Shelton v. Com.*, 89 Va. 453, 16 S. E. Rep. 365.

Presence of Prisoner—When Inferred from Record.—See *foot-note* to *Lawrence's Case*, 30 Gratt. 845.

Same—When Unnecessary.—See *foot-note* to *Lawrence's Case*, 30 Gratt. 845.

Same—Before Arraignment—Order Made.—Va. Code, ch. 208, § 3, which provides that a person tried for felony shall be personally present during the trial, does not apply before his arraignment; and therefore before arraignment an order may be made in his absence. *Boswell v. Com.*, 20 Gratt. 860.

Same—Same—Continuance.—Before arraignment the prisoner need not be present when his case is continued. *Kibler v. Com.*, 94 Va. 804, 26 S. E. Rep. 858. See also, *Anderson v. Com.*, 84 Va. 77, 3 S. E. Rep. 803. On "Continuances," see generally, *Harman v. Howe*, 27 Gratt. 676.

he would live, yet if he afterwards so expresses himself as to indicate a hope, his statements in relation to the contest in which he was struck, are not to be admitted in evidence as dying declarations.

3. Same—Same—Incomplete Utterance—Inadmissible.

—A single sentence is uttered by the deceased, and he is then interrupted, and obviously has not completed what he had intended to say. It is not admissible in evidence for the prisoner.

At the February term of the County court of Prince Edward for 1869, Nathaniel H. Jackson was indicted for the murder of Alexander Bruce. At the same term of the court he was arraigned, and demanded to be tried in the Circuit court of the county. At the August term of this court he pleaded "not guilty," and was put upon his trial. After the evidence had been introduced, and the jury had retired for deliberation, they came into court and stated that there was a difference of opinion among some of the jurors in respect to a portion of the testimony of Atkins R. Dalby, a witness on behalf of the prisoner, and asked that he might be recalled, in order that he might be re-examined; whereupon, a
657 portion of *the testimony of Dalby, as taken down, was read to the jury; the said Dalby not being then in court; nor was the prisoner. But whilst the said testimony, as taken down, was being read, the prisoner was brought into court by the sheriff of the county; and the prisoner being in court, it was agreed by the counsel on both sides, that the said Atkins R. Dalby should be re-examined in person, in regard to such matters as the jury desired to enquire of him. Whereupon the said Dalby was called and re-examined by the jury and the court.

In the progress of the cause, the Commonwealth proposed to introduce the dying declarations of the deceased; which were objected to by the prisoner; but admitted by the court; and the prisoner excepted. It appears from the record that the testimony was taken down at length under the supervision of the judge, and is given in full in the exception. The only question was, whether the deceased had given up all hope of living when the declarations were made. He received the wound which caused his death, on the 26th of January, and died on the 28th. The physicians who dressed the wound had no hope of his recovery, though another, who was called in to see him, did have at first some hope. One of them says:—I heard Mr. Bruce at no time express any hope of recovery. He was preparing for, and apprehensive of, death all the time. He frequently so expressed himself. Another of the physicians says:—Mr. Bruce was under the impression he would die; and was so impressed all the time. And also another physician, who said he manifestly thought he would die from his wound. Witness often heard him express himself, and never heard him express a different opinion. They all testify to his frequently repeating the expression, "what

a horrid death." It was in proof, too, that he made his will; and he requested one of the witnesses to take an interest in his former servants, and said he had left
658 them a homestead for *each family.

These conversations, however, referred to by the witnesses, were on the day he received the wound. Another witness stated that he sat up with the deceased the last night of his illness, from a quarter to twelve o'clock till daylight. The deceased was asleep when the witness went in. When he awoke, the witness said to him, "Old man, you have had a very good nap." He said "yes;" "who knows but I may get well."

Dr. A. S. Dillon, a witness introduced by the prisoner, stated that he called on the deceased the morning after he received his wound. In reply to some enquiries made of him by the deceased, the witness made some remarks touching the character of his wound, and endeavored to speak cheerfully to him. Just about then, very unexpectedly to the witness, he made a remark, in which were these words:—"I did not know he had cut me," and had coupled with these words the word "when," or "where." Witness was more inclined to think he said "when." Thus:—"I did not now when he had cut me." With some earnestness witness interposed and stopped him, and told deceased he did not expect or wish him to make any statement to witness. Witness inferred from his manner, that deceased, intended to give him a statement of the affair; and witness did not wish to hear it. Witness thinks he had given a complete sentence. The attorney for the Commonwealth moved the court to exclude the further testimony of the witness, on the ground that the deceased had not made to the witness a complete statement; which motion the court sustained, and would not permit the witness to testify further, and excluded the testimony above stated. To which opinion of the court the prisoner excepted.

After the jury had retired to consider of their verdict, they returned into court; and one of them stated, that he wished the instructions of the court as to the
659 *law of self-defence. Whereupon the court proceeded to give in writing instructions to the jury, as follows: "To avail of the doctrine of self-defence, a man must not have provoked a quarrel; and must have avoided a collision with his adversary so far as he could do so without putting his own life in extreme peril. But when he could, without such danger to his own person, withdraw from the conflict, to kill his adversary is not a just exercise of the right of self-defence." To which ruling of the court the prisoner again excepted.

The statement of the reading of a part of the evidence of the witness Dalby, in the absence of the prisoner, is given in the record as immediately preceding the application of the juror mentioned in the last exception; and may have been intended to constitute a part of the statement included in that exception, but it is not contained in

the bill of exception, and is not expressly excepted to; but it is given as a part of the record.

The jury found the prisoner guilty of murder in the second degree; and fixed the term of his imprisonment in the penitentiary at five years; and he was sentenced accordingly.

There was a motion for a new trial, which was overruled; and the prisoner excepted; but it is unnecessary to notice it further. The prisoner applied to this court for a writ of error, which was awarded.

Berkeley, for the prisoner:

1st. Upon the question of the effect of reading the evidence of the witness Dalby in the absence of the prisoner, referred to Sperry's case, 9 Leigh 623; Hooker's case, 13 Gratt. 763; Wade's case, 12 Georgia R. 25; Witt's case, 5 Coldw. R. 18; Scagg's case, 8 Smeedes & Marsh. R. 722; Bennett & Head's Lead. Cas. 451, edi. 1857. And he insisted that it was not a question

whether the prisoner had suffered harm 660 by the reading of *the testimony; but it is enough that harm might have been done. Lithgow's case, 2 Va. Cas. 297; Wormley's case, 8 Gratt. 712; Whitfield's case, supra; Wash's case, 16 Gratt. 530. And he insisted further, that the counsel could not consent so as to bind the prisoner.

2d. Upon the law of self-defence he insisted:—That the construction of the court, confirming the right to a case in which the accused has not provoked the quarrel, and where there is extreme peril of life, was erroneous. That where the accused has provoked the quarrel, if he afterwards seeks to decline the fight, and is too fiercely set upon to retreat with safety, he may kill his assailant. Hale's P. C. 479; Appendix to Wharton on Homicide, p. 451. That to justify the taking life there need be only reasonable fear of great bodily harm. 1 Arch. Cr. Pr. and Pl. 223, 793, edi. 1860; Wharton on Homicide 216, 217, 223, 229, 1026-1028; Appendix 456; Chorler v. People, 2 Comst. R. 193; Id. 643, 659; Rex v. Fagent, 7 Car. & Payne 238.

3d. That the deceased must have no hope of living in order to the admission of his statements as evidence. Dunn v. State, 2 Ark. R. 229; 1 Greenl. Evi. 184, § 156, note 1; 2 Russell on Crimes 755; Rex v. Fagent, 7 Car. & Payne 238, 39 Eng. C. L. R. 701; State v. Center, 35 Verm. R. 378; Wharton's Amer. Cr. Law, § 672.

4th. That the evidence of Dillon should have been admitted.

5th. The prisoner should have pleaded in the County court, before he was sent to the Circuit court.

The Attorney General, for the Commonwealth. It is submitted on the part of the Commonwealth, that there is no sufficient error assigned by the prisoner to justify this court in setting aside the judgment of the court below.

The last error assigned by the prisoner will be the first noticed by the Com-

661 monwealth, for the reason that, *if this error be sustained by the Court of Appeals, it will be unnecessary to examine any of the other errors assigned. This error strikes at once at the jurisdiction of the Circuit court; and it is claimed for the accused, that, under the provisions of the act of the general assembly of 1866-7, chap. 208, p. 931, "that trials for felony shall be in the County courts, &c., except that a person indicted for an offence punishable with death, 'may, upon his arraignment, demand to be tried in the Circuit court,' &c.; and that upon this demand, the prisoner shall be remanded for trial in the Circuit court;" and that although the prisoner upon his arraignment exercised his right and demanded to be tried in the Circuit court, yet the County court erred in allowing him to exercise his rights in this behalf before he had pleaded to the indictment, and that the Circuit court erred in allowing the pleadings to be made up after the case had reached that court.

There is nothing in the statute requiring the accused to plead before being remanded to the Circuit court for trial. The words of the statute are, "may, upon his arraignment, demand to be tried in the Circuit court," &c. This provision is for the convenience and benefit of the prisoner. It might not be convenient for him to enter his plea at the time of his arraignment; especially if he contemplated delay by having his case submitted to another tribunal. Arraignment is one thing; pleading is another. The one is the act of the Commonwealth; the other, the act of the prisoner; and it seems that he is left free to exercise this right after the same is remanded to the Circuit court. It is humbly submitted, that the authorities cited by the prisoner in support of this error, do not sustain his view of the case. In Matthew's case, 18 Gratt. 989, it will be seen that the prisoner exercised the right of pleading after his cause had reached the Circuit court; and although the Court of Appeals

662 did not pass upon the question in that case, *it would seem that the practice of pleading in the Circuit court in such cases was at least recognized by the Court of Appeals.

2. The first error relied upon by the prisoner, when compared with the facts shown by the record, do not show such error or misconduct on the part of the court as will justify a new trial. The authority cited by the appellant, in the case of Sperry v. Commonwealth, 9 Leigh 623, is not controverted, when properly applied; but in this case, accused was brought into court, and the witness re-examined in his presence by the jury, and, it seems, was not objected to by the accused. No injustice seems to have been done the accused by the reading of a part of the evidence, as taken down, as the witness, being re-examined, must have satisfied the jury as to the correctness of the evidence of the witness. If the evidence read was not the true evidence of Dalby, certainly testimony, as given by

himself to the jury, after the reading, was the true evidence.

3. As to self-defence, the court below substantially stated the law, to the jury at least, as it is defined by the Court of Appeals, in the case of Vaiden. See 12 Gratt. 717. The prisoner lays the rule down too broadly; court has a right to charge the jury in criminal cases.

4. As to dying declarations. Can it be said that dying declarations of Bruce were given to the jury? It is true, the record states that the court allowed the statement made by Bruce to witness Lyle, to go to the jury as dying declarations. If the statements of Bruce are relied on as dying declarations, they should have been given to the jury, for the reason that, from the time he was stabbed to his death, he expressed the constant apprehension of death, and the belief that he would die. He seems to have been fully satisfied in his mind that he must die. But suppose the evidence not good, in the strictest sense, as dying declarations, *they are certainly good evidence as forming a part of the res gestæ. See Livingston's case, 14 Gratt. 592; also Vass's case, 3 Leigh 786; Hill's case, 2 Gratt. 594; 1 Greenl. Ev., § 156 to 162; Bull's case, 14 Gratt. 613.

5. The rule of evidence is well established, that a party cannot give in evidence a mere part of what a witness said—if any part is to be heard, it must be all that was said; garbled statements must be excluded; and as A. S. Dillon could not state all that was said, he was properly ruled out by the court.

DORMAN, J. The question raised in this case respecting the right of a prisoner to plead or not, upon his arraignment in the County court, when, under the statute, he makes a demand to have a trial in the Circuit court, and what is meant by arraignment in that clause of the statute, have, at this term, been already determined by this court, in its decision in the case of Whitehead v. The Commonwealth.

The first ground of error alleged in the petition of the prisoner, is, that after the evidence was closed and the jury had retired to consult upon their verdict, differing as to the testimony of one of the witnesses, they came into court, requested to hear again the testimony of this witness, the court permitted a portion of the testimony of the witness, as taken down, to be read in the absence of the prisoner as well as the witness. From the record it appears, that sometime during the reading of the notes of this testimony, the prisoner was brought into court; and also, that the witness, being afterwards present, was re-examined, by consent of all parties.

How much of the testimony as taken down was read, in the absence of the prisoner, does not appear. From the way it is mentioned, it must be presumed, that a considerable portion of it was thus read to the jury in the prisoner's absence. No

664 principle is supposed *to be better settled, and, in all criminal trials of

the grade of felony, more rigidly adhered to than that in all such trials, the prisoner has a right to be present in every stage from the arraignment to the rendition of the verdict. It is held to be a right of which he cannot be deprived, and which he cannot waive. So imperative is the rule of law, that no part of the trial can proceed without him. If witnesses are examined, he must have an opportunity to hear and know what they say. If notes of the testimony are, afterwards, read to the jury, it is no less his privilege and right to hear the reading of it. How much influence the reading of the testimony in this case may have had upon the minds of the jury, it is impossible to determine. It is not, however, a question, whether the effect of the reading of the testimony, in his absence, was unfavorable to him, or otherwise, or how far his case was affected by it, if at all. Under the established and safe practice in criminal proceedings, the reading of this testimony was irregular and in violation of the rights of the prisoner, who must be present at every part of the proceedings. In his absence, there can be no trial. The law provides for his presence. And every step taken in his absence is void and vitiates the whole proceeding. On this point all authorities agree. And no question can be raised, as to the extent of the injury done to the prisoner, or whether any injury resulted from his not being present. Circumstances might occur, were the practice to obtain, where great wrong would result. The possibility of wrong is sufficient to secure in all trials, involving life and liberty, the rigid enforcement of the law.

Bishop on Criminal Procedure, § 687, says, "The prisoner cannot be deprived of his right to be present at all stages of the trial." § 688, he states, "In a case of fel-

665 ony or treason, the prisoner must be present during *the whole of the trial, including the giving in of the evidence and the rendition of the verdict." The reading the testimony of a witness, at the request of the jury, who differed about it, constituted a part of the trial, "the giving in of the evidence." It may have been the part of the trial which determined the character of the verdict, and the accused had a right to be present and know all that was said or done on his trial.

In Andrews v. The State, 2 Sneed's R. 550, the court declares, "In criminal cases of the grade of felony, where the life or liberty of the accused is in peril, he has the right to be present, and must be present during the trial and until the final judgment." This decision was placed in part upon the bill of rights in Tennessee. But it is questionable, whether, in criminal trials under the general law regulating such trials, a party accused has not every privilege granted by that bill of rights. See, also, Witt's case, 5 Coldw. R. 11; People v. Perkins, 1 Wend. R. 91; Rex v. Streek, 2 Carr & Payne's R. 413.

In Wade v. The State of Georgia, 12 Georgia R. 25, it is declared, "The court

has no more authority, under the law, to read over testimony to the jury, affecting the life or liberty of the defendant, in his absence, than it has to examine the witnesses in relation thereto, in his absence. The defendant has not only the right to be confronted with his witnesses, but he has also the right to be present, and see and hear all the proceedings which are had against him on the trial before the court. It is said, the presumption must be, that the court read the testimony correctly, and read over all that was declared against the defendant; therefore he was not injured. The answer is, it was the legal right and privilege of the defendant, to have been present in court, when this proceeding was had before the jury, in relation to the testimony delivered against him; and he
666 is to be *considered as standing upon all his legal rights, waiving none of them."

These are citations sufficient to show the strict adherence to the rule in all trials where the life and liberty of the accused is in jeopardy. The law is made for the protection of the citizen, and all are alike amenable to its penalties and entitled to its immunities. Whatever may be the turpitude of his offence, however great his criminality, every man has a right to an impartial trial according to law, and, till found guilty by his peers, that law presumes him innocent; and gives him the right to be present, to see and know all that is said or done by the court affecting his case. From reason and authority it seems to be clear, that the court erred in permitting any part of the testimony taken down to be read over to the jury in the absence of the accused.

The third ground of error alleged in the petition of the prisoner, is the admission of statements of the deceased as dying declarations. The law controlling the admission of this species of evidence is well settled. The only difficulty arises in its application to the facts of a particular case. So diverse are these facts, and so varied in all the circumstances attending each case, that embarrassment often arises in the proper application of the law to the facts shown to exist. The apparent conflict in the determinations on this point, proceed mainly from the imperfect understanding of these attending circumstances. It is difficult often to present them fully and correctly in a record of the case. Much, in every trial, must be left to judicial discretion, and the presumptions must be in favor of a right exercise of such discretion by the court. Yet, in the haste and excitement of a trial, errors may, and do occur, calling for correction by an appellate tribunal.

These dying declarations are an anomaly in the reception of evidence, and are
667 only admissible where all *hope, not only of ultimate recovery, but of a prolonged continuance of life, has left the mind of the person making them. In *Rex v. Hayward*, 6 Car. & Payne R. 157, Chief Justice Tindal thus expresses the rule: "Any hope of recovery, however slight,

existing in the mind of the deceased at the time the declaration is made, would undoubtedly render the evidence of such declarations inadmissible." See, also, 1 Wharton's Am. Crim. Law, § 671. In Bull's case, 14 Gratt. 620, it is thus laid down: "The rule of law is now well settled, that to render dying declarations admissible evidence, they must be shown to have been made when the declarant is under a sense of impending death, and without any expectation or hope of recovery."

In the evidence disclosed in this record, there is much which would bring these declarations of the deceased within the rule as above laid down. He seemed impressed with the belief, that he must soon die of the wound inflicted upon him. He generally so expressed himself. In preparation for death, he made his will; yet, after these declarations were made, he used an expression as to himself, which seemed to indicate, that all hope of recovery was not gone from his mind. When told by an attendant that he had had "a good nap," he replied, "yes," "who knows but I may get well." This certainly implies the existence in his mind of a possibility, if not a probability, of recovery. It would seem that at that time he was not "without any expectation or hope of recovery." From all the attendant circumstances of this case, as presented in the record, the conclusion reached is, that these declarations were inadmissible.

The fifth ground of error alleged in the petition of the prisoner is, that the court erred in its refusal to admit the testimony of the witness Dillon, respecting the statement of the deceased to him. This will be more clearly presented by quoting from
668 the testimony. On *page 99, the witness says: "Just about then, very unexpectedly to me, he made a remark, in which were these words: "I did not know he had cut me," and had coupled with these words the word "when," or "where;" I am more inclined to think he said when; thus, "I did not know when he had cut me." With some earnestness on my part I interposed and stopped him; I told him I did not expect him to make a statement, nor did I wish him. I inferred from his manner that he intended to give me a statement of the affair, and I did not wish to hear it. I think he had given a complete sentence."

In the way this sentence, or part of one, was uttered by the deceased, it plainly presents a portion, and probably only a very small portion, of the facts designed to be communicated when uttered. There is not from the record the slightest reason to conclude that, as it stands, this expression was intended to be the whole truth respecting the circumstances of the death of the deceased, or any considerable portion of them. Were it certain even the sentence was completed, it was manifestly only the commencement of a narrative, which was interrupted. The witness is not certain as to the expression itself. Whether the deceased said when, or where, may be important. The impropriety of the admission of

this testimony would seem to be settled by adjudications of this State.

In Vass's case, 3 Gratt. 864, the court say: "If facts be stated, which are obviously designed by the party who states them to be connected with other facts which he is about to disclose, and to be qualified by them, so that the narration should form an entire and complete history of the whole transaction, and before the purposed disclosure is made it be interrupted, and the narrative remains unfinished, such particular declaration would not be admissible."

See, also, Finn's case, 5 Rand. 701.

669 *From these adjudications upon the point, and from principle, the rejection of this testimony by the court on the trial must be held correct, and that the testimony ought not to have been received.

The other grounds of alleged error in the petition of the prisoner are not held to be well taken, and the action of the court below upon them must be sustained. We do not intend, however, to decide that the law of self-defence, as declared by the court, is so full as to embrace all the law in reference to this point. But as a new trial will be ordered, it is deemed unnecessary to dwell longer upon it.

The judgment of the court must be reversed, and a new trial ordered.

The other judges concurred in reversing the judgment.

Judgment reversed.

DYING DECLARATIONS.

1. Definition.
2. When Admissible.
3. Situation of the Party Who Makes Them.
4. Interval of Time between the Declarations and Death.
5. Requisite Preliminary Proof.
6. Admissibility—Discretion of Court.
7. Res Gestæ.

1. **Definition.**—Dying declarations are statements of material facts concerning the cause and circumstances of homicide, made by the victim under the solemn belief of impending death, the effect of which on the mind is regarded as equivalent to the sanctity of an oath. They are substitutes for sworn testimony, and must be such narrative statements as a witness might properly give on the stand if living. 6 Am. & Eng. Enc. Law 105.

The principle upon which in case of homicide the dying declarations of the deceased are admitted in evidence is that they are declarations made in extremity, under a sense of impending death, and, therefore, when every hope of the world is gone; when every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth—a situation so solemn and awful is considered by the law as creating the most impressive of sanctions. Swisher v. Com., 26 Gratt. 963; Hall v. Com., 89 Va. 177, 15 S. E. Rep. 517; Bull v. Com., 14 Gratt. 613.

2. **When Admissible.**—A person while dying remarked to his sister that it was hard to die by the hand of another and leave his family. This statement was held inadmissible as a dying declaration, because the death of the deceased was not the sub-

ject of the charge and the circumstances of the death were not the subject of the dying declarations. Crookham v. State, 5 W. Va. 513.

Declarations of Opinion Not Admissible.—"Dying declarations, being a substitute for sworn testimony, must be such narrative statements as would be admissible had the dying person been sworn as a witness. If they relate to facts which declarant could have thus testified to, they are admissible. * * * Mere declarations of opinion, which would not be received if the declarant were a witness, are inadmissible. And it is immaterial whether the fact that the declaration is a mere opinion appears from the statement itself, or from other undisputed evidence, showing that it was impossible for the declarant to have known the fact stated." Quoted by ENGLISH, J., in State v. Burnett (W. Va.), 35 S. E. Rep. 983; Vass v. Com., 3 Leigh 786.

Distinct and Complete Statements Admissible.—A person, having received a mortal wound, and being unable, in consequence of the wound, for the greater part of the interval that elapsed before his death, to speak at all, and when able to speak, only able to utter a short word or two, yet retaining his perfect senses and understanding, and being under apprehension of his approaching death,—is asked, Did P. V. strike you first? to which he answered, yes, sir: Did P. V. stab you? to which he also answered, yes, sir: Do you think you are going to die? to which he again answered, yes, sir; and is asked a fourth question, which he is unable to answer, but it does not appear what this fourth question was, or whether it had any relation to the subject, or at what interval after the first three it was put to the dying man. Held, these are such deathbed declarations, being distinct and complete in themselves, as were competent evidence on the trial of P. V. on an indictment for the homicide. Vass v. Com., 3 Leigh 786, 24 Am. Dec. 605.

But, if it had appeared that the declarations were designed by the dying man, to be connected with and qualified by other statements, and with them to form an entire complete narrative, and before the purposed disclosure was fully made, it had been interrupted, and the narrative left unfinished: such partial declarations would not have been competent evidence. Vass v. Com., 3 Leigh 786, 24 Am. Dec. 605; Jackson v. Com., 19 Gratt. 656; Finn's Case, 5 Rand. 701.

Constitutionality.—Dying declarations are not contrary to that provision of the Bill of Rights,—that the accused has a right to be confronted with the witnesses against him. Hill v. Com., 2 Gratt. 594.

3. **Situation of the Party Who Makes Them.**—It is a well-settled rule of law that to render dying declarations admissible evidence, they must be shown to have been made, when the declarant is under the sense of impending death and without any expectation or hope of recovery. Swisher v. Com., 26 Gratt. 963; Hill v. Com., 2 Gratt. 594; Bull v. Com., 14 Gratt. 613; Vass v. Com., 3 Leigh 786; Jackson v. Com., 19 Gratt. 656; King v. Com., 2 Va. Cas. 78; Gibson v. Com., 2 Va. Cas. 111; Puryear v. Com., 83 Va. 51, 1 S. E. Rep. 512; Hall v. Com., 89 Va. 171, 15 S. E. Rep. 517.

Subsequent Hope of Recovery.—A hope of recovery subsequently entertained will not affect the admissibility of a declaration made under the consciousness of impending death. The question is, always, did the deceased, at the time the declarations were made, have the consciousness that death was impending, and have no expectation or hope of recovery? If the declarations were made under the

sense of impending dissolution, and a consciousness of the awful occasion, the principle is not affected by the fact that on other days, when encouraged by others he may have expressed some slight hope of recovery, unless such expressions taken together with all the circumstances of the case, show that he had hope of recovery when the declarations offered were made. *Swisher v. Com.*, 26 Gratt. 963.

But in *Jackson v. Com.*, 19 Gratt. 656, it was held that the declarations of one, who seemed impressed with the belief that he must soon die of the wound inflicted upon him, and so expressed himself and who in preparation for death made his will, but who after these declarations were made used an expression as to himself, which seemed to indicate that all hope of recovery was not gone from his mind, were not admissible as dying declarations.

4. Interval of Time between the Declarations and Death.—But the fact of the declarations not being made immediately previous to death, will not exclude them, provided the deceased was conscious at the time he made them that he was in a dying condition. It is the impression of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible. *Hill v. Com.*, 2 Gratt. 594; *Swisher v. Com.*, 26 Gratt. 963; *Hall v. Com.*, 89 Va. 171, 15 S. E. Rep. 517.

5. Requisite Preliminary Proof.—In a prosecution for murder the offer of dying declarations should be preceded by evidence that they were actually made in expectation of impending death. It is not necessary that the injured person should have stated that they were made in that expectation; it is enough if it satisfactorily appears, in any way, that they were made under that sanction; whether it be directly proved by the express language of the declarant or be inferred from his conduct or other circumstances of his case. *Hill v. Com.*, 2 Gratt. 594; *Swisher v. Com.*, 26 Gratt. 963; *Vass v. Com.*, 8 Leigh 786; *Hall v. Com.*, 89 Va. 171, 15 S. E. Rep. 517.

And it is incumbent upon the party offering the dying declarations of a deceased person in evidence to show that they were made under sense of im-

pending death without expectation or hope of recovery. *Hill v. Com.*, 2 Gratt. 594.

6. Admissibility—Discretion of the Court.—It is the function of the court to decide whether the dying declarations sought to be introduced were made under a sense of impending death without any expectation or hope of recovery; and it is the usual practice for the court to decide this question before allowing the declarations to go to the jury as evidence. To establish the prerequisite facts, it is not necessary that the declarant shall express a belief or conviction that he must or will die. They may be reasonably inferred from attendant facts and circumstances, as any other fact of judicial ascertainment. *Swisher v. Com.*, 26 Gratt. 963; *Hill v. Com.*, 2 Gratt. 594; *Bull v. Com.*, 14 Gratt. 613; *Vass v. Com.*, 8 Leigh 786; *State v. Cain*, 20 W. Va. 679.

But the court can determine only as to the admissibility of dying declarations. Their weight or credit must be left to the jury. *Vass v. Com.*, 8 Leigh 786.

It is not error for the court in the presence of the jury to hear evidence to lay the foundation for admitting the dying declaration of the deceased, especially where the court admonishes the jury that the evidence is not for them but for the court alone. *State v. Cain*, 20 W. Va. 679.

And if the court permits the dying declarations of the deceased to be given in evidence to the jury, reserving the question whether they are made under an expectation of death, and it appears from the testimony that they were made in expectation of death, and were therefore competent testimony, this is no error of which the prisoner can complain. *Hill v. Com.*, 2 Gratt. 594.

7. Res Gestæ.—Statements of deceased *in articulo mortis*, and in presence of accused that accused killed her with poison in whiskey given shortly previous is admissible as part of *res gestæ*—as dying declaration,—and as statement in presence of accused undenied by him. *Puryear v. Com.*, 88 Va. 51, 1 S. E. Rep. 512. See full discussion of "Res Gestæ" in *note* appended to *Jordan v. Com.*, 26 Gratt. 943.

J U D G E S
OF THE
C O U R T O F A P P E A L S.

DURING THE TIME OF THESE REPORTS.

RICHARD C. L. MONCURE, PRESIDENT.

WM. T. JOYNES.

JOSEPH CHRISTIAN.

WALLER R. STAPLES.

FRANCIS T. ANDERSON.

Attorney General:

JAMES C. TAYLOR.

673 *The Richmond Mayoralty Case.*

April Term, 1870, Richmond.

1. **Statute—Enabling Act—Constitutional.**—So much of the act passed the 5th of March 1870, styled the enabling act, as provides for the appointment of councilmen or trustees and mayors and other officers of cities and towns, is constitutional.
2. **Reconstruction Act—When Authority of Military Commanders Ceased.**—The authority of the military commanders appointed under the reconstruction acts of congress, ceased upon the admission of the State's representatives into congress; and when his authority ceased that of his appointees ceased.
3. **Act of Congress—Authority of Military Appointees to Hold Office Over.**—The act of congress of January 26th, 1870, admitting the representatives of the State into congress, does not entitle military appointees to office to hold over until their successors are appointed and qualify.
4. **Constitution—Art. 6, § 25—To What It Applies.**—§ 25 of Art. 6, of the constitution, applies only to officers elected or appointed under the constitution, and for whose election or appointment it provides.
5. **Same—Art. 6, § 20—To What It Applies.**—§ 20, of Art. 6, of the constitution, which provides among other things, that there shall be chosen by the electors of every city a mayor, applies only to a mayor to be chosen under the constitution, at and after the time therein prescribed for the purpose; and not to one appointed to perform the duties of mayor

*This case will be associated in the memory of the present generation of Virginia people with the calamity which occurred in the capitol on the 27th day of April 1870.

From the 16th of March, there were two persons claiming to be mayor of the city of Richmond, each of them acting as mayor, with their respective police force. Such a condition of things of necessity produced much excitement in the city, and this was the greater, that these contesting mayors were associated with different political parties. To put an end to this state of things as speedily as possible, it was agreed by them to prepare a case and submit the questions at issue between them to the decision of the Supreme Court of Appeals; and in accordance with that agreement this case was prepared. It was argued with great zeal and ability by R. T. Daniel, James Neeson and John A. Meredith, for Ellyson, and by L. H. Chandler, H. H. Wells and Henry A. Wise, for Chahoon. The whole city awaited the decision with great anxiety; and a large number of persons were present in the court room on Monday the 26th, in expectation that the decision would then be made; but the president of the court announced that the court was not then ready to make its decision; but that it would be

*Statute—Enabling Act—Constitutional.—See *foot-note* to Teel v. Yancey, 23 Gratt. 691.

†Art. 6, § 20 of Constitution—To What It Applies.—In *Roche v. Jones*, 87 Va. 485, 12 S. E. Rep. 965, the court, in construing this section of the constitution cited the principal case, and said: "The section (§ 20, Art. 6) is merely enabling, and plainly intended to apply only to officers to be chosen under the Constitution after the municipal government became fully and regularly established, and not to officers appointed by the act itself to perform requisite duties until a regular election could be held."

before one could be chosen to enter upon the duties of the office under the constitution.

6. **Military Appointees—No Authority from Constitution of United States or of the State.**—Whatever power these military appointees to office may have had to discharge the duties of their offices until otherwise provided by law, they derived none from the constitution of the United States* or of the State, and it was competent for the legislature to terminate their power derived from any other source.
7. **Constitution—§ 2 of Schedule—To What It Refers.**—The § 2, of the schedule to the constitution, in speaking of courts refers only to courts of record, and not to mayors' courts; which are not courts of record.
8. **Same—Effect of Its Adoption on Officers.**—The constitution did not continue any officers in office after its adoption; but intended to vacate all of them immediately.

These cases were prepared by agreement of the parties to bring before the court the question, whether *Henry K. Ellyson or George Chahoon was the mayor of the city of Richmond. Chahoon was appointed in *1868 by General Schofield, military commandant of District No. 1, created by the reconstruction acts of congress, and held the position, when, on the 26th of January 1870, the senators and representatives of the State of

made on the next day; and for that purpose the court would be opened at 11 o'clock.

On Tuesday the 27th, before the hour of 11 o'clock had arrived, a large crowd of persons were assembled. Within the enclosure of the tables which formed the bar, the officers of the court, members of the bar, and the parties were seated; outside of these tables, and on the sides of the judges' seats, the room was full of persons standing; every seat in the gallery was occupied, and there were several in the clerk's office. At 11 o'clock Judges Joynes and Anderson took their seats upon the bench, and the other judges were just about to enter from the conference room; and the whole assembly were waiting in silent and earnest expectation, when there was heard first a crack; and then immediately a crash; and the floor of the court room to within four feet of the judges' seat, and that of the clerk's office, sunk down, carrying with them hundreds of persons upon them. The gallery followed on the instant with its living load; and then immediately fell the false ceiling, which had been put over the room, with its plaster and timbers; floors and gallery and ceiling piled up upon the bleeding and suffocating mass, which had been carried down into the room below.

It would be a vain attempt to describe the horror of the scene, as the floor, the gallery and the ceiling went down in succession, carrying with them the men upon them, and covering them in the ruins; or the cries and groans ascending through a cloud of dust formed by the plastering, so dense, that no eye from above could penetrate it.

As is always the case on the happening of such a calamity, the escapes and the casualties were alike striking. Judges Joynes and Anderson escaped unhurt into the conference room, by the promptness with which they acted. They must otherwise have been killed; as a mass of timber fell from the ceiling immediately upon their seats, so heavy, that

Virginia were admitted into the congress of the United States; and he held an office under the United States government. Ellyson was appointed mayor of the city on the 16th of March 1870, by the council of the city, under the authority of the act of the general assembly or Virginia, passed the 5th of March 1870, called the enabling act. Under this act the governor appointed members of the council, who took the place of those who had been appointed by the military commander; and the new council appointed Ellyson.

After the appointment of Ellyson, both he and Chahoon continued to act as mayor; Chahoon as mayor, committed John Henry Bell to prison; and Ellyson as mayor, required Archibald Dyer to give bail for his appearance to answer, &c., which was given; and then, by agreement of the parties, writs of habeas corpus were applied for to this court by Dyer and Bell; regular returns were made; and the facts agreed.

Daniel, Neeson and Meredith, for Bell.

The question before the court arises on two petitions for writs of habeas corpus. Writs have issued and proper returns been made on them, and an agreed statement* of facts filed. There is no disputed fact. The only question is a legal one, and involves the enquiry, which of these two officers is the rightful mayor of this city? The question arises, because the facts agreed show that two persons are exercising the functions of mayor at the same time in this city. This then presents the question, which of these two judgments of commitment is lawful. The answer depends upon the decision of the question, who is the rightful mayor? The rightful

it crushed the strong railing which enclosed the judges' bench. The officers of the court also escaped with little or no injury. Messrs. Ellyson and Chahoon were slightly hurt. Messrs. Chandler and Wells did not go down with the floor; and yet they were both badly hurt by the timbers falling from the ceiling; whilst Messrs. Neeson and Meredith went down, and were covered by the ruins, but escaped without serious injury: Messrs. Daniel and Wise were not present.

But the dreadful feature of the calamity was the loss of life. There were taken from the ruins fifty-eight dead bodies. Some of these had obviously been killed by a blow from some heavy and hard substance; others had been suffocated by the persons lying upon them, or by the dust arising from the plaster; they were dead, with not a bruise upon their persons. The bar lost heavily, not only in the number, but in the quality of the victims. Patrick Henry Aylett, brilliant, versatile and eloquent; a worthy descendant of the ancestor after whom he was named. Nathaniel Pope Howard, of extensive and varied learning, which he as anxiously concealed as others seek to make theirs known; accurate in all things to a proverb; and with the unswerving integrity, and the purity of life which secured to him the confidence and regard of all who knew him; and Powhatan Roberts, whose untiring labor and energy was fast raising him high in his profession.

There were others in that stricken throng whose

mayor had jurisdiction of the case, and could commit. The other having no legal title to the office he has assumed to fill, has no jurisdiction whatever, and his commitment is unlawful, a mere nullity, and the prisoner must be discharged.

1st. Rob. R. 731; 2 Rob. R. 842; 9 Gratt. 102; 10 Gratt. 641; 3 Peters 202; and cases therein cited.

2d. We insist that Mr. Chahoon has no title to the office because his appointment in the first instance conferred no title to the office. He was appointed by the military commander under the reconstruction laws. By the second section of the act of 19th July 1867, the general is authorized to remove all State officers, and then he "shall have power to provide from time to time, for the performance of the said duties of such officer or person so removed or superseded, by the detail of some competent officer or soldier of the army, or by the appointment of some other person to perform the same." Such an appointment conferred no title to the office. He was appointed "to perform the duties of the officer removed." He was a mere locum tenens, holding at the will or by the sufferance of the commanding general. This is not a legal title, certainly not a title that vested such a right to the office that the legislature could not interfere and provide for filling it.

But by the order of the general appointing him, he was to hold until his "successor was elected and qualified." This has occurred, and therefore his tenure 678 has*ceased, for Mr. Ellyson has been duly elected and qualified. Nor can the terms of the order calling him mayor, change the nature of his tenure, or enlarge

names we would gladly record if we had the space: men of business in every department of life; men whom the city will long miss; men of intelligence, activity, integrity; men who sustained large interests in the world, and who were the support, the pride, and the joy of their families.

Of the number of the wounded who escaped from that wreck we are not accurately informed. They were almost as numerous as the survivors. A number of them have since died from their wounds; and some are still suffering. And of those who seemed to have been but little hurt, it is a remarkable fact they were unable to resume their employments for sometime; and those who attempted it have suffered severely for it.

It was a mercy that the room below (the hall of the House of Delegates), was nearly empty. A caucus which had met in it that morning, had adjourned, and the hour for the meeting of the house had not arrived. The only persons in that room who suffered, were John M. Turner, son of Major F. P. Turner, one of the pages of the House of Delegates, J. W. D. Bland the senator from Prince Edward, a man of color, who was marked for his good sense, and who had acquired the respect of all who knew him; and the Rev'd John Robertson, a colored minister.

Under such a calamity silence and submission is our proper attitude; for who shall dare to say unto God, what doest Thou?

his powers if it exceeds the reconstruction laws.

3d. If it conferred a title, the title terminated when the operation of the reconstruction laws ceased. Their operation ceased by their own terms, on the admission of the State to representation. The 5th section of the act of the 2d March 1867, provides that the preceding sections (those which declared the State governments provisional, and instituted the military authority, and to which the succeeding acts are merely supplementary), should, in that event, become "inoperative in the State." The act expired, and those who held under it expired with it. This would be true in all cases where the law under which the officer holds ceases to operate. But this principle applies with peculiar force where the appointee is merely appointed to perform the duties of an officer removed or suspended. He has no legal title to the office, no civil right in it, no fixed term, but is a mere locum tenens performing its duties, if the military commander pleases, until the law ceases to operate.

4th. Upon the admission of the State, the new constitution came into operation, and vacated every office theretofore existing, unless preserved by the new. A total interregnum intervened in the absence of any provision to prevent it. This construction is authorized by the sanction and practice of the illustrious convention of 1829-30; Debates, p. 869; and see the provisions of the instrument adopted by them, continuing the old offices and officers, except the legislature, which was directed by the act under which the convention was elected, to assemble as soon as a constitution should be adopted. All the old officers and offices were continued by the constitution of 1851 and the Alexandria constitution. Such a provision was omitted by the convention of 1868, and as will be seen, for a purpose. *The 1st section of the schedule preserves the statute law until repealed by the legislature; and this has the effect to preserve the charter of the city, which is merely a statute, and the office of mayor with it.

5th. It was decided by the Supreme court of the United States in the case of *Permoli v. Municipality No. 1 of New Orleans*, 3 How. U. S. R. 589, that all laws of congress enacted for the government of the territory previous to its admission as a State, were superseded by the adoption and approval by congress of the constitution of the State, and became void and inoperative.

6th. That Chahoon was not continued in office by the order of General Canby. That order was issued on the 27th day of January 1870, the day after the State was admitted, and after the reconstruction laws had expired, and his own power had ceased to exist. The order was a mere brutum fulmen. But if it did continue him in office, it continued him by its own terms only until his successor was duly qualified. The subsequent appointment and qualification of Ellyson, under the enabling bill, terminated

Chahoon's authority under that order. Was not the order of that day superseded by the order of the next day, the 28th, whereby he remitted, if he had any thing to remit, the whole civil power to the authorities of the State?

7th. It is alleged that he was continued in office by the enabling bill. That only continued those who were eligible under the laws of the State, and none others. Chahoon is not eligible. He is a Federal officer, and thereby disqualified from holding any State office. And this holding of a Federal office vacates his office of mayor, if he had title to it. Code, ch. 12, § 2, p. 100; 1 Va. Cases 317; 4 Leigh 643. And this act only continued him until Ellyson was appointed by its own terms.

But he would be displaced by the appointment and qualification of Ellyson 680 under the same enabling bill *that authorized the appointment and qualification of Ellyson, and consequently Chahoon's continuance in office under that law terminated with Ellyson's qualification under the same law.

But it is said he holds over by virtue of an imperative social necessity to prevent anarchy. But the necessity, if it existed, terminated with Ellyson's appointment.

It is further insisted that he is a de facto officer, holding by virtue of his original appointment. His original appointment had ceased, and his title expired by the operation of the new constitution; and if he continued thereafter to hold, he held without any title, legal or colorable; all title had been taken away, and without a colorable title he could not be a de facto officer. Again, there must be an acquiescence on the part of the government to make him a de facto officer. So far from an acquiescence the government dissented, as shown by the passage of the enabling bill by the proper authorities.

But if he was a de facto officer, it conferred no benefit on him. His being a de facto officer gives him no immunities, confers no rights, and shields him from no responsibilities. He cannot recover the office, nor the salary, nor vindicate his acts in any legal proceeding by virtue of his being a de facto officer. He can only do this by showing that he is the de jure officer he claims to be. Blackwell on Tax Titles, ch. iv., p. 95, 2d edi. His acts as to third persons are valid, except only in cases of direct injuries to his fellow-citizens. Black. Tax Titles 96; *People v. Tieman*, 30 Barb. N. Y. R. 193; *Venable v. Curd*, 2 Head's R. 582; *Prescott v. Hayes*, 42 N. Hamp. R. 56.

But if he was a de facto officer, he holds by no such title as would prevent the legislature from interfering. The legislature could provide for filling the office, whether it was absolutely vacant, or occupied 681 by a de facto *officer. A lawful office, and a lawful officer of unquestioned title to the office, are subject to legislative control. No title to office, inferior to a constitutional title or protection, is beyond

the legislature. In the absence of constitutional restriction, the creation, continuance, duties and emoluments of an office, are matters of political expediency, and to be judged of solely by the legislature. *Hoke v. Henderson*, 4 Dev. Law R. 1; *Butler v. The Commonwealth of Pennsylvania*, 10 How. U. S. R. 402; *Coffin v. State*, 7 Porter's R. (Ind.) 157.

And the question now arises, could the legislature provide for filling this office? It did so by the passage of the enabling bill. Had it the right to pass this law?

The legislature has ample power. The fifth article of the constitution confers all legislative power on the general assembly; and this imports a general grant of all that legislative power which resides in the people as a sovereign community, subject only to exceptions expressed in the constitution itself, and to the restrictions and grant of legislative power contained in the Federal constitution; and the judiciary can only pronounce a statute unconstitutional by declaring it to be inconsistent with some provision in the Federal or State constitution. The wisdom, policy and necessity of laws must be left to the discretion of the legislature. With such enquiries the judiciary have nothing to do. It is beyond their province. *Butler v. The Commonwealth of Pennsylvania*, 10 How. U. S. R. 402; 3 Kern. R. 391, 411, 430, 452, 476; 21 Penn. R. 160; 16 Geo. R. 113; 24 Barb. R. 480; 1 Smith's R. (15 New York) 549; 8 Leigh 154; 5 Gratt. 622; 7 Gratt. 68; 13 Gratt. 577; 15 Gratt. 1; 18 Gratt. 85.

There is no provision in the constitution which prohibits the legislature from passing a law to fill an office that is vacant, or held by an incumbent without a legal title, or by any title less than a constitutional title, in the interval before an election
682 can be held at the time *and in the manner prescribed by the constitution; and hence the enabling bill is constitutional, and Mr. Ellyson's election under it is valid.

The power to fill this vacancy may be found in the twenty-second section of the fifth article of the constitution. If so, it is an express grant, and removes all doubt. There is no force in the objection that the enabling act does not declare the offices vacant. The constitution had made them vacant, not only by omitting to continue the offices in existence, but in its original form by express disqualification of all the then incumbents, and there was therefore no necessity to declare them vacant.

The constitutional prescriptions, article 6th, section 20, for city elections on the fourth Thursday in May, and installation on the first day of July 1870, by the terms of the constitution itself are incapable of execution, and therefore inoperative until the dates specified. In the interim legislative power over city organization and government is unlimited. The Enabling Act, under discussion, is temporary, and operative only during this interim, and as preparatory for the regular inauguration of

these constitutional requirements. See section 9. By proceeding to fill the vacancies, the legislature in effect declared the vacancies to exist. It is said these offices are elective under the new constitution, and therefore appointments could not be made to them. But the constitution makes no provision for filling offices between the admission of the State on the 26th of January 1870, and the 1st of July following, when officers elected for cities under the new constitution will come into office. During this interval there is an interregnum for which the enabling act provided; and further, the offices created by the new constitution, or to be created under it and made elective, are not the same with those to which officers were appointed under the enabling act; and thus the argument fails. The
683 *former offices were left vacant by design, and to answer a partizan purpose, as is shown by the sweeping proscription of all the then incumbents. The military appointments were not in their view, because not then made, and besides, were not within the scope of the authority of the convention. The constitution passed on the 17th April, and a vote on its adoption, and an election of a legislature under it, was ordered to be had on the 2d of June following, and the legislature was to have met on the 24th of the same month. Congress was in session, and was expected to ratify the instrument. The officers then in office, and ninety-nine hundredths of the people were disqualified by it to vote or hold office; and then the legislature would have filled the offices thus designedly kept vacant, who would have held office until officers to be elected under the new constitution had entered on their duties. But this legislature has performed the same work in a different manner.

Chandler, Wells and Wise, for Dyer.

We propose first to discuss the question of the constitutionality of the act referred to; and assume at the out-set, as a self-evident proposition, that any attempt on the part of the legislative authority to fill an office created by the constitution in any other way than that pointed out by the constitution is illegal and absolutely void.

Sec. 20, Art. 6, of the constitution declares the manner in which the mayor shall be chosen. The language is "There shall be chosen by the electors of every city a mayor." By the same section it is also provided, "All city, town and village officers whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns or villages, or by some division thereof, or appointed by such authorities thereof as the general assembly shall designate."

684 *The simple reading of this section establishes the following propositions:

1st. The mayor and certain other enumerated officers are required to be chosen by the voters at a general election.

2nd. All city officers whose election is not specially provided for, shall be elected by

the voters of such city, or some division thereof, or be appointed.

3rd. The general assembly has no power to delegate the authority to appoint to a city office any person except some authorities of such city.

The 5th section of the act approved March 5, 1870, is unconstitutional because it undertakes to authorize the governor to appoint councilmen and trustees for cities and towns, when, as before said, the constitution only authorizes appointments of officers for cities and towns to be made by such "authorities of said cities as the general assembly shall designate." The 7th section of the same act is unconstitutional and void, because it undertakes to authorize and require councilmen so appointed by the governor to appoint all municipal officers except judges and officers of courts, including the mayor, who is specially required by the constitution to be elected by the qualified voters. The 21st section of the same article is as follows: "All regular elections for city or town officers under this article shall be held on the fourth Thursday in May, and the officers elect shall enter upon their duties on the first day of July succeeding."

It will be observed that this section is confined to regular elections; special elections to fill vacancies are left to the control of the general assembly. The settled purpose of the framers of the constitution to substitute immediately, the new elective system for the old method of choosing officers, is clearly manifested by the concluding words of the 20th section of the same article: "All laws or city ordinances in conflict *with the provisions of the preceding section, shall be void from and after the adoption of this constitution."

We have, then, in the constitution itself, an explicit provision making the mayor an elective officer, fixing the time at which the election shall be held, and declaring that municipal officers may be appointed only by such authorities of the city as the general assembly shall designate. If these were the only provisions of the constitution applicable to the subject, it would seem impossible to maintain, for a moment, the constitutionality of that portion of the act of March 5, 1870, which undertakes to authorize the appointment of councilmen by the governor, and the appointment of mayor and other officers by such councilmen. There are other provisions in the constitution to which reference will be made.

The constitutionality of the portions of the act of March 5, 1870, above referred to, as applied to this case, can be affirmed only upon the hypothesis,

First. That the offices of councilmen and of mayor were both vacant, having no incumbent; or, second, that the general assembly had the power to create a vacancy.

That there was no vacancy, in fact, is admitted. Mr. Kent and his associates were councilmen, regularly inducted and duly performing all the duties of their offices under color of law, with full acqui-

escence up to the 16th of March. Mr. Chahoon was the mayor, in fact, duly appointed, holding the office, discharging its duties not only without objection, but with full acquiescence, and both councilmen and mayor claim to be still in the exercise of the functions of their offices.

That there was no vacancy in fact is also shown by the language of the 6th and 8th sections of the act itself. The former provides that "The councilmen and trustees now exercising the functions of said offices, may continue in such offices till the 686 councilmen and trustees *appointed, as provided in the foregoing sections, shall qualify." And the latter declares that "All officers now exercising the functions of the aforesaid municipal offices, may continue in such offices until their successors are appointed and qualified."

If then there was no vacancy, in fact, was there a vacancy created by operation of some law other than the act of March 5? There can be but two sources to which we must look for the creation of such a legal vacancy, to wit:

The language of the constitution itself, or the consequences resulting necessarily from the substitution of the new for the old organic law.

The new constitution not only does not create a vacancy, but we think it clearly provides that the old incumbents shall hold over. Sec. 25, Art. 6, under the head of "General Provisions," declares, "Judges and all other officers elected or appointed shall continue to discharge the duties of their offices after their terms of service have expired, until their successors have qualified." Substantially the same language was contained in the constitution of 1864, and received a judicial construction by this court in the case of *Lawhorne ex parte*, 18 Gratt. 85. His honor, Judge Moncure, delivering the opinion, uses the following language: "If this section stood alone, unaffected by the context, there could not be two opinions as to its meaning; it uses the plainest language to embrace all officers, except that it does not mention them all by name; * * * in regard to the performance of the duties of all officers after their terms of service have expired, and until their successors have qualified, ample provision is made by the 22d section of Art. 6. This was a natural and proper provision for the case. It is important that there should be some person always present to perform the duties of every office; and when an incumbent has served out the term for which he was elected or appointed, 687 *who can be more suitable than he, as a general rule, to continue to discharge the duties of his office until his successor has qualified."

This opinion, it will be remembered, was delivered while the convention which framed the constitution of 1868 was in session, and it is but reasonable to suppose that when they re-enacted this provision, they did it with especial reference to the broad and comprehensive construction thus given to

it by the unanimous opinion of the distinguished judges then composing this court, and two of whom are now upon this bench.

The language of this section must be entirely conclusive, and fully establishes the proposition that the incumbents found in office continue to hold their offices until their successors are duly elected and qualified, unless by a most narrow and constrained construction the language used is held to relate only to officers elected or appointed under this constitution.

That such a construction cannot be sustained is apparent when we reflect that the same provision was in the prior constitution, so that there was no interval during which it did not exist in the organic law of the State from 1864 to the present time. It follows, therefore, inevitably, that there was at all times a condition inherent in the tenure of office that the officer elected or appointed shall continue to discharge the duties of his office until his successor had qualified; and the only method by which this conclusion can be avoided, is to assume the utterly untenable position that the Reconstruction Acts, by their own force, abrogated or suspended the laws and constitution of the State; which are in fact not repugnant to the Reconstruction Acts. That such was not the case will appear by even the most cursory examination of the statutes themselves. The true theory was, that no legal State governments existed. That though the laws remained in force,

there was no adequate protection for persons and property. By section 3d of the act of March 7th, 1867, it was made the duty of the general commanding to protect persons and property, to suppress disorder and to cause criminals and disturbers of the public peace to be punished; and to that end he might "allow local civil tribunals to take jurisdiction." What tribunals? Clearly the tribunals created under the State constitution. What laws were they to enforce? Certainly the constitution and laws of the State. It is a notorious fact, and part of the public history which the court will take notice of, that the laws of the State, constitutional and statutory, were not suspended or annulled except in so far as they were in conflict with the laws of the United States. This very court existed under the laws and constitution of the State, and enforced the same laws and constitution. It is a remarkable fact that the provisions of the Reconstruction Acts were aimed, not against the laws, but against the State governments. The language of the 6th section is, "any civil government which may exist therein shall be deemed provisional only." It was the government and not the laws which were to be subject to the paramount authority of the United States. Governor Pierpoint was the provisional governor from the 2d of March 1867, the day of the passage of the first Reconstruction Act, until the 7th of April 1868; and by the judgment of this court, above referred to in *Lawhorne, ex parte*, it was on January 15th, 1868, decided, "that al-

though Governor Pierpoint's term of office has expired, it devolves on him under the said provision of the constitution to continue to discharge the duties of his office until his successor is qualified."

The Reconstruction Act of July 19th, 1867, among other things declared, that the government of Virginia should not only be deemed provisional, but while it continued, subject in all respects to the military commander and to the paramount author-

ity of congress. By the 2d section, the military commander had the right to suspend, remove and appoint to office, and this extended to every office in the State, and that power continued until representatives in congress had been admitted and sworn in. When this occurred, and on the 27th of January, the general commanding, by his order No. 9, paragraph 10, fixed the time at which the term of office of all the officers of the provisional government would terminate. It is as follows: "The term of office of all officers of the provisional government of the State of Virginia, whether holding by original election or appointment under the laws of the State, or by appointment or detail under the laws of the United States, will expire, when their successors, elected or appointed under the new constitution shall have duly qualified; and it is a remarkable fact, that the last sub-division of the same order is a reprint of the schedule to the new constitution.

There is another provision of the constitution which goes far to determine this question. The schedule is as follows: "That no inconvenience may arise from the change in the constitution of this State, and in order to carry the same into complete operation, it is hereby declared, that all rights of individuals, and of bodies corporate and of the State, shall continue, the several courts shall continue, with the like powers and jurisdiction, both in law and equity, as if this constitution had not been adopted." The Mayor's court of the city of Richmond was certainly one of the courts whose continuance was provided for; and it will not do to say that the court was continued without any incumbent, for there is no principle of construction better settled than that statutes shall be so construed as to correct, if possible, the evil sought to be remedied. What was the evil? It was the inconvenience which would necessarily result, if the offices of the State were vacated; the continuance of the office without an incumbent would not relieve the inconvenience. What protection is given to any right by retaining the court without the judge to hold it, or the office of sheriff without a sheriff to execute its process? It seems, therefore, very clear, that the words of the constitution do not create a vacancy.

Nor does the substitution of the new constitution for the old one have the legal effect of vacating these offices. To give such effect to it would be to leave the State without judges, magistrates, sheriffs, municipal or other officers. In the language of the

opinion of the attorney general, furnished by that officer to the executive on March 10, 1870, it "would be to hold that we have been remitted to a state of nature, with no means of suppressing vice or controlling the lawless; it would be to encourage vice, and to offer a reward to those who, from evil inclinations, might wish to prey, like wild beasts, upon their innocent victims."

This question has, however, received the consideration of the Supreme court of the United States in the case of *Leitensdorfer et al. v. Webb*, 20 How. U. S. R. 176.

Territory was conquered by the United States, a provisional government was established, which ordained laws, and instituted a judicial system, "all of which," it was decided by the court, "continued in force after the termination of the war, and until modified by the direct legislation of congress, or by the territorial government established by its authority." This, it will be observed, is the precise condition of Virginia. She had a provisional government, which continued until the re-induction of the State by the authority of congress. Even the constitution, formed under that authority, is a Federal law, because, by the terms of the inducting act, certain fundamental and continuing conditions are attached to admission, conditions which are not only in restraint of the legislative power, but of the sovereign power of the people. Among those conditions was

one which provided that every person
691 who *should neglect, for thirty days after the passage of the act, to take the required oath, should be deemed to have vacated his office. Here is a plain congressional recognition of the fact, that these officers hold over, and if the legality of the inducting act is admitted, it follows, as an inevitable consequence, that the Federal government has the power to enforce the performance of those conditions. Under the authority of the above decision, every civil officer appointed by the general commanding, continues to hold his office until his successor is elected, or appointed and qualified in the manner pointed out by the constitution.

Another case, not unlike the present, arose under the anomalous condition of things existing in Kansas territory. Kansas was organized as a territory May 30, 1854; a constitution was adopted July 29, 1859; admitted as a State January 29, 1861. The constitution ordained two provisions on the subject of officers, one in the schedule, like, if not in the same terms, to that in the schedule of the Virginia constitution, beginning with, "That no inconvenience may arise from the change from a territorial to a State government," and another providing that "certain officers should continue in the exercise of their duties until superseded under the authority of the constitution." The court held, not only that the persons continued in office, but that "all officers of the old government, on the admission of the State, became ad interim State officers. *State v. Hitchcock*, 1 Kan-

sas R. 178. In *People ex rel. Stratton v. Oulton*, 28 Calif. R. 41, 44, it was held, that an officer holds his office "after the expiration of his term, and until the election and qualification of his successor by title, notwithstanding the law creating the office contains no provision authorizing him so to do."

The following cases illustrate the same principle: "A town clerk to be elected annually, would continue town clerk until the election of his successor." *Queen*

692 **v. Corporation of Dunham*, 10 Mod. R. 146. "A constable is not discharged until his successor is sworn in." *Anonymous case*, 12 Mod. R. 256. It is a well settled principle, that annual officers continue until successors are appointed." *McCall v. Byram Man. Co.*, 6 Conn. R. 427. An annual officer, there being no restrictive provision in his appointment, holds until others are appointed in his place." *Spencer v. Champion*, 9 Conn. R. 536. See also *Trustees of Vernon Society v. Hills*, 6 Cow. R. 23; *Picket v. Allen*, 10 Conn. R. 146. In which the court say, "In the absence of any restrictive provision, officers hold over until their successors are appointed; and that this rule applies equally to public and private corporations.

If then there was no vacancy in fact, nor any created by operation of law, it remains only to consider whether the general assembly had the power to create a vacancy; for, however startling the assertion of such a power in the assembly may be, it is in fact the only ground upon which the constitutionality of the act under consideration can be sustained.

The 22d section of the 5th article, is the provision relied upon as granting this authority to the general assembly; and it is as follows: "The manner of conducting and making returns of elections, of determining contested elections, and of filling vacancies in office, in cases not specially provided for by this constitution, shall be prescribed by law; and the general assembly may declare the cases in which any office shall be deemed vacant, when no provision is made for the purpose in this constitution."

We have shown that there is no vacancy, and need therefore only consider the last clause of the section. "The general assembly may declare the cases in which any office shall be deemed vacant when no provision is made for the purpose in this constitution." This, it will be observed,

relates only to declaring vacancies,
693 not to *filling them. There are, strictly speaking, but two cases in which the constitution declares when an office shall be deemed vacant. The first is in the 30th section of article 5. "Senators first elected under this constitution, in districts having odd numbers, shall vacate their offices at the end of two years, and those elected in districts having even numbers, at the end of four years." The second is in section 5th of article 5, where it is provided, that "the removal of any person elected to either branch of the general as-

sembly from the city, county, town or district, for which he was elected, shall vacate his office."

Trial by impeachment is provided for, and mayors have power to suspend and remove councilmen and other municipal officers; but none of these cases fall within the spirit or intent of the language, "declare the cases in which an office shall be deemed vacant." It therefore follows, that if the legislature has the power to declare the cases in which any and all other offices created under the constitution and laws of the State shall be deemed vacant, and if "to declare the cases in which an office shall be deemed vacant," signifies or embraces the power to create a vacancy in office, then the legislative power is imperial.

There is no necessity for trial by impeachment; for the legislature can remove the incumbent. There is no necessity for the method provided in the constitution for removal of judges, because the legislature can vacate the office. The security against inconsiderate action and personal animosity, afforded by the provision of the constitution, requiring the vote of two-thirds of all the senate to convict in an impeachment trial, and the protection given to the judicial officer by the provision requiring for his removal, the concurrent vote of a majority of all the members elected to each house, becomes entirely valueless, for the legislature, by a simple majority vote, can create a vacancy, and thereby remove from office.

694 *Although under our constitution the governmental power is vested in a legislative, executive and judicial department, each separate, distinct and necessarily co-ordinate, their equality is at once destroyed, the judiciary and the executive become the subjects of the legislative department, by admitting that the latter has the power to declare executive and judiciary offices vacant. This court will hesitate long before it pronounces in favor of a proposition so subversive of all republican government, and so suggestive of anarchy and usurpation.

We respectfully submit that such is not the legitimate construction of the 22d section of the 5th Art.; that it is prospective in its operation, referring chiefly to the new offices to be created by the legislature; that it does not, in fact, authorize the general assembly to remove any person from office, or to declare any office vacant. Its language is: "May declare the cases when an office shall be deemed vacant;" in other words may declare certain proper facts and circumstances which will render an office vacant; for instance, it may declare that a bonded officer, failing to give proper security, his office shall be deemed vacant; or may declare that an officer failing to take a required oath for a certain length of time, his office shall be deemed vacant; as was done by the act of congress passed January 26, 1870, re-admitting Virginia, and as was done by the act of the general assembly of March 5th; or it may declare that in case

of removal from the district, county or city from which an officer was elected, his office shall be deemed vacant, as is done by the provision of the constitution in relation to members of the general assembly. These and a great number of the like cases, are the cases referred to in the 22d section.

The first and second sections of the Enabling Act do not undertake to create vacancies, but they furnish the strongest possible argument in support of the
695 propositions *contended for by us.

They show that no vacancy, in fact, exists, and that none ought to exist, because great confusion and embarrassment throughout the State would be caused thereby. And the first section, therefore, expressly authorizes the incumbents to "continue to hold their said offices." In this respect it may be well considered as a declaratory act, passed not for the purpose of creating a new law, but to declare what the old law was, or what the Roman law called an Act of "authentic interpretation." The proviso to that section is a legislative exercise of the power intended to be granted by the 22d sec. of the 5th Art.; it declares the case in which an office shall be deemed vacant, to wit: When the incumbent fails to give a new bond. It is in this particular constitutional; but neither the 5th or 7th sections are of that character; they undertake to make offices appointive, which the constitution makes elective.

The power of the legislature over the subject is restrained in a remarkable degree, by the 20th section of the 6th article. After providing for the choice of municipal officers, by the electors, the legislature is required at its first session to pass such laws as may be necessary to "give effect to the provisions of this section." If the power to declare cases in which vacancies shall be deemed to exist, gave authority to create vacancies, where no provision is made for that purpose, it would clearly be restrained by the clause last referred to; for it is a well settled proposition, that such grants in derogation of constitutional rights, are to be strictly construed; for instance, where power was conferred upon the governor to fill vacancies, it was held that this "gave him no power to make a vacancy by declaring that one exists." Page v. Hardin, 8 B. Mon. R. 648.

Where the constitution provided for the appointment of an officer in a particular way, it was held that the legislature had no power to create a new office, for
696 *the performance of the same duties, and direct the appointment to be made in another manner. Warner v. People, 2 Denio R. 272.

It would be monstrous to allow a constitutional provision to be violated by such indirection when it could not be done directly. We respectfully submit that the portions of the Enabling Act referred to, undertake to do precisely this. They first illegally appoint municipal officers, where there are no vacancies, and then assume that such appointments create vacancies,

and that the appointments are legal because of the vacancies.

Again, it is a well settled proposition of law, that one who enters into office under color of authority by appointment or election, as Mr. Chahoon did in this case, is an officer de facto, who cannot be removed or ejected by force, nor can his title to office be tried in any collateral proceeding. It can only be done by an appropriate remedy, quo warranto, and sometimes by mandamus. In short, it is a judicial and not a legislative question; an act to be performed by the courts and not by the general assembly.

MONCURE, J., delivered the opinion of the court:

There are two persons now claiming to be mayor of the city of Richmond and acting as such; George Chahoon and Henry K. Ellyson; and these two cases of habeas corpus, instituted by persons arrested by the warrant of these two claimants respectively, have, by an amicable arrangement between them, been instituted for the purpose of obtaining the opinion of this court upon the question, which of them is lawful mayor of the city?

This is a deeply interesting question, not only to the city of Richmond, but to the State at large; and its importance, and the necessity of an early decision of it, has induced the court to take up the cases 697 for hearing *at the earliest possible moment, in order that the question involved may be decided as soon as possible, consistently with a proper examination and consideration of it. We have fully heard the argument of able counsel on both sides of the question, and have given to it all the consideration of which we are capable. The result of our deliberations I will now proceed to announce:

There cannot be two mayors of the city of Richmond at one and the same time. If Chahoon is mayor, Ellyson is not; or if Ellyson is mayor, Chahoon is not.

Chahoon claims to be mayor by virtue of an appointment as such in 1868, by General Schofield, then military commander of the district of Virginia, acting under what are called the Reconstruction Acts. And he also claims that his authority is confirmed by the constitution of the State, and even by what is called the Enabling Act itself, which he admits is to that extent constitutional. But he insists that that act is unconstitutional so far as it essays to authorize and provide for the appointment of another person as mayor. On the other hand, Ellyson claims to be mayor by virtue of an appointment made in pursuance of that act.

The whole question, therefore, resolves itself into this: Is the Enabling Act, or at least that part of it under which Ellyson received his appointment, unconstitutional? We confine ourselves to that part of the act, because it is the only part which necessarily comes under consideration in these cases. There is another part of the act, to wit: The provisos in the 2d section, which subject any judgment, decree or order made by

the Court of Appeals at the term thereof, commencing on the 11th day of January 1870, to the supervision and control of the Court of Appeals organized under the constitution; upon the question, as to the constitutionality of which, we understand 698 this court will soon *be called upon to decide; and we wish, therefore, not to prejudge that question, even collaterally.

This court, undoubtedly, has power to declare an act of the legislature to be unconstitutional and void; and it is the duty of the court to do so in a proper case. It is, however, a very delicate power, to be exercised very carefully; and before an act of the legislature is annulled as unconstitutional, the court should be well satisfied that it is so. Prima facie, every act of the legislature is constitutional, and the burden of clearly showing the contrary devolves on him who asserts it. If the question be doubtful, it will be solved in favor of the validity of the act. The members of the legislature and the governor are elected by the people, and are presumed to be both intelligent and patriotic. Before entering upon the discharge of their duties, they take an oath to support the constitution of the State and of the United States; and it is not to be presumed that they would unite in passing and approving an act without being well satisfied that it is constitutional.

The preamble of the enabling act, which was approved March 5th, 1870, is in these words: "Whereas, grave doubts have arisen as to the right of the civil officers of the Commonwealth, the governor, attorney general, lieutenant governor, and members of the general assembly excepted, to continue to hold their offices, and to exercise the powers, perform the duties and enjoy the privileges and emoluments appertaining to the same, and as to the legality of their acts as such officers, since the admission of the State as one of the co-equal States of the American Union; and whereas, the failure to recognize the official acts of such officers as legal, and their removal from office at this time, would cause great confusion and embarrassment throughout the State: Therefore,"

Then follow the 13 sections of the act; the 1st of which, recognizes as legal, 699 all such officers described in *the preamble who are eligible to office under the existing constitution and laws of Virginia, and who qualified on or before the 26th day of January 1870 (the day on which the State was admitted to representation in congress); provided that all officers of whom bonds are required by law for the proper discharge of their respective duties, should give or renew their bonds with good security within the time and in the mode therein prescribed. The 2d section legalizes the acts heretofore done by such officers and otherwise lawful, subject to the proviso in regard to any judgment, decree or order made by the late Court of Appeals as before referred to. The 3d section relates to the filling of vacancies in the office of justice of the peace and constable now exist-

ing, or which may hereafter accrue, before an election for such officer shall be held under the constitution. The 4th section vacates the offices of circuit and county clerks at the first term of their respective courts hereafter held by judges elected under the present constitution, and authorizes each one of such judges at the first term of his court to appoint a clerk for said court to continue in office until his successor shall be regularly elected and qualified; vacates the offices of attorneys for the Commonwealth and sheriffs at the first term of the County courts hereafter held by judges elected under the present constitution in their respective counties; and authorizes such judges then to appoint attorneys for the Commonwealth and sheriffs for their respective counties, to continue in office until their successors are elected and qualified under the constitution; and provides for the execution of bonds according to law by the sheriffs and clerks appointed under this section. The remaining sections, except the last, which merely declares the act to be in force from its passage, more immediately concern the question now under consideration; and will, therefore, be set out in full. They are as follows:

700 *'5. That for the more efficient government of the cities and towns of the Commonwealth, the governor of this State shall, as soon as practicable, appoint as many councilmen or trustees for each city and town, now entitled to trustees or councilmen, as are now provided by law.

'6. The councilmen and trustees, now exercising the functions of such offices, may continue in such offices till the councilmen and trustees appointed, as provided in the foregoing section, shall qualify, and no longer; and shall fill vacancies in their respective bodies occurring during their continuance in office.

'7. In all cities and towns, the councilmen or trustees appointed by the governor, as hereinbefore prescribed, shall have authority, and are hereby required, to appoint all municipal officers, except judges and officers of the courts hereinafter provided for in their respective cities and towns, who shall have all the powers, and discharge all the duties now conferred and required by law upon such municipal officers.

'8. All persons now exercising the functions of the aforesaid municipal offices may continue in such offices till their successors are appointed and qualified, as herein provided, and no longer.

'9. The officers appointed, in pursuance of this act, shall continue in office until their successors, elected under the constitution of this State, are duly qualified.

'10. Every person appointed, as herein prescribed, shall take the oaths of office required by law; shall give bond in such penalty and with such security as existing laws may provide for officers holding like offices, and shall receive such compensation as existing laws may provide in like cases.

'11. The judges of the Corporation and Circuit courts, and Courts of probate, here-

after elected for the said towns and cities of the Commonwealth, shall appoint the officers of their respective courts, to
701 continue *in office until their successors are elected and qualified, as provided by law. The sheriffs, clerks and other officers required to give bond, appointed under this section, shall not enter upon the discharge of their respective duties until they shall have given bond according to law; and in case of the failure of any such officer to give such bond, within twenty days after his appointment, the said appointment shall be vacated, and the aforesaid court shall proceed to appoint his successor with like powers, and subject to like limitations, as herein provided.

'12. This act shall not be construed so as to deprive the general assembly of the right to remove any and all officers at present holding offices in this State, or who may be hereafter appointed under the provisions of this act; or to adopt such other measures for filling vacancies in offices which now exist, or may hereafter occur, as to it may seem right and proper."

Under this act and in strict pursuance of the terms thereof, the governor appointed councilmen for the city of Richmond, who appointed Ellyson as mayor; and he accordingly took the oaths required by law and proceeded to execute the duties of the office. At the time of his appointment and qualification, Chahoon was acting as mayor, under the appointment of Gen. Schofield, as before stated.

Had the legislature constitutional power to pass this act, so far as it relates to the subject of the present enquiry?

The act may be unconstitutional, either because it is contrary to the constitution of the United States or the laws made in pursuance thereof, being the paramount and supreme law of the land; or because it is contrary to the constitution of the State of Virginia.

The counsel for Chahoon contend that it is contrary to both—The counsel for Ellyson that it is contrary to neither.

702 *There is certainly nothing in the constitution itself of the United States to which this act can be opposed. Is there anything in any law of congress made in pursuance of the constitution of the United States to which it is opposed?

If there be any such thing in any such law, it is in the acts of congress commonly called the Reconstruction Acts, or in the act admitting the State to representation in congress.

The Reconstruction Acts certainly subjected the State to the military authority of the United States. But they were limited in their operation; and it was expressly declared in the first of them, to wit, the act of March 2, 1867, to which the others are merely supplementary, that it should be inoperative in said State when and after the State shall be declared entitled to representation in congress, and senators and representatives shall be admitted therefrom on their taking the oath prescribed by law.

The State was declared entitled to representation in congress by an act passed January 26, 1870, and her senators and representatives were thereupon admitted therefrom on their taking the oath prescribed by law. So that, by the very terms of the Reconstruction Acts, they have become inoperative in the State. They were enacted only for a purpose, which has been fully accomplished.

We can see nothing in the Reconstruction Acts which can give to Chahoon, the appointee of the military commander, any right to continue to hold the office of mayor against Ellyson, the appointee under the Enabling Act of the State. The authority of the military commander of Virginia ceased when her representatives were admitted into congress, and when his authority ceased that of his appointees also ceased. It would be strange if, after the principal ceased to have any authority, his subordinate agents should continue to have authority.

703 *Then as to the act admitting the State to representation in congress. This act provides "that before any member of the legislature of said State shall take or resume his seat, or any officer of said State shall enter upon the duties of his office, he shall take and subscribe," &c., a certain oath therein set out. And further provides "that every such person who shall neglect for the period of 30 days next after the passage of this act, to take, subscribe and file such oath as aforesaid, shall be deemed and taken, to all intents and purposes, to have vacated his office."

It is argued that this act recognizes, and in effect declares, the right of persons who had received appointments to office from the military commander, and continued to perform the duties of such office until the passage of the act, to hold over until their successors are appointed and qualified; and that this is one of the fundamental conditions on which the State was admitted to representation in congress.

We do not think so. Congress, in the passage of this act, had not in its mind the question, whether such persons would be entitled to hold over or not, and much less did it intend to give them authority to do so. Its manifest and only object was to require every member of the legislature before taking or resuming his seat, and every other officer of the State before entering upon the duties of his office, to take the oath prescribed by the act. It was properly left to the State to determine who were or should be her officers. It is true, the second proviso declares vacant the office of every such person who shall neglect for the period of 30 days, next after the passage of the act, to take, subscribe and file such oath; but this only imposes a penalty for the failure to comply with the previous provision.

Certainly congress did not intend that any person who might have been appointed by the commander of a military district, to perform the duties of an office

704 *therein, should have any right under the constitution and laws of the United States to continue to perform those duties after the cessation of all military authority in such district, and after it was fully restored to its position as a sovereign State of the Union; did not intend that the legislature, the representative of the sovereignty of the State, subject only to a few constitutional restrictions, should not have power to enact a law appointing another agency than the one which had been used by the military commander to perform the duties of an office during the short interval between the period of the restoration of the State and the day fixed in the constitution for filling the office. These appointees of the military commander received their appointments with full knowledge that their authority might be terminated at any time, not only by the will of such commander, but by the cessation of military power in the State, and her re-admission to all her sovereign rights. Chahoon received his appointment on the 4th of May 1868, and might have had to give it up the next day. He actually held it for nearly two years, during which the state of things existing when he received it continued; and he even continued to perform its duties and receive its emoluments after the state of things had ceased, and until another person was appointed under the authority of the State to take his place. Surely he can have no cause to complain that any right which he has under the constitution or laws of the United States has been violated. If he has a valid claim, it is under the constitution or laws of the State of Virginia. And this brings us to the next question:

Is there any thing in the constitution of the State to which the Enabling Act, or so much of it as we now have under consideration, is opposed?

It is supposed by the counsel of Chahoon to be opposed to the 25th section of the 6th article of the constitution, which declares, that "judges, and all other

705 *officers elected or appointed, shall continue to discharge the duties of their offices after their terms of service have expired until their successors have qualified." And it is contended that the persons who were performing the duties of the different offices of the State at the time of her admission to representation in congress, under appointments previously made by the military commander, are "officers," in the meaning of that section, and entitled as such to hold their offices until their successors have qualified.

We do not think so. We think the section was plainly intended to apply only to officers elected or appointed under the constitution, and for whose election or appointment it provides. It was literally copied, except in the omission of a single word, from a section in the constitution of 1864, commonly called the Alexandria constitution, which section was itself literally copied, with a like exception, from the constitution of 1851, in which constitutions it plainly had the

same meaning; and it was considered necessary by the framers of those constitutions, notwithstanding the insertion of such a section, to provide expressly, as they did in the schedules thereto annexed, that all persons in office at the time of the adoption of said constitutions, except as therein otherwise expressly directed, should continue in office "until their successors are qualified," in the language of the constitution of 1851, or "until their present terms expire," in the language of the constitution of 1864. In the constitution of 1830, article 7, after providing for the case of the governor and privy councillors, further provides, that "all other persons in office, when this constitution shall be adopted, except as is herein otherwise expressly directed, shall continue in office till successors shall be appointed, or the law shall otherwise provide." It was considered necessary by

706 some of the ablest men in the distinguished body, which framed that constitution, to adopt such a provision, in order to authorize officers acting under the old constitution, when it ceased to operate, to continue to act under the new, when its operations commenced; and the provision in the 7th article was accordingly adopted. The conventions which framed the constitutions of 1851 and 1864, followed, in this respect, the precedent of their illustrious predecessor. If the necessity of such a provision, in order to the continuance of the authority of the old officers, was a question of doubt when the constitution of 1831 was framed, and was solved on that occasion, by assuming that there was such a necessity, and acting upon the assumption by adopting the provision, surely after this precedent had been followed by two succeeding conventions, when the framers of the present constitution adopted that instrument, and carefully omitted such a provision, while they copied from the constitutions of 1851 and 1864, the section before referred to in regard to "judges and all other officers," it may be fairly presumed that they did not intend to include in the word "officers," used in that section, persons who were performing the duties of office at the time of the adoption of the constitution, especially when these persons were appointees or officers of a military provisional government. At all events, this is not so plain a question as to make an act of the legislature providing other agencies for the performance of these duties until the arrival of the period fixed by the constitution for the election or appointment of these officers, an unconstitutional and void act. The fact is, the section was plainly intended, in its very nature and by its very terms, to have only a prospective operation, and to be confined to officers elected or appointed under the constitutional machine after it had been set in motion. It provides for the case of officers "whose terms of service have expired;"

707 that is, terms of service prescribed by the constitution, and not *for the case of officers acting under a prior gov-

ernment, whose terms of service under their appointments may not have expired, or who may have been appointed to no term of service at all, but during the mere pleasure of a military commander.

The case of Lawhorne, ex parte, 18 Gratt. 85, relied on by the counsel of Chahoon in support of their views on this branch of the subject, can give them, we think, no support whatever. Governor Pierpoint was elected to his office under the constitution of 1864, which was received and recognized as the constitution of the State after the war, and thenceforward continued to be our only constitution until it was superseded by the present constitution. While that constitution was in force, Governor Pierpoint's term of service under it expired; and the question arose, whether he was entitled to hold over under the aforesaid provision of the constitution; and that question depended alone upon the question, whether the "governor" was an "officer" in the meaning of that provision. To be sure we were then under a military government, and it may be said by some that during its existence the constitution of the State was suspended, and that Governor Pierpoint became a mere provisional officer. But certainly the counsel for Chahoon do not say that the constitution was suspended; on the contrary, they maintain that there never has been any such interregnum. However that may be, certain it is, that the question came up in Lawhorne's case, for decision by this court, whether, according to the true construction of that constitution, Governor Pierpoint was entitled to hold over as aforesaid. As was then well understood, this question was brought up for the decision of this court with the knowledge and approbation of General Schofield, then military commander of the State, who was willing, in this respect, to conform to the constitution of the State and the construction which might be put upon it by this court.

708 *Again, it is supposed that the act in question is contrary to the 20th section of the 6th article of the constitution. That section provides, among other things, "that there shall be chosen by the electors of every city a mayor," &c.; and it is contended that by reason of this clause, a mayor of a city can only be chosen by the electors of such city, and, therefore, the act in question, providing for such an appointment otherwise, is unconstitutional and void, though the appointment was only for the short interval to elapse before the time prescribed by the constitution for making the regular election under the article, to wit: the 4th Thursday in May next; or rather the time when the officers elected under that article are to enter upon their duties, to wit, the 1st day of July succeeding.

We think that this clause also, was plainly intended to apply only to a mayor to be chosen under the constitution at and after the time therein prescribed for that purpose, and not to one appointed to perform the duties of mayor before one could be chosen

and enter upon the duties of the office under the constitution. Certainly an appointee under and by virtue of the Enabling Act, could be no more objectionable on constitutional grounds, than an appointee of a military commander during the provisional government, holding over after that government had ceased to exist. The provision in the constitution for an election required time for its execution. A day was fixed for that purpose by the constitution with a view to afford such time; and until that day arrived there can be no election under the constitution. Indeed there would scarcely be time to make the necessary preliminary arrangements and make an election earlier. Hence the necessity of either permitting Chahoon to go on to perform the duties of the office until an election can be made, or providing otherwise by law for the case. That provision has been
709 made by the Enabling Act; *and we think the constitutional competency of the legislature to make such a provision clearly existed. They might have pursued the other alternative, but they did think fit to do so.

There are other provisions of the same section to which it is contended the act in question is opposed. But the same answer applies to and concludes the objection, that all these provisions apply to elections or appointments to be made under the constitution, which could have no effect before the 4th Thursday in May or the 1st day of July succeeding, and not to elections or appointments which might be provided for by law to fill up the short interval before that time.

A great deal was said in the argument about the question whether there was a vacancy in the office or not, and the power of the legislature first to create and then to fill a vacancy; and it was contended by the counsel for Chahoon, that "however startling the assertion of such a power in the assembly may be, it is in fact the only ground upon which the constitutionality of the act under consideration can be sustained." The same counsel say, that "the 22d section of the 5th article is the provision relied upon as granting this authority to the general assembly;" and they set out this section in their brief. But they contend that this section is prospective entirely in its operation, though they deny that the operation of the 25th section of the 6th article is entirely prospective.

Now whatever may be the true construction of the 22d section of the 5th article, which we deem it unnecessary now to decide, we think the power of the legislature to pass the enabling act does not at all depend upon that section; and that all the discussion about, whether there was a vacancy or not in these offices, and whether the legislature has a right first to create and then to fill a vacancy, is wholly beside the question we now have to decide.

710 Whatever power these officers *may have had to continue to discharge the duties of their offices until otherwise pro-

vided by law, we are clearly of opinion that it was competent for the legislature to terminate their power, whether it was derived from common law principles, as was argued, or any otherwise, except under the constitution of the United States or of this State, under neither of which do we think they have any power.

The State, upon her re-admission to representation in congress on the 26th of January 1870, came under the control of the legislature, whose duty it then was to complete the organization of the government under the constitution. At that time, the only officers which had been elected under the constitution were the governor, attorney general, lieutenant governor and members of the general assembly. All the other civil offices of the State, which existed prior to the constitution, were filled, if filled at all, only by persons who had previously held them, most of whom were military appointees. These persons continued to perform the duties of their offices after the re-admission of the State. But a very grave doubt arose whether they had any power to do so; and whether all their acts done under such supposed power would not be regarded as null and void. It was considered by some that these officers had no such power, because there was no provision in the constitution, or the schedule annexed thereto, as there had been on former occasions of the like kind, to authorize them to hold over; or because they were mere military appointees, whose power necessarily ceased with the military government, from which they derived their power; or because the framers of the constitution actually intended that their power should cease, and that they should not hold over by virtue of the original appointment.

Now, whether these officers had power to hold over or not, all will admit that
711 legislation was proper and *necessary to clear up all doubt on the subject and place it on such a basis as would conduce to the welfare of the Commonwealth. The legislature so thought, and accordingly enacted the enabling act, the preamble of which, clearly and forcibly sets forth the motives and necessity for the act. The counsel for Chahoon admit, that to a certain extent, the legislature had power to pass this act, and it is wise and expedient, that is, to the extent that it confirms what had been previously done by these officers in the discharge of the duties of their offices, and to the extent that it confirms what might thereafter be done by them in the discharge of those duties during the period prescribed by the act. But the counsel deny that the legislature had power to provide for the appointment of any person to fill an office, the duties of which were at the time performed by a person holding over, under an appointment of the military commander; and especially had not power to enact the sections of the enabling act herein before recited, in regard to the more efficient government of the cities and towns of the Commonwealth.

An admission that the act is constitutional to the extent to which it is approved by the counsel of Chahoon, goes far to admit that it is constitutional so far as concerns the question we are now considering.

But we clearly think that it is constitutional to that extent also. The legislature had a right to say to those persons who were performing the duties of civil offices under appointments made by military power or otherwise prior to the re-admission of the State: "We will sanction what you have done according to law, and will authorize you to continue to perform the duties of your offices until other persons are appointed and qualified to perform them. But we choose to appoint other persons to perform them until elections and appointments can be made under the constitution, and we therefore pass the enabling act for that purpose."

712 *It is contended that the schedule annexed to the constitution contains provisions, which show that its framers intended that a person who was performing the duties of mayor of a city at the time of the adoption of the constitution, should have authority to continue to perform them until a successor is appointed and qualified, at the time and in the mode prescribed by the constitution. But certainly this argument is founded on a very strained inference, and cannot be sufficient to show that the enabling act is unconstitutional.

The preamble and first section of that schedule show the only purpose for which it was adopted, and that it was not intended to secure to incumbents then in office, any immunity in their offices, or power to continue to hold them for any length of time, against the expressed will of the legislature to the contrary. "That no inconvenience may arise from the changes in the constitution of this State, and in order to carry the same into complete operation, it is hereby declared, that" is the language of the preamble. Thus plainly showing that the convention was looking to public convenience, and not to the private interest of individuals in continuing to hold office; that it was acting in this matter, solely because there might be necessity for some such action before it could be taken by the legislature; and not because they intended to place this matter beyond the reach or control of the legislature. All the safeguards that were deemed necessary for the conservation of private rights were embodied in the constitution itself. The only office of a schedule is to provide for a transition from the old to the new government, and to obviate inconveniences which would otherwise arise from such transition. The convention acts in this matter as an ordinary legislature, and only because there is necessity for such action before a legislature can or will be convened under the constitution. To be sure if a convention, in

713 framing the schedule, should plainly show an intention *to place any of its provisions beyond the control of the legislature, such provisions being the

act of the representatives of the sovereignty of the State without any constitutional restrictions, would be as effectual and binding as if they were embodied in the constitution itself. But unless such an intention plainly appears, the presumption is, that the provisions of the schedule are subject to future legislation. The language of the 1st section of the schedule is: "The common law and the statute laws now in force not repugnant to this constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature." Thus expressly affirming the control of the legislature over the subject (though such an express affirmance was unnecessary). There seem to be two provisions of this schedule which are relied on by the counsel for Chahoon as tending to show, that the convention intended to continue the mayor in office until his successor is elected and qualified under the constitution.

One of these two provisions is that contained in the 2d section, which declares, among other things, that "all rights of bodies corporate, and all charters of incorporation, shall continue." And it is argued, that this provides for the continuance of the office of mayor and of the officer for the time being himself in the office, as rights of the body corporate, under its charter. But how long was this continuance to last? Always? Certainly not; for that would have been against an express provision of the constitution itself, which declares, that "there shall be chosen by the electors of every city a mayor." Then the continuance was to be either for some specified period, or until otherwise provided by law. There is no specified period, unless it be the day named in the constitution in regard to the general election. But there is nothing in the schedule which confines

the provision to that day, and the 714 presumption *is, for reasons before stated, that the provision is subject to the control of the legislature. There is no conceivable reason why the matter should be placed beyond such control. Municipal corporations in their police, which is in fact a part of the police of the State, are subject to the control of the legislature, like any other part of the civil government.

The other of the two provisions, before referred to, is contained in the same section, and is that which declares, that "the several courts, except as herein otherwise provided, shall continue with the like powers and jurisdiction, both in law and in equity, as if this constitution had not been adopted, and until the organization of the judicial department of this constitution." It is argued, that the mayor's court is one of the courts contemplated by this provision, and was therefore intended to be continued; that the word "court" here embraces the judge of the court, who is the mayor; and that therefore it was intended to continue the mayor in office. It may be answered, if a mayor be necessary to hold one of the courts here intended to be continued, it is not necessary that any particular person should

be such mayor; but the court may be held by any person whom the legislature may appoint to take the place of him who was the incumbent of the office when the constitution was adopted.

But the true answer is, that while the convention may have intended, in the former part of the section, to continue the then acting mayor in office until otherwise provided by law, it did not intend to include the mayor's court, much less the mayor himself, in the word "courts," used in the latter part of the section. They are courts of record, which the mayor's court is not. They are the courts, whose organization is provided for by the 6th article of the constitution concerning the "judiciary department," or such of them as existed

under the old constitution; that is,
715 the Court of *Appeals, Circuit courts, County courts, and Hustings courts.

These courts were to continue, except, &c., "with the like powers and jurisdiction, both in law and in equity, as if this constitution had not been adopted, and until the organization of the judicial department of this constitution." An immediate organization of that department was contemplated by the constitution, which provided, that the judges should be chosen by the joint vote of the two houses of the general assembly; and though their terms of office were not to commence until the 1st day of January next following their appointment, yet it was provided that they should "discharge the duties of their respective offices, from their first appointment and qualification, under this constitution, until their terms begin." This was "the organization of the judicial department," referred to in the schedule, and plainly it has no reference to a "mayor's court," which is nowhere mentioned in the constitution, nor to a mayor, who could not be chosen under the constitution earlier than the 4th Thursday in May, nor enter upon the duties of his office until the 1st day of July.

In construing the constitution, and the schedule and election ordinance annexed, in the light of all the surrounding circumstances under which they were made, we think it obvious that the framers of the constitution, purposely omitted any provision that the persons then performing the duties of office in the State should continue to hold over, until their successors should be elected or appointed and qualified under the constitution; and that they intended that those offices, except where otherwise expressly provided in the constitution, should be immediately, or as soon as convenient, filled by the legislature; either directly, or in a mode to be prescribed by law. Almost all the offices were then held by men who were disqualified to hold office

by the very terms of the constitution
716 itself as originally *framed. It was contemplated that there would be a very short interval between the adoption of the constitution and a session of the legislature under it, when all the offices could at once be filled. The convention closed its

labors on the 17th day of April 1868; and by an election ordinance then enacted, it was declared that the constitution adopted by the convention, should be submitted for ratification on the 2nd day of June 1868, to the voters of the State; that an election should be held at the same time and places for members of the general assembly and for all State officers to be elected by the people under the constitution; that the officers elected should enter upon the duties of the offices for which they are chosen as soon as elected and qualified in compliance with the provisions of the constitution, and should hold their respective offices for the term of years prescribed by the constitution, counting from the 1st day of January next, and until their successors are elected and qualified. And that the general assembly elected under said ordinance should assemble at the capitol in the city of Richmond on the 24th of June 1868: And the commanding general was requested to enforce the said ordinance. Had all these things been done as contemplated, the legislature, which would doubtless have been composed of many if not most of the persons who composed the convention, would probably have filled at once, by a new election or appointment, all the remaining offices of the Commonwealth, and provided that the officers so elected or appointed should discharge the duties of their respective offices, "from their first appointment and qualification," as provided in the constitution in regard to the judges, or "as soon as elected and qualified," as provided in the election ordinance, in regard to members of the general assembly and all State officers to be elected by the people under the constitution. And thus the ship of state would have set out on her new voyage with an entirely new crew.

717 *If we be right in this view, then it follows, that not only is there nothing in that part of the enabling act now under consideration opposed to anything in the constitution, but it is in conformity with the intention of the framers of that instrument.

We are therefore of opinion, that so much of the enabling act as authorizes the appointment of councilmen and mayors of the cities, is constitutional.

As to the argument that the enabling act itself confirms the title of the incumbents in office; a sufficient answer is, that whatever right or title that act may give is expressly limited by its terms, and extends no longer than the period when the legislature might otherwise provide; and they did otherwise provide by the enabling act, in regard to the appointment of councilmen and mayors of the cities.

And as to the argument founded on the supposed general principle of law, "that a change in the organic constitution of government does not vacate the old offices until successors are duly qualified;" the answer is, that even admitting this to be so, "successors are duly qualified," within the meaning of this proposition, whenever per-

sons appointed to fill the offices by the legislative power of the new government are duly qualified.

The incumbents of office at the time of an organic change of government, continuing to hold over after such change (in the absence of a provision of the new constitution, or of an act of the legislature of the new government giving them such authority), hold by sufferance only and upon a principle of public necessity or convenience, not in virtue of any individual or private right. They cannot set up any claim against the legislature, which has ample power to put an end to their official authority at any time, and appoint others to take their places, subject only to any constitutional restrictions which may plainly appear to exist.

718 *We have now, we believe, noticed all the grounds taken in argument by the counsel of this case, unless it be the ground, that by reason of what are called "the fundamental conditions," on which the State was admitted to representation in congress, we have only advanced from a provisional to a provincial State, and have not yet gotten back to our original position as one of the sovereign States of the Union. What may be the meaning and effect of those conditions, is a question which does not arise in this case, as we have endeavored to show that the right of the old incumbents to continue to hold their offices is not made one of those conditions. It may not, however, be out of place to say, that we regard Virginia as one of the sovereign States of the Union, and as the co-equal in every respect of Massachusetts, New York, Pennsylvania, or any of the Old Thirteen.

We have delivered a very long opinion in these cases, not because we have had any doubt or difficulty in deciding them, but because of the great importance of the question involved, the ability and earnestness with which it has been discussed, and the excitement which it has produced. If our decision shall have the effect of settling the question, and restoring peace and quiet to the city of Richmond, we will rejoice to have had an agency in bringing about so desirable an end.

The result of our opinion is, that on the 17th day of March 1870, under and by virtue of the act of the general assembly, approved March 5th, 1870, commonly called "the Enabling Act," Henry K. Ellyson became the lawful mayor of the city of Richmond, and has ever since been, and is yet, such mayor; that the petitioner, Archibald Dyer, was lawfully required by said Ellyson, as such mayor, to give bail, as mentioned in the petition of said Dyer, who is therefore lawfully in the custody of William E. Martin, as such bail; that George Chahoon

719 *the said Ellyson became lawful mayor as aforesaid, and had no authority to issue the warrant of commitment, mentioned in the petition of John Henry Bell, whose imprisonment is therefore unlawful;

and that the said petitioner, Dyer, must be remanded to the custody of his said bail, and the said petitioner, Bell, must be discharged from imprisonment.

The judgment is as follows:

This day came again the parties by their counsel, and the court having maturely considered the petitions, writs of habeas corpus, and returns thereon, an agreed statement of facts filed, and the arguments of counsel in these cases, is of opinion, for reasons stated in writing, and filed with the papers, that so much of the act of the general assembly approved March 5th, 1870, commonly called the Enabling Act, as provides for the appointment of councilmen or trustees, and mayors and other officers of cities and towns, is constitutional; that on the 17th day of March 1870, by a due appointment and qualification under the said act, Henry K. Ellyson became the lawful mayor of the city of Richmond, and has ever since been, and is yet, such mayor; that he had authority as such to require the petitioner, Archibald Dyer, to give bail, as mentioned in the petition of said Dyer, who is therefore lawfully in the custody of William E. Martin as such bail; and that George Chahoon has not been mayor of said city since the said Ellyson became lawful mayor as aforesaid, and had no authority to issue the warrant of commitment mentioned in the petition of John Henry Bell, who is therefore detained without lawful authority. It is therefore ordered that the said Archibald Dyer be remanded to the custody of his said bail, and that the said John Henry Bell be discharged from imprisonment.

720

Jones v. Tatum.

April Term, 1870, Richmond.

Absent, CHRISTIAN, J.†

Sale of Land—Proper Parties.—T. conveyed to H. B. & J. B. ninety acres of land in trust for his wife for life, and at her death to their children, with a power of appointment by will to the wife, which she did not make. After the death of T. and his wife, four of their children being of age, file their bill against the other two who were infants of the age of seventeen and nineteen years, asking for a sale of the land. There was a decree directing the land to be sold, and it was sold, partly on a credit, and the sale was confirmed. The purchaser having failed to make the last payment, a rule was made on him to show cause why the land should not be sold to pay the balance of the purchase money. He appeared and filed an affidavit objecting to the title, that the trustees H. B. & J. B. had not been parties to the suit, and that there was but 80 acres of land. J. B. describing himself as surviving trustee, executed a release deed, which was filed in the suit. A sale was decreed, and the purchaser appealed. **HELD:**

1. **Statute of Uses—Trust Ended—Quære—Is Trust Executed.**—**Quære.** Whether under the Virginia

*For monographic note on Costs, see end of case.

†He decided the case in the court below.

statute of uses, the trust having ended, the legal title was in the trustees. But if it was, and they should have been parties, the sale having been made and confirmed, and the purchaser in quiet possession, the deed of release of the surviving trustee cured the defect.

2. **Sale in Gross—No Abatement.***—Though the tract was described as containing ninety acres, it was a sale in gross and not by the acre, and the purchaser is not entitled to an abatement from the purchase money.

3. **Same—Same.**—If the facts stated by the purchaser would entitle him to an abatement from the purchase money, the facts not being proved he is not entitled to it.

721 4. **Judicial Sales—Payment to Commissioner.†**—The decree having directed the commissioner to give security, and to pay the money coming to the infants to their guardian, *the purchaser paying to the commissioner in pursuance of the decree, is exonerated from liability for its proper disposition, and cannot object to the decree on that ground.

5. **Proof as to Surviving Trustee—Objection in Court of Appeals.**—No objection having been made in the court below, that it was not shown that J. B.

***Sale in Gross—Abatement.**—See the principal case cited and the decision discussed in *Watson v. Hoy*, 28 Gratt. 711. See also, *foot-note* to same case on this point.

See principal case approved in *Farrier v. Reynolds*, 88 Va. 147, 18 S. E. Rep. 303.

†**Judicial Sales—Payment to Commissioner—Authority to Receive the Money.**—See *Finney v. Edwards*, 75 Va. 52, where the court held that the commissioner had authority under decree and peculiar circumstances of the case to collect the purchase money.

A commissioner selling land under a decree of court cannot collect the deferred installments of the purchase money when the bonds were directed to be returned to the court. *Omohundro v. Omohundro*, 27 Gratt. 824.

A special commissioner, appointed by a decree to make a sale of land, who makes the sale and takes the purchase bond payable to self as commissioner, has no authority to sue on or collect on said bonds unless specially authorized to do so. *Blair v. Core*, 20 W. Va. 205; *Clarke v. Shanklin*, 24 W. Va. 30.

Same—Same—Failure of Commissioner to Give Bond—Liability of Purchasers.—The purchaser at a judicial sale is bound to take notice of the decrees, etc., under which the sale is made and must be presumed to know the law which governs such sales. *Hess v. Rader*, 26 Gratt. 749. So, the purchaser does not relieve himself from liability for the purchase money by payment to a commissioner who has not yet given the bond required by law in order to authorize him to receive payment. *Hess v. Rader*, 26 Gratt. 746, and *foot-note*; *Tyler v. Toms*, 75 Va. 117; *Whitehead v. Bradley*, 87 Va. 676, 18 S. E. Rep. 196; *Shumate v. Williams (Va.)*, 22 S. E. Rep. 808; *Eggleton v. Whittle*, 84 Va. 163, 4 S. E. Rep. 222; *Eggleton v. Dinsmore*, 84 Va. 858, 6 S. E. Rep. 146.

Where receiver collects the money from a purchaser at a judicial sale before giving the required bond and fails to account, though he may afterwards give the bond, the purchaser may be compelled to pay the money a second time. *Woods v. Ellis*, 85 Va. 471, 7 S. E. Rep. 852.

Same—Same—Defects in Commissioner's Bond.—See *Lloyd v. Erwin*, 29 Gratt. 598, and *foot-note*.

was the surviving trustee, that question cannot be made in this court.

6. **Appeal from Decree—Costs.**—The purchaser having resisted the decree for a resale, and taken an appeal from a former decree in the cause, was properly subjected to pay the costs of the proceedings under the rule.

This is an appeal by a purchaser at a judicial sale from a decree requiring him to pay the balance of the purchase money. The facts of the case, so far as it is material to state them, are as follows:

On the 26th day of April 1866, four of the six Tatums being adults, filed their bill against the remaining two who were infants, in the Circuit court of the county of Henrico, in which they stated, that on the 31st day of May 1843, Theophilus Tatum, of the said county, executed a deed which was duly recorded, conveying to Henry Branch and James M. Boyd, among other things, a tract of land in the said county, containing ninety acres, adjoining the Tree Hill tract and the land of William B. Randolph and others, in trust for the use of his wife, Anna D. Tatum, during her life, and at her death to her children then living, and the descendants of any who might be dead, with a power of appointment by will to the said Anna D. Tatum; who, by a paper executed by her in the form of a will, devised the property to the said Theophilus Tatum for life, but made no further appointment. That the said Anna D. Tatum died in October 1865, survived by her husband, the said Theophilus Tatum, and six children, who were the plaintiffs and defendants in the suit, and her only heirs at law, one of the defendants being nineteen years old and the other seventeen years old. The said Theophilus died on the 13th day

722 of November 1865, about a month after the death of his said wife. *That the will of said Anna D. Tatum had never been admitted to record, for the reason, that both the witnesses were dead, and their handwriting could not be proved. But it was a matter of no importance, as the title to the said land was then in the same persons, either with or without the will. That upon the death of the said Anna D. Tatum and Theophilus Tatum, the trust created by the said deed was fully executed, and ceased, and the title to the said land vested absolutely in the said surviving children. The said deed, and the said will, marked A and B, were exhibited with the bill. That the said land, consisting of ninety acres, and being divisible among six persons, could not be divided in kind without manifest injury to the interest of all parties; so that a sale was absolutely necessary for an equal and judicious partition of the same. And that such sale could not be made without the aid of a court of equity, because two of the distributees are minors, and incapable in law of giving their consent, though capable in fact of deciding prudently with respect to their interests, and desiring the said sale to be made. The plaintiffs therefore prayed that

the said land might be sold, and the proceeds of sale divided according to the rights of the parties respectively; and for general relief.

In the said deed exhibited with the bill, the said land is described as "containing ninety acres, be the same more or less," and its situation and boundaries are very minutely described.

On the same day on which the bill was filed, a guardian ad litem was assigned to the infant defendants, and filed their answer, and the said infants themselves, by leave of the court, filed an answer in proper person, in which they said they believed the allegations of the bill to be true, and expressed a desire that the said land might be sold for a division. And, thereupon, it

723 was decreed that a commissioner of the court should enquire, *ascertain and report:—1st, whether either of the parties entitled to distribution in the land would accept the same, and pay therefor to the other parties such sums as their interest might entitle them to; 2ndly, whether partition of the said land could be conveniently made among the parties entitled; and 3rdly, whether the interests of the persons entitled to the said land would be promoted by a sale thereof.

A day or two after that decree was made, commissioner J. H. Sands proceeded to execute the same by taking the depositions of two witnesses upon interrogatories agreed to by the guardian ad litem, and made a report:—1st, that partition could not be conveniently made of the real estate in the bill mentioned; 2nd, that no party was able or willing to take the entire subject, and pay therefor to the other parties such sums of money as their interest therein might entitle them to; and 3rd, that the interests of those who were entitled to the subject or its proceeds, would be promoted by a sale of the entire subject. The depositions of the witnesses, which were returned with the report, fully sustain it.

On the 30th day of April 1866, the cause came on by consent to be heard on the papers formerly read, and the report of the said commissioner, to which there was no exception, and the court decreed that William H. Tatum, who was appointed commissioner for that purpose, should proceed, after giving at least ten days' notice of the time, place and terms of sale, by advertisement in one or more newspapers of the city of Richmond, to sell, at public auction, to the highest bidder, the land in the bill mentioned, for cash as to one-fourth of the purchase money, and upon a credit of six, twelve and eighteen months, with interest from the day of sale, as to the balance, taking from the purchaser negotiable notes, well endorsed, for the credit payments, and retaining the title until a deed should be

724 ordered by the court to be made. The said commissioner was *directed to report his proceedings and return the said notes to the court. But he was not to have authority to act under the said decree until he should have entered into bond with

good security before the clerk of the court, in a penalty of six thousand dollars, conditioned according to law.

On the 26th day of October 1866, a report of the said commissioner of sale was returned and filed, from which it appears that in pursuance of the said decree of the 30th of April 1866, he did, after duly advertising the said land, sell the same (reserving a grave yard) at public auction, on the premises, on the 28th day of May 1866, when the appellant, William Jones, became the purchaser for the sum of \$4,750. The purchaser desiring it, the commissioner received from him \$2,000 in cash, leaving due \$2,750. The purchaser executed his notes at 6, 12 and 18 months for the deferred payments. The first note for \$386 25 (interest added), being the residue of the first two payments, after deducting the cash (\$2,000) paid; the second at 12 months, for \$1,258 75; and the third at 18 months, for \$1,294 38. The commissioner further reported, that after deducting the cost of the suit up to that time, and the charges of sale, from the cash payment, there remained in his hands for distribution the sum of \$1,838 15, of which each party was entitled to one-sixth; and that he had not returned the notes, but retained them, to deposit in bank for collection. Annexed to the report was a statement of an account of the transaction.

On the 5th day of November 1866, the cause again came on to be heard by consent, upon the papers formerly read, and the said report of commissioner Tatum, to which there was no exception; upon consideration whereof, the court confirmed the said report, and directed the said commissioner to pay over the fund in his hands to the parties entitled thereto; that is, \$300 to each of the six distributees, paying the portion 725 of each of *the infant defendants to his legally qualified guardian, and retaining in his hands the balance of thirty-eight dollars and fifteen cents to meet future costs of the suit, and to be accounted for thereafter in a decree for further distribution. And the commissioner was further directed to deposit the notes of the purchaser for the deferred payments in some bank of the city of Richmond, when necessary, in order to their collection, and report his further action to the court.

No other proceeding was taken in the case until the 28th day of April 1868, when another report of commissioner Tatum, dated on the 18th of that month, was returned and filed. The said commissioner stated therein, that since his last report in the case, the purchaser, Jones, had paid in full, the bond of \$386 25, and had paid \$1,068 75 in part of the bond for \$1,258 75 falling due on the 28th of May 1867, and had paid nothing more. That there then remained unpaid a balance of \$190 on the bond for \$1,258 75, and the whole of the bond for \$1,294 38, due 28th November 1867. That he, the commissioner, had applied repeatedly to the said Jones to pay the balance due, but hitherto without avail. That the said Jones had several times stated that the

title to the land sold him was defective, and he was not bound to pay. And that he, the commissioner, believed the title to be unquestionable, and he invoked the exercise of the power of the court to compel payment.

On the same day on which that report was filed, to wit: The 28th day of April 1868, the cause came on again to be heard by consent, on the papers formerly read and the said report; whereupon, on the motion of the plaintiffs, it was ordered, that unless the said purchaser, Jones, should show cause to the contrary on the 1st day of May 1868, having been first served with a copy of the said order, the said commissioner should proceed, at the risk and

726 cost of the said Jones, to resell the said land to the highest bidder at public auction, for cash as to so much as will be sufficient to pay the costs and charges of the said sale and the costs of the proceeding under the said order, and to pay in full the balance, principal and interest, due upon the bonds executed by the said Jones to the said commissioner for the purchase money of the said land under the sale theretofore made to said Jones; and for the balance, upon such terms as the said Jones might prescribe; or, upon his failure to prescribe, upon six and twelve months' credit, for negotiable notes, with interest from the day of sale, well endorsed, and retaining the title to secure their payment. The commissioner was directed to give at least sixty days' notice of the time, place and terms of said sale in some newspaper published in Richmond. But if the said Jones, at any time before the expiration of the said sixty days, should pay to the said commissioner all costs and charges which might have accrued or been incurred by reason of said order, and should also pay in full the balance, principal and interest, which should be due upon his said bonds; then the said commissioner was directed not to make such sale, but to execute and deliver to the said Jones, a deed with special warranty for the said land. And the commissioner was directed to report his proceedings to the court.

A copy of this order was served on the said Jones on the 30th of April 1868, and evidence of such service was returned and filed with the papers in the cause.

On the 1st day of May 1868, an affidavit of the said Jones was received and filed. In this affidavit the affiant, after setting out the facts in regard to the sale, the part payment of the purchase money, and the balance due thereon, stated, that before the last payment became due he negotiated a loan of \$2,250, which one Sanford of

727 New York agreed to advance on said land, to be secured by deed of trust thereon, upon being furnished with an abstract of good title thereto; that as he depended on said land as a means to pay said balance, he at once employed J. H. Sands as his attorney to examine said title, who, upon doing so, reported the same defective, for that the legal title was out-

standing in Branch and Boyd (the trustees in the deed of trust of the 31st day of May 1843, aforesaid), and that they were not parties to the suit under a decree in which said land was sold, and also that said land, sold as containing ninety acres, only contained eighty-nine acres, as appeared from the deed and commissioner's books of the county of Henrico; that the tax bills also show only eighty-nine acres; that he is himself a practical surveyor, and upon measuring said land finds that it contains only 88 37-100 acres; that the foregoing are the reasons why said balance has not been paid; that he purchased said land for a nursery and has expended on it and the growth of plants and trees, over \$3,000; that the value of said plants and trees alone will amount to five or six thousand dollars at the fall of the leaf, and to remove the same before the fall planting, would result in utter loss to him of the whole; that it was by no fault of his, but through the fault of irregularities in the proceedings in said partition suit, that said last payment was not made; that the parties must take time to cure such defects by making the proper parties to said suit, so as to perfect the title, and thus enable him to borrow the money on the land; that besides, no one but himself is affected by the delay, because one of the six heirs is a minor and will not be of age for many years, whose share amounts to more than half of the balance of said purchase money now unpaid, and could not be used by the guardian, or be better secured or invested; that there may be liabilities outstanding against the

said trustees, who hold the legal title; 728 that if a sale were made with these defects of title, it would be ruinous to him, the relief from which he now seeks at the hands of the court; and that he asks that said title be perfected and the deficiency in the land be allowed him before he is decreed to pay the said balance.

On the 6th day of May 1868, there was filed in the suit a deed, bearing date the 20th day of April 1868, executed by Robert H. Branch, surviving trustee under the deed of trust from Theophilus Tatum, of the 31st day of May 1843 aforesaid; and also by the said William H. Tatum, commissioner as aforesaid, whereby the said Branch, with the assent of the said commissioner, granted, released, and confirmed to the said Jones, his heirs and assigns, the tract of land aforesaid, freely and absolutely, discharged from the said trust, and all the estate, right, title and interest of him the said Branch, trustee as aforesaid, in or to the same. This deed was duly certified for record as to both of the parties who executed it. And on the same 6th day of May 1868, the cause came on again for decision upon the papers formerly read, and upon the rule entered in the cause on the 28th day of April 1868, returned executed, the answer of William Jones thereto filed (to wit, his affidavit aforesaid), and the deed of release aforesaid. Upon consideration whereof, the court being of opinion

that the said Jones had not shown any sufficient cause why he should not be required to perform his contract for the purchase of the said land, made the said rule absolute, and decreed that the said commissioner should proceed to execute the decree entered in the cause on the 28th day of April preceding as aforesaid, with this addition thereto, that if the said Jones should, before the expiration of the sixty days as provided for in said decree, make the payments therein specified, then the said commissioner, along with the deed to be executed by him to the said Jones, should also deliver to the said Jones the deed of
729 *release aforesaid, which he was authorized to withdraw from the papers of the cause for that purpose.

From this decree, or rather from the three decrees of November 5th, 1866, and April 28th, and May 6th, 1868, the said Jones prayed for an appeal to the District court held at Williamsburg, which was accordingly allowed. The District court affirmed the decrees of the Circuit court, and from the decree of the District court, the said Jones prayed for and obtained an appeal to this court.

Steger, Williams and Sands, for the appellant:

1. Confessedly the title was not good when the sale was made.

(a.) The trustees were not parties to the suit. The trusts were of a special character, and required the presence of the trustees to see the fair administration of the subject. Infants' property being sold, every fiduciary interested in the property should have been represented and before the court.

(b.) The attempt to supply the title by the release of one of the trustees will not suffice. The court will not compel a purchaser to take a doubtful title. Though the court's opinion should be in favor of the title, the purchaser ought not to be compelled to take it if there were reasonable doubts of its sufficiency. *Pyrke v. Waddingham*, 17 Eng. L. & E. R. 534; *Collard v. Sampson*, 21 Id. 352. 1 Sugd. Vend. 455.

2. The appellant has sustained serious damage by the defect of title. After having paid the cash instalment of the purchase money and others, amounting to \$2,000, and expended upwards of \$3,000 in improvements, and when in treaty to settle the whole purchase money by effecting a loan upon the faith of the property itself, he is arrested by a defect of title discovered by the counsel who examined the title. This defect of title, confessed by the parties,
730 *has resulted thus in serious loss to the appellant. To force the title upon him now, would be to make the parties to the suit profit by their own wrong. The appellant asks that the defects may be cured and himself protected in the premises.

3. The doubt about the title necessitates the appeal. The costs should be borne by the appellees—not by the appellant.

4. Clearly the Circuit court should have

directed the purchase money to have been invested, so as to protect the appellant; or have required security for the faithful application of the proceeds of the infants' share. Sess. Acts 1865-66, pp. 167-8. The direction of payment to the guardians was clearly improper.

5. The decree asked for by the appellant is this: A direction that the trustees and all other necessary parties should be made parties to the suit; a direction that the proper abatement should be made to the appellant for the defect in the quantity of the land; and with this view, that the cause be referred to a commissioner to ascertain how much land the parties in the suit have title to; that the decrees of the Circuit court be corrected, and the shares of the infants be properly invested and secured; and that costs be awarded the appellant.

Griswold & Griswold, for the appellees:

1. The proceeding was under chap. 124 of Code, p. 581.

There is no proof of any deficiency. And the deficiency claimed, even if proved, is too small to justify vacating the sale. 1 R. C. 1819, p. 335, sec. 60; Code 1860, ch. 112, sec. 58, p. 544; *Nelson v. Carrington*, 4 Munf. 332; *Nelson v. Matthews*, 2 Hen. & Mun. 164; *Neal v. Logan*, 1 Gratt. 14; *Jolliffe v. Hite*, 1 Call 301. The sale was in gross. *Keyton's adm'r v. Brawford's ex'ors*, 5 Leigh 39.

The trustees were not necessary
731 parties. None are *necessary parties except such as have a substantial material interest. 2 Rob. Pr. (old ed.) 262. The trustees had no such interest. The trusts were fully executed. They held merely the dry legal title. They could not disturb the title or possession of the appellant, and were bound to transfer to him the legal title upon his application. *Hill on Trustees* 278, 316; *Suppt. R. C.*, p. 159, sec. 65; Code 1860, chap. 136, sec. 21, p. 611; *Davis v. Teays et als.*, 3 Gratt. 283.

It is too late for the appellant to claim relief, either because of any defect of title, or of any irregularities in the proceedings. It was incumbent on him to satisfy himself that the title was good, the proceedings regular, and all proper parties were before the court, and make his objection to the completion of the sale before the confirmation of the commissioners report. He will not be entertained in any complaint after such confirmation. 2 Daniel's Ch. Pr. 1456, 1460, note 1; *Threlkelds v. Campbell*, 2 Gratt. 198; *Worsham v. Hardaway's adm'r*, 5 Gratt. 60; *Young's adm'r v. McClung*, 9 Gratt. 336; *Daniel v. Leitch*, 13 Gratt. 195, 210, 212; *Faulkner v. Davis*, 18 Gratt. 651; *Cralle v. Meem*, 8 Gratt. 496.

But if he could object because of a defect of title, he could not be discharged from his contract if the defect could be cured within a reasonable time. And in this case it has been entirely cured by the deed of release from the surviving trustee. *Daniel v. Leitch*, supra, 195, 213, 216; *Reeves v.*

Dickey, 10 Gratt. 138; Young's adm'r v. McClung, 9 Gratt. 336.

The order for a resale, after a rule to show cause, was the proper remedy of the appellee. 2 Daniel's Ch. Pr. 1277-8; Clarkson v. Reed, 15 Gratt. 288.

It was no error prejudicial to the appellant to direct the payment of the money to the guardian of the infants, without additional security. The purchaser's title cannot be affected by the manner in which

732 the *court disposes of the purchase money. He has nothing to do with it.

Daniel v. Leitch, 13 Gratt. 195, 211.

It is too late to raise the question as to Branch being the surviving trustee. He calls himself so in the deed of release. No contrary suggestion was made in the court below. Claiming relief from his purchase, the onus was on the appellant, to show himself entitled to it.

A decree, otherwise right, will never be reversed for error in awarding costs. Ashby v. Kiger, 3 Rand. 165.

MONCURE, P., after stating the case, proceeded:

The errors assigned in the petition for an appeal to the District court, which were the errors relied on by the counsel for the appellant, in the argument of the case before this court, are:—1st, that the trustees in the deed of the 31st day of May 1843, should be made parties to the suit; 2ndly, that an abatement of the purchase money should be made for the alleged deficiency of one acre in the quantity of the land; 3rdly, that the shares of the infant defendants should be properly invested and secured; and 4thly, that the appellant was improperly subjected to the payment of costs, as he was not in default. I will proceed to consider these supposed errors in the order above stated; and

First, that the trustees aforesaid should be made parties to the suit.

Whether they should be parties to the suit, or rather should have been parties to the suit at the time of its institution or not, depends upon whether they had then any legal title to the land. And that question depends upon another; which is, whether, by our statute of uses, the legal title was transferred from them to the children of Anna D. Tatum, the plaintiffs and defendants in this suit at the time of her death in October 1865, or at the time of her husband, Theophilus Tatum's death, in November 1865. Certainly such title would have been

733 so transferred by the operation of the English *statute of uses. 1 Lomax's Dig., pp. 194-195, marg. There seems

to be a material difference between the English statute of uses and ours; and it may be doubtful whether our statute would have that effect. Id. and seq.; Bass v. Scott, 2 Leigh 356. Our statute has not yet been judicially construed, except that in the case just cited, it was considered as not extending to a devise. If the trustees in this case had any title to the land at the time of the institution of the suit, it was a

mere dry legal title, such as is described in Hill on Trustees, pp. 316-317, marg. There was but one duty which then remained for them to perform, and that was, to convey that legal title to the plaintiffs and defendants in this suit, who were seized of a perfect equitable title, and were in the actual possession and enjoyment of the estate. If these trustees had refused to perform that duty on request, they might have been compelled to do so by suit, and would have subjected themselves to the costs of the suit. Id. 278, marg. They could not have charged the estate by any act or default of theirs, and could not have recovered possession of it by an action at law against the beneficiaries. Code, ch. 135, § 21, p. 611. It is not strange therefore that the counsel who drew the plaintiff's bill considered that they had no interest in the subject of the suit, or at least not such an interest as to require them to be made parties. But all the facts in regard to the title were set out in the bill, and the deed of trust was exhibited therewith, so that the court might see, and the purchaser might see, the precise state of the title. No objection was made by the purchaser to the title, nor to any supposed defect of the suit in not making the trustees parties, until long after the report of sale had been confirmed, the purchaser had received possession of the land, had paid a large part of the purchase money, had executed his notes for the balance, and his note for the last deferred payment had become payable.

734 *But without deciding whether this objection for want of parties, would have been valid, even if made by the purchaser before the confirmation of the sale, much less that it was valid when made for the first time about two years after the sale, on being pressed for the payment of the balance of the purchase money; I am of opinion that it was cured by the deed of release which was executed by Robert H. Branch, surviving trustee, under the said deed of trust, and filed in the cause when the last decree was entered therein. Surely if such a release had been executed before the suit was brought, it would have been unnecessary and improper to have made the trustees parties; and for the same reason, it was unnecessary, and would have been improper, to amend the bill and make them parties after that release was executed and filed. The appellant says, he does not know that Branch is the "surviving trustee," and, that "if it be a fact that Boyd, the other trustee, is dead, it ought, somehow, to have been properly stated in the pleadings; it certainly is not a fact of which the court will take judicial notice." The deed of release recites that Branch was the surviving trustee. No objection was made to it in the court below. It was not there pretended by the purchaser that Boyd was not dead, nor did he call for proof of the fact, or ask for time to enquire into it. The objection was made, for the first time, in the appellate court; and it then came too late. The presumption is, that Boyd was

dead and Branch was the surviving trustee, as the deed recites. I am, therefore, of opinion that this first assignment of error ought to be overruled.

Secondly, that an abatement of the purchase money should be made for the alleged efficiency of one acre in the quantity of the land.

The tract of land was supposed to contain ninety acres. It was so described in the bill, and was no doubt so described in the advertisement of sale, though in 735 the *deed of trust, which was filed as an exhibit with the bill, it is described as containing ninety acres, "be the same more or less." I think the land was not sold by the acre, but that it was sold by the tract for \$4,750, which is far from being an equimultiple of the supposed number of acres. The boundaries of the land were well defined, and are minutely set out in the deed of trust. There appears to have been no doubt or difficulty as to any of the corners or lines. The purchaser no doubt viewed every foot of it. Being a small tract, he could probably stand in the centre and see all of it at one view. He was a practical surveyor, and could estimate the quantity with sufficient accuracy to be satisfied that it was about ninety acres; and he was willing and agreed to give for it \$4,750. It is extremely improbable that he would have been unwilling to give that price for it if he had known that the actual quantity was eighty-nine instead of ninety acres; or that the owners, if that had been the fact, would have taken any less for it. The improvements were valuable, and worth at least as much as the land. The purchaser called for no survey, even supposing that he had a right to call for one; but paid a large part of the purchase money, gave his notes for the balance, and entered into the possession and enjoyment of the land; and the sale was confirmed by the court. Being a practical surveyor, he knew that surveys of the same land rarely, if ever, produce precisely the same quantity, but almost always vary to some small extent, on account of the variation of instruments. That the quantity might vary in this case, one way or the other, to the extent of an acre, was what might reasonably have been and probably was expected. But it was as fair for one as for the other. The purchaser says, he afterwards made an experimental survey and ascertained the deficiency to be an acre and a fraction. Suppose he had ascertained 736 an excess to that extent instead of a deficiency, *would he have considered himself bound to pay for it? Would he have been held liable for it? Would the parties to the suit have thought of claiming it? I think not. Then the rule ought to work both ways.

But a conclusive answer to this assignment of error is, that there is no proof in the record that the alleged deficiency exists. The fact is asserted in the affidavit filed by the purchaser, nearly two years after the sale, in answer to the rule requiring him to pay the balance of the purchase money.

But it is an affirmative allegation, the proof of which devolved on him who made it. The ground on which alone a purchaser in such a case is entitled to relief, is that of mistake. And he must clearly prove the mistake, especially in a case like this, in which the report of sale as been confirmed, and there has been so great a lapse of time, and so much done by the parties, founded on the assumption that there was no such mistake. Even if it be true, as stated in the affidavit, that the quantity of the land is stated as 89 acres in the books of the commissioner of the revenue (of which however there is no legal evidence), that does not prove the real quantity. I am therefore of opinion that this second assignment of error ought to be overruled.

Thirdly, that the shares of the infant defendants should be properly invested and secured.

The sale in this case was made when the infant defendants were nearly of age: one of them being nineteen and the other seventeen; and both of them having answered the bill in proper person upon oath, expressing a desire that the sale should be made. Their portions of the cash payment were decreed to be paid, and have no doubt been paid, to their legally qualified guardians. The balance of the purchase money remaining unpaid is about equal to the amount of their shares of the whole purchase money. When the last decree in the

737 cause was made requiring the purchaser to pay the *balance of the purchase money, one of these two infant defendants had probably arrived at age, and the other is no doubt now of age. Certainly it is the duty of the court, in such a case as this, to see that an infant's share of the fund is secured, as required by the Code, chapter 124, § 3, page 581. The commissioner appointed to sell the land in this case was required, before acting under the decree, to enter into bond with good security in the penalty of six thousand dollars, conditioned according to law. As the infants would soon be of age, it was no doubt desired by them, and thought proper by the court, that their portions of the cash payment should be paid to their legally qualified guardians, instead of being loaned out or otherwise invested for short periods. This may have been error; but no one complains who has any right to complain of it. The infant defendants, or rather the defendants who were infants, do not complain of it. They are satisfied, no doubt because they have received their money, or the full benefit of it. The purchaser has no right to complain of it. When he paid the money, in obedience to the decree, to the commissioner of the court, who was authorized to receive it, and who had given bond with good security for its faithful application, he thereby discharged himself from all further liability for this money, and the proper application of it devolved upon the court. It is settled that a purchaser at such a sale is not answerable for any disposition which the court may make

of the purchase money. *Brown v. Wallace*, 4 Gill & John. R. 479; *Daniel, &c. v. Leitch*, 13 Gratt. 195, 211. I am therefore of opinion that this third assignment of error ought to be overruled.

Fourthly and lastly, that the appellant was improperly subjected to the payment of costs as he was not in default.

The costs here referred to are not 738 the costs of the *suit. All of those costs which had been incurred down to the time of the distribution of the cash payment, were paid out of the amount of that payment; and the sum of thirty-eight dollars and fifteen cents was then retained by the commissioner to meet the future costs of the suit and to be accounted for thereafter. The only costs alluded to in this assignment of error are the costs of the proceeding under the rule, which cannot be more than one or two dollars; that is, the clerk's fee for entering it and the sheriff's for serving it. And these costs would no doubt have been given up by the parties, or refused to be imposed on the purchaser by the court, if, on the return of the rule, he had paid the balance of the purchase money or given assurance of such payment in a short time. But he did not do so. On the contrary he stood out against the rule, and defended himself against it on the ground of defect of quantity, and defect of parties, notwithstanding the execution of the deed of release aforesaid. And when the rule was made absolute, instead of then acquiescing, he carried the case to the District court, and brought it thence to the Court of Appeals. In persisting in his resistance of the rule after the deed of release was filed, he lost the advantage he might otherwise have had in getting rid of these costs, and made the rule thenceforward a necessary proceeding. Under these circumstances, I think the court committed no error in subjecting him to these costs, and certainly none for which the decrees or any of them ought to be reversed.

I am therefore of opinion that the said decrees ought to be affirmed.

The other judges concurred in the opinion of MONCURE, P.

Decree affirmed.

COSTS.

I. In General.

II. Power to Award Costs.

III. Rights to and Liability for Costs.

- A. In General.
- B. Plaintiffs and Defendants.
- C. Nominal Party to Suit.
- D. Vendor and Vendee.
- E. Collateral Parties.
- F. Wills.
- G. Motions.

IV. Costs in Equity.

- A. In General.
- B. Injunctions.
- C. Fiduciaries.

D. Divorce Suits.

E. Bills.

F. Decrees.

G. Parties to the Suit.

V. Costs in Appellate Court.

A. In General.

B. Parties.

VI. Security for Costs.

VII. Taxation of Costs.

VIII. Payment and Collection of Costs.

IX. Costs in Criminal Cases. (See monographic note on "Fines and Costs in Criminal Cases.")

I. IN GENERAL.

Nature.—The general principle is, that costs are considered as an appendage to the judgment, rather than a part of the judgment itself; that they are considered, in some sense, as damages, and are always entered, in effect, "as an increase of damages by the court." *M'Rea v. Brown*, 2 Munf. 46.

How Laws of Costs Are Interpreted.—It is expressly provided by statute, Va. Code 1887, § 3547, that the laws of costs shall not be interpreted as penal laws.

General Statutory Rule as to Recovery of Costs on Final Judgment, in Action or on Motion.—Except where it is otherwise provided, the party for whom final judgment is given in any action, or in a motion for judgment for money, whether he be plaintiff or defendant, shall recover his costs against the opposite party; and when the action is against two or more, and there is a judgment for, or discontinuance as to some, but not all of the defendants, unless the court enter of record that there was reasonable cause for making defendants, those for whom there is such judgment, or as to whom there is such discontinuance (and order otherwise), they shall recover their costs. Va. Code 1887, § 3545; *Middleton v. Johns*, 4 Gratt. 129.

II. POWER TO AWARD COSTS.

General Rule.—The general rule is that costs lie within the discretion of a court of equity, and are properly awarded to the party prevailing. This general rule has statutory sanction, Va. Code 1887, § 3547, providing that nothing in ch. 173, Va. Code 1887, a chapter treating costs generally, shall be construed as affecting the discretion of a court of equity over the subject of costs, except a provision that in every case the party substantially prevailing in an appellate court shall recover costs. *Adkins v. Edwards*, 83 Va. 300, 2 S. E. Rep. 485.

Court's Discretion—When Dependent on Amount in Controversy.—Judgment should be for defendant in a personal action on contract, when less is found due than \$20, exclusive of interest, unless the court enter of record that the matter in controversy was of greater value than twenty dollars, exclusive of interest, in which case it may give judgment for the plaintiff for what is ascertained to be due him, with or without costs, as to it may seem right. Va. Code 1887, § 3544; *Maitland v. M'Dearman*, 1 Va. Cas. 131; *Neff v. Talbot*, 1 Va. Cas. 139; *Pendred v. Pendred*, 2 Va. Cas. 93; *Larowe v. Binns*, 2 Va. Cas. 203; *Ferguson v. Highley*, 2 Va. Cas. 255.

Attorney's Fees—When Court Cannot Include in Costs.—The law taxes the defendant with certain costs for attorney and counsel fees, and the courts cannot, directly or indirectly, impose upon him fees to the plaintiff's counsel beyond what is thus provided by law. *Stovall v. Hardy*, special court of appeals of Virginia, reported in Virginia Law Jour-

nal for 1879, p. 100; *Gurnee v. Bausemer*, 80 Va. 807; *Citizens' Nat. Bank v. Manoni*, 76 Va. 802.

Costs Unascertained When Award Made—Validity.

An award that the defendant shall pay the costs of the suit, is good, without ascertaining the amount of the costs. *Macon v. Crump*, 1 Call 575.

Declaration or Bill Amended after Defendant Appears

—Power to Award Costs.—The plaintiff may of right amend his declaration or bill at any time before the appearance of the defendant, or after such appearance if substantial justice will be promoted thereby. But if such amendment be made after the appearance of the defendant, the court may impose such terms upon the plaintiff as to a continuance of the cause, and the payment of the costs of such continuance, as it may deem just. The plaintiff may also at any time before or after the appearance of the defendant, in the vacation of the court wherein the suit is pending, file in the clerk's office, with the other papers in the cause, an amended declaration or bill, supplemental bill, or bill of revivor; whereupon the clerk shall issue a summons against the defendant, requiring him to plead to, or answer such amended declaration or bill. But if the court shall be of opinion that the same was improperly filed, it shall dismiss such declarations or bill at the costs of the plaintiff. *W. Va. Code 1899, ch. 125, § 12*; *Baylor v. B. & O. R. R. Co.*, 9 W. Va. 270; *Henry v. Davis*, 13 W. Va. 230; *Harrison v. Loneberger*, 11 W. Va. 175; *Norris v. Lemen*, 28 W. Va. 336; *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526; *Hinton v. Ellis*, 27 W. Va. 422.

Defendant Relinquishes Rights—Court Cannot Award Costs on Confirmation.—Where a defendant, a short time before the institution of a suit against him, has relinquished all right to and interest in the subject-matter of controversy, and subsequently, before the hearing, has his relinquishment put upon record, he cannot complain that the circuit court, without awarding any costs against him, has entered a decree in favor of the plaintiff, and confirming the relinquishment of the defendant. *Workman v. Doran*, 34 W. Va. 604, 12 S. E. Rep. 770.

Order of Reference to Arbitrators in Pending Suit—Costs.—Where the court makes a reference, in a suit pending, to arbitrators, the court may give costs, although the award by the arbitrators does not mention them. *Coupland v. Anderson*, 2 Call 106.

Opening of Road—Costs of Inquest.—It is proper that the county court should direct that the damages assessed by the jury to the owner of the land through which the road is opened, and the costs of the inquest, should be provided for and paid out of the county levy. But it is error to direct all the costs of the applicant for the road to be thus provided for and paid. His costs, except the costs of the inquest, should be recovered against the contestant. *White v. Coleman*, 6 Gratt. 138.

Contested Elections—No Authority to Award Costs.

—In cases of contested elections before the county court, under § 160, Va. Code 1887, the county court has no authority to give a judgment for costs to either party. *West v. Ferguson*, 16 Gratt. 270. And if in such a case the county court does give a judgment for costs to either party, a writ of prohibition from the circuit court is a proper proceeding to arrest the judgment. *West v. Ferguson*, 16 Gratt. 270.

Attachment Proceedings—Cannot Include Interest in Costs.—If an attachment demands only a specified sum and costs, not including interest, the court

cannot give judgment for interest. *George v. Blue*, 8 Call 455.

Interest on Costs.—An act passed January 20, 1804, entitled "An act concerning the proceedings in courts of chancery, and for other purposes," did not authorize a judgment for interest upon the costs of a suit. *M'Rea v. Brown*, 2 Munf. 46.

III. RIGHTS TO AND LIABILITY FOR COSTS.

A. In General.

Final Determination of Cause—Who Liable for Costs.

—Upon the final determination of a cause, the decree for costs must follow the recovery, and go to the party substantially prevailing. *Allen v. Shriver*, 81 Va. 174; *Bryan v. Salyards*, 3 Gratt. 188; *Ashby v. Smith*, 1 Rob. 55.

Suit Brought in Wrong Name—Apportionment of Costs.—But where a suit is brought against the president and directors of a branch bank, it is such error as to bar recovery, but the defendants cannot have judgment for costs. They can no more have judgment against the plaintiff, than he can have judgment against them. *Mason v. Far. Bank*, 12 Leigh 84.

Record Contains Unnecessary Matter—Who Liable for Costs.—If a party have an account taken as to a subject, before decided by the court, in the same cause, so much of the report will be at his own cost. *Corbin v. Beverley*, 4 H. & M. 448.

B. Plaintiffs and Defendants.

1. Plaintiffs.

Action of Unlawful Detainer—Right to Costs.—If the verdict of the jury, or the finding of the justice, when a case of unlawful detainer is tried without a jury, be that the defendant unlawfully withholds the premises in controversy, or any part thereof, from the plaintiff, judgment shall be for the plaintiff that he do recover possession, and his costs. *W. Va. Code 1899, § 215, ch. 50*; *Mann v. Bryant*, 12 W. Va. 516; *Lawson v. Dalton*, 18 W. Va. 766.

Fraud on Jurisdiction—Liability for Costs.—If a plaintiff, in order to give jurisdiction to the court, in a case where defendants live in another county, unites in the action, a party whom he knows is not a party to the contract, the court will on motion dismiss the suit with costs. *Bush v. Campbell*, 26 Gratt. 403.

Effect on Liability When Payments Are Made after Suit Brought.—Evidence may be given of payments made after suit brought at any time before trial; but not so as to deprive the plaintiff of costs if the payments were made after suit brought. *Hudson v. Johnson*, 1 Wash. 10.

2. Defendants.

Disclaimer by Record—Real Action—Right to Costs.

—Where a defendant is permitted to abandon the controversy in a real action by a simple entry of disclaimer on the record book, after the plea of not guilty has been put in, no judgment for costs subsequently incurred should be given against him. *Fisher v. Camp*, 26 W. Va. 576.

Offer to Confess Judgment—Right to Costs on Refusal.—There is a statutory provision in West Virginia to the effect that a defendant may before trial make an offer to the plaintiff in writing, to confess judgment for property or a sum specified in such offer. If the plaintiff does not accept the offer, or give notice to defendant of his acceptance, and at the trial does not recover a more favorable judgment, the justice, in whose court this provision applies, shall adjudge the plaintiff to pay all costs of the action from the time of the offer. See statute for Proceedings, *W. Va. Code 1899, ch. 50, § 118*; *White v.*

Emblem, 43 W. Va. 819, 28 S. E. Rep. 761; Newlon v. Wade, 43 W. Va. 283, 27 S. E. Rep. 244.

Entry by Defendant after One Suit Had—Liability for Costs Already Incurred.—A general judgment for costs against two defendants in ejectment is proper, though one of them did not enter himself a defendant until there had been one trial of the cause, and a large portion of the costs had been incurred. Middleton v. Johns, 4 Gratt. 129.

Defence—Alternative Judgment—Costs.—If in defence, a jury find for the plaintiff, the chattel, if to be had, or in lieu thereof a certain sum, the value of the chattel, and specified damages, it is not error for the court to render judgment for the chattel, if to be had, and if not, the price found by the jury, with the damages and costs, even though no price or value had been laid in the declaration. Bates v. Gordon, 3 Call 555.

Interpleader—When Party, at Whose Instance Filed, Liable for Costs.—Where a bill of interpleader was filed by a certain party against two others, in order that it might be litigated and determined between them which is entitled to a sum of money in his hands, and the bill is filed in consequence of a demand for the money made on him by one of the parties to the litigation, and the court determines that the other party, at whose instance the bill was not filed, is entitled to the money in question, it is proper for the court to decree that the latter have his costs of the suit paid him by the one at whose instance the interpleader was filed. Beers v. Spooner, 9 Leigh 153.

2. Apportionment.

When Each Liable for His Own Costs.—Where the plaintiff and defendant each set up pretensions greater than they sustain, though each succeed in part, each may be decreed to pay his own costs. Beverley v. Brooke, 4 Gratt. 187.

Two Defendants—Plaintiff and One Defendant Prevail—Rights.—Where the suit of a plaintiff is against two defendants, and the plaintiff and one defendant substantially prevail against the other defendant, the latter will be decreed to pay the costs. McNiel v. Baird, 6 Munf. 316.

C. Nominal Party to Suit.

Person for Whose Benefit Suit Brought Liable for Costs.—When a suit is in the name of one person for the benefit of any other, if there be judgment for the defendant's costs, it shall be against such other person for whose benefit the suit was brought. Va. Code 1887, § 3546; Pates v. St. Clair, 11 Gratt. 22; Hale v. Morgan, special term of court of appeals, 1878, reported in Va. Law J. 1879, p. 52.

Same—Name Need Not Appear on Record.—Whether the fact be endorsed upon the declaration or writ, or not, if the fact appears of record, the party for whose use the suit is, though brought in another name, is liable for the costs of the suit. Hayes v. Mut. Prot. Asso., 76 Va. 225; Johnston v. Mann, 21 W. Va. 15.

Same—Ejectment—Landlord Liable for Costs.—A landlord, who is entitled to be substituted in the place of or joined with the defendant in ejectment, and without causing himself to be made a party, defends such action unsuccessfully in the name of the original defendant, will be ordered to pay the costs of the plaintiff, after execution against the defendant, on the record, has been returned unsatisfied. Johnston v. Mann, 21 W. Va. 15.

Same—Wife's Separate Estate—Husband Joined.—In a suit by or against a wife regarding her separate estate, if the husband is joined only for conformity,

he is not bound to pay the costs. Nicholas v. Austin, 82 Va. 817, 1 S. E. Rep. 183; Hayes v. Mut. Prot. Asso., 76 Va. 225; Farley v. Tillar, 81 Va. 275.

D. Vendor and Vendee.

Vendor—Bill for Specific Performance—Liability for Costs.—Where a party is not bound to take the title to property until the existence and validity of a certain conveyance has been judicially ascertained, the burden of establishing these facts devolving on the vendor, the vendor is liable for the costs of a suit brought to enforce specifically a contract to pay for the property when a lawful title is conveyed. Wade v. Greenwood, 2 Rob. 474.

Vendee—Sale of Lands—Vendor's Covenants Broken—Costs.—Land was sold and conveyed, and a bond given by the vendors with condition to perfect the title. Subsequently a bill was filed by the vendors to subject the land to sale for payment of the purchase money, and the vendee answered, and objected that title has not been perfected. The cause lingered for some years, partly by fault of vendee. Subsequent events made a sale proper, although a sale was improper at the time of the institution of the suit. *Held*, that as the vendee was not in default when the suit was commenced, he is entitled to have a decree for his costs. Peers v. Barnett, 12 Gratt. 410.

Same—Vendee Defends Title—Set-Off—Costs.—Where a vendee purchases land on credit, takes possession, and a deed is made to him, with covenants by vendor to sell and convey a perfect title, and vendee subsequently defends a claim by a third party to the land, the litigation extending over many years, and resulting in a confirmation of the vendee's title, the vendee is not entitled to have his costs of defending such suit set off against the interest due on the purchase money. The vendor's covenants are complied with on confirmation of the title. Selden v. James, 6 Rand. 465.

Same—False Claim of Title to Land—Liability for Costs.—See *post*, "Costs in Equity." Tracy v. Tracy, 14 W. Va. 243.

Same—Omission to Give Vendor Notice of Suit by Claimant—Costs.—The omission by the purchaser of goods to give notice to his vendor of a suit pending, brought against the purchaser by the real owner of the goods, will prevent a recovery by the purchaser of costs of that suit, in a subsequent action against his vendor. Byrnside v. Burdett, 15 W. Va. 702.

E. Collateral Parties.

Sheriff—Recovery of Costs against Deputy.—A sheriff, against whom a judgment is rendered for the default or misconduct of his deputy, is entitled to recover of such deputy, not only the amount of the original judgment, but all additions arising thereto from coroner's commissions, included in a forthcoming bond, costs of a judgment on that bond, costs and damages on appeals, or arrest of *supersedeas*, until its final affirmance by the court of appeals. But a judgment against the deputy, in the sheriff's favor, if rendered for more damages than have been recovered against the sheriff, ought to be reversed with costs. Stowers v. Smith, 5 Munf. 401.

Surety—Several Motions for Several Debts—Costs on Each.—A surety having paid several sums of money for his principal, may maintain several motions, and recover several judgments, for the debts, and for the costs of each motion. Ayres v. Lewellin, 3 Leigh 609.

Same—Forthcoming Bond—Recovery of Costs against Principal in Original Bond.—A surety in a forthcoming bond, is not entitled to a decree for the costs of

awarding the execution on the forthcoming bond, either against the principal in an original bond, or his sureties, but only against the principal in the forthcoming bond. This principle was laid down upon the following facts: The principal of a bond became insolvent. Judgment was obtained against one of several sureties, and execution levied on his property. This surety then executed a forthcoming bond, having as his surety upon the latter bond one of the sureties upon the original bond, against whom no judgment had been obtained. The bond was forfeited, and the surety in the forthcoming bond paid it, with interest, costs, etc. *Preston v. Preston*, 4 Gratt. 88.

Guardian Ad Litem—Liability for Costs.—A court may compel a person so appointed, to act as guardian *ad litem*, but he shall not be liable for costs of the suit. See Va. Code 1887, § 3255.

Prochein Ami—Liability for Costs.—The general doctrine is that the *prochein ami* is liable to pay the costs of the suit. *Burwell v. Corbin*, 1 Rand. 181.

Poor Person's Liability for Costs.—Poor persons are allowed services from counsel and officers without fees or costs. Va. Code 1887, § 3538.

Persons Named in Plea of Abatement Not Liable—Costs.—As to recovery of costs by persons who are named in a plea of abatement, and are found not liable, see Va. Code 1887, § 3263.

F. Wills.

When Estate Liable for Costs.—Where a testatrix bequeathed certain property to her daughter for life, for her separate use, remainder to daughter's children and descendants, and appointed a trustee, to whom her executor was to deliver the property, and directed that any receipts given by the daughter to the trustee, for either principal or interest, should be a full discharge to him, a decree of the lower court sustaining legatee's claim of principal as against the trustee was affirmed by the court of appeals, with costs to be paid out of the estate. *Brown v. George*, 6 Gratt. 424.

Same—Probate.—Where a paper purporting to be a will is offered for probate by the nominated executor, and its probate is opposed by some of the next of kin, the costs should be paid out of the estate. *Roy v. Roy*, 16 Gratt. 418.

G. Motions.

Judgment—Clerical Error—Injured Person's Right to Costs.—The clerk of the court having made an error in entering a judgment, which error is merely clerical, and amendable upon motion, at a subsequent term, the injured party may, if he pleases, proceed by writ of error *coram nobis*, although, in such proceeding, he is not entitled to costs. *Gordon v. Frasier*, 2 Wash. 130.

Same—Motion to Correct or Reverse—Costs.—As to the recovery of costs on motion to reverse or correct a judgment, see Va. Code 1887, § 3451; *Erwin v. Vint*, 6 Munf. 267; *Davis v. Com.*, 16 Gratt. 134; *Richardson v. Jones*, 12 Gratt. 53.

Same—Variance from Amount Confessed—Costs on Quashing.—Where a judgment has been confessed for a certain sum, interest and costs, subject however to certain credits, and an execution issues thereon without endorsing the credits, the judgment debtors, after levy, giving notice to the judgment creditor that they would move to quash for variance, and the credits are endorsed after notice given of motion to quash, the judgment debtors are entitled to the costs of their motion. *Williamson v. Ong*, 1 W. Va. 84.

Motion to Quash—Execution—Variance—Costs.—The fact that a decree for a specific sum against one person assesses the costs against such person and another jointly, does not warrant a joint execution against the two for the specific sum and the costs, there being no privity as to the specific sum. And on motion such execution will be quashed. *Taney v. Woodmansee*, 23 W. Va. 709.

Same—Amount in Controversy—Appeal.—An appeal will lie to a decree overruling a motion to quash an execution, although the amount in controversy was composed wholly of costs, decreed against defendant. *Taney v. Woodmansee*, 23 W. Va. 709.

IV. COSTS IN EQUITY.

A. In General.—Va. Code 1887, § 3547, expressly provides that the law of costs shall not be interpreted as a penal law, nor shall anything in ch. 173, Va. Code 1887 take away or abridge the discretion of a court of equity over the subject of costs, except § 3548, Va. Code 1887, which provides that in every case in an appellate court costs shall be recovered by the party substantially prevailing.

It is considered, however, as the exercise of a sound discretion to forbid the imposition of costs, on a party nowise in the wrong, and the very fact that an appeal will not lie from the court of chancery merely on the ground that the appellant has been improperly decreed to pay costs, renders the lower courts all the more careful in the exercise of the discretion given them on this subject, and in cases of doubt or great novelty the court will refuse to award costs to either party against the other, and not unfrequently the result is that each party is decreed to pay his own costs. *Barton's Ch. Pr.* (2d Ed.) 875; *Farmers' Bank v. Reynolds*, 4 Rand. 188; *Pennington v. Hanby*, 4 Munf. 144; *Ashby v. Kiger*, 3 Rand. 165; *Jones v. Mason*, 5 Rand. 577; *Adkins v. Edwards*, 83 Va. 300, 2 S. E. Rep. 435; *Beverley v. Brooke*, 4 Gratt. 187; *Zane v. Zane*, 6 Munf. 417; *Tabb v. Boyd*, 4 Call 461; *Jackson v. Cutright*, 5 Munf. 331; *Lewis v. Thornton*, 6 Munf. 98; *Magarity v. Shipman*, 82 Va. 784, 1 S. E. Rep. 109; *Turner v. Turner*, 3 Munf. 66.

B. Injunctions.

Perpetuation as to Any Part—General Rule as to Costs.—As a general rule, if an injunction be perpetuated at the hearing as to any part of the sum enjoined, the complainant will recover his costs; but this is not always the case, as it is a matter resting in the sound discretion of the court under all of the circumstances. *Degraffenreid v. Donald*, 2 H. & M. 10; *Ross v. Gordon*, 2 Munf. 289. See, in this connection, *Tuley v. Barton*, 79 Va. 387.

Same—Effect of Error in Decreeing Costs.—Where an injunction is perpetuated in part, the complainant ought, in general, not to be decreed to pay costs. And the error of awarding costs in such case is sufficient, upon the complainant's appeal, to reverse the decree, though right in every other respect. *Ross v. Gordon*, 2 Munf. 289.

Judgment Perpetuated in Part—Residue Dissolved—Costs.—Where an injunction to a judgment at law is perpetuated as to part, being the amount of just discounts claimed by the plaintiff in equity, of which he might avail himself at law if he had made defence, and is dissolved as to the residue, the chancellor decreeing that the plaintiff in equity shall pay the defendant there, his costs, such decree for costs is right. *Donally v. Ginatt*, 5 Leigh 359.

Error in Perpetuating in Part—Award of Costs.—When a decree, by which an injunction is made

perpetual *in part* is considered erroneous (*to the injury of the appellee*), in not having made it perpetual *in toto*, the court of appeals will affirm so much as allows him *his costs*, in the court of chancery; and, reversing the residue, and making such decree as that court should have made, will also allow him his costs in the appellate court. *Defarges v. Lipscomb*, 2 Munf. 451.

Decree Dissolves Injunction after Full Hearing—Bill Dismissed on Appeal—Costs.—In all cases where a bill is merely for an injunction, and there is but a single defendant, if there is a decree dissolving the injunction, and that decree is made not on a mere motion to dissolve, but after the cause has been set down for a full and regular hearing, the case is not then to be retained for any further proceedings, but the bill will thereupon be dismissed with costs. *Rowton v. Rowton*, 1 H. & M. 110; *Byrne v. Lyle*, 1 H. & M. 7.

Judgment for Purchase Money Enjoined—Allowance of Costs.—If a plaintiff properly comes into a court of equity to enjoin a judgment on account of defects in the title of the land for the purchase of which the debt was contracted, he is entitled, upon the removal of the objections to have his costs. If, however, he has another case pending where the same questions are involved, and where he could have had the relief asked for, by a proceeding in that case, he will not be allowed his costs. *Young v. McClung*, 9 Gratt. 836.

A purchaser coming into equity to enjoin a judgment for the purchase money of land, though the title is afterwards perfected, is entitled to his costs. *Reeves v. Dickey*, 10 Gratt. 138.

Joint Devisees Improperly Restrained—Recovery of Costs.—Where a joint devisee has, at the instance of a tenant claiming under the other devisees, been improperly restrained by injunction from entering upon land, a court of equity, on motion, will dissolve the injunction and dismiss the bill, and decree costs against the tenant. *Baldwin v. Darst*, 8 Gratt. 182.

Heir and Executor—Form of Decree for Costs.—On dismissing a bill filed by the heir and the executor of vendee, to have a title made for the land purchased, and meanwhile to enjoin vendor from collecting the purchase money, the decree for costs should not be against the plaintiffs jointly, nor against the executor *de bonis propriis*. *Long v. Israel*, 9 Leigh 556.

C. Fiduciaries.

Trustees—Suits Relating to Trust Funds—General Rule as to Costs.—In the case of suits between the *cestui que trust* and the trustees in relation to the trust fund, the general rule that guides, rather than governs, a court of equity is, that the trustees shall have their costs either out of the trust fund, or from the *cestui que trust* personally, who may be found to be in fault, and this rule applies whether the trustees be plaintiffs or defendants. *Darby v. Gilligan*, 37 W. Va. 59, 16 S. E. Rep. 507.

Same—Equity Discretion in Awarding Costs.—In suits by and against trustees, a court of equity has wide discretion in awarding costs. *Darby v. Gilligan*, 37 W. Va. 59, 16 S. E. Rep. 507.

Same—Personal Liability.—A defendant trustee resisting the plaintiff's claim, and failing in his defense, is liable personally for costs. *Beverley v. Brooke*, 4 Gratt. 187.

A trustee defendant, resisting the plaintiff's claim, and failing in his defense, will not be permitted to charge against the fund, money expended in attorney's fees, unless it appears that such de-

fense was reasonable and proper. *Darby v. Gilligan*, 37 W. Va. 59, 16 S. E. Rep. 507.

Personal Representatives—Statutory Rule as to Personal Liability.—As to when a judgment or decree for the costs of any proceedings shall be rendered against the representative personally, see Va. Code 1887, § 2877.

Executors—When Judgment for Costs against Executor.—If a declaration lay the assumpsit to the executor, instead of the testator, and the judgment be against him, he must pay costs. *Thornton v. Jett*, 1 Wash. 188; *Carr v. Anderson*, 2 H. & M. 361. The judgment, however, in both of these cases, for the costs, was against the executor, to be levied on the unadministered goods of the testator, in the executor's hands, if there were any, and if not, then on his own proper goods and chattels.

Executors—Probate of Will—Liability for Costs.—If a person named executor in a paper purporting to be a will, offers it for probate in the district court, and it is there established, but the judgment is reversed by the court of appeals, the executor does not pay the costs in the district court. *Spencer v. Moore*, 4 Call 423.

Administrator—When Entitled to Recover Costs.—Where a suit is instituted against an administrator shortly after his qualification, for distribution, when he has received no assets of the estate, and during the progress of the cause he receives assets for which the plaintiff is entitled, the administrator is entitled to a decree against the plaintiff for costs, as the administrator has been in no default. *Eldson v. Fontaine*, 9 Gratt. 286.

Administrator—When Not Debited with Costs of Litigation.—When administrators, after many years of litigation, conducted chiefly at their own expense, recover a large sum of money and costs, they should not be debited with the amount of the costs so recovered. *Robertson v. Gillenwaters*, 85 Va. 116, 7 S. E. Rep. 871.

Administrator—Pleas—When Judgment on Same Entitles Him to Costs, and When Not.—When a defendant administrator pleads "*non assumpsit*," and "*fully administered*," and the first is found for the plaintiff, and the second for the defendant, the judgment ought to be for the plaintiff for the debt and costs, *quando acciderint*, and the defendant ought to have a judgment for the separate costs of the second issue. If the plaintiff has replied to the plea of "*fully administered*," and afterwards withdraws his replication by consent of the court, the defendant may at that time object to it, unless on the terms of the plaintiff's paying the costs occasioned by that replication. If he neglects to do so, it will be construed into an admission that he is not entitled to recover any, and there will be no judgment at any future term for his separate costs, if the first issue on the plea of "*non assumpsit*" is found against him. But if a defendant administrator pleads both pleas, and the plaintiff declines replying to the plea of "*fully administered*," or having replied to it, withdraws it without subjecting the defendant to costs by doing so; and the first issue is then found for the plaintiff, he ought to have a judgment for his debt and costs, *quando*, etc., and the defendant is not entitled to any costs. And when an administrator defendant pleads the single plea of "*fully administered*," and the issue is found for him, the plaintiff ought to have judgment for debt, and costs, *quando acciderint*; and the defendant ought to have a judgment against the

plaintiff for the general costs of the action. *Timberlake v. Benson*, 2 Va. Cas. 348.

D. Divorce Suits.

Allowance of Costs—General Rule.—In divorce suits costs may be awarded to either party, as equity and justice may require. W. Va. Code 1899, ch. 64, §8; *Hitchcox v. Hitchcox*, 2 W. Va. 435.

Husband Sues—When Liable for Costs.—It is proper for a decree in favor of a husband, granting a divorce *a mensa et thoro* from the wife, to provide that he shall pay the costs of the suit, where he had been rude and dictatorial in his speech, unkind and negligent in his treatment, and there is no other act of misconduct upon her part than desertion not upon legal grounds. *Carr v. Carr*, 22 Gratt. 168.

E. Bills.

Creditors' Bills—General Rule as to Liability for Costs.—As a general rule, when one creditor, suing for himself and others, who may come in and contribute to the expenses of the suit, institutes proceedings for their common benefit, those who derive a benefit shall bear their proportion of the expense and not throw the whole burden on one. But it only applies to those creditors who derive a benefit from the services of counsel in a cause in which they are not specially represented by counsel. If a creditor has his counsel in the cause he cannot be required to contribute to the compensation of others. And this contribution must come from the creditors, as the debtor cannot be charged with it. *Stovall v. Hardy*, special court of appeals of Virginia, reported in Va. Law Journal, 1879, p. 109; *Citizens' Nat. Bank v. Manoni*, 76 Va. 802; *Gurnee v. Bausemer*, 80 Va. 807.

Same—Separate Suit—Liability for Costs.—A creditor, who with knowledge that there has been a decree for an account in another creditor's suit, brings a separate suit for his own claim, will be compelled to pay the costs. *Stephenson v. Taverners*, 9 Gratt. 398; *Kent v. Cloyd*, 30 Gratt. 555; *Laidley v. Kline*, 23 W. Va. 555; *Bilmyer v. Sherman*, 23 W. Va. 656.

Same—When Costs Not Allowed.—Where two creditors by several judgments file separate bills in chancery, impeaching a conveyance of land by a debtor, as fraudulent, and the chancellor, on the motion of the plaintiffs, consolidates the causes, but the final decree dismisses the bills respectively, and the plaintiffs respectively appeal, if the amount in controversy in one of the suits is insufficient to give the court jurisdiction, the appeal in that suit will be dismissed, but without costs. *Clalborne v. Gross*, 7 Leigh 331.

Same—Right to Separate Costs.—Where several creditors have several claims against the same debtor, each plaintiff is entitled to a decree for his separate costs, though the causes were heard together. *Barger v. Buckland*, 28 Gratt. 850; *Umbarger v. Watts*, 25 Gratt. 167.

Mortgagor's Bill—Liability for Costs.—On a mortgagor's bill for an account of profits, and a conveyance of the mortgaged premises, if he still be indebted on the mortgage, his equity of redemption should be allowed him, but the costs of the suit should be decreed against him. *Turner v. Turner*, 3 Munf. 66.

Bill for Discovery—Facts Known to Party—Costs.—Where a party files a bill in equity for the discovery of certain facts, and the evidence shows that he knew the facts at the time, or had the means of knowing them, and such call for discovery is the only ground of equity jurisdiction, the bill should

be dismissed, with costs. *Hale v. Clarkson*, 23 Gratt. 42.

Bill for Sale of Infant's Lands—Costs.—A court of equity has no power to decree a sale of infant's lands for the payment of debts incurred for necessities, and upon a bill to subject an infant's real estate for such debts, the bill will be dismissed with costs to appellant. *Gayle v. Hayes*, 79 Va. 542.

F. Decrees.

Affirmance of Decree—When Award of Damages Improper.—Damages ought not to be given upon the affirmance of a decree dismissing a bill with costs, when such decree is not rendered "for any sum of money or quantity of an article," except costs. *Williamson v. Bowie*, 6 Munf. 176.

Interlocutory Decree—Non-Allowance of Costs.—No complaint can be made even by the party substantially prevailing, against non-allowance of costs upon an interlocutory decree, as upon final decree the question of costs can be properly adjusted. *Yost v. Porter*, 80 Va. 855.

And it is not error for a decree, not final, though adjudicating the principles of a cause, to reserve the question of costs for future adjudication, and to refuse costs to the party prevailing. *Cooper v. Daugherty*, 85 Va. 343, 7 S. E. Rep. 387.

Final Decree—Who Liable for Costs.—Upon the final determination of a cause, the decree for costs must follow the recovery, and go to the party who substantially prevails. *Allen v. Shriver*, 81 Va. 174.

G. Parties to the Suit.

1. Plaintiff.

Court Erroneously Directs Persons to Be Made Parties—Costs.—A court of chancery ought not to give costs against complainants to a suit, when parties have been brought erroneously into the suit, by the direction of the court. *Lewis v. Thornton*, 6 Munf. 87.

Remedy at Law Complete—Accident Prevents Defense—Costs in Equity.—A complainant whose remedy was complete at common law, but who by accident was prevented from making defense there, may be relieved against the judgment, but ought to pay the costs in chancery. *Degraffenreid v. Donald*, 2 H. & M. 10; *Mosby v. Haskins*, 4 H. & M. 427.

Motion to Amend—Special Demurrer—Costs.—After a special demurrer to a bill, the plaintiff may have leave to amend, on payment of costs. *Rose v. King*, 4 H. & M. 475.

Unjust Discounts against Judgment—Award of Costs.—If a party resort to equity to obtain discount against a judgment at law, to which he is not justly entitled, but which his creditors were willing to allow him, the costs should be decreed against him. *Tapp v. Beverley*, 1 Leigh 80.

2. Defendant.

Bill for Relief against Judgment—Costs.—On a bill to be relieved against a judgment at law, if the relief is granted in part only, the defendant is entitled to his costs at law, and must pay the costs in equity. *Thompson v. Davenport*, 1 Wash. 126; *Pugh v. Jones*, 6 Leigh 299.

Answer—Impertinent Matter—Award of Costs.—If an answer contain impertinent or scandalous matter, it will be referred to a commissioner to expugn such matter, at the costs of the party filing the answer. *Mason v. Mason*, 4 H. & M. 414.

Motion—When Payment of Costs a Condition Precedent.—A defendant, after an order for an account may move to set it aside and file his answer, on paying the costs which have accrued before the commissioner. *Lindsay v. Campbell*, 4 H. & M. 505.

Purchasers—False Claim of Title—Liability for Costs.—Where a court is satisfied, and so declares by its decree, that certain parties "have no title or color of title" to certain tracts of land, the land not being embraced in a trust deed under which they purchased,—such parties having litigated their pretensions in that respect by their answers to the plaintiff's bill, the court should decree costs against them. *Tracy v. Tracy*, 14 W. Va. 243.

Heirs of Vendor—Conveyance—Liability for Costs.—The heirs of a vendor, retaining the legal title to the land, ought not to be decreed to make a conveyance with general, but with special, warranty; neither ought they to be compelled to pay costs. *Pennington v. Hanby*, 4 Munf. 140.

3. Plaintiff and Defendant.

When Each Liable for His Own Costs.—Where the plaintiff and defendant set up pretensions greater than they sustain, though each succeed in part, each may be decreed to pay his own costs. *Beverley v. Brooke*, 4 Gratt. 187.

Successive Liability for Costs.—A bill against two defendants being dismissed as to one, and the costs decreed to be paid to him by the plaintiff, were also decreed to be paid by the other defendant to the plaintiff. *Spencer v. Ford*, 1 Rob. 648.

V. COSTS IN APPELLATE COURT.

A. In General.

1. Court of Appeals—General Rule as to Costs.—The court of appeals has no discretion as to the costs of an appeal: but must allow them to the party substantially prevailing. Va. Code 1887, § 3548; W. Va. Code 1899, ch. 138, § 11; *Cocke v. Pollok*, 1 H. & M. 499; *Ferguson v. Millender*, 32 W. Va. 30, 9 S. E. Rep. 38; *Darby v. Gilligan*, 37 W. Va. 59, 16 S. E. Rep. 307.

The party substantially prevailing in the court of appeals is entitled to costs, although in form, the decision be adverse to him. *Ellzey v. Lane*, 3 H. & M. 539.

Decree Affirmed—General Rule as Respecting Costs.—Except in case of palpable error, the court of appeals upon affirming a decree on its merits, will not reverse it with respect to the costs. *Wimbish v. Blanks*, 76 Va. 365.

Jurisdiction When Only a Matter of Costs Involved.—If the appeal involves only a matter of costs, even though the amount of the costs be not less than five hundred dollars, the court of appeals will not take jurisdiction. See Va. Code 1887, § 3455; *Ashby v. Kiger*, 3 Rand. 165; *Neal v. Com.*, 31 Gratt. 511; *Cooke v. Piles*, 3 Munf. 151.

Error in Costs Only—Case Not Reversed.—An appellate court never reverses a case for error only, in the judgment, as to the costs. *Franklin v. Geho*, 30 W. Va. 27, 3 S. E. Rep. 168. And if no other error is found in a decree, it will not be reversed because the court might have erred in decreeing costs. *Pritchard v. Evans*, 31 W. Va. 137, 5 S. E. Rep. 461.

Improper Decree for Costs—No Appeal.—An appeal cannot be taken from a chancery court on the ground that the appellant has been improperly decreed to pay costs. *Ashby v. Kiger*, 3 Rand. 165.

Costs Are No Ground for Jurisdiction.—Whether a decree for costs in the court below be correct or not, cannot be looked into in the appellate court, when the appeal cannot be supported on any other ground. *Hoggess v. Robinson*, 5 W. Va. 402.

Controversy Settled Pending Appeal—Costs.—As a general rule, if the matter in controversy in the

suit be settled, pending an appeal or writ of error, a court will simply dismiss the appeal or writ of error without deciding the merits merely to determine as to the costs, and will therefore not pass on the costs. *Ferguson v. Millender*, 32 W. Va. 30, 9 S. E. Rep. 38.

In Mill Cases.—On an appeal in a mill case, the party prevailing ought to be allowed, in the bill of costs, the mileage and attendance of his witnesses summoned to the court of error. *Eppes v. Cralle*, 1 Munf. 258.

Damages on Costs.—Where the appellate court reverses the judgment as to costs, the successful party is not entitled to damages on the costs. *Hudson v. Johnson*, 1 Wash. 10.

2. County Court—Jurisdiction—Amount in Controversy—Costs.—No appeal lies to the county court from a judgment of a justice of the peace for the sum of \$10 and costs, as costs are no part of the matter in controversy. *N. & W. Ry. Co. v. Clark*, 92 Va. 118, 22 S. E. Rep. 867.

Same—Will—Admission as a Party after Appeal—Costs.—In a contest relative to a will, a person who was not a party in the county court may, by becoming interested after an appeal to a higher court (district court) be admitted a party there, and carry up the cause to the court of appeals; but, on reversing the judgment of the court below (district court), and affirming that of the county court, such party can only recover the costs in the lower court (district court). *Cogbill v. Cogbill*, 2 H. & M. 467.

B. Appellant and Appellee.

1. Appellant.

Judgment Appealed from Partially Favorable—Reversed.—If the judgment below be in part favorable to the appellant and it is reversed as to that part on appeal, the appellant shall pay the costs of the appeal. *Pendleton v. Vandevier*, 1 Wash. 381.

Writ of Error—Judgment Affirmed—Costs.—Where upon an appeal from a judgment against a married woman as a sole trader, to the circuit court, in which court the judgment of the lower court is affirmed, the husband and wife join, and go to the court of appeals by writ of error, and the judgment of the circuit court is affirmed, the plaintiffs in error will have to pay the costs. *Farley v. Tillar*, 81 Va. 275 (1886).

Vendee Appellant—Decree for Resale—Appeal.—Where a purchaser has resisted a decree for a resale of land, and taken an appeal from a former decree in the cause, it is proper to subject him to the payment of the costs of the proceedings under the rule. *Jones v. Tatum*, 19 Gratt. 720.

Record—Immaterial Matter—Costs.—If an appellant has copied into the record portions of the record in the court below, which are immaterial to the determination of the matter involved in the appeal, a court will as a general rule not vary its decree or judgment on that account or give any direction to the clerk in reference to taxing the costs in such a case, as the court as a general rule leaves it to counsel to determine what parts of the record of the court below should be copied. But if this privilege of counsel is so abused, that there is copied into the record presented to the appellate court a large amount of matter, which is obviously immaterial and can have no weight in determining the matters in controversy on the appeal, the court will correct such abuse by varying its decree or judgment or by giving instructions to the clerk as to the taxation of costs; and if the record has been so unnecessarily increased, the court in such an extreme case will at the instance of the appellee

apply a similar correction. *Spang v. Robinson*, 24 W. Va. 827.

Same—Improperly Duplicated—Costs.—Where on one appeal, two copies of the record are sent to the appellate court, and docketed on the motion of the appellant, the appellant must pay the costs occasioned thereby to the appellee. *Harrison v. Lane*, 4 Munf. 495.

Same—Failure to Provide Copy in Time—Costs.—Where the appellant fails to bring up a copy of the record within the time limited by law, and it is filed by the appellee, who obtains a dismissal of the appeal, the fee to the clerk of the chancery court for the copy of the record so filed, may be taxed in the bill of costs as a part of the costs of defending the appeal; and the same rule exists where the record is brought up by the appellant. *Mahone v. Long*, 3 Rand. 557.

Writ of Supersedeas—When Appellant Entitled to Costs for Prosecuting Same.—Where an inferior court has erred in not allowing the defense of set-off on a forthcoming bond, and the judgment is reversed, on writ of error to appellate court, and the cause remanded, the appellant (defendant below) will be entitled to his costs expended in prosecuting the writs of supersedeas in the appellate court. *Allen v. Hart*, 18 Gratt. 722.

When Prochein Ami and Feme Liable to Appellant.—A suit being brought in the name of a feme by her next friend, and a decree in her favor being reversed, and the bill as to the appellant ordered to be dismissed, the appellant will recover his costs, both in the appellate court and the court below, as well against the next friend as against the feme. *Spencer v. Ford*, 1 Rob. 648.

2. Appellee.

Cause Reversed—When Entitled to Costs.—Although a cause be reversed, it sometimes happens that costs are decreed in favor of the appellee. This is the result when the decree is affirmed, the appeal dismissed, or the cause remanded to the lower court after being affirmed. *Kent v. Matthews*, 12 Leigh 573; *Strother v. Hull*, 23 Gratt. 652; *Williamson v. Howard*, 2 Rob. 39; *Harman v. Odell*, 6 Gratt. 207; *Handly v. Snodgrass*, 9 Leigh 484; *Boyce v. Smith*, 9 Gratt. 704; *Blessing v. Beatty*, 1 Rob. 287; *Marks v. Hill*, 15 Gratt. 400.

Reversal of Decree Injurious to Appellee—Costs.—On reversing a decree because injurious to the appellee, costs will be allowed if he substantially prevails. *George v. Richardson*, Gilmer 230.

Interlocutory Decree—Costs.—On an appeal from an interlocutory decree, correct on the merits, but erroneous for want of proper parties, the court will reverse the decree, but allow the appellees to recover costs as the parties substantially prevailing; because, an appeal from an interlocutory decree, is only given to prevent the payment of money on change of property, or to settle principles. *Cunningham v. Patteson*, 3 Rand. 66; *Handly v. Snodgrass*, 9 Leigh 484; *Armstrong v. Pitts*, 13 Gratt. 235.

Judgment Appealed from Partially Affirmed—Costs.—Where a judgment of the court below in favor of the appellee is affirmed so far as it affects the appellant, although the appellate court reverses so much of the judgment as affects a third party who has not appealed, costs will be given to the appellee as the party substantially prevailing. *Harman v. Odell*, 6 Gratt. 207.

Amount Insufficient to Give Jurisdiction—Costs.—While it is error to decree interest on the aggregate

of principal and interest from a time anterior to the rendition of a decree, which would require a decree to be corrected, yet, where the difference is insufficient to give the court of appeals jurisdiction, the decree would be reversed, if there was no other error, with costs to the appellee. *Lamb v. Cecil*, 25 W. Va. 288; *Bee v. Burdett*, 23 W. Va. 744; *Ross v. Gordon*, 2 Munf. 289.

Injunction Dissolved—Recovery of Costs.—Upon a bill against two persons, an assignor and assignee of a debt, for which judgment has been recovered at law against the plaintiff in equity, praying an injunction, the assignee appears and answers, but the assignor is not brought before the court by regular process. It turns out that the plaintiff has no just claim to relief against the assignee, but may have one against assignor. The injunction is dissolved, and the bill dismissed, generally. *Held*, that the appellee (assignee) should have his costs in the appellate court. *Lockridge v. Sharrot*, 5 Leigh 876.

Costs in Case of Caveat on Appeal.—Damages are not to be given upon an affirmance of a judgment in cases of *caveat*, but costs will be given to the appellee. *Preston v. Harvey*, 8 Call 495.

Fraudulent Conveyance—Bill to Set Aside—Costs.—In a bill by creditors to set aside a deed of trust for payment of debts, on the ground that the deed was fraudulent on its face, the bill did not ask for an account, but there was a general prayer for relief; the deed was sustained as valid, and the bill in the lower court was dismissed generally, it not appearing that the plaintiffs asked for an account, or that the court considered the question. The court of appeals affirmed the decree of the lower court sustaining the deed, and reversed it as to the account, but held that appellees should pay costs. *Marks v. Hill*, 15 Gratt. 400.

Refunding Bond—Omission to Require—Appeal and Costs.—Where it is apparent that the omission in a decree, in favor of a legatee against an executor, to require a refunding bond was not intentional, but resulted entirely from inadvertence, an appellate court, if the decree be right in other respects, will affirm it so far as it has gone, with costs to the appellee, as the party substantially prevailing. *Handly v. Snodgrass*, 9 Leigh 484; *Heffner v. Miller*, 2 Munf. 48.

Witness—Deposit of Costs Does Not Make Party Interested Competent.—A party appellee cannot be received as a witness for his co-appellees, either upon his releasing to them his interest in the subject in controversy, or upon his or their depositing with the clerk a sum of money sufficient to cover the costs. *Cogbill v. Cogbill*, 2 H. & M. 467; *Eacho v. Cosby*, 26 Gratt. 112. See Va. Code 1887, §§ 3346-49, rendering competent, with specified exceptions, parties, and persons interested, thus abolishing the common-law rule, in many particulars, regarding witnesses.

Co-Appellees—Apportionment of Costs.—The court of appeals in reversing a decree, there being three appellees, one of whom gets by the decision in the appellate court what was sought by his bill and denied by the court below, and another of whom prevails in the appellate court to the same extent that he prevailed in the court below; will decree that the third appellee pay to the appellant his costs. *Breckenridge v. Auld*, 1 Rob. 148.

3. Sureties.

Liability of Surety for Costs Accruing on Appeal.—The surety on a bond for the prosecution of an injunction is not liable for the costs and damages

which may accrue on an appeal to a superior court. *Woodson v. Johns*, 3 Munf. 280.

Supersedeas—Quashed by Appellate Court—Award of Costs.—Where a surety recovers several judgments for debt against a principal in the county court, and at the instance of the principal the circuit court awards one supersedeas to the several judgments, and reverses them by a single judgment, and to this judgment, the court of appeals, at the instance of the surety, awards a supersedeas, and reverses the judgment of the circuit court, ordering the supersedeas awarded by the circuit court to be quashed as improvidently awarded, the surety is entitled to his costs in the circuit court as well as in the court of appeals. *Ayres v. Lewellin*, 8 Leigh 609.

Subrogation—Judgment—Subject in Controversy—Costs.—A chancery suit was brought in a circuit court by a surety in a forfeited forthcoming bond, to be subrogated to the lien of the judgment creditor on the land of a co-surety, and to enforce out of such land the payment of one-half of this debt and the costs of the original case and the costs in a chancery suit, which had been brought by the creditor to enforce out of the lands of the sureties the payment of the debt and costs, all the debt and costs as well as the costs of the chancery suit having been paid by the complainant. *Held*, that in determining whether the appellate court has jurisdiction on an appeal from the circuit court dismissing the bill, the subject in controversy must be regarded as a moiety of all the moneys paid by the plaintiff, whether on the forfeited forthcoming bond or the costs attending it, or the costs of the first chancery suit, and the interest on such sums. *Clevenger v. Dawson*, 15 W. Va. 348.

VI. SECURITY FOR COSTS.

Statutory Provisions—Virginia.—For general statutory provisions in Virginia relative to the requirement of security for costs in a suit or action, see Va. Code 1887, § 3539.

Same—West Virginia—Lapse of Statutory Period—Effect.—The W. Va. Code 1899, ch. 138, § 2, provides that in any suit (except where a poor person is plaintiff), there may be a suggestion on the record of the court, or, if the case be at rules, on the rule docket, by a defendant or any officer of the court, that the plaintiff is not a resident of this state and that security is required of him, etc. In construing this statute the court held that security may be given before the court, notwithstanding the period of 60 days had elapsed. *Dean v. Cannon*, 37 W. Va. 123, 16 S. E. Rep. 444. For cases construing this statute, see *Enos v. Stansbury*, 18 W. Va. 477; *Bailey v. McCormick*, 22 W. Va. 95; *Haymond v. Camden*, 23 W. Va. 180; *Rutter v. Sullivan*, 25 W. Va. 427.

Constitutionality.—The statute requiring of non-resident plaintiffs costs, is constitutional. *Nease v. Capehart*, 15 W. Va. 299.

Security—Effect When, and When Not Required.—If security for costs is required, the security must be given, but if not required it is not error to proceed without it. *Carter v. Washington*, 2 H. & M. 31; *Purvis v. Hill*, 2 H. & M. 614.

Plaintiff Non-Resident—Failure to Provide Security for Costs—Effect.—Where, on the motion of defendant in an attachment case, the plaintiff who is a non-resident of the state, is ordered to give security for the costs of the suit within sixty days, and fails to do so, his bill should be dismissed, and it is error to proceed to hear the cause. *Anderson v. Johnson*, 32 Gratt. 558.

On reversing a decree and remanding the cause, the appellate court will not direct the suit to be dismissed at once for the failure of the plaintiff to give security for costs, but will direct that he be allowed a reasonable time to comply with the order. *Anderson v. Johnson*, 32 Gratt. 558.

Plaintiff Non-Resident—Ruling as to Security for Costs.—A plaintiff not being an inhabitant of this commonwealth may be ruled to give security for the costs in the lower court, by the judge of such court; but not for costs incurred in the court of appeals, from which the suit was remanded for further proceedings. *Lambert v. Key*, 4 H. & M. 484.

When Tender of Security Should Be Received.—Upon a rule requiring security for costs, if sufficient security be tendered, in court, at the first calling, after the expiration of the sixty days, it ought to be received, and the suit ought not to be dismissed. *Vance v. Bird*, 4 Munf. 364.

Motion to Dismiss for Want of Security—Tender—Effect.—Where plaintiffs are non-residents, and an order is entered for security for costs, to be given in sixty days, the plaintiff's attorney having notice of the order, and no security is entered within the sixty days, it is error to dismiss the suit for failure to give the security within sixty days, if sufficient security is offered at the time of the motion to dismiss. *Goodtitle v. See*, 1 Va. Cas. 123.

Waiver of Requirement for Security.—Construing § 2, ch. 138, W. Va. Code 1899, providing for security for costs when the plaintiff is a non-resident, the court held in *Dean v. Cannon*, 37 W. Va. 123, 16 S. E. Rep. 444, that the requirement of security could be waived, and that such waiver may be presumed from the conduct of the defendant. *Enos v. Stansbury*, 18 W. Va. 477; *Rutter v. Sullivan*, 25 W. Va. 427.

When Security Given Does Not Include Costs in Appellate Court.—An undertaking executed by parties, as security for costs in a suit brought by a non-resident in the form prescribed by W. Va. Code 1899, ch. 138, § 2, does not bind the parties to pay the costs in the appellate court, but only the costs incurred in such suit in the court below. *Bailey v. McCormick*, 22 W. Va. 95.

Motion for Continuance—Plaintiff Delays Security—Effect.—It is error to rule a defendant to trial on a motion for continuance, when the plaintiff has failed until the term at which the motion is made, to give security for costs, after a rule to do so. *Jacobs v. Sale*, Gilmer 123.

Motion against Plaintiff for Security—Bill of Exceptions.—There is no objection, upon a motion in equity against a plaintiff for security for costs, to take a bill of exceptions to the opinion of the court, in which bill the evidence introduced on the motion is stated. *Evans v. Bradshaw*, 10 Gratt. 207.

Ejectment—Lessor of Plaintiff Dies—Security.—In ejectment where the lessor of the plaintiff dies, security and costs must be given. *Carter v. Washington*, 2 H. & M. 31.

VII. TAXATION OF COSTS.

Statutory Provisions.—For general statutory provisions as to the taxation of costs, see Va. Code 1887, ch. 173.

Miscellaneous Matter Taxed.—As to miscellaneous matter taxed by the clerk, see Va. Code 1887, § 3554.

Where an appellant fails to bring up a copy of the record, within the time limited by law, and it is filed by the appellee, who obtains a dismissal of the

appeal, the fee to the clerk of the chancery court for the copy of the record so filed, may be taxed in the bill of costs, as a part of the costs of defending the appeal; and the same rule exists, where the record is brought up by the appellant. *Mahone v. Long*, 8 Rand. 557.

Perplexed Accounts—Reference to Commissioners—Bill of Costs.—If, on a motion in a county court, on the common-law side thereof, it becomes proper to refer to a commissioner, longstanding and perplexed accounts, for the purpose of facilitating the investigation of the cause to the parties, and to the court, and such reference is made by order of court, and with the assent of the parties, the fee of the commissioner, for stating and reporting the accounts, ought to be taxed in the bill of costs, and a judgment for those costs ought to be rendered against the party who has to pay the general costs. If such taxation is made, and noted by the clerk of the county court at the foot of the record, it will be presumed by the appellate court, that the order for such taxation was made by the court itself (it not being a matter of course with the clerk, to include such fee in his taxation of costs), though it does not appear on the minutes of the court. *Leachman v. Overseers, etc.*, 2 Va. Cas. 309.

Injunction—Motion to Overrule or Sustain—Costs.—Costs should not be taxed upon overruling or sustaining a motion to dissolve an injunction. *Barnett v. Spencer*, 2 H. & M. 7.

VIII. PAYMENT AND COLLECTION OF COSTS.

Officers and Witnesses—Payment Out of Costs.—As to how an officer or a witness, to whom fees or attendance is due, may secure payment out of costs, see Va. Code 1887, § 3521.

New Trial—Payment of Costs Necessary.—It is error to grant a new trial except upon the terms of paying the costs. *Boswell v. Jones*, 1 Wash. 323.

Same—Payment of Costs—Condition Precedent.—If a judgment awarding a new trial, directs the payment of costs of the first trial, without saying that the costs shall be paid before the new trial is had, it shall nevertheless be considered a precedent condition. *Rixey v. Ward*, 3 Rand. 52.

Same—When Objection for Non-Payment Not Allowed.—Where a new trial has been granted, upon condition of the payment of the costs of the former trial, as prescribed by Va. Code 1887, § 3542, but the costs are not paid at or before the next succeeding term of the court, the court may, on the motion of the opposing party, set aside the order granting it, and proceed to judgment on the verdict, or it may award execution for costs, as may seem best; but if neither is done, and the parties proceed with the new trial, objection cannot thereafter be made, either in the trial court or the appellate court, that the costs have not been paid. *Central Land Co. v. Obenchain*, 92 Va. 130, 23 S. E. Rep. 876.

Plea Amended—Payment of Costs a Condition.—When it is necessary for the defendant to amend his plea, the court, upon payment of costs, should permit the amendment. *Cooke v. Beale*, 1 Wash. 313.

Nonsuit—Presumption of Payment or Waiver of Costs.—Where a plaintiff is nonsuited, and is ordered to pay costs and damages, if by a subsequent order in the case the nonsuit is set aside, and the action is re-instated on the docket as recited in the order, upon the payment of costs, and at another day the parties appear by their attorneys, and waive a jury, and consent to submit the matters of law and fact to the court in lieu of a jury, and the

trial is proceeded with, it must be presumed that the former order, requiring the payment of costs, has been either complied with or waived by the parties. *Walker v. Henry*, 36 W. Va. 100, 14 S. E. Rep. 440.

Tender of Coupons in Payment.—Costs recovered in tax suits are not "taxes, debts or demands due the commonwealth." The officers of the court to whom they are due, are under no obligation to receive coupons in payment of their fees, and a tender of coupons of the state, genuine or spurious, in payment thereof, is not good. *Ellett v. Com.*, 85 Va. 517, 8 S. E. Rep. 246.

Party Not of Record—Mode of Requiring Payment of Costs.—The appropriate mode of requiring a person for whose benefit an action is brought, though his name does not appear of record, to pay costs, is by rule, requiring him to show cause why he should not be compelled to pay the same. *Johnston v. Mann*, 21 W. Va. 15.

IX. COST IN CRIMINAL CASES.

See monographic note on "Fines and Costs in Criminal Cases."

739 *Exchange Bank of Va. for Camp, Trustee, v. Knox, &c.*

Farmers Bank of Va. for Goddin, &c. v. Anderson & Co.

April Term, 1870, Richmond.

(Absent, ANDERSON,† J.)

Liquidation of Banks—Construction of Statute.—Under the act of February 13th, 1866, requiring the banks of the Commonwealth to go into liquidation, the banks, being insolvent, execute deeds conveying all their property, including debts due to them, to trustees for the payment of their debts. **Held:**

1. **Same—Same—Forbids Preferences.**—That the act forbids and prevents all preferences among the creditors of the bank.

2. **Same—Same—Set-Off by Debtor.**—That a debtor of the bank cannot set off notes of the bank bought up by the debtor after the execution and recording of the deed and notice thereof to the debtor.

3. **Same—Same—Trustees—Purchasers.‡**—The banks being utterly insolvent, the trustees are the trustees of the creditors, not of the banks, and are purchasers and assignees for value of all the property and effects of the banks, for the benefit of the creditors.

**Note by the Reporter.*—In these cases it should have been stated at p. 755, that JOYNES, J., doubted whether the assignees of the banks in the deeds executed in pursuance of the act of assembly, could be regarded as purchasers for value; his impression being that they should be regarded as only assignees in law. But he concurred in the result.

†He was related to one of the parties.

‡**Trustees and Creditors—Purchasers.**—Several cases cite the principal case as authority for the proposition that trustees for the benefit of creditors, and the creditors themselves, are purchasers. See *Shurtz v. Johnson*, 28 Gratt. 667; *Chapman v. Chapman*, 91 Va. 400, 21 S. E. Rep. 813; *Hill v. Rixey*, 26 Gratt. 80; *Cammack v. Soran*, 30 Gratt. 297; *Williams v. Lord*, 75 Va. 404. See also, *Evans v. Greenhow*,

4. **Charters—Authority under.**—Though the charters of the banks require them to take their notes in payment of debts due to them, this does not authorize debtors of the banks to pay their debts with the notes of the banks, bought up after the execution and recording of the deeds.

5. **Bankrupts—Judgment of Appellate Court.**—After the judgment in the court below the appellees are declared bankrupts and obtain their discharge. The appellate court will, upon their petition, make it a part of their judgment of reversal, that execution shall not be issued upon the judgment without a previous order to that effect by the court below, made upon notice to them.

These cases involve the same question, and were heard together in this court.

740 *In October 1867, the Exchange Bank of Virginia, suing for the benefit of George W. Camp, trustee, instituted an action of debt in the Circuit court of the county of Alexandria against Knox & Brother and others, upon a negotiable note for one thousand dollars, due on the 1st of June 1861. The defendants appeared and pleaded nil debet, and a tender and offsets, on which issues were made up; and the parties agreed the facts, and dispensing with a jury, submitted the whole case to the court. From this statement of facts it appeared that the note sued on was executed and protested, and notice of protest given. That the Exchange Bank was insolvent, and that on the 12th of July 1866, the bank, in accordance with the act of the general assembly, passed February 12th, 1866, requiring the banks of the Commonwealth to go into liquidation, made a deed by which the bank conveyed to George W. Camp, the whole property and assets of the bank, including notes due to it, in trust to be collected and disposed of among the creditors of the bank, in accordance with the provisions of the act aforesaid, according to the legal rights and priorities of the said creditors. That the notes of the bank filed with the plea of the defendants, were purchased by them at a depreciated price, after the deed aforesaid was made and duly recorded; and the defendants had notice thereof; that these notes were issued by the bank prior to the note sued on. And the court was authorized to draw all such inferences from the facts agreed; as the jury might do.

The cause was afterwards transferred to the Circuit court of the city of Richmond; and came on to be heard in that court on the 1st of August 1868, when the court gave judgment in favor of the defendants. To

15 Gratt. 153; Wickham v. Martin, 13 Gratt. 437; Witz v. Osburn, 83 Va. 230, 2 S. E. Rep. 33.

Relief against Defective Execution of Power.—In Freeman v. Eacho, 79 Va. 47, the court, citing the principal case, said: "It is well settled that relief against a defective execution of a power will be granted only in favor of one who has a superior equity to the party against whom relief is sought."

See monographic note on "Banks and Banking" appended to Bank v. Marshall, 25 Gratt. 378.

this opinion of the court, the plaintiff excepted; and obtained a supersedeas to this court.

741 *In October 1867, the Farmers Bank of Virginia, suing for the benefit of Goddin and Robinson, trustees, instituted an action of assumpsit in the Circuit court of Richmond, against Joseph R. Anderson & Co., to recover the value of \$116,922 88 of Confederate money, as of March 20th and April 1st, 1865. The defendants pleaded non assumpsit, and set-offs; and filed an account of offsets, consisting of the notes of the Farmers Bank. And the parties having agreed the facts, waived a jury, and submitted the whole case to the decision of the court.

It appeared from the facts agreed, that the defendants owed the bank, as of the 20th of March 1865, \$16,922 88, and, on the 1st of April 1865, \$100,000; upon a dealing in Confederate money as a standard of value. That at that time that money was as sixty to one of gold. That the bank notes mentioned in the account of offsets, and tendered in payment, were acquired by the defendants after the deed of trust executed by the bank had been made and recorded; and with notice to the defendants of said assignment. That said notes were issued by the bank prior to the time when the demand of the plaintiffs sued on accrued, and prior to the deed of assignment. That the bank executed the deed of trust on the 19th of January 1867, and it was duly recorded on the same day.

This deed refers to the act of February 12, 1866, requiring the banks to go into liquidation, and conveys to the trustees, Goddin and Robinson, all the property and assets of the bank, including debts of every description, upon trust, after paying certain expenses and commissions, to apply the proceeds to the redemption of the outstanding circulation or notes of the bank, ratably among the holders thereof, &c. Provided, however, that if according to the proper legal construction of the aforesaid act of the 12th day of February 1866, a ratable distribution among all the creditors

742 of said *bank, not having specific liens on the property of the bank, be required, then the parties of the second part (the trustees) shall apply and distribute the proceeds of said assets according to the said requirement of said act, and shall not make or attempt any distribution giving preference or priority to the noteholders as aforesaid.

On the 1st of August 1868, the cause came on to be heard, when the court gave judgment for the defendants. To which opinion of the court the plaintiffs excepted, and applied to a judge of this court for a supersedeas; which was awarded.

Claughton, Howard & Roberts, and Bradley T. Johnson, for the appellants.

Crump and Brent & Wattles, for the appellees.

CHRISTIAN, J. These two cases are

brought up by writs of error to judgments of the Circuit court of the city of Richmond. Being kindred cases, they were heard together in this court, and were argued with marked ability and learning by the counsel on both sides. They present a question, which is without judicial precedent in this State. Its adjudication, here, will affect important interests. Its novelty, as well as its importance, alike demands a very careful consideration.

In the one case, the suit is brought by the Exchange Bank, for the use of Geo. W. Camp, trustee, to recover a certain sum of the defendants, who were makers and endorsers of a negotiable note, duly protested, and which was the property of said bank, before and at the time of the assignment of its assets to trustees for the benefit of its creditors. In the other case, the suit is instituted by the Farmers Bank for the use of Goddin and Robinson, trustees, to recover of the defendants a certain amount,

loaned and advanced to them; which
743 *amount they have overdrawn in their dealings with the bank.

In the first case, the defendants pleaded "nil debet," and also filed a plea of "tender and offsets."

In the second case, the defendants plead "non assumpsit," "payment," and "set off."

In both cases, the defendants filed an account of offsets, consisting of the notes of these banks, respectively, representing nominally the full amount of plaintiffs' demand. It is admitted in both cases, that these bank notes were acquired by the defendants after the respective deeds of assignment were made, and that they were greatly depreciated below their face value. It is also admitted, that when these bills of the bank were purchased, the defendants had notice of the said assignment.

The sole question, therefore, presented in these two records is, whether or not, these depreciated bank notes thus acquired, can be set off against the demands of the plaintiffs, suing for the use of the trustees of the creditors of the banks. It is to this question that I shall confine my opinion.

The close of the late civil war found all the banks of circulation in the State, in a condition of hopeless insolvency. They were compelled to suspend business, and there was scarcely a remote possibility of a resumption. In this state of things, forced upon them by the calamities of war, nothing remained for them but to go at once into a course of liquidation, and to distribute among their creditors such remnants of their assets as might yet be realized.

In this condition of things, and to effectuate this object upon equitable terms, the general assembly passed the act of the 12th of February 1866, entitled an act requiring the banks of the Commonwealth to go into liquidation.

The purpose of that act was to provide regulations, *by which, as re-
744 cited in the preamble, "a speedy

settlement of the affairs of said banks should be made, in order to a legal and proper distribution of their assets amongst all persons entitled to share in such distribution."

The 1st section provides that it shall be lawful for the president and directors of any bank of circulation, chartered by the general assembly of Virginia, to make a deed, conveying all the assets of the bank to such persons as they may select; and providing that "the proceeds of said assets shall be distributed amongst all persons, corporations and associations entitled to share in such distribution, according to the legal rights and priorities of such persons, corporations and associations, at the time such deed shall be executed."

In conformity with this act of assembly, and in strict pursuance of its provisions, the Exchange Bank and the Farmers Bank each executed, in proper legal form, through its president and directors a deed, by which all the assets, real and personal, of said banks, respectively, were conveyed to certain trustees therein named, for the benefit of the creditors of said banks.

The deed made by the Exchange Bank provides for a distribution of its assets "pro rata" amongst all its creditors, according to their legal rights and priorities. The deed executed by the Farmers Bank gives preference to the noteholders over the depositors and other general creditors. But it contains the following provision: "Provided, however, that if, according to the proper legal construction of the act of the 12th of February 1866, a ratable distribution among all the creditors of the bank, not having specific liens on the property of the bank, be required, then the trustees shall apply and distribute the proceeds of the said assets according to the requirement of said act, and shall not make or attempt any distribution giving preference or priority to the noteholders as aforesaid."

745 *This deed, and the act of assembly under which it was made, have received the judicial construction of this court. In *Robinson & als. v. Gardiner & als.*, 18 Gratt. 509, it was held, "that upon the true construction of this act, all the creditors of the bank, not having a specific lien, are placed upon the same footing, and are entitled to share the assets ratably."

The second section of the act referred to makes a provision, the object of which is to prevent any creditor from obtaining by suit more than his just and ratable share in the distribution of the proceeds of the assets of the bank, and thus to preserve that equality of distribution contemplated by the first section. It, in effect, declares that each creditor of the bank is entitled to his ratable share in a fair pro rata distribution of the assets of the bank; and plainly implied that such is to be the rule of distribution.

I have thus noticed, with some particularity, the act of the 12th of February 1866, because, in my view of the case, a proper understanding of the purposes of this act, if it does not furnish a key to the solution

of the question before the court, at least advances one step towards solving the difficulty in the way of a satisfactory conclusion.

It is evident that this statute was intended to secure the equal distribution of the effects of these corporations among their creditors; and it was so expressly decided in the case of *Robinson v. Gardiner* (supra). A part of these effects were the debts due to these banks, and among others the debts due from these defendants.

These obligations of the defendants, along with the other assets of the banks, were assigned to trustees for the benefit of all the creditors of these corporations. Now, if the defendants are to be permitted to purchase the bills of the banks, and set them off against their obligations, the plain objects and purposes of the statute are totally defeated, and instead of the
746 equal rights of *all the creditors being secured (as was the design of the legislature), there would follow a most unequal and inequitable mode of distribution, in this, that these defendants (who are creditors as noteholders) would receive every dollar of their claims, while the other creditors would receive but a small proportion of theirs.

It must not be forgotten, that when, in conformity with the act of February 1866, these banks executed their respective deeds of assignment, they had ceased to exist for the purposes for which they were created. A resumption of their operations as banks was simply impossible. The stockholders had no longer any interest in them. It only remained to wind them up for the benefit of the creditors. *Robinson v. Gardiner* (supra). In this view, the grantees in said deeds were not trustees for the banks, but for the creditors only. *Haxtun v. Bishop*, 3 Wend. R. 13; *Diven v. Phelps*, 34 Barb. R. 224. The true principle, I conceive to be this: These corporations being insolvent, under the statute, and the deeds made in pursuance thereof, the rights of all the creditors attach equally to all their assets, and whoever takes their bills afterwards (being indebted to such corporations) takes them subject to this right of all the creditors to share equally in their assets. His claim is upon the assets for his proportionate share. The statute, as well as the deeds of assignment, virtually secures to the creditors collectively the entire and exclusive right to all the assets. The debtor, therefore, must pay his debt, and take his dividend for his claim, arising from his ownership of the bills, acquired under such circumstances. It is true that a bank, as long as it is solvent, or rather, as long as it has control of its assets, is bound to take its own bills in payment of debts due to it; but when it becomes insolvent, and goes into liquidation, making an assignment of all its assets for the benefit of its creditors, the rights of all its creditors attach equally, and a debtor then takes the bills of
747 the *bank subject to the rights of other creditors to enforce his obligation against him for the equal benefit of all.

Diven v. Phelps, 34 Barb. R. 224; 9 Cowen R. 408, notes; 1 Paige R. 585; 3 Wend. R. 13. But independently of the act of 12th February 1866, the obligations enforced, and the rights established under it, according to the construction I have given it, it must be conceded, on general principles, that these notes of the banks, acquired after notice of the assignment, cannot be pleaded as set offs in actions brought by the assignees of the banks, unless these cases are taken out of the operation of the general and well-settled principles of law, in consequence of the provisions of the charters of these corporations, or of the general law regulating them. To this question I shall advert presently.

It is a principle of law, too well settled to admit of doubt or argument now, that a set off as between original parties, acquired after the assignment for a bona fide purpose, of the subject in controversy and notice thereof, cannot be set off against a holder for value. 12 Johnson R. 343; 1 John. Ca. 51; 5 Munf. 388; 14 Gratt. 1.

It is equally well settled that the trustees and beneficiaries in a deed of trust to secure bona fide debts, are purchasers for valuable consideration. A pre-existing debt is of itself a valuable consideration for a deed of trust executed for its security. *Wickham, &c. v. Martin & Co.*, 13 Gratt. 427; *Evans, trustee, v. Greenhow & als.*, 15 Gratt. 153.

In the first named case Judge Daniel says (and in this part of his opinion the whole court concurs with him): "I think it has been the constant course of the court in this State to regard the creditors in a deed of trust made by their debtor bona fide for their indemnity, in the light of purchasers for value." Id. 437.

This opinion of Judge Daniel is quoted approvingly by Judge Moncure, delivering the opinion of the court *in
748 *Evans, trustee, v. Greenhow & als.* (supra). A deed of trust is certainly an assignment of the subject matter in controversy, and the appellants (the trustees) are assignees for valuable consideration in the general sense of these terms.

But it may be said that the trustees in this case are assignees in law and not in fact; that the deeds were made under the mandate of the legislature and were not voluntary.

Admitting that this is true, does it alter the relations of the parties so as to change the principles of law applicable to questions of set off? I think not.

An assignee in bankruptcy is an assignee in law; and yet it is well settled that in an action brought by assignees in bankruptcy, the defendant cannot set off a claim against the bankrupt acquired after the bankruptcy. 6 Term R. 57; 2 John. R. 273. Chancellor Kent, delivering the opinion of the court in the latter case says (referring to the first named case): "The decision of King's Bench in that case is founded in good sense and sound policy. It would, as Lord Kenyon observes, be unjust, if one person, who happened to be indebted to an-

other at the time of his bankruptcy, was permitted by any intrigue between himself and a third person, so to change his own situation as to diminish, or totally destroy, the debt due to the bankrupt by an act *ex post facto*." *Ib.* 278.

And so administrators may be said, in a certain sense, to be assignees in law of debts due to their intestate, and yet it has been repeatedly decided that in an action brought by an administrator for a debt due to his intestate, the defendant cannot set off a debt due from the intestate purchased by the defendant after the death of the intestate. 20 John. R. 136; 2 Paige R. 402; 3 Paige R. 402.

Whether, therefore, these trustees are to be regarded as assignees in law or
749 assignees in fact, the set off *claimed by the defendants is equally inadmissible; and there can be no reason why the well settled and universally recognized principles of the law of set off should not be applicable to these cases, unless indeed it be found in the charter of these corporations, or in the general law regulating their operations. And this brings me to consider the argument which was pressed with so much earnestness and ability by the counsel for the appellees. It is insisted by them, and with great apparent force, that the fact that the assignment in these cases was made not by an individual, but by chartered institutions, which are required by the general law creating them and regulating their operations, to receive their own notes in payment of debts due to them, forbids the application of the general principles of law adverted to, and that for this reason the right of the debtor to pay his debt in the notes of the bank cannot be affected by an assignment of that debt to a third party. It is earnestly contended that the right of a debtor to the bank to pay his debt in the bills of the bank is a part of the contract under which the bank issues its notes, which is inherent in the obligation, and follows it to whomsoever and for whatsoever purpose it may be transferred, and goes with it even into the hands of a bona fide holder for value. If the case is for the appellees, it is only upon these grounds. Let us examine carefully and fairly these propositions. All these questions turn upon the true construction to be given to section 16 of chap. 58, Code 1860, which is in the following words: "§ 16. Though a bank have a branch, all its notes shall be signed by the president and countersigned by the cashier of the parent bank. All such notes shall be received in payment of debts to the bank, whether contracted at the parent bank or branch." Now, the exact meaning of this section may be discovered, 1st, by considering the terms in which it is couched, and their relations to each other; and, 2d, the mischief it was intended to remedy.

750 *It may be observed in passing, that the legislative mind in this section is directed to the subject of parent banks and branch banks, and not to the

subject of the obligations of banks generally. "Though a bank have a branch, all its notes shall be signed by the president and countersigned by the cashier of the parent bank. All such notes (that is, notes signed by the president and countersigned by the cashier of the parent bank), shall be received in payment of debts to the bank, whether contracted at the parent bank or branch." The last clause of this section was taken from the act 1836-7, entitled "an act establishing general regulations for the incorporation of banks." Section 9 contains the following provisions: "All bills or notes negotiable or payable at any office of discount and deposit of any bank, shall be placed on the legal footing of bills or notes negotiable or payable at the parent bank. And the notes of each shall be received at the parent bank or any of its branches in payment of debts due to any or either of them." The phraseology is different, but the meaning of these two provisions is precisely the same. The obvious meaning is this: that whether the debt is contracted with the parent bank or the branch bank, the notes of the parent bank, signed and countersigned by the president and cashier of the parent bank, shall be received at the branch bank for a debt due to the branch bank; and so the notes of the branch bank, signed and countersigned as required, shall be received at the parent bank for a debt due to the parent bank: or, in other words, the legislature meant simply to say, that when a debt to a bank became payable by its terms at the parent bank, the debtor should have the right to pay it there in notes of the bank, which, on their face might be redeemable at a branch of that bank; and on the other hand, that a like debt, payable at the branch bank, might be paid there in notes, which on their face were redeemable at the parent bank.

751 *The mischief to be remedied no doubt was, that in such cases, notes redeemable at the branches were refused at the parent bank, and notes redeemable at the parent bank were refused at the branches; and without such a provision as this, the debtor would be required to pay his debt either in specie or else in bank notes redeemable at the counter of the particular bank, whether parent or branch, at which the debt was payable. Such a practice would be inconvenient and vexatious, and it is plain to my mind that this was the mischief which the § 16, ch. 58 of the Code was intended to remedy. This being the plain object of the clause, it would be a strained interpretation, unwarranted by any sound rule of construction, so to apply this clause as to constitute a right of set off against a debt, which, though once due to a bank, had ceased to be so due, by reason of an assignment made, and known by the debtor to have been made, before the subject of the set off was acquired.

Such a construction cannot be fairly maintained. Nor can I perceive the force of the argument so earnestly pressed by the

counsel for the appellees, that these provisions are incorporated in the charter of all the banks, and constitute a contract binding on them to receive their notes at par in payment of all debts due to them; and that this obligation follows the debt, no matter to whom or for what purpose it may be transferred or assigned. Such a proposition, carried out to its legitimate and logical conclusion, would lead to this absurd result: A note executed by A. to B., payable in gold, is transferred to the bank. As long as it is the property of the bank, it is conceded, it may be paid in the notes of the bank. But suppose the bank assigns this note for a valuable consideration to a third party; if the position of the appellees be right, then the note which originally was payable by B. in gold may be discharged in depreciated notes, though it be in
752 the *hands of a third party for full value. But again, the effect of such a construction would destroy the negotiability of every note or bill of exchange which came into the possession of the bank; and once in its possession, it would become burdened with this condition (no matter into whose or how many hands it might pass), to be discharged in the notes of the bank, however depreciated, though originally it was payable in gold. Such must be the inevitable result of such a construction.

Now, as between the banks and the bill-holders, the law does make a contract that the bank shall receive its own notes in payment of a debt due to it by the bill-holder; but it must be a debt due to the bank, and when assigned to a third party for value, it is then a debt due to the assignee, and not to the bank, and there is no obligation on the assignee to receive the notes of the bank, but the debt must be paid as other debts are paid. The truth is, that these provisions of the statute are, as before illustrated, simply laws regulating the payment at the parent banks and branch banks respectively of debts "due to any or either of them," and cannot be said to constitute a contract binding upon every party who may be the assignee or endorsee of the debt originally due to the bank. The case of *"Woodruff v. Trapnall,"* 10 How. U. S. R. 190, so much relied upon by counsel for the appellees, comes far short of establishing the principle for which it was invoked. When properly understood and applied, it does not at all conflict with the positions taken in this opinion. The case was this: In 1836 the legislature of Arkansas chartered a bank, the whole capital of which belonged to the State, and the president and directors of which were appointed by the general assembly. The 9th section of the act of incorporation provided "that the bills and notes of said institution shall be received in all payment of debts due to the State of
753 Arkansas." In 1845 this section was repealed. *Woodruff was the treasurer of the State of Arkansas, and became a defaulter to a large amount. Suit was instituted on his official bond and judgment

recovered, upon which execution was issued in 1847. Woodruff tendered in payment of this execution the notes of the bank issued before the repeal of the section referred to. And the question was, whether the State should be compelled to receive these notes in payment of this execution.

The court decided that the act of 1845, repealing the 9th section of the act of '36, was unconstitutional, because it impaired the obligation of the contract created by that section between the State and the bill-holder to receive its own notes (the State being the bank in this case) in payment of debts due to it.

The judgment in this case was a debt due to the State of Arkansas, and the provision of law was, that the notes and bills of this institution shall be received in payment of all debts due to the State of Arkansas. This was clearly a case of contract, which could not be impaired by legislation. And so in the case before us, as long as the bank had control of its own assets, and carried on its operations as a bank, there unquestionably was a subsisting contract between the bank and the bill-holder to receive its own bills in payment of debts due to it. But when the bank parted with its assets, assigning them to trustees for the legitimate purpose of a fair and equitable distribution among its creditors, then the debts of the defendants are no longer debts due to the bank, but due to the creditors of the bank, being a part of its assets in the hands of the trustees for distribution. Therefore the decision of the Supreme Court, in *Woodruff v. Trapnall*, can have no application to this case.

I have said in the beginning, that these cases present a question which is without judicial precedent in this State. I have
754 carefully examined the decisions of *the courts of other States to ascertain what has been the ruling of these courts on this question, and I find that, with a single exception (if that, indeed, can be considered an exception), the whole current of decisions have been in one direction; to wit, that the assignees of a bank are not obliged to take from the debtor the notes of the bank obtained after notice of the assignment. This has been the uniform course of decision in New York. See 3 Wend. R. 13; 1 Paige R. 585; 1 Law Reg. N. S. 238; 34 Barb. 224. The courts of Pennsylvania have decided the same way, 8 Watts & Serg. 311; *Housum v. Rogers*, 4 Wright R. 190, 40 Pa. So in Ohio, 1 Ohio R. 381, 376; 3 McLean R. 397. So in Kentucky, 16 B. Munr. R. 454; 1 Duval R. 85; and in Mississippi, *King v. Elliott*, 5 Smeedes & Marsh. R. 428. And such is the uniform judgment of all the courts where this point has been adjudicated, with the exception of the Court of Appeals of the State of Maryland. That court has decided (6 Gill & Johnson 263), that the assignees and trustees of an insolvent bank, authorized to collect its debts and pay its creditors, are bound, under the statutes of that State, to receive the notes of such banks without

reference to the time at which they were acquired. But that case is peculiar in this, that at a meeting of the board of directors of the bank, preparatory to the execution of the deed of trust, a resolution was adopted by said board to the effect, that "the debtors of this institution should have the privilege of paying their debts in notes of the bank." And the statute upon which the decision is founded, provides for the payment of debts due to the bank, whether solvent or insolvent, in the notes of the bank, whether it is carrying on its operations as a bank, or whether after the insolvency its assets have been assigned to commissioners, to wind it up for the benefit of its creditors. The decision is based upon the particular facts of the case, and the peculiar provision

755 of the *Maryland statute, and cannot be regarded as authority in the cases before us. But if there was no such peculiarity, and it was a case going to the full extent of the broad principle for which it was invoked by the counsel for the appellees, it could not be permitted to stand in the way of the unbroken current of decisions by the courts of New York, Pennsylvania, Ohio, Kentucky and Mississippi, and other States already referred to.

I have thus examined, somewhat in detail, the several grounds upon which the appellants and the appellees have put their claims before this tribunal, with the authorities upon which they rest them, and am constrained to conclude that the case is with the appellants, both upon principle and authority. And I am bound to say, too, all the equities of the case are against the appellees. They are seeking to pay in a depreciated currency that for which they received full value, and that, too, at the expense of others, who have equal rights with them, and in violation of that just and equitable rule of distribution prescribed by an act of the general assembly. I am, therefore, of opinion, that the judgments in both cases should be reversed.

The other judges concurred in the opinion of CHRISTIAN, J.

The judgments were as follows:

This day came the parties, by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said judgment is erroneous. Therefore, it is considered by the court that the same be reversed and annulled, and that the plaintiff recover against the defendants the costs by the said plaintiff expended in the prosecution of the writ of supersedeas aforesaid here. And this court proceeding

756 *to enter such judgment as the said Circuit court ought to have entered, it is further considered, that upon the statement of the facts agreed in the case the law is for the plaintiff, and that the said plaintiff recover against the defendants, one thousand and two dollars and fifteen

cents, with interest thereon from the 1st day of June 1861, till payment, the principal, charges of protest, and interest in the declaration mentioned, and the costs by the said plaintiff expended in the prosecution of the said suit in the said Circuit court.

And the defendants, John S. Knox, Jr., and Robert F. Knox, having filed their petition to this court, representing that since the rendition of the judgment aforesaid, they have been adjudicated bankrupts, under the act of congress passed on the 2d day of March 1867, and have received their certificates of discharge, which or copies of which were presented with said petition; and praying that this court, in its judgment reversing the said judgment of the said Circuit court, would make such provision as would protect them from any execution that might be issued upon the same; upon consideration thereof, it is ordered that no execution be issued upon the said judgment without a previous order to that effect, made by the said Circuit court, after reasonable notice to the said defendants to appear and show cause, if any they can, against it; which is ordered to be certified to the said Circuit court.

And on the motion of the defendants, John S. Knox, Jr., and Robert F. Knox, it is ordered that they have leave to withdraw the original certificates of discharge filed with the said petition, on leaving copies thereof.

This day came, &c., and the court having, &c., is of opinion, for reasons stated in writing and filed with the record, that the said judgment is erroneous. Therefore, it is considered, &c., and this court proceeding, &c., it is further considered by

757 the court, that upon the *statement of facts agreed in the case, the law is for the plaintiff, and that the said plaintiffs recover against the defendants, nineteen hundred and forty-eight dollars and seventy-one cents, with interest thereon from the 1st day of April 1865, till payment, and the costs by the said plaintiff expended in the prosecution of the said suit in the said Circuit court. Which is ordered to be certified to the said Circuit court.

Judgment reversed.

758 *Skipwith & als. v. Cabell's Ex'or & als.
Lee & als. v. Cabell's Ex'or & als.

April Term, 1870. Richmond.

1. Wills—Interpretation—Conditional Legacy.*—Mrs. C. an old and very wealthy lady, after disposing by her will and two codicils, of a large amount of her

*Wills—Interpretation—Conditional Legacy.—In French v. French, 14 W. Va. 499, the court, after quoting in full the first two headnotes of the principal case, said: "It seems that it is now an established principle, that while a person may make a conditional will, his intention to do so must appear clearly."

See also, the principal case approved in Cody v. Conly, 27 Gratt. 822.

property, at the close of the second codicil says: In case of a sudden and unexpected death, I give the remainder of my property to be equally divided between my cousin Dr. C. of Philadelphia and my cousin P. S., of New Orleans, one-half of which each must hold in trust for the benefit of their children. This is not a conditional legacy dependent upon the sudden and unexpected death of the testatrix.

2. **Same—Same—Same.**—In such cases the question is whether the contingency is referred to as the reason or occasion for making the disposition, or as the condition upon which the disposition is to become operative.

3. **Same—Revocation.**—The second codicil is dated August 18, 1861. On the 27th November 1861, the testatrix made a sixth codicil, as follows: In consequence of the state of the country, I now revoke my bequests to Dr. C. and his children, and also to Mrs. T. her daughter C. and also to Miss L. all of them residents of Philadelphia. Evidence was offered to prove that testatrix had been advised that there was danger that the legacies would be confiscated by the Confederate government, and that this was the reason of the revocation. **HELD:**

1. **Same—Same.**—If the advice was erroneous it would not avoid the revocation.

2. **Same—Same—Parol Evidence—Inadmissible to Show Mistake of Testatrix.***—Parol evidence is not admissible to show the views or opinions of the testatrix, in order to show that she acted under a mistake. The mistake which induces the revocation must appear on the face of the will.

3. **Same—Tenants in Common—Effect of Revocation as to One Tenant.**—C. and S. took under the residuary clause of the will each one-half as tenants in common, and upon the revocation of the bequest to Dr. C., the half given to him does not pass to S. but is undisposed of by the will and goes to the next of kin.

4. **Same—"Money Legacies."**†—By the first clause of her will testatrix says: Of the ten thousand
759 "and fifty dollars which I received from my uncle Fitzhugh Carter's estate, I give and bequeath two thousand dollars of it to Mrs. C.; two thousand dollars of it to Mrs. J.; two thousand dollars of it to my cousin Mrs. Y.; one thousand dollars of it to my friend Miss L.; one thousand dollars of it to Mrs. B.; one thousand and fifty dollars to Mrs. F. of Philadelphia, and one thousand dollars of it to my cousin Miss R. I give the sums mentioned above to Gen'l Cocke in trust, &c. At the death of the husband of testatrix he had standing in his name \$10,050 of bonds of the State of Virginia which he had purchased with money derived from the estate of Fitzhugh

Carter; he intended these bonds to be transferred to his wife and they were accordingly transferred to her by his ex'or. These are money legacies, and are not specific bequests of the bonds.

5. **Same—Ademption.**—By another clause of the will testatrix leaves to the unmarried daughters of her cousins B. and C. "my guaranteed bonds of the James River and Kanawha Company, to be equally divided between them." After the date of the will an act was passed which authorized the holders of the bonds of this Company, for which the State was bound, to surrender them and receive in lieu thereof, bonds of the State for the same amount, and under this act the testatrix exchanged her guaranteed bonds for State bonds, which she held at her death. The exchange of the guaranteed bonds for State bonds was not an ademption of the legacy; and the legatees are entitled to have the State bonds.

6. **Investment in Confederate Bonds.**—In the progress of a suit brought by the ex'or to have the estate administered, the court authorized him to invest funds of the estate in his hands, in Confederate bonds. He paid large sums of Confederate money to one of the residuary legatees, but the parties entitled to the other half of that legacy being unascertained, he paid nothing to them. **HELD:**

1. **Same—Loss Borne Ratably.**—That the loss sustained by the investment in Confederate bonds, must be borne ratably by all the parties entitled to residuum.

2. **Same—Scaling.**—That in ascertaining the residuum, and the payments made to the one residuary legatee, these payments must be scaled according to the value of the money at the time of the payment.

7. **Will—Interpretation.**—By the second clause of the will testatrix says: I give half the Virginia State stock that I may own when I die to my cousin S. L.

760 He is entitled to one-half of the aggregate *amount of State stocks she owned at her death, except the State bonds exchanged for the guaranteed bonds of the James River and Kanawha Company. But though her money was invested in State bonds by a bank in its own name, and deposited with the treasurer of the State, under an agreement with her to pay the taxes on the bonds, and also the investment, and return her the bonds when she required it, or purchase others and deliver them to her, this does not make the bonds hers, so as to entitle S. L. to one-half thereof.

This was a bill filed in January 1863, in the Circuit court of Nelson county, by D. J. Hartsook, executor of Mary W. Cabell, deceased, to obtain a construction of certain clauses of her will and the codicils thereto, and to have the direction of the court in the administration of the estate. The legatees interested in the clauses, which were supposed to be of doubtful construction, and the next of kin, so far as they were known, were made parties defendants.

Mrs. Cabell was the widow of the late Joseph C. Cabell, of Nelson county, and she died in that county in December 1861. She was the daughter of George Carter, and her mother was a Skipwith. She was an old lady, possessed of a very large estate, consisting principally of slaves, bank stock and bonds, without children, or brothers or

***Same—Parol Evidence.**—In *French v. French*, 14 W. Va. 507, the court, citing as authority the principal case, said: "Parol declarations of the testator cannot be admitted to control the construction of a will, except when the terms used in the will apply indifferently without ambiguity to each of several different subjects or persons, when evidence may be received as to which of the subjects or persons so described was intended by the testator." See also, *Wootton v. Redd*, 12 Gratt. 196.

See *Young v. Cabell*, 27 Gratt. 761 for the sequel of the principal case.

†**Same—"Money Legacies."**—See, as to Demonstrative Legacies, *foot-note* to *Corbin v. Mills*, 19 Gratt. 432.

sisters, or their descendants; all her uncles and aunts but one were dead, and her next of kin scattered over the United States, and a number of them in Europe, were the descendants of these uncles and aunts; and those of them who were known and made parties in this suit were about one hundred.

The will of Mrs. Cabell, and the six codicils thereto, were written by herself; and they give abundant proof that not only the handwriting, but the whole frame and structure, as well as the provisions of these instruments, were her own work. The legatees number about fifty, and the legacies range from a gold thimble up to twenty

thousand dollars, and even more,
761 given specifically, *beside the residuary bequests. The clauses of the will and codicils on which the questions decided in this court arose, or which may throw light upon them, are the following: The will is dated the 22d of December 1859, and says first: "Of the ten thousand and fifty dollars which I received from my uncle Fitzhugh Carter's estate, I give and bequeath two thousand dollars of it to Mrs. Hill Carter, of Shirley; two thousand dollars of it to Mrs. Mary Cabell Irvine; two thousand dollars of it to my cousin Mrs. Fanny Young; one thousand dollars of it to my friend Miss Lucy Claiborne; one thousand dollars of it to Mrs. Margaret Brown, daughter of Mrs. McClelland; one thousand and fifty dollars to my friend Mrs. Fanny Taylor, of Philadelphia; and one thousand dollars of it to my cousin Miss Landonia Randolph. I leave the sums mentioned above, to Gen'l Cocke, in trust for the sole and separate use of the ladies whose names are mentioned."

The second bequest is:—"I give and bequeath half the Virginia State stock that I may own, when I die, to my cousin Smyth Lee."

After a number of other bequests, the first of them being to her cousin Peyton Skipwith of all the Richmond city stock that she might own at her death, and her mother's portrait, comes the following: "I leave to Dr. Charles Cocke, in trust for the sole and separate use of the now unmarried daughters of my cousin Carter Braxton, and my cousin Dr. Corbin Braxton, my guaranteed bonds of the James River and Kanawha Company, to be equally divided between them."

In the conclusion she says:—"I have written one, and I mean to write another codicil to this will." And after signing it she says:—I appoint my cousin, P. H. Skipwith, my executor; if he cannot act, I appoint D. J. Hartsook, without either of them giving security.

The first codicil is dated the 24th of December 1859. After making a number
762 of bequests of money, trinkets, *portraits and furniture to different persons, she signs it; and then adds: I intend, hereafter, writing another codicil to dispose of the rest of my property; but in case of a sudden death, I will add to this codicil, that I give to my cousin, Peyton H. Skipwith,

my servant Peyton, &c., mentioning several slaves. And then, after another signing, comes the following clause: "I have specified in several instances, exactly what different stocks are to be given to different persons; but in case changes be made in the location of my stock, I wish it to be distinctly understood, that out of my general property, those same persons are to receive the sums of money specified as given to them. I also leave all and every thing that I have given to my cousins, Peyton Skipwith and Smyth Lee, in trust to D. J. Hartsook for their sole and separate use, to do with as they please."

The second codicil, which is dated at its commencement, on the 28th of February 1861, and at its conclusion, August 18th, 1861, after several legacies of money to other persons, gives to Miss Cornelia Taylor, of Philadelphia, one thousand dollars, and to Mrs. Lewis, of Philadelphia, two thousand dollars; and then says: "In case of a sudden and unexpected death, I give the remainder of my property to be equally divided between my cousin, Dr. Carter of Philadelphia, and my cousin Peyton Skipwith, of New Orleans one-half of which, each must hold in trust for the benefit of their children."

The third, fourth and fifth codicils are of no importance; the sixth, which bears date the 27th of November 1861, says: "In consequence of the state of the country, I now revoke my bequest to Dr. Charles Carter and his children, and also to Mrs. Fanny Taylor, her daughter Miss Cornelia Taylor, and also to Miss Fanny Lewis, all of them residents of Philadelphia."

763 *On the 30th of April 1863, the court, on the motion of the plaintiff, made an order, that it appearing that the plaintiff has money in his hands received in the due course of his trust, belonging to the estate of his testatrix, which moneys, owing to the difficulties and doubts concerning the construction of the will, and the dispersed situation of some of the legatees, he is unable to pay over to the parties entitled, leave is granted him to invest the whole or any part of said money in registered bonds of the Confederate States or of the State of Virginia, taking said bonds in his name in his fiduciary character. And it shall be the duty of the plaintiff to preserve the bonds thus taken, and to exercise due diligence in collecting the interest thereon.

Several of the legatees mentioned in the first clause of the will, Smyth Lee and Peyton H. Skipwith, answered separately, and all the next of kin mentioned in the bill united in an answer; all of them setting up their respective pretensions. But without going into detail, the several questions, with the evidence in relation to them, may be stated as follows:

It was contended by the legatees under the first clause, that they were demonstrative legacies, and that the legatees were entitled to receive in money, the sums mentioned. And it appeared from the evidence that Joseph C. Cabell, the husband of the

testatrix, had, in his lifetime, received from the representatives of Fitzhugh Carter's estate, a sum of money which he invested in State bonds in his own name, to the amount of ten thousand and fifty dollars. As this was money derived through his wife, he wished it to be transferred to her, and had executed a power of attorney to D. J. Hartsook, authorizing him to transfer the stocks to her; though this power had not been delivered to Hartsook, and nothing was done under it during his lifetime; but after his death, with the consent of the residuary legatees of Joseph C.

Cabell, his executors transferred the
764 *stock to Mrs. Cabell. These bonds were kept separate from her other bonds by Mrs. Cabell, and they are entered separately in the book in which she entered a statement of the bonds and stocks which she held. This book was before the commissioner, and is referred to as marked A.

Under the second clause of the will, Smyth Lee claimed that he was entitled to one-half of all the State bonds which the testatrix owned at her death. Of these bonds, there were \$29,550 of which there was no dispute, that he was entitled to one-half. He contended that the bonds mentioned in the first clause should be taken into the estimate and added to the above sum; and further, that bonds to the amount of \$7,600, which she held at her death, and for which she had exchanged her guaranteed bonds of the James River and Kanawha Company, should be taken as constituting a part of the State bonds referred to in the second clause of the will. And he insisted still further, that the Bank of Howardsville held the State bonds of the testatrix to the amount of \$34,600, which should also be taken as a part of the fund of which he was entitled to share.

It appears from the evidence, that at the time Mrs. Cabell wrote her will, she held \$7,600 of the bonds of the James River and Kanawha Company, guaranteed by the State. These are the bonds given in the will to the unmarried daughters of Carter and Corbin Braxton. On the 23d of March 1860, the general assembly passed an act to amend the charter of the James River and Kanawha Company, by the 4th section of which act, the Board of Public Works was directed, upon the surrender by the holders thereof, of any of the bonds of the James River and Kanawha Company, for the payment of which the State is responsible, to issue to said holders a correspondent amount of the bonds of the State. Under this act, Mrs. Cabell surrendered her guaranteed

bonds, and received in lieu thereof, a
765 certificate *of debt of the State for \$7,600, bearing date January 1st, 1861; and this she held at her death.

In relation to the \$34,600, Hartsook who was the agent of Mrs. Cabell during her widowhood, for the management of her property, and also the cashier of the Howardsville Bank, states in his first examination: "The sum of \$34,600 of State stock, purchased from time to time, in the life-

time of Mrs. Cabell, was transferred by her or by me as her agent, to the Bank of Howardsville; the agreement being that the said bank should pay the State taxes, and Mrs. Cabell should receive the interest. This stock was either purchased in the name of the Bank of Howardsville, or transferred to said bank, and now stands in the name of said bank, and is held by the State treasurer as security for the redemption of the issues of said bank. This stock is not entered in the book marked A (the book kept by Mrs. Cabell in which she entered her stocks and bonds), and heretofore referred to; not being in her possession, but standing as above stated, in the name of the bank, and the certificates in the hands of the State treasurer.

In his second examination he says: On the ledger of the Bank of Howardsville, there stands to the credit of Mrs. Mary W. Cabell's estate the sum of \$34,600, in the registered stock of the State of Virginia. This affiant was cashier of said bank, and the agent of Mrs. Cabell; and at various times had collected for her, and had in his possession, large sums of her money, which money she wished invested in stocks. This affiant at various times purchased from others certificates of stock of the State of Virginia, which was by them transferred to the Bank of Howardsville, and by it deposited with the treasurer of the State for the purposes mentioned in the charter of the bank. This was done in pursuance of an agreement with Mrs. Cabell, that the bank was to pay her the whole interest on said
766 stock, taxes thereon to be paid by the bank; and whenever *Mrs. Cabell wished it, the bank was to redeem the stock so deposited, or purchase for her a like amount. After her death I transferred to her credit on the books of the bank all the stock thus purchased and deposited with the treasurer of the State, amounting to \$34,600 as above stated. During her lifetime this affiant was credited with this stock on the books of the bank, but the officers of the bank knew it to be Mrs. Cabell's, under the agreement aforesaid; and therefore her estate was credited with it. "There was no written contract between Mrs. Cabell and the bank in regard to this matter." He further stated, that of this \$34,600 there were still deposited with the treasurer three certificates of \$10,000 each deposited by the bank, two of which are the identical certificates deposited by him; the residue, amounting to \$4,600, he believed had been exhausted in the redemption of the issues of the bank.

The commissioner who was directed to enquire into the facts in relation to these subjects, reported the facts as herein stated; and on the last question concluded his report as follows: No evidence that Mrs. Cabell ever owned any such stock appears on her book, wherein she kept lists of her stocks, which is herewith filed, marked com'r A. It therefore appears to the com'r that the Bank of Howardsville was a borrower of Mrs. Cabell to the extent of said

\$34,600, and is debtor to her estate in that amount; and he, so regarding it, has listed the same among the assets of the estate, as a debt due from said bank; and under the provisions of the charter of said bank has reported it as a good debt. The report on this question was excepted to by Smyth Lee.

The legatees of the bonds of the James River and Kanawha Company, guaranteed by the State, insisted that the exchange of the bonds was an ademption of the legacy; and that under the provision of the 1st codicil, they were entitled to be paid out

767 of the general *property of the estate the nominal amount of the bonds.

And Peyton H. Skipwith insisted that the residuary clause of the will in favor of Dr. Carter, of Philadelphia, having been revoked, he was entitled to the whole of the residuum. Whilst the next of kin insisted, first, that the bequest of the residuum having been on the contingency of her sudden and unexpected death, and this not having occurred, the bequest was void; and, second, that if the bequest was valid, it was revoked as to the one moiety given to Dr. Carter; and as to that and the other legacies mentioned in the clause of revocation, Mrs. Cabell died intestate, and that the legacies given to these legatees, passed to them as the next of kin.

In relation to the revocation of the bequest to Dr. Carter and the other legatees living in Philadelphia, Hartsook, in his examination, says: Some time before her (Mrs. Cabell's) death, I was at her house, and she said she had made her will and had written it so plain that no difficulty could be made; and said she wanted the persons to whom she had given her property to get it as soon after her death as possible. I remarked to her, that under the sequestration act, if she had given property to any of her northern friends, it might be confiscated, and that I mentioned it for her consideration. She thanked me, and said she had, and that she would revoke the bequests. On visiting her the next time, she remarked that she had revoked the bequests to her northern friends on account of the state of the country. I then asked her if she had made any disposition of the property given in these revoked bequests, or whether she had any residuary clause to her will which would take it. She replied she had a residuary clause; and that would do. I told her that perhaps it would not. She replied, well, I cannot help it now. She was suffering greatly and very feeble.

Mrs. Mosby, another witness, says:
768 "She (Mrs. *Cabell) talked about dying for several months before her death, but I do not think she gave up all expectation of recovery until about eight days before she died.

The only other questions in the cause were, whether the assets, amounting to \$47,600, invested under the order of the court in the cause in Confederate bonds, were to be considered as invested for the next of kin, and they to bear the whole

loss, or whether it was to be considered a part of the residuum, and the loss to be borne by all the parties interested in that residuum; and, second, whether the payments made by the executor during the war to Peyton H. Skipwith, on account of his interest in the residuum, should be charged to Skipwith at their nominal amount, or at their real value at the time of payment. These payments amounted to \$73,910 in Confederate money.

By the decree of the court made on the 10th of October 1866, the court held, 1st. That the bequest of the residuum was not on a contingency which avoided it. 2d. That Peyton H. Skipwith took only one-half of the residuum, and the testatrix died intestate as to the half left to Dr. Carter. 3d. That the legatees of the Fitzhugh Carter fund under the first clause took only the State bonds. 4th. That the legacy of the guaranteed bonds of the James River and Kanawha Company was adeemed by the change into State bonds; and that the legatees were entitled to be paid the nominal amount of said bonds out of the general assets of the testatrix. 5th. That the State bonds constituting the Fitzhugh Carter fund, except the \$1,050 left to Mrs. Fanny Taylor of Philadelphia, and afterwards revoked, were not to be taken into the account of the State bonds owned by the testatrix at her death, of which Smyth Lee was to receive one-half. And the commissioner's report was recommitted, with instructions to retake the accounts before ordered and any others which the parties may require to be taken.

769 *The second decree was made on the 10th of October 1867, when the court held, that the \$47,600 invested under the order of the court in Confederate bonds, should be embraced in the residuum, and all the parties interested in that residuum should bear the loss ratably; and that Peyton H. Skipwith should be charged only the real value of the Confederate money received by him from the executor on account of his interest in the residuum, as at the time it was paid to him.

From these decrees, Skipwith for himself, and as trustee for his children, obtained an appeal to the District court, where they were affirmed; and he then obtained an appeal to this court. On the 8th of May 1868, after the decision in the District court and before the appeal to the Supreme Court of Appeals, the Circuit court made another decree, carrying out the principles settled in the former decrees. And C. C. Lee and others, the next of kin, obtained an appeal from that and the former decrees.

Baldwin, for the appellant Skipwith. It is obvious on the face of these testamentary papers, that it was the intention of this testatrix not to die intestate as to any part of her property. Her next of kin are exceedingly numerous, there being over one hundred of them parties on this record; and they are scattered over the world; many of them wholly unknown to her.

1st. I shall discuss the effect of two of the codicils of this testatrix: first, that of the 18th of August 1861, which is the second codicil to the will; and second, that of the 27th of November 1861, which is the sixth of these papers. It is said for the next of kin that the provision in the second codicil, giving the residuum of the estate to Dr. Carter and Peyton Skipwith and their children, is contingent, depending on the sudden and unexpected death of the testatrix; and that she did not so die. This

language is used in the first codicil; 770 and *it is not pretended that in that codicil it has this effect. Here is an old lady, seventy-five years old; what death as to her can be sudden and unexpected. In construing such words the courts are cautious in construing them as conditions. 1 Lomax Ex'ors 19; 1 Redfield on Wills 176, 178-9, 180. This being an olograph will, no particular formality is required in its publication. Now this second codicil is dated the 18th of August. She made several codicils afterwards; and in none of them has she shown a disposition to change it. In the sixth codicil she recognizes this provision in the second, for there is no other bequest to Dr. Charles Carter and his children.

2d. It is said on behalf of Dr. Carter and his children, that the revocation of the bequest to him and his children in the sixth codicil is void, because it was done under a mistake. There are some cases of mistake which will avoid a provision in a will; there are some cases in which a testator is allowed to be deceived; as a bequest under the belief that the attention of the legatee proceeds from affection; it will not be allowed to show that this was not the fact. On the other hand, when there has been a bequest to a son, which has been revoked under the belief that he was dead; the revocation will be held to be void. And if there is a bequest to a woman under the belief that she is his wife, and it appears she is not his wife, the bequest is void. But in all these cases you must find the mistake on the face of the will, and it cannot be proved by parol. 1 Lomax Ex'ors 51; 1 Redfield Wills 358. The distinction taken in the cases is shadowy; and the only safe rule is that you must stand upon the will and the facts appearing in it which induces the revocation. In this case the testatrix says in consequence of the state of the country she revokes the bequest. If the state of the country was not as it was, then you might say the mistake would avoid the revocation.

771 *It is said that this is a patent ambiguity, and therefore parol proof is admissible to explain it. Parol evidence to prove what was the state of the country; what Mrs. Cabell thought was the state of the country! Counsel confine it to her mistake as to confiscation; but no case goes so far as to hold that a mistaken belief or opinion or conjecture will avoid the revocation. Who will say what was the state of the country at that time? Though Hart-

sook says he suggested the danger of confiscation, she says, she revokes on account of the state of the country.

3d. The counsel, all of them, seem to consider that the rule in relation to lapsed legacies governs this case. It in fact has no application to it. A lapsed legacy is a defeat pro tanto of the testator's will. The courts have said if a specific legatee dies in the testator's lifetime, the legacy goes into the residuary bequest; not because the testator intended it; but for no reason but the strong disposition to prevent an intestacy. They presume what is true, that a party sitting down to write his will intends to dispose of the whole of his estate.

Then when they came to the residuary estate, as there may be two residuary legatees, they established the rule, that where they were joint legatees, and one died in the lifetime of the testator, the survivor should take the whole; but if they were to take as tenants in common, it does not pass to the survivor.

And so there is another rule. If there is a bequest to a class, the legacy will go to those who survive the testator.

These are arbitrary rules established by the courts; and these being established, gentlemen jump to the conclusion, that the rule applies to a revocation of a legacy. But there is no ground for this conclusion. When a testator revokes a legacy, he is doing a testamentary act; and it is his intention which is to govern. In the 772 *one case, the intention of the testator is defeated; in the other, his intention is expressed. The codicil is a part of the will, and both are to be regarded as one paper. It is a republication of the will as modified by the codicil, and if there is a clause of revocation, the will is to be read as if the clause revoked was non scriptum.

Then, if the courts struggle against an intestacy when the intention of the testator is defeated, much more should it be the policy of the courts to construe the testamentary acts to effect the same object. 2 Redfield Wills 442, gives the rule as to lapses. The testator is supposed to give away the legacy from the residuary legatee only in favor of the special legatee. A fortiori, the court is bound to presume against the intestacy in the case of a revocation, and to enquire what is the intention of the testator expressed upon the face of the paper read as one.

It may be supposed that this question is concluded upon authority; but I have been surprised to find how little authority there is upon it. The judges and text writers have fallen into the error of confounding the principles; yet, there is no such authority as concludes it. The first case is *Humphreys v. Taylor*, Amb. R. 136. This case shows that the will is to be read as if the bequest revoked was non scriptum. In a case of a lapse, you must read the will as with the clause in it; but when you consider a revocation, you read it as with the clause out. This case is referred to in

several books. *Larkins v. Larkins*, 3 Bos. & Pul. R. 16, 17, refers to *Humphreys v. Taylor*, for the principle that a revocation without a new gift is the gift of the whole to the other. Bacon's Abr. folio edi. Wills & Testaments, Letter G.

This case of *Larkins v. Larkins*, is a case in favor of the appellant; as is also *Harris v. Davis*, 28 Eng. Ch., 1 Coly. R. 416.

The only case in which in such a case as the present, *the revocation was held to be a lapse, is *Creswell v. Cheslyn*, 2 Eden's R. 123. To this case, is appended a note of sergeant Hill, in which he questions its correctness. Then the question is, whether this case so disapproved, so settles the law as to bind this court.

Then how does this will read as corrected by the codicil. I give the remainder of my property to be equally divided between my cousin Dr. Carter of Philadelphia, and my cousin Peyton Skipwith of New Orleans, &c. Strike out all that relates to Dr. Carter; and it will all be given to Skipwith. This is not a case of artificial construction, where you are settling a principle; but it is a case of the intention of the testatrix in writing the two provisions. The whole is given to be divided; the division is dispensed with, and therefore it is not to be divided. You re-write the will and strike out every thing which relates to Dr. Carter and his children.

Fitzpatrick, for Smyth Lee's adm'r. We contend that there is error in the decrees and rulings of the court below, in so far as the decrees relate to the distribution of the Virginia State stocks; first, because \$10,050 of State stocks, called the Fitzhugh Carter fund, is ordered to be distributed as specific stock legacies, and not to be estimated as stock owned by the testatrix at her death, in the computation to be made, to ascertain the legacy which would pass to Smyth Lee under the second clause of the will; by which ruling the legacy of Smyth Lee is diminished to the extent of \$4,500 in State stocks.

Second, because \$34,600 of State stocks which were loaned to or deposited with the Howardsville Bank, were not treated as the property of the testatrix, whereby the legacy to Smyth Lee is diminished the sum of \$17,300, being one-half of the stocks so deposited.

The question is one purely of construction, and *must be decided by gathering the intention of the testatrix from the instrument itself. The language used in the second clause of the will is general and not restricted in the least. By it Smyth Lee is entitled to receive one-half of all the State stock owned by the testatrix at her death; no exceptions whatever are made; we have only to ascertain what amount of Virginia stocks were owned by testatrix at her death in order to fix the rights of this legatee. But it is contended that the legacies given under the first clause of the will are specific stock legacies and not demonstrative, as the au-

thorities would indicate. If this be so, which we submit is not the case, yet the general legacy to Smyth Lee, although it may have been fluctuating during the life of the testatrix, cannot be reduced by reason of such specific legacy, provided the common fund charged with the specific and general legacy be sufficient to satisfy both; as in this instance. It appears from the master's report that the testatrix owned at her death \$37,700 of Virginia stocks, one-half of which is \$18,850, which, if the Fitzhugh Carter stock be added, will amount to \$28,900, which being deducted from the \$37,700, leaves in stock for general administration, the sum of \$8,800, after paying all stock legacies, general and specific. Thus it will be seen that, without necessity, the provisions of the second clause of the will are limited and restricted by the decree of the court, so as to reduce the legacy thereunder; thus doing violence to the plain meaning of the language used. But it is contended that the first clause qualifies the second. In what way? No allusion is made in either clause to the other. If the legacies under the first clause were specific, and there was not enough stock to satisfy all stock legacies, general and specific, then the specific stock legacies would be paid to the exclusion of the general stock legacies; but no such question can arise here, as a

large amount of stock remains after satisfying all. *But it may not be amiss to enquire if the legacies under the first section of the will are specific; if so, they are specific stock legacies, and a sale of the stocks by the testatrix in her lifetime would have defeated the legacies. Would such a sale have so operated? We think not. The Fitzhugh Carter fund would have remained, and the legacies would be paid as general money legacies or as demonstrative legacies; which would not be the case if they are specific legacies. We think there is clearly error in this part of the decree.

As to the second ground of the complaint, we think that the record abundantly shows that at the time the testatrix made her will, she believed that she was the owner of State stocks, deposited with the Bank of Howardsville, to the amount of \$34,600, which had accumulated in the hands of her agent D. J. Hartsook during the period from 1856 to 1858, and which had been invested by said agent under her direction. Under this belief she makes her will in 1859, giving Smyth Lee one-half of all her State stocks. Was it not her intention to embrace one-half of the State stocks deposited with the Bank of Howardsville in this bequest? Clearly it was. The stocks were purchased with her money. She received the interest. Her agent, who was also the cashier of the bank, regarded them as belonging to her. She died under that conviction; they were listed and appraised as her property; and were in truth hers against the world, except that being in the hands of the State treasurer they were liable to make good the redemption of the notes of the bank; and

that, not because they belonged to the bank, but because they were deposited for that purpose under an arrangement between the bank and the owner, which was accomplished by the cashier of the one and agent of the other, who happened to be one and the same person. But for the results of the

war, this stock would have been re-
776 leased by the bank, and returned *to the estate; in which event no difficulty or question would have been raised as to the right of Smyth Lee to receive one-half of the same. If the bank cannot replace the stocks, is not Smyth Lee entitled to one-half of the claim against the bank for said stocks? We think he is, and therefore ask that the decree be corrected accordingly. We do not think it necessary to add words in support of that portion of the decree which gives to Smyth Lee one-half of the guaranteed bonds of the James River and Kanawha Company which had been converted into State stocks in the lifetime of the testatrix. They were Virginia stocks at her death, and, as such must pass under the will.

Lyons and Young, for Mrs. Irvine, &c., insisted:

I. That the bequests to Mrs. Irvine, Mrs. Young, and Miss Lucy Ann Claiborne are demonstrative legacies, so far partaking of the nature of specific legacies, that they are not liable to abatement, and must be paid before any residuum can be declared.

1. Roper on Legacies 198-9; 2 Lomax on Ex'ors 70, 71.

II. That the bequests in the second codicil to Dr. Charles Carter and Peyton Skipwith, being made "in case of a sudden death," which did not occur, pass nothing, and the subsequent codicils show that the testatrix so regarded them. 1 Jarman on Wills 156, 7, 8.

The testatrix left no residuary legatee; therefore,

III. The legacies to Dr. Carter and his children, Mrs. F. Taylor, Mrs. Cornelia Taylor and Miss Fanny Lewis, were expressly revoked by the sixth codicil.

IV. The devisees, Skipwith and Carter, if they took at all, took in severalty, and not jointly, as they would have done if the subject had not been money; the bequest is not to them jointly, but "to be equally divided" between them, and each therefore took one moiety in severalty, and not one-half
777 of each dollar and each share *of stock.

And the executor could not legally have paid or transferred to either, more than a moiety; to have paid two-thirds to either, when both were living, would have been a devastavit as to the excess above a moiety. Between such owners or tenants there would have been no survivorship at the common law; but if there would, there can be none in Virginia, because of the statute which abolishes it. The idea that Skipwith succeeds to the share of Dr. Carter and his children, is entirely without foundation; and as to that share, as well as to the share of Mrs. Fanny Taylor and her daughter, and Mrs. Lewis, the testatrix

died intestate. The legacy to Dr. Carter was for his children, and did not lapse, but was revoked. But the rule that lapsed legacies fall into the residuum does not apply to the subject of the residuary legacy itself. *Frazier v. Frazier's ex'or et al.*, 2 Leigh 642.

V. As to the bequest to Smyth Lee, there is no difficulty, and no conflict between that bequest and the bequest to these appellees. First, because, as already shown, the legacies to those legatees cannot fail. Secondly, because the testatrix, knowing that the \$10,050, which she received from Fitzhugh Carter, was invested in State stock prior to the devise, by the bequest of the fund bequeathed the stock necessary to pay it, and therefore did not intend to bequeath it, and did not bequeath it to Smyth Lee; and intended, of course, to bequeath him one-half of her State stock, exclusive of that in which the fund aforesaid was invested, and so much, if any, as might be necessary to raise the amount of the legacies. Any other interpretation of her will would convict the testatrix of the absurdity of bequeathing a fund in the first clause of her will to one set of persons, and the very next clause to another person. Such interpretation is repudiated by the law, as it is by common sense; the rules of law being,

first, that every interpretation of a will
778 shall be rational; and secondly, *that the interpretation shall be such, if practicable, as to give effect to all parts of the will, and destroy none.

In this case, the interpretation here insisted upon conforms to all these rules, and makes the will harmonious; while the opposing interpretation violates them all, and makes the will incongruous. 2 Williams on Ex'ors, p. 974, § 3.

Howison, for Dr. Carter and his children, insisted:

1. That it was the clear intent and meaning of the testatrix that Dr. Carter and his children should have one-half the residuum of her estate, and full effect should be given to this intent.

2. That the deposition of D. J. Hartsook is admissible in evidence to show acts and declarations of the testatrix or in her presence just before and just after the 6th codicil was made, in order to ascertain its true meaning. 1 Jarman on Wills 362-367; *Shelton's ex'ors v. Shelton*, 1 Wash. 53; *Flemings v. Willis*, 2 Call 5; *Mackey v. Fuqua*, 3 Call 19; *Bates v. Holman*, 3 Hen. & Mun. 502; *Ambler v. Norton*, 4 Hen. & Mun. 23; *Jones v. Robertson*, 2 Munf. 187; *Land v. Jeffries*, 5 Rand. 211; *Early v. Wilkinson & Hunt*, 9 Gratt. 68; *Smith's ex'or v. Spiller*, 10 Gratt. 318.

3. That in the light of this deposition, of the codicils themselves, and of the public history of that time, it is clear that the testatrix did not intend to revoke her bequest to Dr. Carter and his children unless it was subject to confiscation.

4. That her impression that it was so subject was false both in law and in fact. In law, because the sequestration acts of

the Confederate congress were null and void in law. *Folliott v. Ogden*, 1 H. Black. R. 123, 136; Same on appeal, 3 Durnf. & East 726-737; *Wolff v. Oxholm*, 6 Maule & Sel. 92; *Texas v. White & als.*, 7 Wall. U. S. R. 701. In fact, because the sequestration acts never confiscated the property, 779 but only sequestered the *annual interest, rents and profits. Act August 30th, 1861, sec. 6.

5. That the sixth codicil being made under the influence of an impression false at the time, though not ascertained to be false until afterwards, did not revoke the bequest previously made in favor of Dr. Carter and his children. *Jarman's Powell on Devises*, 21 Law Lib. top pages 306, 309; 1 *Jarman on Wills* 163-166; 1 *Lomax on Ex'ors* 51-53; *Campbell v. French*, 3 Ves. R. 321; *In re Moresby*, 1 Haggard's R. 378; *Doe dem. Evans v. Evans*, 2 Perry & Dav. R. 378; *Tulk v. Houlditch*, 1 Ves. & Beame R. 248. The distinction made in the following cases does not weaken, but rather confirms the above: *Att'y Gen'l v. Ward*, 3 Ves. R. 327; *Ashburnham v. Bradshaw*, 2 Atk. R. 36; *Att'y Gen'l v. Lloyd*, 3 Atk. R. 551; *Willet v. Sandford*, 1 Ves. sen. R. 178, 186.

Even the word "revoke" will be construed not to revoke a bequest, when the true intent is not to destroy the benefit previously given. *Lord Carrington v. Payne*, 5 Ves. R. 404; 1 *Jarman Wills* 441, 458.

Grattan and Young, for the unmarried daughters of Carter and Corbin Braxton. For these legatees we insist:

That by the surrender of the guaranteed bonds and the taking the State bonds, these legatees have become entitled to come under the provisions of the codicil, and to receive the amount of the bonds out of the general property of the testatrix.

1st. Upon the language of the codicil.

2nd. Because the legacy was specific, and adeemed by the change of the bonds; and thus is the case provided for by the codicil.

1. Legacy specific.

2 *Lomax Ex'ors*, p. 73, 74; *Barton v. Cooke*, 5 Ves. R. 461; *Sibley v. Perry*, 780 7 Ves. R. 522, 529, 530; *Parrott v. Worsford*, 1 Jac. & Walker 574, 582; *Ashburner v. McGuire*, Lead. Cas. Equ. 201, 346, 352, 353; *Patteson v. Patteson*, 1 Mylne & Keene 12; *Ademption*, Lead. Cas. 356-7-8. Intention not the enquiry. *King's ex'ors v. Sheffey's adm'r*, 8 Leigh 614.

The act of March 23d, 1860, Sess. Acts of 1859-60, p. 113, did not, of its own operation, convert the bonds of the company into State bonds. See § 13, p. 117.

2. The amount of the bonds is to be paid out of the general property. On the language of the codicil.

3. If the legacy is not adeemed, the legatees are entitled to the State bond into which the guaranteed bonds were converted.

Halyburton & Gites, and J. Alfred Jones, for the next of kin, insisted. 1st. That the disposition made by the codicil of August 18th, 1861, is inoperative because it was only to take effect "in case of sudden and

unexpected death" of the testatrix; and her death was not sudden and unexpected. And they referred to the cases of *Parsons v. Lanoe*, 1 Ves. sen. R. 190; and *Sinclair v. Hone*, 6 Ves. R. 607.

2d. That the legacy of the guaranteed bonds to the unmarried daughters of Carter and Corbin Braxton was not adeemed; or if it was, they were not entitled to be paid out of the general property of the testatrix. And they referred on this point to 2 *Lomax Ex'ors* 105-6; *Stout v. Hart*, 2 Halst. Law R. 414; *Anthony v. Smith*, 1 Busbee Equ. R. 188.

3d. That the legacy to Mrs. Irvine and others of the Fitzhugh Carter fund, was a specific legacy of the State bonds. That it came precisely within the definition of a specific legacy as given by Williams; and exactly resembles the case of *Rider v. Wager*, 2 P. Wms. R. 328, cited 2 Wms. Ex'ors 820, 821.

4th. That the legacy to Dr. Carter and his children of one-half the residuum 781 of the estate, was revoked *by the codicil of the 27th of November. That the bequest was not shown to have been revoked under a false impression or in consequence of such impression; and they insisted that extrinsic evidence was inadmissible to show a different motive from that stated in the will. And they referred to 1 *Jarm. on Wills* 343 top, 348 marg. 2d Amer. ed.; 2 *Philips on Evi. Cow. & Hill* 350, § 4; *Wooten v. Redd*, 12 Gratt. 196; *Ratcliffe v. Allison*, 3 Rand. 537; *Land v. Jeffries*, 5 Id. 211; *Roberts v. Roberts*, Law Journal 1862, No. 4, p. 46, of Probate, Matrimonial and Admiralty; *In re Winn*, Jurist of 1861, part 1st, p. 764; *Maxwell v. Maxwell*, 3 Metc. Ken. R. 102; *Dougherty v. Dougherty*, 4 Id. 25.

5th. That by the revocation of the bequest to Dr. Carter, the next of kin became entitled to the legacy bequeathed to him. And they referred to 2 Wm's Ex'ors 763; *Viner v. Francis*, 2 Cox's R. 189; *Doe v. Sheffield*, 13 East's R. 526; *Andrews v. Partington*, 3 Bro. C. C. 401 in note; *Gaskell v. Holmes*, 25 Eng. Ch. R. 438; *Mann v. Mann*, 2 Stra. R. 905; *Bagnell v. Dry*, 1 P. Wm's R. 700; *Page v. Page*, 2 Stra. R. 820; *Knight v. Gould*, 2 Myl. & Keene R. 295, 8 Cond. Eng. Ch. R. 2; *Sykes v. Sykes*, 3 Law R. 1867-68, 299; S. C. in the Chancery Appeal Cases, 3 vol. p. 301; *Lord Bindon v. Earl of Suffolk*, 1 P. Wm's R. 96.

6th. And they insisted that Skipwith should have been charged with the whole amount received by him from the executor at its nominal amount, \$73,910.

JOYNES, J. These are three several appeals in the same case. The bill was filed by D. J. Hartsook, executor of Mrs. Mary W. Cabell, dec'd, against her legatees and distributees, for the purpose of obtaining the advice and direction of the court, in his administration of the estate, and especially in respect to the construction and effect of certain provisions of the will and codicils of the testatrix. The first two appeals

782 are from the decree *of the District court affirming interlocutory decrees of the Circuit court. The last appeal is from the first decree of the Circuit court. The various questions arising on these appeals will now be disposed of:

I. Mrs. Cabell, after disposing, by her will and two codicils of a large amount of her property, embracing probably the greater part of it, at the close of the second codicil, made the following provision: "In case of a sudden and unexpected death, I give the remainder of my property to be equally divided between my cousin Dr. Carter of Philadelphia, and my cousin Peyton Skipwith of New Orleans, one-half of which, each must hold in trust for the benefit of their children."

It is contended, on behalf of the next of kin, that the bequest contained in this clause is dependent on the condition of the testatrix dying suddenly and unexpectedly. It is contended, that according to the evidence, she did not die suddenly and unexpectedly, and that, therefore, nothing passed by the bequest.

In cases of this sort, the question to be determined is, whether the contingency is referred to as the reason or occasion for making the disposition, or as the condition upon which the disposition is to become operative. Porter's case, Law Rep. 2 P. & D. 22; Dobson's case, Law Rep. 1 P. & D. 88. These were cases in which the words of contingency had reference to the whole will; but the same principles apply when they have reference only to a particular bequest, as in the present case. In Dobson's case, the court said, that a will will not be held to be conditional, unless it is clear that the testator intended that it should operate only in a certain event; and in Porter's case, the court said, that if the language used by the testator can, by any reasonable interpretation, be construed to mean that he referred to the contingent event as the reason for making the will, then the will is not conditional. In Dobson's case, the language was this: "In

783 case of any fatal accident *happening to me, being about to travel by railway, I hereby leave all my property," &c. The court said, that the meaning seemed to be this: "My mind is drawn to the consideration that all railway travelling is attended with danger, and I, therefore, think I had better make my will." It was accordingly held, that the will was not conditional, and it was admitted to probate, although the testator returned unhurt from the travel by railway alluded to in the will.

Mrs. Cabell had disposed of part, and probably the greater part, of her property by her will, and the codicils already made, and she evidently desired and intended to dispose of the residue. The fact, no doubt, was, that she had not fully made up her mind as to the objects, or all the objects, on whom she would bestow the residue, and she seems to have apprehended, that she might be cut off by a sudden and unexpected death, before she would be able to do so.

To provide against that contingency, she thought proper to make the disposition contained in the clause in question, which she intended to stand, in case she should make no other. So, in like manner, in a previous codicil, she had said: "I intend hereafter writing another codicil, to dispose of the rest of my property, but in case of a sudden death, I now add to this codicil," &c.

In putting a construction upon the ambiguous language of this clause, we may properly take into consideration the character of the contingency referred to. And when we do so, it seems hardly possible to believe that the testatrix could have intended the bequests in this clause to be contingent, upon her happening to meet a sudden and unexpected death. What is a "sudden death?" What we call the occasion or the cause of death, as a shot, or a blow, or a fall, may be sudden, but how soon must death follow, to give it the character of a "sudden death?" And what is an "unexpected death?" Unexpected

784 to whom? Unexpected *for how long a time? We may well say of a death taking place under certain circumstances, that it was sudden and unexpected; and of a death taking place under certain other circumstances, that it was not sudden and unexpected. But how can we draw the line? It is plainly impossible, in the nature of things, to lay down a rule for determining when a death is sudden and unexpected, and when it is not; and this must have been as obvious to the testatrix as it is to us. And then, what possible motive could she have had to make her bounty dependent on such a condition? She might live many years. Could she have intended, in that event, that it should depend upon the mere manner of her death, whether her legatees should take? Such a purpose would have been whimsical and absurd to the last degree, and inconsistent with all our experience of human motives and feelings.

Upon the whole, it seems clear, that such expressions as those used in this clause, could not properly be construed as creating a condition, unless accompanied by other language, so clear as to admit of no other interpretation. They are not so accompanied in the present case, and without putting the slightest strain upon the language, we can understand it as designed only to express the reason, which led the testatrix to dispose of the residue at that time, and to avoid the risk of further delay.

The bequests, therefore, were absolute and not conditional, and so the Circuit court held.

II. The second codicil, containing the residuary clause just considered, is dated, at the beginning, February 28, 1861, and at the end is the date August 18, 1861. On the 27th day of November 1861, the testatrix made a sixth codicil, as follows:

"In consequence of the state of the country, I now revoke my bequests to Dr. Carter and his children, and also to Mrs. Fanny Taylor, her daughter Miss Cornelia
785 *Taylor, and also to Miss Fanny

Lewis, all of them residents of Philadelphia." It is contended on behalf of Dr. Carter and his children, that this revocation is inoperative and void, because made under a mistake. To establish the alleged mistake, they refer to the testimony of Mr. Hartsook, who says that in a conversation with the testatrix, he suggested to her, for her consideration, that if she had given property to any of her northern friends, it might be confiscated under the sequestration act [of the Confederate States]—that she replied, that she had done so, and would revoke the bequests; and that she subsequently told him that she had revoked the bequests to her northern friends, in consequence of the state of the country. The alleged mistake is, that she supposed that these legacies, if not revoked, would or might be confiscated, whereas, it is insisted, the sequestration act was wholly void in law; and, moreover, did not confiscate the corpus of any property, but only sequestered the profits.

The most that can be made of this evidence is, that the testatrix had been advised by the witness, as his opinion, that the legacies referred to would be liable to confiscation, and that she adopted that opinion by making the revocation. But it is laid down, that if a revocation is made dependent upon the information received by the testator, or upon his belief or opinion, the act will be held valid, notwithstanding he may have been misinformed, or under a misapprehension. 1 Redfield on Wills 358, pl. 25. It is as if she had said, "I have been advised that these legacies will be liable to confiscation, and, to avoid all risk, I revoke them." She chose to make the revocation because she had been so advised, but she does not put it on the soundness of the advice, and the revocation cannot be set aside by showing that the advice was unsound. 1 Powell on Devises 527; Atto. Genl. v. Lloyd, 3 Atk. R. 551. Besides, it

has not been shown that the testatrix was *under any mistake. The counsel admits that the profits of the legacies would have been liable to confiscation, or to sequestration, which was practically the same thing: and this may have been just what she apprehended. We ought to presume so, if this was the only sort of confiscation that was lawful or usual. And if she apprehended confiscation of the whole, it has not been shown that the apprehension was unfounded.

But the codicil does not state any fact upon the supposition of whose existence the testatrix proceeded in making this revocation. All that she says is, that she revokes the bequests, "in consequence of the state of the country." What there was in the state of the country that caused her to do so, or what she thought or feared in regard to the state of the country, does not appear on the face of the will. In the cases cited by counsel, the fact which the testator assumed to exist, and the assumed existence of which induced the revocation, appeared on the face of the will. But here

we are asked to go outside of the will, and to ascertain from parol evidence what were the particular views and opinions of the testatrix, so as to lay the foundation for a case of mistake. No case has been found in which this has been allowed, and to allow it would violate fundamental principles.

The Circuit court, therefore, was right in holding, that the revocation was valid and effectual.

III. The next question is, what became of the half of the residuum, the bequest of which was thus revoked? The next of kin claim, that it passed to them as undisposed of; which was the view held by the Circuit court; while Skipwith claims, that the effect of the revocation was to make the whole residuum pass to him and his children.

The claim of Skipwith has been maintained on two grounds, one of which is, that the original bequest of *the residue was to a class, composed of the children of Carter and the children of Skipwith. The short answer to this is, that the bequest was not to the children of Carter and the children of Skipwith, jointly and collectively, but to the children of Carter and the children of Skipwith, as separate families, each family taking one-half; in other words, the bequest was not to one class, but to two classes.

But the ground mainly relied upon is, that, in consequence of the revocation, the will must be read as if the revoked bequest, and everything relating to it, were struck out, or had never been inserted; the effect of which, it is said, will be, that the whole residuum is still disposed of, and that Skipwith and his children are the only persons to whom it is given.

It is clear that under the terms of the residuary clause, Dr. Carter and Mr. Skipwith, as trustees for their children respectively, took the residuum as tenants in common. Each took a moiety, and a moiety only. If, therefore, the words importing a bequest to the Carters, be considered as struck out, there will remain only a bequest of a moiety to the Skipwiths. And it is a well settled doctrine in England, that where there is a devise or bequest of a residue to several as tenants in common, and a revocation by codicil of the devise or bequest of one of the shares, that share does not fall into the residuum and pass under the will, to the other devisees or legatees, but becomes undisposed of, and goes under the law to the heir at law, in case of real estate, and to the next of kin [distributees], in case of personal estate. The reason is, that each tenant in common took only his several share, by the original gift, since tenants in common do not, like joint tenants, take per my et per tout, and there being no new gift by the codicil of the share revoked from one of them, the others can take no greater share than they had by the original will.

*The leading case on this subject, is Cresswell v. Cheslyn, 2 Eden R. 123, decided by Lord Northington in 1761, whose decision was affirmed by the House

of Lords. There is a note to that case by Serjeant Hill, in which he questions the correctness of the decision upon the same ground as that mainly relied upon in the present case. That case, however, has always been followed, and its doctrine is firmly established in England. The latest case is *Sykes v. Sykes*, decided at the Rolls in 1867, Law R. 4 Eq. 200 and by the Lord Chancellor on appeal in 1868, Law R. 3 Ch. App. 301. The Master of the Rolls said, that *Cresswell v. Cheslyn* had been considered an authority for more than one hundred years, and that he did not know a single case in which its authority had been doubted. See, also, the following cases, in which the doctrine of *Cresswell v. Cheslyn* was recognized and approved. *Skrymsher v. Northcote*, 1 Swanst. R. 566; *Shaw v. McMahon*, 4 Dr. & War. R. 431; *Harris v. Davis*, 1 Coll. R. 416; *Clark v. Phillips*, 21 Eng. L. & Eq. R. 122; *Ramsey v. Shelmerdine*, Law Rep. 1 Eq. 129. In *Humphrey v. Taylor*, Amb. R. 136, cited by the counsel for Skipwith, the legatees took as joint tenants, and not as tenants in common; and that was the ground of the decision. *Cresswell v. Cheslyn* has likewise been approved and followed in this country. *Brownell v. De Wolf*, 3 Mason R. 486; *Floyd v. Barker & al.*, 1 Paige R. 480.

IV. By the first clause of her will the testatrix bequeathed as follows:

"Of the ten thousand and fifty dollars which I received from my uncle Fitzhugh Carter's estate, I give and bequeath two thousand dollars of it to Mrs. Hill Carter of Shirley, two thousand dollars of it to Mrs. Mary Cabell Irvine, two thousand dollars of it to my cousin Mrs. Fanny Young, one thousand dollars of it to my friend Miss Lucy Claiborne, one thousand dollars of it to Mrs. Margaret Brown, daughter of 789 Mrs. *McClelland, one thousand and fifty dollars to my friend Mrs. Fanny Taylor of Philadelphia, and one thousand dollars of it to my cousin Miss Landonia Randolph. I give the sums mentioned above to Gen'l Cocke, in trust for the sole and separate use of the ladies, whose names are mentioned."

It appears from the evidence, that, at the death of the husband of Mrs. Cabell, he had standing in his name \$10,050 of bonds of the State of Virginia, which he had purchased with money derived from the estate of Wm. Fitzhugh Carter; that he regarded these bonds as belonging to his wife, and they were accordingly transferred to her by his executor; that in a book kept by Mrs. Cabell, and containing a list of all her stocks and public bonds, the said bonds were entered under the head of "State bonds transferred by J. C. Cabell's ex'or to Mary W. Cabell, derived from Wm. Fitzhugh Carter's estate," and that these bonds were kept by Mrs. Cabell, and were found after her death, wrapped up together in a separate wrapper.

It is contended, on behalf of the next of kin, that the language of this clause of the will must be construed with reference to

the facts disclosed by this evidence; and that the effect of it, when so construed, is to give specific legacies of stock, and not legacies of money, as the words, taken literally, import. And so the Circuit court held. The legatees, on the other hand, insist, that the legacies are money legacies, with a fund referred to out of which they are to be paid, though they are to be paid at all events; in other words, that they are what are called demonstrative legacies.

It is a well settled rule, that the court will incline against construing a legacy to be specific, and that a legacy will not be held to be specific, unless there appears in the will a clear intention to make it so.

The following language is used in 1 790 Roper on Legacies 213, *in reference to the class of cases in which the question is, whether a legacy of stock is general or specific. "The intention of the testator to bequeath specifically must not be inferred by conjecture, nor upon a term which is capable of a double intendment, when the form of bequest is general; for a court of equity requires the intention to give specifically, either to be expressed, or to be clearly and indisputably manifested from perusal of the whole will." Thus, a direction to transfer stock to a legatee will not make the legacy specific, though the testator had such stock at the date of his will. For the testator may have meant a transfer of the particular stock he had at the date of the will; or that the executor should purchase stock and transfer it to the legatees. In a case of that sort (*Sibley v. Perry*, 7 Ves. R. 522), Lord Eldon held, that the legacy was not specific, though he had no doubt, in private, that the testator meant to give the stock which he had; but he said there was no case deciding that a legacy was specific, without something marking the specific thing, the very corpus.

So when the bequest is of stock, the fact that the testator possessed at the date of his will, the precise number of shares bequeathed, will not of itself make the bequest specific. Thus, in *Robinson v. Addison*, 2 Beav. R. 515, the testator made a bequest of five and a half shares in the Leeds and Liverpool canal, and two other bequests of five shares each; making fifteen and a half shares in all. At the date of the will, he owned just fifteen and a half of those shares. Lord Langdale held, that the bequest was not specific, and in giving judgment, said: "In the gift, the testator has used no words of description or reference by which it appears that he meant to give the specific and particular shares which he then had."

Various arguments depending on the general scope and effect of the will, 791 were used for the purpose of *showing, that the testator in giving the precise number of shares which he possessed, must have had those shares in contemplation and none other, and consequently must have meant specific gifts of them." * * * "It is, however, clear, the testator, if he had meant to give only the

shares which he had, might have designated them as his; that the mere circumstance of the testator having, at the date of the will, a particular property of equal amount to the bequests of the like property which he has given, without designating it as the same, is not a ground upon which the court can conclude that the legacies are specific." *Davis v. Cain*, 1 Ired. Eq. R. 45; and *Tift v. Porter*, 4 Seld. R. 516, are cases of the same sort. See, also, 2 Wh. & Tud. L. Ca. 241.

In *Kirby v. Potter*, 4 Ves. R. 748, where the question was, whether the legacy was a specific legacy of stock, or a legacy of money payable out of stock, Lord Alvanley held the rule to be, that no legacy should be held to be specific unless demonstrably so intended, and he said, that "whenever there is a legacy of a given sum, there must be positive proof that it does not mean sterling money, in order to make it specific." In a subsequent case (*Deane v. Test*, 9 Ves. R. 152), Lord Eldon thought Lord Alvanley had spoken too strongly in saying that nothing less than "positive proof" of intention would be sufficient to overrule the prima facie construction of the words. Lord Eldon held, that where the words import a gift of money, as of a sum of money out of certain stock, the prima facie intention is to give a money legacy; a settled rule of construction to which it was wholesome to adhere, "until driven out by strong, solid and rational interpretation, put upon plain inference drawn from the rest of the will." He said further, that minute criticism would not vary the prima facie rule of construction. See, also, 1

Roper on Leg. 219, 220, 227, 234, 235, 792 240. In *Walton v. Walton*, 7 John.

Ch. R. 259, Chancellor Kent lays down the rule in these words: "The courts are so desirous of construing the bequest to be general, that if there be the least opening to imagine, that the testator meant to give a sum of money, and referred to a particular fund only as that out of which he meant it to be paid, it shall be construed pecuniary, so that the legacy may not be defeated by the destruction of the security."

In construing a will, the enquiry is, not what the testator meant to express, but what the words used by him do express; and, as was said by Sir William Grant in *Attorney General v. Grote*, 3 Mer. R. 316, "to authorize a departure from the words of a will, it is not enough to doubt whether they were used in the sense which they properly bear. The court ought to be quite satisfied that they were used in a different sense, and ought to be able distinctly to say, what the sense is in which they were meant to be used." And, as was said by Lord Eldon in the same case (2 Rus. & Myl. R. 699), "individual belief ought not to govern the case; it must be judicial persuasion." As a general rule, the question whether a legacy is general or specific, is to be determined upon the face of the will. *Innes v. Jolmson*, 4 Ves. R. 568. And though it has been held, that where a tes-

tator has described the subject of the bequest in ambiguous terms, evidence of the state and value of the property may be received, in aid of the construction, to determine whether a legacy is general or specific; *Boys v. Williams*, 2 Rus. & Myl. R. 689; *Attorney General v. Grote*, Ib. 699; it is not admissible to alter the meaning of the words employed, when the meaning is plain, or to supply a reference to a particular subject or corpus, when none is imported by the language of the will. Parol evidence is always admissible to ascertain the thing actually described, but it is not admissible to show that the testator intended, by his will, to refer to a thing which the will does not describe. *Pell v. Ball*, 1 Speers' Eq. R. 48.

793 *Applying these rules to the clause under consideration, it seems to be clear, that the bequests contained in it cannot be regarded as specific. There is no mention of stock or bonds. The subjects of the several bequests are described as so many dollars; in the latter part of the clause they are referred to as "the sums mentioned." In the beginning of the clause, the aggregate subject is spoken of as so many dollars, the amount being equal to the sum of all the several legacies. It is only by going out of the will that we find an argument in favor of holding the legacies to be specific; it is only by going out of the will that we find that it was stock and not money that came to the testatrix from the estate of her uncle Fitzhugh Carter. And even if we consider the evidence relied upon, it is by no means conclusive. The testatrix may have chosen to consider, that she had received ten thousand and fifty dollars in value from her uncle Fitzhugh Carter's estate, and to give that amount, in money, to those among whom she divided what came from that source. The fact that the identical bonds derived from Fitzhugh Carter's estate were kept by her in a separate wrapper, apart from her other bonds and stocks, indicates nothing decisive, if indeed it can be said to indicate anything at all to the purpose. The most that can be said of all this evidence is, that it affords a conjecture, that the testatrix intended by this clause to give stock and not money. But, as we have seen, no conjecture, however strong and plausible, will be sufficient to overrule the prima facie construction of the language.

The Circuit court, therefore, erred in holding these legacies to be specific legacies of stock. They are money legacies, but whether general or demonstrative, it is not necessary to decide, as the estate is ample to satisfy them, so that the question whether a special fund is appropriated to their satisfaction is unimportant.

794 *V. By another clause of the will, the testatrix bequeathed "my guaranteed bonds of the James River and Kanawha Company," to the unmarried daughters of Carter Braxton and Dr. Corbin Braxton. At the date of the will, she owned certain bonds of the James River and Ka-

nawha Company, the payment of which was guaranteed by the State of Virginia, which amounted, in the aggregate, to \$7,600. In the year 1860, an act was passed by the legislature of Virginia which provided, among other things, that such of the holders of guaranteed bonds of the James River and Kanawha Company, as should surrender them, should receive, in lieu thereof, bonds of corresponding amount of the State of Virginia. Sess. Acts 1859-60, p. , sec. 4. In pursuance of this act, Mrs. Cabell surrendered the bonds of the James River and Kanawha Company held by her, and received in lieu of them, a corresponding amount of bonds of the State, which she held at the time of her death. It is contended, on the part of the legatees in this clause, that, by the conversion of the bonds, the legacies were adeemed, and that they are entitled to receive money to the nominal amount of the bonds, under a subsequent clause of the will; and so the Circuit court held. The clause referred to is in these words: "I have specified in several instances, exactly what different stocks is to be given to different persons, but in case changes may be made in the location of my stock, I wish it distinctly understood, that out of my general property, those same persons are to receive the sums of money specified as given to them." It is contended, on behalf of those who take the residuum, that there was no ademption, and that the legatees of the guaranteed bonds are entitled to the State bonds into which they were converted, and have, therefore, no claim to receive money, under the provision referred to.

The general rule in regard to specific legacies is, that *the claim of the legatee will be defeated, if the thing specifically bequeathed to him is not in existence at the time of the testator's death; in that case, the legacy is said to be adeemed. And it seems to be the better opinion, and is now the established rule in England, that ademption depends on a rule of law, and not upon the intention of the testator. 1 Roper on Leg. 329, et seq.; 2 White & Tudor Lead. Cases, notes to Ashburner v. Macguire.

The word ademption, as applied to specific legacies of stock, or of money, or of securities for money, must be considered as synonymous with extinction or annihilation. Where stock specifically bequeathed has been sold by the testator, or where a debt specifically bequeathed has been received by the testator, the subject of the bequest is extinguished or annihilated; nothing exists upon which the will can operate, and the legacy is adeemed and gone. But "where the thing specifically given has been changed in name and form only, and is in existence, substantially the same, though in a different shape, at the time of the testator's death, it will not be considered as adeemed by such nominal change." This is the language of the English annotators upon Ashburner v. Macguire, 2 Wh. & Tud. 249. It may be illustrated by the following cases.

In Dingwell v. Askew, 1 Cox Eq. R. 427, stock standing in the name of trustees for the testatrix, was specifically bequeathed, and the testatrix subsequently took a transfer of the stock from the trustees into her own name. This was held not to be an ademption of the bequest. In Roper it is said, that this case is an authority, that the transfer of a fund specifically bequeathed, into the names of new trustees, will not affect a specific bequest. And the author supposes the case of trustees authorized by deed or will to change securities, with the concurrence of A., the person who was empowered to dispose, and had disposed, by will, *of the fund then in stock, and they, with his consent, sold the stock specifically bequeathed, and invested the proceeds upon a mortgage; and he expresses the opinion, that, in such a case, there would be no ademption. In Blackwell v. Child, Ambl. R. 260, Child, the testator, who was a partner, under articles providing for a renewal of the partnership, bequeathed specifically his share, described as nine-twelfths of the profits of the partnership. After the date of the will, the articles of partnership expired, and the partners, about a year later, entered into new articles, in which the shares were divided into twenty-four parts, fourteen of which belonged to Child. It was held by Lord Hardwicke, that though the interest of the testator was varied, there was no ademption. In Ashburner v. Macguire, 2 Bro. C. C. 108, the testator bequeathed specifically to A., for life, the interest of a bond due him, and, after the death of A., bequeathed the principal of the bond to her children. After the date of the will, the debtor became bankrupt, and the testator proved his debt under the commission, and received a dividend upon it. It was held by Lord Thurlow, that the legacy was not adeemed, except to the extent of the dividend received out of the bankrupt's estate by the testator, and he decreed that the bond should be delivered to the legatees. In Oakes v. Oakes, 15 Eng. L. & Eq. R. 193; S. C. 9 Hare R. 666, the testator was possessed, at the date of his will, of certain shares of the Great Western Railway Company, which he bequeathed specifically. Subsequently these shares were, by a resolution of the company, under authority of an Act of Parliament, converted into consolidated stock. It was held by Vice Chancellor Turner, that there was no ademption. He said: "The testator had this property at the time he made his will, and it has since been changed, in name and form only. The question is, whether a testator has, at the time of his death, the *same thing existing, it may be in a different shape, yet substantially the same thing." He added, that he thought the case was stronger in favor of the construction he adopted, because it was not shown that the testator, in any respect concurred in the conversion of the shares into stock. It will be observed, however, that this circumstance was not the ground of the decision. In Walton v. Walton, 7 John. Ch. R. 259,

there was a specific bequest of thirty shares of the stock of the Bank of the United States. After the date of the will, the charter of the bank expired, and its assets were conveyed to trustees, who divided them among the stockholders, from time to time, as they were received.

The testator received dividends on his shares, but never disposed of them. It was held by Chancellor Kent, that, though the fund was varied and differently arranged, and was diminished in value by operation of law, it was not destroyed, nor its identity lost, and that there was, therefore, no ademption. In *Ford v. Ford*, 3 Foster R. 312, the testator, by a codicil, bequeathed to his wife all notes of hand payable to him at the date of the codicil, which was held to be a specific bequest. At the date of the codicil, the testator held four promissory notes signed by Samuel S. Hill and his brother. Subsequently, during the life of the testator, these notes were taken up, the brother of Samuel S. Hill was released at his own request, and four other notes, signed by Samuel S. Hill alone and secured by mortgage, were given in their stead. The court, after a discussion of numerous authorities, said: "Where the identity of the debt is not lost, where it still preserves its form substantially, as at the date of the will, where there has been no payment of it, but only a change of the security for it, there seems to be no reason for considering it adeemed." * * * * *

"In the present case, the debt existing at the date of the codicil has not been paid by the substitution of the new notes and the mortgage *for the original notes. Its

identity has not been lost, and nothing has been accepted in satisfaction of it. There was merely a change of the security and of the evidence of the debt from joint and several notes, to notes secured by mortgage." It was accordingly held that there was no ademption. In *Anthony v. Smith*, Busbee Eq. R. 188, a testator bequeathed to his debtor the bond which constituted the debt. After the date of the will, the testator, for the convenience of other creditors of the debtor who desired a new deed of trust to be executed, took from him a new bond, adding to the principal the interest that had accrued. The Court held, that there was no ademption. It said: "Did the subsequent transactions between the parties destroy the debt, or so change it that it could not be known to be the same? If it had been collected by the testator, there is no doubt that the debt would be lost; but, instead of being collected, it was only renewed, and renewed only because other creditors of the plaintiff desired a new deed of trust to be executed. It was the same debt, principal and interest, secured by a new note. The new security does not annihilate, but preserves the substance of the thing given, to wit, the debt. Such certainly appears to be the opinion of Lord Hardwicke when he said, in the case of *Blackwell v. Child*, 'I think it is a specific legacy of quantity, bequeathed out of a

certain body, and if the body be subsisting at the death of the testator, the debt shall be paid out of it. It was said to be like 'the novation of a debt, which does not destroy the legacy of the debt.'" In *Gardner & als. v. Printup*, 2 Barb. S. C. R. 83, the testator made a bequest which was held to be specific, of the proceeds of a bond and mortgage which he held against Briggs and Schenck. The bond was for \$8,000, payable in six annual instalments, with interest. Proceedings having been commenced to collect the debt, the mortgagors sold part of the land embraced in the mortgage to one 799 *Yost, for \$5,000, of which \$1,700 was paid to the testator, and the balance of \$3,300 was secured by the bond of Yost and another party, executed directly to the testator, and endorsed as a payment on the mortgage. As between the testator and the mortgagors, this bond was understood to be an absolute payment of the amount of it; but the lien of the mortgage upon the part of the land bought by Yost, was not released, being retained to secure the payment of the bond. The court held, that the money due upon Yost's bond passed to the specific legatee as part of the legacy.

In *Stout v. Hart*, 2 Halsted (Law) R. 418, the testator made a specific bequest of a bond of Peter Phillips and John Phillips, the latter being a surety. After the date of the will, at the request of John Phillips and for his accommodation, and to enable him to secure and indemnify himself as surety, the testator accepted from him a new bond, executed by John Titus as principal, and said John Phillips as surety, and gave up the old bond.

Subsequently, Peter Phillips, administrator and John Phillips, by an arrangement between them, ascertained the respective shares of the debt which Peter Phillips and John Phillips ought to pay. The administrators executed their bond to the testator for the share of Peter Phillips, and John Phillips and John Titus executed their bond for the share of John Phillips.

The court held, that the legacy was not adeemed. This decision was, however, made in the year 1801, and the court expressed the opinion, that ademption was wholly a question of intention, which it understood to be the settled doctrine of the English courts at that time. See, also, *Doughty v. Stillwell*, 1 Bradf. R. 300.

The substantial subject of the bequests in this clause, is the bonds, as evidences of debt, and not as pieces of paper. The substance of the transaction by which the James River and Kanawha bonds 800 *were converted into State bonds, was merely this, that one of the original parties, whose name was of no value, was released, and the separate obligation of the only solvent party accepted, in lieu of the obligation of both. The debt due upon the guaranteed bonds has never been paid, and so the real subject of the bequest has never been extinguished. The State bonds are only a substituted security for the same debt, and the principle is the same as if

the James River and Kanawha bonds had been renewed, without the guaranty of the State, and either with or without other security. The subject is now known by another name, but it is not necessary that the subject shall continue the same in name, provided it continues the same in substance.

The result is, that the subject of the bequests in this case has, in the language quoted from White & Tudor, and by them adopted from Vice Chancellor Turner, been "changed in name and form only, and is in existence substantially the same, though in different shape," and that there has, therefore, been no ademption, and the legatees of the guaranteed bonds, therefore, take the State bonds which were substituted for them. The clause of the will above quoted applies to the case of such "a change in the location of stock" as to amount to an ademption, so that, but for that clause, the legatee would get nothing.

VI. At April term 1863, the Circuit court of Nelson gave authority to the executor to invest the funds in his hands, in registered bonds of the Confederate States, or of the State of Virginia. In pursuance of this authority, the validity of which has not been controverted, he invested \$47,600 in Confederate bonds, and, of course, the amount has been lost. The Circuit court held, that this loss is chargeable to the estate, so as to throw half the loss on the Skipwiths. The Skipwiths complain of

801 this, and say, that this investment *was not made for them; that they were ready to receive, and did receive, what was offered to them; and that it was not their fault, that the next of kin, who were entitled to the other half of the residuum, were not forthcoming, or did not or could obtain their share.

There is no foundation for this complaint. It was not the fault of the next of kin, that they did not receive any part of the Confederate money in the hands of the executor. It was never offered to them. What remained in the hands of the executor belonged to the estate, and its loss was the loss of the estate.

VII. Skipwith received, at different times, from the executor, in Confederate money, the sum of \$73,910, on account of the half of the residuum to which he was entitled, as trustee for his children. The Circuit court held, that in the division now to be made, this sum must be charged at its actual value in the present currency, estimated at \$17,239 76. The next of kin insist, that it should be charged at its full nominal amount, and, in support of this position, they allege that Skipwith is to blame for their receiving nothing, and seem to intimate that there was something like collusion between him and the executor.

If this claim should be allowed, the result would be, that the next of kin, in the division of good money now to be made, would receive \$73,910 before Skipwith would receive anything, though what Skipwith has heretofore received was only equivalent to \$17,239 76 in good money. In other words,

the next of kin would get \$73,910 of good money, as the equivalent of Skipwith's \$73,910 of Confederate money, or \$73,910 as the equivalent of \$17,239 76; thus giving them, in round numbers, \$56,000 more than he gets, though he is entitled to just the same as they are. This would be gross injustice. There is no evidence of any

802 collusion between Skipwith and the executor. Skipwith *received, and had a right to receive, what he could get in Confederate money, but it was no fault of his that the next of kin got nothing. They got nothing, because the names of most of them and the proportions in which they were entitled, were unknown. And there is no evidence that any of those who were known, made an effort to get a part of the Confederate money.

As to the suggestion that Skipwith may have invested the Confederate money to advantage, and realized from it more than its value in the present currency, there is nothing in the record to show that he probably did so. There was no such suggestion made, and no enquiry on the subject was asked in the Circuit court. The suggestion comes too late.

VIII. By the second clause of her will, the testatrix bequeathed to Smyth Lee, one-half the "Virginia stock" she might own at the time of her death. The Circuit court held, that this was a general or fluctuating legacy, and that it must be taken in subordination to the legacies in the first clause, which were held to be specific legacies of State stock.

It has already been held that the legacies in the first clause are money legacies and not specific legacies of stock; so that the particular ground of this decision fails. The bequest to Smyth Lee, however, is not of one-half of each State bond of which the testatrix might be possessed at her death, but of the half of the aggregate of all the bonds of which she might be then possessed. It would seem to follow, therefore, that in ascertaining what is the amount or quantity of this half we must embrace all in the computation, though part may be specifically bequeathed. But that is unimportant, for there is no specific bequest of State bonds in the will. The State bonds which were taken in place of the guaranteed bonds, pass to the specific legatees of those latter bonds. But these State bonds are thus regarded as being still, in effect, guar-
803 anteed *bonds. They ought not, therefore, to be counted as State bonds in computing what Smyth Lee is entitled to.

It is further insisted, on behalf of Smyth Lee, that the Circuit court erred in holding that \$34,000 of State stock, which it is said had been loaned to, or deposited with, the Howardsville Bank by the testatrix, should not be embraced in computing the amount or quantity of such stock held by her at her death. This, of course, depends upon the question, whether that stock belonged to the testatrix at her death. The evidence is, that Mr. Hartsook, who was the agent

of the testatrix, and cashier of the Howardsville Bank, made use of her money, with her consent, in purchasing State stock, which was transferred by the sellers to the bank, and deposited by it with the treasurer of the State to secure its circulation. This was done under an agreement with the testatrix, that the bank should pay the taxes on the stock, and pay to her the whole of the interest upon it, and that when she should require it, the bank should redeem the stock and deliver it to her, or deliver her an equal amount of like stock.

It appears from this evidence that there was no loan or deposit of stock by the testatrix. The stock was bought with her money, but it was not bought in her name, nor for her, and never belonged to her. She had, according to the terms of the contract, a right to demand from the bank an amount of stock equal to what was bought with her money, and if the bank failed to comply with this demand, she had her remedy in damages. But it was nothing more than a loan of money, with a special agreement as to the manner in which the loan should be repaid. It is clear, therefore, that the Circuit court was right in refusing to give to Smyth Lee any part of this claim against the Howardsville Bank.

The decrees appealed from must therefore be reversed, and the cause remanded.

804 *The decree is as follows:

The court is of opinion, for reasons stated in writing and filed with the record,

1. That the legacies bequeathed to Mrs. Hill Carter of Shirley, and others, in the first clause in the will of Mary W. Cabell, dec'd, are legacies of money, and not specific legacies of State bonds or stock, as held by the said Circuit court, and the said District court; but whether the said legacies are general or demonstrative, it is not necessary to decide, inasmuch as the estate is ample to satisfy the said legacies; so that it is not important to enquire whether a particular fund is appropriated to their satisfaction.

2. That under the bequest in the second clause of said will, Smyth Lee is entitled to an amount or quantity of bonds of the State of Virginia, out of those left by the testatrix, equal to the half of the whole amount of such bonds belonging to the testatrix at the time of her death; and that in ascertaining the whole amount of said bonds, to one-half of which amount the said Smyth Lee is entitled, all the bonds of the State of Virginia belonging to the testatrix at the time of her death, are to be taken into the estimate, except the \$7,600 of State bonds received by the testatrix in the place and stead of the guaranteed bonds of the James River and Kanawha Canal Company, and that those bonds should not be so embraced.

3. That the bequests of guaranteed bonds of the James River and Kanawha Canal Company to the unmarried daughters of Carter Braxton and Corbin Braxton are specific legacies; and that the same were not adeemed by the surrender by the testa-

trix to the State of Virginia of the said James River and Kanawha Canal Company's bonds and the acceptance by her, in lieu thereof, of bonds of equal amount of the State of Virginia, and that the said legatees are therefore, entitled to the said

State bonds in the place and stead of said *canal bonds; and that they are not entitled to receive the nominal amount of such bonds in money, as held by the said Circuit court and by the said District court.

The court is, therefore, of opinion, that the said decrees of the said Circuit court and the said decree of the said District court are erroneous in the several particulars hereinbefore set forth, and that there is no other error therein.

Therefore it is adjudged, ordered and decreed, that the said decree of the said District court, and the said decree of the said Circuit court rendered May 8, 1868, be and the same are hereby reversed and annulled, so far as the same are hereinbefore declared to be erroneous, and that they be affirmed in all other respects. And this court proceeding to render such decree as the said District court ought to have rendered, it is further ordered that the said decrees of the said Circuit court from which the appeal was taken to the said District court, be reversed and annulled, so far as the same are inconsistent with the principles of this decree; and that the same be in all other respects, affirmed. And the cause is remanded to the said Circuit court to be further proceeded in, in conformity to this decree.

And the court doth further adjudge and order that the appellants in each of these appeals pay to the appellees their costs by them expended in the defence of said appeals respectively; which is ordered to be certified to the said Circuit court.

On motion of the counsel of C. C. Lee and others, next of kin of M. W. Cabell, dec'd, it is ordered that nothing in this decree shall prevent the said next of kin or any other party interested from asserting by proper proceedings any claim they may be advised to assert against D. J. Hartsook executor of M. W. Cabell, 806 *dec'd, on account of his transactions as such executor.

Decree reversed in part, and affirmed in part.

807 *Cousins v. The Commonwealth.

April Term, 1870, Richmond.

Statute—Assessment of Taxes—Information—What It Must Allege.*—An information under the 1st section of the act of February 18th, 1866, Sess. Acts 1865-66, p. 82, ch. 2, in relation to the assessment of taxes on licenses, must allege that the sale was "for

*Indictment under Statute.—In *Com. v. Hampton*, 8 Gratt. 590, the court said: "It is a general rule, that indictments upon statutes must state all the circumstances which constitute the definition of the offence

profit or on commission, or for other compensation," or it will be fatally defective on demurrer, or on motion in arrest of judgment.†

At the May term 1867 of the Circuit court of Franklin county, the attorney for the Commonwealth filed an information founded on a presentment of the grand jury, against Wm. B. Whitesides, John Cousins and Lee Sammons, "that they, on the 26th day of August 1866, at Bethel church in the said county of Franklin, did sell goods, wares and merchandise without having obtained the license required by law therefor, against the peace," &c.

The case was sent to the County court of Franklin for trial; and there Cousins appeared, and demurred to the information; but the court overruled the demurrer. He then pleaded not guilty, on which issue was joined; and upon the trial the jury found the defendant guilty, and assessed his fine at five hundred dollars; and the court rendered a judgment thereon.

On the trial, several questions were raised by the defendant; but they were not passed upon by this court; and therefore need not be stated. He also moved the court to arrest the judgment, because the information does not charge that the defendant sold the goods, wares and merchandise without

in the act, so as to bring the defendant precisely within it."

In *Boyd v. Com.*, 77 Va. 54, the court said: "It is a familiar and elementary principle of criminal pleading that an indictment upon a statute must state all the circumstances which constitute the definition of the offence in the act, so as to bring the defendant precisely within it. If the indictment may be true, and still the accused may not be guilty of the offence described in the statute, the indictment is insufficient. So, where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in a definition; but it must state the species—it must descend to particulars."

In many cases, indictments brought under authority of statutes have been pronounced fatally defective because some averment made essential by the statute has been omitted. See *Peas's Case*, 2 Gratt. 631; *Young's Case*, 15 Gratt. 664; *Hampton's Case*, 3 Gratt. 590; *Howel's Case*, 5 Gratt. 664; *Old's Case*, 18 Gratt. 915; *Morgan's Case*, 26 Gratt. 992; *Bailey v. Com.*, 78 Va. 19.

See *Taylor v. Com.*, 20 Gratt. 825, for a case where the indictment was held not fatally defective on account of an immaterial omission.

In *Dull v. Com.*, 25 Gratt. 974, the court, citing the principal case, said: "It is certainly safer and better, in a prosecution for a statutory offence, to describe the offence in the indictment in the very language in which it is described in the statute." See also, *State v. Riffe*, 10 W. Va. 794; *Com. v. Young*, 15 Gratt. 664-666.

An indictment, which charges an offence in the language of the statute, will not be held bad because it contains surplus matter. *State v. Hall*, 26 W. Va. 238.

†See the opinion of the court for the act.

808 having obtained a license to *sell the same as a merchant. But the court overruled the motion; and the defendant excepted.

The defendant carried the case to the Circuit court, where the judgment was affirmed. And he then obtained a writ of error to this court.

The cause was argued on all the points made in the record, but this court considered only the objection to the information.

Ould & Carrington, for the appellant:

1. The information charges that the said Cousins did, "on the 26th day of August 1866, at Bethel church, in the said county of Franklin, sell goods, wares and merchandise, without first having obtained the license required by law therefor."

The law under which the information was framed, was passed on the 13th of February 1866. The information charges an offence against the 1st section of that law, which requires a merchant's license to sell personal property. The language of that section is as follows: "No person shall, without a license authorized by law, sell, contract to sell, or offer to sell, for himself or for others, for profit or on commission, or for other compensation, any personal property by deed or other writing, by delivery, sample, card, or other representation, including as such coal oil, salt and copperas water, except as follows, to wit:" and then follows certain exceptions of persons and merchandise in the same section. See Acts of 1865-'66, page 32. The license required by this section is familiarly known as "a merchant's license," because of its distinguishing words, "for profit or on commission, or for other compensation." The information leaves out these essential words, and simply charges the defendant with selling goods, wares and merchandise without a license. A person might sell goods, wares and merchandise, not even within the excepted cases, and yet not offend *against this statute. If a lawyer were to sell to one of his brethren

a volume of Reports at the price which he gave for it, it would hardly be an offence within the meaning of the act, but yet it would be covered by the language of the information. In *Hampton's case*, 3 Gratt. 590, it was held, "that indictments upon statutes must state all the circumstances which constitute the definition of the offence in the act, so as to bring the defendant precisely within it." In that case the information left out the words, "otherwise than is in the statute expressly provided," the act itself making the sale of ardent spirits penal, otherwise than is in the statute expressly provided. An essential ingredient of the offence, as it is described in the statute, is omitted in the information, to wit: that the sale was "for profit or on commission, or for other compensation." It is such a fact in the case that makes it a merchant's transaction, and demands a license. These words are certainly as essential in defining the offence, as the omitted words in *Hampton's case*. Besides,

the rule is very stringent, that a statutory offence should be described in the words of the statute. It is dangerous even to resort to circumlocution, where the words used are equivalent. But everywhere the rule is invariable, that everything which is named in the statute, as a constituent of the offence, must be expressly charged. In Howel's case, 5 Gratt. 664, the court says: "In indictments for statutory offences, the language of the statute defining the offence should be strictly followed."

2. In Hill's case, 5 Gratt. 682, the Court of Appeals held, that "where exceptions are in the enacting part of a law, it must be charged that the defendant is not within any of them," but that a defendant must claim for himself the benefit of a "proviso." The same doctrine was substantially held in Hampton's case. In the enacting part of the statute on which this information was founded, there are specified exceptions
810 as to *persons and things. Yet it is not charged that the defendant is not within any of them. The doctrine of Hill's and Hampton's cases is sustained in every State.

The Attorney General, for the Commonwealth:

In Hill's case, 5 Gratt. 682, it was held that an indictment for selling by retail, rum, brandy, &c., without a license, was good under the 3rd section of the act of 1839-40, Sess. Acts, ch. 2, p. 5, though it did not negative the exceptions contained in the proviso in the 4th section. In the Act of 1865-66, p. 32, it is provided that no person shall, without a license authorized by law, sell, contract to sell, or offer to sell, for himself or for others, for profit or on commission, or for other compensation, any personal property, &c. The information charges that Cousins sold goods, &c., at a particular place on a certain day, without having a license; and this implies that he sold them for compensation. If he did not sell for compensation, it was for him to prove it.

There are two offences created by the statute; one the selling as a merchant; the other selling as a peddler, without license. We charge that the appellant sold as a merchant. The information charges but one sale at one place.

The court will not quash an information or indictment on motion, unless it is clear the court has not jurisdiction to try it. Ledge's case, 6 Gratt. 699.

MONCURE, P., delivered the opinion of the court:

This is a writ of error to a judgment of the Circuit court of Franklin county, affirming a judgment of the County court of that county, whereby the Commonwealth recovered against the plaintiff in error a fine of five hundred dollars and costs of the prosecution. The information on which the judgment was obtained was against the plaintiff and two others, and charged

811 *that they, "on the 26th day of August 1866, at Bethel church in the said county of Franklin, did sell goods, wares and merchandise, without having first obtained the license required by law therefor, against the peace and dignity of the Commonwealth of Virginia." The information seems to have been founded on the first section of the act passed February 13, 1866, Sess. Acts 1865-6, p. 32, chap. 2, which is in these words: "No person shall, without a license authorized by law, sell, contract to sell or offer to sell, for himself or for others, for profit or on commission, or for other compensation, any personal property by deed or other writing, by delivery, sample, card or other representation, including as such, coal oil, salt and copperas water, except as follows, to wit:" and then follow the exceptions. There was a demurrer to the information, which was overruled. And there was a motion in arrest of judgment, which was also overruled. Several questions arose in the case, which are set forth in the assignment of errors in the petition, but it is only necessary to notice one of them, which arises both on the demurrer and on the motion in arrest of judgment. That question is, whether the information is fatally defective, in not charging the sale to have been made "for profit or on commission, or for other compensation," in the words of the statute?

We think these are material words in the statutory description of the offence. The statute does not prohibit the mere sale of personal property without a license, but such a sale "for profit or on commission, or for other compensation." It is necessary, therefore, in an information or indictment on this statute to charge that the sale was for profit, or on commission, or for other compensation, in order to show that the statute has been violated. This is according to a well settled principle of law in regard to pleading in criminal cases, which has been repeatedly and recently
812 recognized by *this court. Commonwealth v. Peas, 4 Leigh 692, 2 Gratt. 629; Same v. Hampton, 3 Gratt. 590; Howel v. The Commonwealth, 5 Id. 664; Commonwealth v. Young, 15 Id. 664; Old v. The Commonwealth, 18 Id. 915.

We therefore think that the information is fatally defective, for the reason aforesaid; that both the demurrer to the information and the motion in arrest of judgment ought to have been sustained; and that the judgments, both of the Circuit and County courts, ought to be reversed.

The judgment was as follows:

It seems to the court, for reasons stated in writing and filed with the record, that there is a fatal defect in the information in this case, which was a sufficient ground for sustaining the demurrer to the said information, and the motion in arrest of judgment; and that the judgments, both of said Circuit court and of the said County court are erroneous. Therefore, it is considered, that the said judgment of the said Circuit court be reversed and annulled.

And this court proceeding to enter such judgment as the said Circuit court ought to have entered, it is further considered that the said judgment of the said County court be also reversed and annulled, and that the said plaintiff be discharged from further prosecution on the said information, and go thereof without day. Which is ordered to be certified to the said Circuit court.

Judgment reversed.

813 *Sledd v. The Commonwealth.

April Term, 1870, Richmond.

(Absent, CHRISTIAN,* J.)

1. **Indictment—Mode of Stating Time of Offence—Unessential.**†—Since the act, Code, ch. 207, § 11, no mode of stating the time of an offence in an indictment or presentment can vitiate it.
2. **Act of April 19, '67, § 22—Applies to Butcher.**‡—A butcher carrying on his business in the markets of a city, who goes out into a county and buys cattle, sheep or hogs, and butchers the animals and sells the meat at his stall in the market, comes within the provisions of the act of April 19th, 1867, § 22, Sess. Acts 1867, p. 822, in relation to assessment of taxes on licenses, and must take out a license for so buying.§
3. **Verdict—Amend—When.**—The jury may amend their verdict at any time before they are discharged.
4. **Presentment of Three Counts—Verdict on First Count—Judgment.**—There being three counts in a presentment, and the jury having found the defendant guilty on the first count and assessed his fine, and not guilty on the second and third counts, the judgment should be for the Commonwealth on the first count, and for the defendant on the second and third counts.
5. **Same—Same—General Judgment.**—In such case there having been a general judgment for the Commonwealth, this court will amend and affirm it.

At the August term 1867 of the County court of Henrico, the grand jury presented Wm. W. Sledd, first, that within two years last past, in said county, he did, without a license authorized by law, unlawfully canvass the said county for the purpose of buying and offering to buy, and did actually buy, certain matter of subsistence for man, to wit: cattle, sheep and hogs, not for his own use or for the use of his family.

814 *There was a second and third count in the presentment. The second for buying and selling cattle for profit, and not for feeding and grazing for as long as two months, without a license; and the third was for selling cattle for others on a commission for profit, without a license.

The defendant appeared and demurred to the presentment and each count thereof; and also pleaded not guilty. But the court overruled the demurrer to the presentment; and the jury, under the instructions of the

court, found the defendant guilty under the first count of the presentment, and assessed his fine at ten dollars; and found him not guilty on the second and third counts.

During the progress of the trial, the defendant took two bills of exception to the rulings of the court. It appeared from the evidence, that Sledd, at various times and places, and among others, at the State scales and dividing pens, near the city of Richmond, and at the end of the Brooke turnpike, five miles from the city, in Henrico county, did buy and offer to buy cattle, sheep and hogs, and at various times within two years, prior to this presentment, and since the passage of the act of assembly concerning the assessment of taxes on licenses, passed February 13th, 1866, and April 19th, 1867, and down to the time of making the presentment; and went to said places for the purpose of buying the live stock of said description, of any and all persons from whom he could buy them, without a license to canvass the county of Henrico under the acts of February 13th, 1866, and April 19th, 1867.

And it further appeared that Sledd had, for many years carried on the business of a butcher at the markets in the city of Richmond, that he had regularly paid the dues and taxes assessed by the city authorities, consisting of stall rents and other charges; and had paid his internal revenue

815 tax to the United States as and for *a butcher carrying on said employment; and was a butcher carrying on his business in the said city at the time when he bought and offered to buy live stock as aforesaid in said county for his business as a butcher, and that he slaughtered the same and converted them into butcher's meat for sale at his stall in the market; and he did not sell them as live stock.

The head of the Brooke turnpike is on the road leading from the State scales or dividing pens, and is a place of common resort for butchers, hucksters and others, to meet the vendors of live stock, chickens, eggs, butter and other provisions for the market of Richmond. Stock and provisions are commonly bought and sold at that place, and often on the road between that place and the city.

When the evidence had been introduced, the attorney for the Commonwealth moved the court to instruct the jury as follows: If the jury shall believe from the evidence, that the defendant, Wm. W. Sledd, at different times during the two years next before this presentment was made, and since the 13th of February 1866, and since the 19th of April 1867, went into different places in the county of Henrico, for the purpose of buying or offering to buy, and did offer to buy, and actually buy, calves, and other cattle, or sheep or hogs, at such times and places, from any persons who had the same for sale, upon the best terms the said Sledd could obtain, and not for his own use or for the use of his family, but to be killed and sold for human food, and that the defendant had no license to canvass

*He had decided the case in the Circuit court.

†See *Frommer v. City of Richmond*, 31 Gratt. 649.

‡See *Robertson's Case* (Va.), 20 S. E. Rep. 363.

§See the act, in the opinion of JOYNES, J.

said county under the provisions of the act passed the 13th of February 1866, or of the act passed the 19th day of April 1867, then they should find the defendant guilty under the first count of the presentment; even though they should further believe from the evidence, that the defendant was, during all the said period of two years, a regular

816 butcher, carrying on his business as such in the *markets of the city of Richmond, under authority of said city; and that he bought said calves and other cattle, sheep and hogs, for the purpose of slaughtering them and selling them at his stall or stalls in said market, in the prosecution of his said business of a butcher; and that he did so slaughter and sell them. This instruction the court gave; and the defendant excepted.

After the foregoing instructions were given, which was on Saturday the 10th of October, the jury were sent out to consider of their verdict, and failing to agree, they were adjourned over to the 15th of the month; to which the defendant objected, but the objection was overruled by the court. On the 15th, the jury were again called, and again retired to consider of their verdict; and after a considerable time they returned into court with a verdict in the following words and figures, viz: "Under the instructions of the court, we, the jury, find the defendant guilty, and assess his fine at ten dollars." And thereupon, the attorney for the Commonwealth suggested to the jury to amend the form of their verdict, so as to read: We, the jury, following the instructions of the court, find the defendant guilty, &c., &c. To which amendment, one of the jurors objected. At the instance of the defendant, the jury were then polled, each jurymen responding, that was his verdict. And after the polling of the jury and before they were discharged, the defendant moved the court to set aside the verdict on the ground that the jury had found the defendant guilty under the whole presentment and each count thereof, and there was no evidence on the second and third counts; which motion the court overruled. And thereupon, one of the jury, after hearing the discussion upon the motion to set aside the verdict, said that he desired to amend his verdict. The court then, at the instance of the attorney for the Commonwealth, enquired of the jury whether they desired to amend

817 their verdict, and took the vote *of each jurymen in open court upon the question; to which proceeding of the court the defendant objected; but the court overruled the objection; and each of the jurymen answering that he did desire to amend his verdict, the court sent them out to consider of their verdict; to which the defendant objected; and after retiring, they again returned into court, and handed in a verdict in the words and figures following, viz:

Under the instructions of the court, we, the jury, find the defendant guilty under the first count of the presentment, and assess his fine at ten dollars; and not guilty

as to the second and third counts of the presentment. To which the defendant objected.

The verdict in the form last returned was thereupon recorded in the presence of the jury, which was objected to by the defendant; and the jury were thereupon discharged. The defendant then moved the court to set aside the verdict as not the verdict of the jury, and as contrary to the law and the evidence; which motion, the court overruled. And the defendant excepted to all the rulings of the court herein stated, and the exception referred to the first and made it a part of the second.

The judgment of the court was—Therefore, it is considered by the court, that the Commonwealth recover against the said Wm. W. Sledd, ten dollars, the fine by the jurors in their verdict assessed, and her costs by her in this behalf expended.

Sledd thereupon obtained a writ of error to the Circuit court, where the judgment was affirmed. And he then applied for and obtained a writ of error from this court.

Wise, for the appellant.

The Attorney General, for the Commonwealth.

818 JOYNES, J. The first question which arises on this record is, whether the Circuit court erred in overruling *the demurrer to the indictment. The ground of demurrer is not stated, but it is supposed to have been founded upon the manner in which the time of the offence is laid.

The indictment which was found in August 1867, charges the offence to have been committed "within two years last past" (two years being the limitation to prosecutions under the revenue laws), and no other time is laid. The term of two years before the finding of the indictment covered a considerable period before the enactment of the statute creating the offence, so that, non constat, but that the offence charged was committed before the statute was passed. We think that such a mode of laying the time would have been fatal on demurrer, according to the rules of pleading at common law. 1 Chitty Cr. Law 223; Wharton's Precedents 8; People v. Miller, 12 Calif. R. 291, and cases cited. The case is not like that of Nichols and Janes, 7 Gratt. 589. Under an act which went into operation on the 31st day of May 1848, the indictment alleged that the defendants did, on the 1st day of May 1848, and from thence up to the 8th day of April 1849, not being married to each other, lewdly and lasciviously cohabit together. Though the 1st day of May 1848 was a time, before the statute went into operation, the unlawful cohabitation, which was a continuous offence, was alleged to have continued from that time to a day long after the statute took effect. The General court held the indictment good on demurrer.

According to the rules of criminal pleading at common law, the allegation of time, except where time is the essence of the

offence, was the merest formality, and served no useful purpose. It did not limit the Commonwealth in its proof to the time specified, and, therefore, did not serve to notify the accused of the precise act for which he was prosecuted. And whatever

time might be laid in the indictment, 819 it was incumbent on *the Commonwealth, in every case, to prove that the act charged was committed at a time when it was an offence against the law, and within the period of limitation, if any. The Code (ch. 207, sect. 11) provides, that no indictment shall be quashed or deemed invalid "for omitting to state, or stating imperfectly, the time at which the offence was committed, where time is not the essence of the offence," &c. &c. &c. "or for the insertion or omission of any other words of mere form or surplusage." The provisions of this section were designed to get rid of cumbrous and useless technicalities, and ought to receive a liberal construction. If the statement as to time in this case can be regarded as an "imperfect" statement within the meaning of the statute, it is cured by the express words of the statute. If it cannot be regarded as an "imperfect" statement, then it may be rejected as surplusage, as the indictment would be good without it. And as the statement of time may be omitted altogether, it would seem that no mode of stating the time of an offence can now vitiate an indictment.

The Circuit court did not err, therefore, in overruling the demurrer to the indictment.

The act of April 19th, 1867 (sec. 22), provides that "no person shall, without a license authorized by law, canvass any county or corporation in this Commonwealth, or any part thereof, for the purpose of buying or offering to buy, or shall actually buy, any matters of subsistence for man or beast, or for any beverage or for any clothing, or for any materials of which clothing is made." This provision is copied from the act of February 13th, 1866, except that the words, "or shall actually buy," are not in the latter act. The act contains an exception of purchases made by a party for his own use, or for the use of his family. The indictment charges in the first count, that the plaintiff in error "did, without a license authorized by law, unlawfully

820 *canvass the county of Henrico for the purpose of buying and offering to buy, and did actually buy, certain matter of subsistence for man, to wit: Cattle, sheep and hogs, not for his own use or the use of his family," &c. The facts certified sustain all the allegations of this count, and show that the offence was committed after April 19th, 1867. The other counts need not be noticed, as upon them there was a verdict for the defendant. It was proved that the defendant was a butcher, doing business as such in the city of Richmond, and that he purchased the live stock in the indictment mentioned, for the purpose of slaughtering them and selling them as butcher's meat in the Richmond

market, and that he did slaughter them and sell the meat accordingly. The court instructed the jury, in substance, that the facts that the defendant was a butcher and that he bought the animals and sold the meat prepared from them in the course of his business as a butcher, did not exempt him from the penalties of the act; to which the defendant excepted. After the verdict, the defendant moved the court to set it aside. The motion was overruled; and the defendant again excepted.

The language of the act is general, and embraces all persons except those who buy for their own use or for the use of their families. It is insisted, notwithstanding, that the act could not have been intended to apply to butchers buying live stock to supply meat for their own stalls, and that it should be so construed as to except them. One of the reasons advanced in support of this position is, that butchers are not subject to any tax upon their general business, from which it is argued that the legislature could not have intended to tax one of the usual modes of obtaining meat for carrying on their business. But the offence charged and proved against the defendant in this case, was not simply the buying of stock, but canvassing the county for stock and buying it. The fact that the legisla-

821 ture saw fit not *to impose any tax upon butchers as such or upon their general business, has no tendency to show that it did not intend to include them along with all other persons, in language broad enough to comprehend all, in reference to the practice of canvassing, which is not an essential part of a butcher's business, nor an essential means of carrying it on. Indeed, the legislature may have intended to include them, for the very reason, that they paid no tax on their general business. The language of the act is broad enough to include all persons whatever, who do the acts described, and we cannot make an exception in favor of any class, upon mere speculation and conjecture, however plausible.

It is further insisted that the purchasing of live stock by a butcher is not embraced by the provision we are considering, because the 60th section of the act of April 20, 1867 (Sess. Acts 870), provides, as it is said, for every case of dealing in horses, mules, asses, jennets, cattle, sheep, and hogs, or any of them, and shows how far the legislature intended to impose taxes upon the dealing in such animals, or any of them. But that section applies only to dealing in the living animals, and to two sorts of such dealing, namely, selling for others on commission or for profit, and buying and selling for profit. The imposition of a tax upon such dealings in cattle, sheep and hogs, does not indicate that when the legislature imposed a tax upon the practice of canvassing for matters of subsistence and buying them, it meant to except those who thus buy cattle, sheep and hogs. The tax imposed upon those who buy and sell live stock for profit, and the tax imposed upon canvassing for matters

of subsistence, apply to different sorts of business, and reach different classes of persons.

Thus it is argued that cattle, sheep and hogs alive, do not fall within the description of "matters of subsistence for man."

It is insisted that these terms in 822 *the statute embrace only such articles as are themselves food, and not such also as are only materials from which food is made. We do not see any foundation for this construction. The main object of the legislature seems to have been to derive revenue from a practice which had become prevalent in many parts of the State. The words "matters of subsistence" seem to have been designed to embrace a great variety of things, which could not be enumerated or more specifically described. If the object had been to embrace merely such things as are used as food without a change of their form, it would have been easy to say so by apt and familiar words. If the provision is confined to such articles as are themselves food, or as are consumed in the form in which they are bought up by those who canvass the country, it will embrace a very limited number of articles. It will embrace butter, milk and cheese, but it will not embrace poultry, fish, vegetables or eggs, any more than cattle, sheep or hogs. It will not embrace a great majority of the articles which are bought up by the huckster, any more than those which are bought up by the butcher. Such a limited construction, besides not being required by the language, would, in a great measure, defeat the object and policy of the law. We think that the words "matters of subsistence for man," as used in the act, comprehend all articles or things, whether animal or vegetable, living or dead, which are used for food, and whether they are consumed in the form in which they are bought from the producer, or are only consumed after under-

going a process of preparation, which is greater or less according to the character of the article.

Nor do we perceive any ground for holding that the act applies, as contended by counsel, only to those who "buy things as they sell them in kind." The act, by its

terms, applies to all who canvass and buy, 823 without any reference to the mode in which they sell what they *buy, and

without any reference to the purpose for which they buy, with an exception only of those who buy for their own use or the use of their families. We are not authorized to introduce another exception by construction, without the clearest proof that it was the intention of the legislature to make it.

We do not think it necessary to discuss other views submitted by counsel on this branch of the case. They have all been duly considered, but they do not affect the result. We are of opinion, that the County court did not err in the instruction given to the jury, or in refusing to set aside the verdict as contrary to the law and the evidence.

The County court did not err in allowing the jury to amend their verdict. The jury had not been discharged or the verdict recorded, and it is familiar practice in such a case, to allow the jury to amend their verdict. *Blackley v. Sheldon*, 7 John. R. 32; *Commonwealth v. Gibson*, 2 Va. Cas. 70; 1 Chitty Cr. Law 648.

There is a formal error in the judgment in this, that there is no judgment for the defendant on the second and third counts, upon which he was found not guilty. The judgment will be amended in that respect, and as amended it must be affirmed.

The other judges concurred in the opinion of JOYNES, J.

Judgment amended and affirmed.

INDEX.

AGENTS.

See *Principal and Agent*.

ANSWER.

1. Though all of an answer responsive to a bill is to be received as evidence, the court may believe a part of it, and disbelieve another part of it.

Mayo's ex'or & als. v. Carrington's ex'or & als., 74

2. Upon bill by a legatee against executors for the settlement of their accounts, not specifying errors in their settled accounts, what weight will be given to the allegations of the answer.

See *Executors & Administrators*, No. 4, 5, and

Corbin & als. v. Mills' ex'ors & als., 438

Robinson's adm'r v. Mills' ex'ors & als., 438

APPELLATE COURT.

1. The certificate of a commissioner who takes a deposition does not state that it was taken pursuant to notice; but though the deposition is excepted to on other grounds, no objection is taken to it in the court below for want of notice. Although there is no notice or evidence of notice in the record, the objection for want of notice cannot be taken in the appellate court.

Steptoe v. Read, for, &c., 1

2. A commissioner settling accounts between tenants in common in a lead mine, reports a considerable sum as due from plaintiffs to defendant, and then says—"The complainants will hereafter render an account of a remnant of the business in their hands." There are exceptions by both parties to the accounts as stated; but the court overrules all the exceptions, confirms the report, and makes a final decree in favor of the defendant. It being not probable that the further account referred to by the commissioner will lessen the amount due the defendant, if there be no other error, the appellate court may amend the decree by providing for the further account, and affirm it.

Graham & als. v. Pierce, 28

3. Where the question in the appellate court, is whether a verdict is contrary to the evidence, where the ultimate facts upon which the legal conclusion in the case must rest, are to be deduced by balancing the different facts proved, and by weighing and comparing the inferences to be drawn from them, respect should be paid to the verdict and judgment of the court below.

Rich. Fred. & Pot. R. R. Co. v. Snead & Smith, 354

4. See *Judicial Sales*, No. 5, and *Jones v. Tatum,* 720

5. See *Bankrupts*, No. 1, and *Exchange Bank of Va. for Camp v. Knox, &c.,* 739

6. See *Criminal Jurisdiction and Proceedings*, No. 23, and *Sledd's Case,* 813

ASSIGNOR AND ASSIGNEE.

1. In a bill by an assignee against the obligor and assignor, the assignment is not questioned by the assignor. There is no necessity for proving it as against the obligor.

Mayo's ex'or & als. v. Carrington's ex'or & als., 74

2. If the assignment of a debt is without recourse, it is doubtful whether it will carry with it an equitable lien for the debt; but if the assignment is general, the equitable lien passes with it. *Idem,* 74

3. M. proposes in writing, to purchase of C. certain real estate upon specified terms. This proposition is accepted by C. by a writing at the foot of the proposal, and 826 the real estate is conveyed to *M.; and C. then assigns the instrument by a writing upon it, to J. The assignment is complete, and J. may sue M. in equity upon it, in her own name. *Idem,* 74

ATTACHMENTS.

1. On the 15th of March 1867, H. & P., merchants in New York, execute a deed by which they convey to S. all their effects, in trust to pay their debts, with directions to take possession at once and proceed to execute the trust. Part of the effects are goods shipped to A. & W., commission merchants at Richmond, Va., to be sold for and on account of H. & P. On the 16th of March, R. sues H. & P. in Richmond, and sues out an attachment, which is served on A. & W. as garnishees. A. is not in advance to H. & P. when the attachment is served. W. has advanced on the goods, but afterwards sells them, and has a balance in hand after paying himself. The attachment has preference over the deed, and is to be first satisfied out of the proceeds of the sale of the goods in the hands of A. & W.

A. C. Smith v. R. P. Smith, 545

BANKRUPTS.

After judgment in the court below and appeal, an appellee is declared a bankrupt and obtains his discharge. Upon reversal of the judgment and judgment for plaintiff below, the appellate court will, upon the petition of the bankrupt, make it a part of their judgment of reversal, that execution shall not issue upon the judgment without a previous

order to that effect by the court below, made upon notice to the bankrupt.

Exchange Bank of Va. for Camp v. Knox, &c., 739

BANKS.

1. Where a note is deposited for collection at a bank at which it is payable, and is protested for non-payment, and the holder permits it to remain in the bank, it may at any time while it remains there, be paid to the bank by the debtor; provided he has no notice that the bank has no authority to receive it.

Alley & als. v. Rogers, 366

2. When a bank might, and when it might not, receive Confederate money in payment of a note deposited for collection. See *Negotiable Paper*, No. 2, 3, 4, and

Idem, 366

3. Under the act of February 12th, 1866, requiring the banks of the Commonwealth to go into liquidation, the banks being insolvent, execute deeds conveying all their property, including debts due to them, to trustees for the payment of their debts. HELD:

1. That the act forbids and prevents all preferences among the creditors of the bank.

Exchange Bank of Va. for Camp v. Knox, &c., 739

Farmers Bank of Va. for Goddin, &c. v. Anderson & Co., 739

2. That a debtor of the bank cannot set off notes of the bank bought by the debtor after the execution and recording of the deed and notice thereof by the debtor.

Idem, 739

3. The banks being utterly insolvent, the trustees are the trustees of the creditors, not of the banks, and are purchasers and assignees for value of all the property and assets of the banks, for the benefit of the creditors.

Idem, 739

4. Though the charters of the banks require them to take their notes in payment of debts due to them, this does not authorize the debtors of the banks to pay their debts with the notes of the banks bought up after the execution and recording of the deeds.

Idem, 739

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See *Negotiable Paper*.

CHILDREN.

1. The word children in a devise and bequest held to be a word of purchase, and not of limitation.

Moon & wife v. Stone's ex'or & als., 130

2. The word children in a bequest can generally have no other meaning than that of issue in the first degree, unless there be other words in the will to give it another meaning; except when the rule in *Wild's case*, 6 Coke 16, applies, which is founded on peculiar reasons.

Idem, 130

CIVIL WAR.

1. The international law applied to all transactions between persons residing *within the limits of the authority of the Confederacy, and persons residing in the United States outside the Confederate authority.

Billgerry v. Branch & Sons, 393

2. For the effect of the war upon the contract of indorsement of a bill or check, see *Negotiable Paper*, Nos. 6 and 8, and

Idem, 393

CO-DEFENDANTS.

1. Though an interlocutory decree for the sale of land is affirmed on appeal, there may be a decree between the co-defendants, when the cause goes back, if it is a proper case for such a decree.

Alley & als. v. Rogers, 366

CONFEDERATE DEBTS.

1. In July 1862, W. sells land in Henrico county at public auction, and it is purchased by C. Nothing is said at the time of the sale as to the kind of money which will be received, but the land is sold for its value in Confederate money as of that date, and C. makes the cash payment in that money, and gives his negotiable notes, payable in one and two years, with a deed of trust to secure them. W. receives payment of the first note when it becomes due, in the same money, and has sold the second note to L., who has paid for it in the same currency. When this second note fell due, C. tendered payment in Confederate notes, which was refused; and he files a bill to have the amount ascertained, and to be permitted to pay the same and have the deed of trust released. HELD:

1. The sale was made with reference to Confederate notes as a standard of value, and L., though the holder for value of the negotiable note, takes it as it was held by W.

Lohman v. Crouch & al., 331

2. C. having tendered the money to L. when the note fell due, L. is only entitled to the value of the Confederate notes at that time; but C. not having retained the money, must pay interest from that day.

Idem, 331

3. C. having tendered the money as soon as it was due, the court cannot impose upon him any equitable condition, beyond the payment of the sum due upon the note.

Idem, 331

4. C. sends an agent to L. on the day the note is due to pay it, and the agent tells L. he is sent to pay the money and get the note; and he shows L. a parcel of money which the agent holds in his hand, which is more than the amount of the note. L., without objecting that it is not the precise amount due, refuses to receive payment, because the notes have greatly depreciated since the note was made. It was a good legal tender.

Idem, 331

5. QUÆRE: If the tender had not been

made until after the note fell due, upon what equitable terms would C. have been relieved? Would he have been required to pay L. the value of the Confederate notes he paid W. for the note, at the time he bought it, or the proportionate value of the land? *Idem*, 331

CONSTITUTION AND CONSTITUTIONAL LAW.

1. So much of the act passed the 5th of March 1870, styled the enabling act, as provides for the appointment of councilmen, or trustees and mayors and other officers of cities and towns, is constitutional.

The Richmond Mayoralty case, 673

2. Sec. 25 of art. 6 of the constitution, applies only to officers elected or appointed under the constitution, and for whose election or appointment it provides.

Idem, 673

3. Sec. 20 of art. 6 of the constitution, which provides, among other things, that there shall be chosen by the electors of every city a mayor, applies only to a mayor to be chosen under the constitution, at and after the time therein prescribed for the purpose, and not to one appointed to perform the duties of mayor before one could be chosen to enter upon the duties of the office under the constitution.

Idem, 673

4. Sec. 2 of the schedule of the constitution, in speaking of courts, refers only to courts of record, and not to mayor's courts, which are not courts of record.

Idem, 673

5. The constitution did not continue any officers in office after its adoption, but intended to vacate all of them immediately.

Idem, 673

6. As to the power of the legislature to terminate the power of officers not holding under the constitution, see *Officers*, No. 6, and

Idem, 673

828 *7. See *Criminal Jurisdiction and Proceedings*, No. 16, and

Whitehead's case, 640

CONTRACTS.

1. What is a contract for Confederate money. See *Confederate Debts*, No. 1, and *Lohman v. Crouch & als.*, 331

CONTRIBUTION.

1. How land sold on same day, but conveyed on different days, shall contribute to pay off a prior lien. See *Equity Jurisdiction and Relief*, No. 9, and

Alley & als. v. Rogers, 366

CORPORATIONS.

1. R., the president of a railroad company, signs his name without any addition, to a due bill, acknowledging that there is due to S. & H. \$484 in full of labor performed on cottage lot of the railroad company. It being uncertain on the face of the note, whether the labor was performed for R. or

the company, parol evidence is admissible to ascertain that fact.

Rich. Fred. & Pot. R. R. Co. v. Snead & Smith, 354

2. The authority of the president of a railroad company to make contracts for necessary labor for the company, is incident to his office. And he may furnish evidence of the amount payable under the contract, either before or after the service, and put that evidence, in his discretion, into the form of a due bill or promissory note; unless such power is restricted by special legislation, or by regulations of the company known to the other contracting party. *Idem*, 354

3. A corporation being defendant in a suit in equity, which seeks to have it declared null, the holders of stock in it are not proper parties in it to defend the suit.

Wash. Alex. & Georget. R. R. Co. v. Alex. & Wash. R. R. Co., 592

4. In such a case the holders of the stock claiming, that if the corporation is annulled, they have equitable interest in the property, may be admitted as party defendants to protect their interests. *Idem*, 592

5. The plaintiff and defendant corporation being corporations of this State, the owners of the stock, though non-residents, are not entitled to have the cause removed to the United States court, to have the validity of the corporation decided. *Idem*, 592

6. The A. & W. Railroad Co. make a deed on their property to secure certain bonds; and it provides that if the trustee becomes incapable of acting, any court of record of A. county, upon the application of three-fifths of the holders of the bonds, upon notice to the president or any director of the company, may appoint another trustee. The trustee, president and directors go into the enemy's lines, and remain there during the war. An order of the court of A. county, substituting another person as trustee, without notice, is null and void; and a sale made by such substituted trustee is utterly null.

Idem, 592

7. QUÆRE: Whether the act, Code, edi. of 1860, ch. 61, §§ 28, 29, applies to a sale by a trustee of a mere equity conveying no legal title to the property of the corporation.

Idem, 592

8. See *Officers, passim*, and *The Richmond Mayoralty Case*, 673

COSTS.

See *Judicial Sales*, No. 6, and *Jones v. Tatum*, 720

COUNTY LEVY.

1. The county court which lays the county levy is not a special tribunal erected for that special purpose. It is the ordinary county court; and that court is a court of general jurisdiction. Therefore, though the record does not show that the justices had been summoned for the purpose, or that a majority were present, the act of the court in laying the levy cannot be questioned in any collateral proceeding.

Ballard & als. v. Thomas & Ammon, 14

2. The sheriff and his sureties in office when the county levy is laid, are responsible, at the end of six months from the date of the levy, to all the creditors of the county provided for by it, though the sheriff has not then collected the money, or any part of it.

Idem, 14

3. Though after the levy, the sheriff is removed from his office on the motion of his sureties, before the six months has expired, 829 the sheriff and his sureties are *liable to the county creditors provided for in the levy.

Idem, 14

4. The act of 1851, Code, edi. 1860, ch. 49, § 18, which authorizes the county court, where there is a vacancy in the office of sheriff, from other causes than his death, to appoint a collector of the taxes, levies, &c. is permissive only, not mandatory; and if not acted on, a sheriff removed from office must proceed to collect them; and his sureties are liable for his default.

Idem, 14

5. Though the sheriff is removed from his office on the motion of his sureties, he still has authority to collect the levy, and his sureties are responsible for his failure to account to the county creditors.

Idem, 14

6. A county creditor provided for in the county levy, is not bound to apply to the sheriff or his deputies for payment, before he proceeds to enforce payment of his debt by the sheriff and his sureties.

Idem, 14

7. The proper recovery by the county creditor, is the principal debt, with interest from the end of the six months to the date of the judgment, and ten *per cent.* damages upon the amount of such principal and interest, and interest upon the whole from the date of the judgment till paid.

Idem, 14

COURTS.

Circuit Courts.

When the circuit courts have, and when they have not, jurisdiction to try a prisoner for felony.

Philips' Case, 485

Wright's Case, 669

County Courts.

1. The county court which lays the county levy is not a special tribunal erected for the special purpose. It is the ordinary county court; and that court is a court of general jurisdiction. Therefore, though the record does not show that the justices had been summoned for the purpose, or that a majority were present, the act of the court in laying the levy cannot be questioned in any collateral proceeding.

Ballard & als. v. Thomas & Ammon, 14

2. The county courts are courts of general jurisdiction, and in proceeding under the act, ch. 110, § 9, Code of 1860, for the assignment of dower, it is to be presumed, in the absence of proof to the contrary, that the court had jurisdiction of the case, and proceeded regularly in it.

Devaughn v. Devaughn, 556

CRIMINAL JURISDICTION AND PROCEEDINGS.

In September 1867, J. is committed for trial for a felony at the October term of the county court, and at that term of the court an information is filed against him, and he elects to be tried in the circuit court, and is remanded for trial in that court. He remains in jail until the April term of the court 1868, no indictment having been found against him. The grand jury terms of the county court are November and June. At the April term of the circuit court, after the grand jury has been discharged, he applies for a writ of *habeas corpus* to obtain his discharge. HELD:

1. Having been committed for trial in the county court, that is the court in which he is held to answer, in the sense of the statute, though he had been remanded for trial in the circuit court; and he should be indicted in the county court.

Jones' Case, 478

2. The second term of the court spoken of in the statute, is the second term at which a grand jury is directed to be summoned.

Idem, 478

3. If it was so that the prisoner was held to answer in the circuit court, that would not be until he was remanded to that court, and therefore, though the prisoner was committed for trial in the county court before the September term of the circuit court, that could not be one of the terms spoken of by the statute.

Idem, 478

4. And if the November term in the county court could be connected with the April term in the circuit court, still though the grand jury at the April term had been discharged before the application for the writ, the judge might have ordered another grand jury to be summoned during the term, and therefore the term could not be counted as one of the terms until it was ended.

Idem, 478

5. The filing of an information being unauthorized in the case of a felony, is of no avail, and an indictment must be *found within the time prescribed by the statute.

Idem, 478

6. On the 24th of June 1867, P. was committed by a justice of the peace for examination on a charge of murder. The examining court commenced on the 2d of July, and sent him on for trial before the circuit court of the county. At the October term 1867, of the circuit court he was indicted for murder, and when he was arraigned he tendered a plea to the jurisdiction of the circuit court. The court had jurisdiction to try the prisoner.

Philips' Case, 485

7. Though the plea tendered by the prisoner was informal, and properly rejected by the court, yet the objection to the jurisdiction, being a mere question of law, however made, whether by suggestion or motion *ore tenus*, should be considered and decided by the court.

Idem, 485

8. The act passed the 27th of April 1867,

Sess. Acts 1866-'67, ch. 118, p. 915, to revise and amend the criminal procedure, provided that it should go into operation on the 1st of July 1867, and it repeals the law as to examining courts. Still a prisoner committed on a charge of murder on the 24th of June 1867, must be committed for examination; and it is proper to proceed under the former law, in the examination of the prisoner before an examining court, and his trial before the circuit court.

Idem, 485

9. The authority of a judge who presides at a criminal trial extends over the jury not only during the day whilst they are in court, but after the adjournment for the day; and it is not illegal or improper for the judge to take charge of a juror in the temporary absence of the sheriffs to whom the jury has been committed.

Idem, 485

10. Separation of a juror out of the custody and control of the officers having charge of the jury, is *prima facie* sufficient to vitiate the verdict; and it is incumbent on the Commonwealth to refute that presumption, by disproving all probabilities or suspicions of tampering.

Idem, 485

11. The act Code, edi. 1860, ch. 16, § 18, upon the construction of statutes, applies to cases of repeal of statutes in express terms as well as repeals by implication; and it preserves the rights which are inherent in the proceedings; and the proceedings are to conform to the new law only when the change would not effect or impair these rights; and this whether the change in the proceedings is civil or criminal.

Idem, 485

12. A prisoner is indicted for felony in the circuit court, he being in custody at the time. The circuit court has no jurisdiction to try him on this indictment, but he must be sent before a justice for examination and commitment in the county court.

Wright's Case, 626

13. The arraignment of a prisoner and his plea are distinct parts of the proceeding; and therefore upon his arraignment, and without pleading, he may elect to be tried in the circuit court.

Whitehead's Case, 640

14. Two prisoners may be arraigned together. This does not prevent their pleading separately, and electing to be tried separately.

Idem, 640

15. The record of the court states that the grand jury presented the following indictments as true bills, viz: one against M. N., one against &c., setting out eight names, and then one against G. W. & R. W., and one against R. H. & G. C. not true bills. Though it is doubtful whether the indictment against W. and W. belongs to the first or the last class, the court may look to the indictment and the endorsement upon it by the foreman, to ascertain the fact.

Idem, 640

16. The act, Sess. Acts 1866-'67, ch. 208, § 4, p. 932, directs that the writ of *venire facias* shall command the officers charged with its execution to summon twenty-four persons, freeholders of his county or corporation, "residing remote from the place where the offence is charged to have been committed." This direction is mandatory, and the writ is defective, and should be quashed if it is omitted. And it is not in violation of the bill of rights.

Idem, 640

17. A prisoner in custody is indicted in the hustings court of L., held by a judge. He is not entitled to be sent before a justice for examination; but the court may proceed to try him upon the indictment.

18. Upon a trial for felony it is the right of the prisoner, a right which he cannot waive, to be present from the arraignment to the verdict. And if the evidence of a witness on the trial, which has been reduced to writing, or any part of it, is read to the jury in the absence of the prisoner, it is error, for which the verdict will be set aside.

Jackson's Case, 656

831 *19. What statements of deceased are not admissible as dying declarations. See *Dying Declarations*, No. 1, 2, and

Idem, 656

20. An information under the 1st section of the act of February 13th, 1866, Sess. Acts 1865-'66, p. 32, ch. 2, in relation to the assessment of taxes on licenses, must allege that the sale was "for profit or on commission or for other compensation," or it will be fatally defective on demurrer or on motion in arrest of judgment.

Cousins' Case, 807

21. The jury may amend their verdict at any time before they are discharged.

Sledd's Case, 813

22. There being three counts in a presentment, and the jury having found the defendant guilty on the first count and assessed his fine, and not guilty on the second and third counts, the judgment should be for the Commonwealth on the first count, and for the defendant on the second and third counts.

Idem, 813

23. In such case, there having been a general judgment for the Commonwealth, the appellate court will amend and affirm it.

Idem, 813

DEPOSITIONS.

1. A commission to take a deposition being in all other respects correct, the omission, from inadvertence, of the clerk issuing it to sign his name to it at the bottom will not vitiate it.

Sleptoe v. Read for, &c., 1

2. Though the commissioner taking a deposition does not give the names of the parties in his certificate, or state it was taken in pur-

suance of a commission, yet as the names are given in the caption to the certificate, and the commission is returned with the deposition and attached to it, the certificate is sufficient.

Idem, 1

3. The certificate of a commissioner who takes a deposition does not state that it was taken pursuant to notice; but though the deposition is excepted to on other grounds, no objection is taken to it in the court below for want of notice. Although there is no notice or evidence of notice in the record, the objection for want of notice cannot be taken in the appellate court.

Idem, 1

DOWER.

1. The county courts are courts of general jurisdiction, and in proceeding under the act, ch. 110, § 9, Code of 1860, for the assignment of dower, it is to be presumed, in the absence of proof to the contrary, that the court had jurisdiction of the case, and proceeded regularly in it.

Devaughn v. Devaughn, 556

2. In the assignment of dower to the widow, the assignment should be based upon both the annual and fee simple value of the property.

Idem, 556

3. The widow is not entitled, as of right, to have the mansion house included in the dower assigned to her.

Idem, 556

DYING DECLARATIONS.

1. Though the deceased may have expressed himself and have acted in such a way as to indicate that he had no hope or expectation that he would live, yet if he afterwards so expresses himself as to indicate a hope, his statements in relation to the contest in which he was struck are not to be admitted in evidence as dying declarations.

Jackson's Case, 656

2. A single sentence is uttered by the deceased, and he is then interrupted, and obviously has not completed what he intended to say. It is not admissible in evidence for the prisoner.

Idem, 656

EQUITY JURISDICTION AND RELIEF.

1. Where an agency is of a fiduciary character, the principal may sue his agent in equity for an account of his agency.

Zetelle v. Myers & al., 62

2. An agency to manage, lease and sell property, and pay expenses upon it, to collect debts, and pay over the moneys received to the principal, is of a fiduciary character.

Idem, 62

3. An agency under a power of attorney to manage and dispose of personal property, and collect debts, and a trust under a deed to lease and sell real estate, created at the same time, by the same parties to the same parties, and being intended for one common object, the whole claim should be embraced in a suit in equity by the principal against the agents for an account. See *Practice in Chancery*, No. 1, and

Idem, 62

4. When an assignee of a contract for purchase of land may sue the purchaser 832 *in equity in her own name, and need not prove the assignment, see *Assignor and Assignee*, No. 1, 3, and

Mayo's ex'or & als. v. Carrington's ex'or & als.,

5. What equitable relief will be given a purchaser of land, purchasing for Confederate money, and not tendering the money when it fell due. See *Confederate Debts*, No. 5, and

Lohman v. Crouch & als., 331

6. In such case, if the purchaser tenders the money when it falls due, equity cannot impose upon him any equitable conditions beyond paying the sum due.

Idem, 331

7. A non-resident of the State, owner of notes secured by deed of trust on real estate, before the war deposits them in a bank for collection, and they are protested for non-payment. During the war they are paid by a trustee under a subsequent deed of the debtor, to the bank, in Confederate notes, when they are in value as twelve to one for gold. The payment is invalid, and the notes are still due and unpaid, and the owner may have the deed of trust given to secure them enforced.

Alley & als. v. Rogers, 366

8. In such a case the owner of the notes is entitled to have a decree for the sale of the land conveyed to secure them, without first proceeding against the debtor, or the bank, or the trustee who paid them, or any other person.

Idem, 366

9. The trustee in the second deed sold a part of the land to different persons on the same day, but conveyed the different parts to the purchasers on different days. If it is not necessary to sell all the land to pay off the notes, that part still held by the second trustee is to be first sold; and after applying the proceeds of sale to the payment *pro tanto* of the notes, the balance due upon them is to be paid ratably out of the lots sold, in proportion to the amount of the purchase money of each at the sale made by the second trustee, without regard to the dates of the deeds made by him.

Idem, 366

10. The decree for the sale of the land for the payment of said notes being interlocutory, though it is affirmed on appeal, there may be a decree between the co-defendants when the cause goes back, if it is a proper case for a decree.

Idem, 366

EVIDENCE.

1. Where one defendant is not a competent witness for the other, see *Witness*, No. 1, and

Steeptoe v. Read for, &c., 1

2. A witness is not competent to give evidence for one purpose only. If he is competent at all, he may be examined upon any matter upon the record.

Idem, 1

3. The original order book of a county court is competent evidence whenever a certified copy would be evidence.

Ballard & als. v. Thomas & Ammon, 14

4. The original order book may be proved to be such by a deputy clerk or any other person who can identify it.

Idem, 14

5. At common law, if upon a prosecution for an assault and battery, the defendant pleaded guilty, the record was competent evidence in a civil action for the same assault and battery, to prove it.

Honaker v. Howe, 50

6. But where the defendant, without pleading, throws himself upon the mercy of the court and submits to a fine, the record is not evidence, in a civil action for the same act, to prove it.

Idem, 50

7. In Virginia, where a defendant, on an indictment for misdemeanor, without pleading confesses a judgment for a specific sum as a fine, the record is not evidence, in a civil action for the same cause, to prove the fact. Nor is it evidence to enhance the damages.

Idem, 50

8. Though all of an answer responsive to a bill is to be received in evidence, the court may believe a part of it and disbelieve another part of it.

Mayo's ex'or & als. v. Carrington's ex'or & als., 74

9. When parol evidence may be admitted to show whether a note signed by an agent is intended as his own, or that of the company, see *Corporations*, No. 1, and

Rich. Fred. & Pot. R. R. Co. v. Snead & Smith, 354

10. When statements of deceased are not admissible as dying declarations, see *Dying Declarations*, No. 1, 2, and

Jackson's Case, 656

833 *EXECUTORS AND ADMINISTRATORS.

1. The accounts of an executor which have been regularly settled in the mode prescribed by law, are to be taken as *prima facie* correct. They are liable to be impeached on specific grounds of surcharge and falsification to be alleged in the bill; but the court will not decree an account upon a general allegation that the settled accounts are erroneous.

Corbin & als. v. Mills' ex'ors & als., 438

Robinson's adm'r v. Mills' ex'ors & als., 438

2. Where an account has been ordered on a proper bill, if an additional objection to the settled accounts is discovered in the progress of the cause, the plaintiff may raise the objection before the commissioner, with a proper specification, in writing; and the defendant may meet the objection by an affidavit, which shall have the same weight as an answer would have had if the matter had been alleged in the bill.

Idem, 438

3. Executors have regularly settled their

accounts before a commissioner of the court of probate, and they have been approved and recorded. A devisee and legatee of their testator files a bill, and without specifying any errors in the settled accounts, calls upon them to render an account of all their actings and doings. The executors may object to any overhauling of their settled accounts, except so far as they may be open to objections apparent on their face.

Idem, 438

4. To such a bill the executors answer, giving a full account of their administration; and there is a decree for an account. The allegations of the answer, though affirmative, must be taken as true unless disproved, so far as they relate directly to the accounts which they are thus required to give.

Idem, 438

5. If in such a case the plaintiff does not amend his bill, and specify errors in the accounts, allegations in the answer, though not explanatory of the account, and therefore perhaps not within the scope of the discovery sought by the bill, but having a relation to the subject-matter of the account, and important to a correct understanding of the motives of the executors, and of the circumstances under which they acted, unless disproved, are to be taken as true.

Idem, 438

FELONY.

1. The filing of an information against a prisoner committed for trial for a felony, is of no avail, and an indictment must be found against him within the time prescribed by the statute, or he will be discharged.

Jones' Case, 478

2. A prisoner committed for trial for a felony, must be indicted in the county court, though upon an information filed against him, he has been on his own motion remanded for trial in the circuit court.

Idem, 478

3. The second term of the court spoken of by the statute, by which time a prisoner must be indicted, is the second term at which a grand jury is directed to be summoned.

Idem, 478

4. Where a prisoner is to be tried for a felony. See *Philips' Case,* 485

Wright's Case, 626

5. The distinction between the arraignment and the pleading in a felony.

Whitehead's Case, 640

INDICTMENTS AND INFORMATIONS.

1. An information under the 1st section of the act of February 13th, 1866, Sess. Acts 1865-66, p. 32, ch. 2, in relation to the assessment of taxes on licenses, must allege that the sale was "for profit or on commission, or for other compensation," or it will be fatally defective on demurrer, or on motion in arrest of judgment.

Cousins' Case, 807

2. Since the act, Code, ch. 207, § 11, no mode of stating the time of an offence in an indictment or presentment can vitiate it.

Sledd's Case, 813

JUDGMENTS.

1. At common law in a joint action against several parties, there can be but one final judgment, and it must be for or against all the defendants; and the rule is the same, whether the contract sued on is joint, or joint and several, or whether the action is founded on several and distinct contracts, as the maker and endorsers of a negotiable note.

Steptoe v. Read, for &c., 1

834 *2. This general rule does not apply where the plea of one defendant admits the contract, and sets up a discharge by matter subsequent, as bankruptcy; or where he sets up a personal disability at the time of the contract sued on, as infancy. And these exceptions apply whether the contract is joint, or joint and several. *Idem*, 1

3. The act, Code, edi. 1860, ch. 177, § 19, applies only to cases in which some of the defendants are discharged upon grounds of defence merely personal; and where the ground of defence goes to the foundation of the entire contract, the case remains as at common law. *Idem*, 1

4. In an action on a contract against two defendants, though one of them confesses a judgment, if the other proves a defence that goes to the foundation of the entire contract sued on, there must be final judgment in favor of both defendants. *Idem*, 1

5. How judgment in a criminal case should be entered. See *Criminal Jurisdiction and Proceedings*, No. 22, and

Sledd's Case, 813

JUDICIAL SALES.

T. conveyed to H. & B. ninety acres of land in trust for his wife for life, and at her death to their children, with a power of appointment by will to the wife; which she did not make. After the death of T. and his wife, four of their children being of age, file their bill against the other two, who were infants, of the age of seventeen and nineteen years, asking for the sale of the land. There was a decree directing the land to be sold, and it was sold, partly on a credit, and the sale was confirmed. The purchaser having failed to make the last payment, a rule was made on him to show cause why the land should not be sold to pay the balance of the purchase money. He appeared and filed an affidavit objecting to the title; that the trustees, H. & B., had not been parties to the suit, and that there was but eighty-nine acres of land. B., describing himself as surviving trustee, executed a release deed, which was filed in the suit. A sale was decreed, and the purchaser appealed. **Held:**

1. **QUÆRE:** Whether under the Virginia statute of uses, the trust having ended, the legal title was in the trustees. But if it

was, and they should have been parties, the sale having been made and confirmed, and the purchaser in quiet possession, the deed of release of the surviving trustee cured the defect.

Jones v. Tatum, 720

2. Though the tract was described as containing ninety acres, it was a sale in gross, and not by the acre, and the purchaser is not entitled to an abatement from the purchase money. *Idem*, 720

3. If the facts stated by the purchaser would entitle him to an abatement from the purchase money, the facts not being proved, he is not entitled to it. *Idem*, 720

4. The decree having directed the commissioner to give security, and to pay the purchase money to the infants' guardian, the purchaser paying to the commissioner in pursuance of the decree, is exonerated from liability for its proper disposition, and cannot object to the decree on that ground. *Idem*, 720

5. No objection having been made in the court below, that it was not shown that B. was the surviving trustee, that question cannot be made in this court. *Idem*, 720

6. The purchaser having resisted the decree for a resale, and taken an appeal from the former decision in the cause, was properly subjected to pay the costs of the proceeding under the rule. *Idem*, 720

JURIES.

1. What authority the judge who presides at a criminal trial has over the jury out of court. See *Criminal Jurisdiction and Proceedings*, No. 9, and

Philips' Case, 485

2. Separation of a juror out of the custody and control of the officer having charge of the jury, is *prima facie* sufficient to vitiate a verdict; and it is incumbent on the Commonwealth to refute the presumption, by disproving all probabilities or suspicions of tampering. *Idem*, 485

LACHES AND LAPSE OF TIME.

1. Great laches in prosecuting a suit in equity after it has been commenced, by an assignee of the purchase money of land against the debtor purchaser, excused under the circumstances.

835 **Mayo's ex'or & als. v. Carrington's ex'or & als.*, 74

LEGACIES AND LEGATEES.

1. Testator gives to his daughter for life \$590 *per annum*, payable quarterly, being the interest on the purchase money (\$9,000) of the real estate on, &c., sold by me to B. He gives two other sums to the daughter for life, *per annum*, described as the interest on the purchase money of other parcels of land sold to other parties, \$300 *per annum*, payable semi-annually, the interest on \$5,000 of State stock of Virginia. And at the death of his

daughter he gives these several principal sums of money to the children of his daughter. And he receives part of the purchase money specified, in his lifetime. The legacies, both to the daughter and her children, of the three first sums are demonstrative, and not specific. The legacy of the stock, and the interest upon it, is a general legacy of so much State stock and the interest upon it as it is paid by the State.

Corbin & als. v. Mills' ex'ors & als., 438

Robinson's adm'r v. Mills' ex'ors & als., 438

2. To this bequest the testator adds: In case of the death of any child of my said daughter, born or to be born, unmarried under the age of twenty-one years, and not leaving issue, the share of property coming to this child shall immediately vest in and belong to his or her surviving brothers and sisters and their lineal descendant; the descendants taking their deceased parent's share. A child of the daughter, over twenty-one years of age at the death of the testator, after his death marries and dies in the lifetime of her mother, not having had a child, and her husband surviving her. The legacy vested in the child at the death of the testator; and it did not divest upon her death without children; but her husband takes it as her administrator.

Corbin & als. v. Mills' ex'or & als., 438

Robinson's adm'r v. Mills' ex'ors & als., 438

3. Mrs. C., an old and very wealthy lady, after disposing by her will and two codicils of a large amount of her property, at the close of the second codicil says: In case of sudden and unexpected death, I give the remainder of my property to be equally divided between my cousin Dr. C. of Philadelphia, and my cousin P. S. of New Orleans, one-half of which each must hold in trust for the benefit of their children. This is not a conditional legacy, dependent upon the sudden and unexpected death of the testatrix.

Skipwith & als. v. Cabell's ex'or & als., 758

Lee & als. v. Cabell's ex'or & als., 758

4. In such cases the question is whether the contingency is referred to as the reason or occasion for making the disposition, or as the condition upon which the disposition is to become operative. *Idem*, 758

5. The second codicil is dated August 18, 1861. On the 27th November, 1861, the testatrix made a sixth codicil as follows: In consequence of the state of the country, I now revoke my bequests to Dr. C. and his children, and also to Mrs. T., her daughter C., and also to Miss L., all of them residents of Philadelphia. Evidence was offered to prove that testatrix had been advised that there was danger that the legacies would be confiscated by the Confederate government, and that this was the reason of the revocation. **HELD:**

1. If the advice was erroneous, it would not avoid the revocation. *Idem*, 758

2. Parol evidence is not admissible to show the views and opinions of the testatrix in order to show that she acted under a mistake. The mistake which induces the revocation must appear on the face of the will. *Idem*, 758

3. C. and S. took under the residuary clause of the will, each one-half as tenants in common, and upon the revocation of the bequest to Dr. C., the half given to him does not pass to S., but is undisposed of by the will, and goes to the next of kin. *Idem*, 758

4. By the first clause of her will testatrix says: Of the ten thousand and fifty dollars which I received from my uncle Fitzhugh Carter's estate, I give and bequeath two thousand dollars of it to Mrs. C., two thousand, &c.; giving to different ladies legacies together, amounting to the precise sum of \$10,050. At the death of the husband of testatrix he had standing in his name \$10,050 of bonds of the State of Virginia, which he had purchased with money derived from the estate of Fitzhugh Carter; he intended these bonds to be transferred to his wife, and they were transferred to her by his executor. These are money legacies, and are not specific bequests of the bonds. *Idem*, 758

5. By another clause of her will, testatrix leaves to the unmarried daughters of her cousins B. and C. "my guaranteed bonds of the James River and Kanawha company, to be equally divided between them." After the date of the will, an act was passed which authorized the holders of the bonds of this company, for which the State was bound, to surrender them, and receive in lieu thereof bonds of the State for the same amount; and under this act the testatrix exchanged her guaranteed bonds for State bonds, which she held at her death. The exchange of the guaranteed bonds for State bonds was not an ademption of the legacy, and the legatees are entitled to have the State bonds. *Idem*, 758

6. In the progress of a suit brought by the executor to have the estate administered, the court authorized him to invest funds of the estate in his hands, in Confederate bonds. He paid large sums of Confederate money to one of the residuary legatees, but the parties entitled to the other half of that legacy being unascertained, he paid nothing to them. **HELD:**

1. That the loss sustained by the investment in Confederate bonds must be borne ratably by all the parties entitled to the residuum. *Idem*, 758

2. That in ascertaining the residuum, and the payments made to the one residuary legatee, these payments must be scaled according to the value of the money at the time of payment. *Idem*, 758

7. By the second clause of the will, testatrix says: I gave half the Virginia State stock that I may own when I die to my

cousin S. L. He is entitled to one-half of the aggregate amount of State stocks she owned at her death, except the State bonds exchanged for guaranteed bonds of the James River and Kanawha company, but not to bonds in which her money was invested by a bank in its own name, under an agreement with her to pay her the interest and pay the taxes, and return the bonds or buy others, when she required it.

Idem, 758

LIENS.

1. If the assignment of a debt is without recourse, it is doubtful whether it will carry with it an equitable lien for the debt; but if the assignment is general, the equitable lien passes with it.

Mayor's ex'or & als. v. Carrington's ex'or & als., 74

LIMITATION OF ESTATES.

1. S. by § 10 of his will, says: I lend to my daughter S. 140 acres of land, to be possessed by her during her natural life, and the natural life or widowhood of any husband she may have, and at her death and at the death or after marriage of her husband, then to be equally divided among her children, if she has any, and if she has none, then to be divided among all my children. He gives to S. a female slave and her increase on the same terms and conditions. S. died without having married, and by her will gave her estate to C. **Held**:

1. S. took an estate but for her life, with a contingent estate for the life or widowhood of any husband she might have.

Moon & wife v. Stone's ex'or & als., 130

2. The word children as used in this devise, is a word of purchase, and not of limitation. *Idem*, 130

3. The word children in a bequest can generally have no other meaning than that of issue in the first degree, unless there be other words in the will to give it another meaning, except where the rule in *Wild's Case*, 6 Coke 16, applies, which is founded on peculiar reasons. *Idem*, 130

LIMITATIONS—Statutes of.

1. In a suit in equity by the assignee of the purchase money of land against the purchaser and assignor, her suit being for a specific performance of the contract, the statute of limitations is no bar to the claim.

Mayor's ex'or & als. v. Carrington's ex'or & als., 74

NATIONAL LAW.

1. See *Civil War*, No. 1, and *Negotiable Paper*, No. 6, 7, 8, and

Billgerry v. Branch & Sons, 393

837 *NEGOTIABLE PAPER.

1. If a note deposited for collection in a bank where it is made payable, is not paid at maturity, but being protested, is permitted by the owner to remain in the bank,

however long and from whatever motive he may permit it thus to remain there, it may, as a general rule, be safely paid to the bank by the debtor, provided he has no notice that the bank in fact has no authority to receive the money.

Alley & als. v. Rogers, 366

2. In regard to notes deposited at a bank for collection during the war, when Confederate money was the only currency, they might properly have been paid in that money; at least without notice that other money was demanded. *Idem*, 366

3. In regard to notes payable at banks before the war, deposited for collection and protested for non-payment, but neglected to be withdrawn by the owner residing in this State. **QUÆRE**: Whether after two or three years the bank had authority to receive payment of such notes in a currency which came into existence after the protest of the notes, and had depreciated in value at the time of payment, as twelve to one compared with specie, in which payment might legally have been demanded. *Idem*, 366

4. In the case of a non-resident owner the bank had no authority to receive payment of notes deposited for collection before the war, and protested for non-payment, in the depreciated Confederate currency; and the payment of them to the bank was a void payment, and the said notes are still due and unpaid; and a deed of trust given to secure them, not having been released, is a subsisting security; and the owner of the notes is entitled to have the same enforced for the payment of said notes. *Idem*, 366

5. In such case the owner of the notes is entitled to have a decree for the real estate conveyed to secure them, without first proceeding against the debtor, or the bank, or any other person. *Idem*, 366

6. Bills or checks drawn by a bank in Richmond, Va., upon a bank in New Orleans, were endorsed in Petersburg, Va., in February 1863, to a resident of Vicksburg. The late war was then in progress, and Petersburg, Richmond and Vicksburg were within the Confederacy, whilst New Orleans was in the permanent possession of the Federal forces. The endorsement was illegal and void, and the endorsee cannot recover against the endorser in an action brought after the war.

Billgerry v. Branch & Sons, 393

7. The international law applied to all transactions between persons residing within the limits of the authority of the Confederacy and persons residing in the United States, outside of the Confederate authority. *Idem*, 393

8. After Vicksburg had been taken possession of by the Federal forces, viz: on the 23d of October 1863, the bills were presented for payment at the New Orleans bank, and payment refused. Under the proclamation of the President of the United States of April 2, 1863, intercourse between Vicksburg and New Orleans was still prohibited, and the demand of payment was illegal. *Idem*, 393

9. Notice of demand and refusal to pay, was put into the postoffice at New Orleans on the 23d of October 1863, directed to the endorsers at Petersburg, Va. The war being then in progress, and there being no mail communication between New Orleans and Petersburg, the notice was insufficient.

Idem, 393

10. Holder for value of a negotiable note, given upon a Confederate contract, will be subject to have the same scaled. See *Confederate Debts*, No. 1, and

Lohman v. Crouch, 331

OFFICERS.

1. So much of the act passed the 5th of March 1870, styled the enabling act, as provides for the appointment of councilmen or trustees, and mayors and other officers of cities and towns, is constitutional.

The Richmond Mayoralty Case, 673

2. The authority of the military commanders appointed under the reconstruction acts of congress, ceased upon the admission of the State's representatives into congress; and when his authority ceased, that of his appointees ceased.

Idem, 673

3. The act of congress of January 26th, 1870, admitting the representatives into congress, does not entitle military appointees to office to hold over until their successors are appointed and qualify.

Idem, 673

4. Sec. 25 of art. 6 of the constitution, applies only to officers elected or appointed under the constitution, and for whose election and appointment it provides.

Idem, 673

5. Sec. 20 of art. 6 of the constitution, which provides, among other things, that there shall be chosen by the electors of every city a mayor, applies only to a mayor to be chosen under the constitution, at and after the time therein prescribed for the purpose, and not to one appointed to perform the duties of mayor before one could be chosen to enter upon the duties of the office under the constitution.

Idem, 673

6. Whatever power these military appointees to office may have had to discharge the duties of their offices until otherwise provided by law, they derived none from the constitution of the United States or of the State, and it was competent for the legislature to terminate their power derived from any other source.

Idem, 673

7. The constitution did not continue any officers in office after its adoption, but intended to vacate all of them immediately.

Idem, 673

NEW TRIALS.

1. Where the question in the appellate court, is whether a verdict is contrary to the evidence, where the ultimate facts upon which the legal conclusion in the case must rest, are to be deduced by balancing the different facts proved, and by weighing and comparing the inferences to be drawn from

them, respect should be paid to the verdict and judgment of the court below.

Rich. Fred. & Pot. R. R. Co. v. Snead & Smith, 354

PARTIES.

1. A corporation being a defendant to a suit in equity which seeks to have it declared null, the holders of stock in it are not proper parties to defend the suit.

Wash., Alex. & Georget. R. R. Co. v. Alex. & Wash. R. R. Co., 592

2. In such a case the holders of the stock claiming that if the corporation is annulled, they have equitable interests in the property, may be admitted as parties to protect their interests.

Idem, 592

PAYMENTS.

1. When, and when not, notes made payable at a bank, and deposited there for collection, might be paid in Confederate money. See *Negotiable Paper*, No. 2, 3, 4, and

Alley & als. v. Rogers, 366

2. When payment of a bill or check on a bank is forbidden by the law of nations and the acts of congress. See *Negotiable Paper*, No. 8, and

Billgerry v. Branch & Sons, 393

3. How payment in Confederate money to one residuary legatee is to be valued in estimating the residuum, and in charging him. See *Legacies and Legatees*, No. 7, and

Skipwith & als. v. Cabell's ex'or & als., 758

Lee & als. v. Cabell's ex'or & als., 758

PLEADING—At Common Law.

1. See *Practice at Common Law*, No. 1, and

Steptoe v. Read, for &c., 1

PLEADING—In Equity.

1. See *Executors and Administrators*, No. 1, 2, 3, 4, 5, and

Corbin & als. v. Mills' ex'ors & als., 438

Robinson's adm'r v. Mills' ex'ors & als., 438

PRACTICE—At Common Law.

1. Two defendants in assumpsit file a joint plea of *non assumpsit*, on which issue is taken. Afterwards, one of them asks leave to withdraw the plea as to himself, and to file a separate plea, that the defendants did not assume, &c. This being refused, he asks leave to file such plea in addition, which is also refused. As the issue on both pleas would be the same, both rulings were correct.

Steptoe v. Read, for &c., 1

2. At common law, in a joint action against several parties, there can be but one final judgment, and it must be for or against all the defendants; and the rule is the same, whether the contract sued on is joint, or joint and several, or whether the action is founded

on several and distinct contracts, as the maker and endorsers of a promissory note.

Idem, 1

3. This general rule does not apply
839 *where the plea of one of the defendants admits the contract and sets up a discharge by matter subsequent, as bankruptcy or where he sets up a personal disability at the time of the contract sued on, as infancy. And these exceptions apply equally, whether the contract is joint, or joint and several.

Idem, 1

4. The act, Code, edi. 1860, ch. 177, § 19, applies only to cases in which some of the defendants are discharged upon grounds of defence merely personal; and where the ground of defence goes to the foundation of the entire contract, the case remains as at common law.

Idem, 1

5. In an action on a contract against two defendants, though one of them confesses a judgment, if the other proves a defence that goes to the foundation of the entire contract sued on, there must be final judgment in favor of both defendants.

Idem, 1

6. When verdict and judgment of the court below will be regarded in the appellate court, upon exception taken to overruling motion for new trial, on the ground that the verdict is contrary to the evidence. See *Appellate Court*, No. 3, and

Rich. Fred. & Pot. R. R. Co. v. Snead & Smith,

354

PRACTICE—In Chancery.

1. Z. being about to leave the country, executes a power of attorney, by which he gives to M. and C. the amplest power to manage and dispose of all his property here for his benefit, and collect debts due him. On the same day Z. and his wife convey to M. and C. a house and lot, in trust to lease or sell the same, and pay over the proceeds as received to Z. The deed of trust and power of attorney being designed to effect one common object, Z. cannot file a bill against M. and C. for an account of the trust subject under the deed, and bring an action at law for the moneys received from the personal property and debts, under the power of attorney; but if he chooses to proceed in equity, must embrace the whole in that suit.

Zetelle v. Myers & al.,

62

2. The court should have required the plaintiff to elect whether he would amend his bill so as to embrace the whole of the transactions, and dismiss his action at law, or whether he would prosecute that action; and upon his failure to elect, or electing to prosecute his action at law, should have dismissed his bill.

Idem, 62

3. W. held a long lease on property of C., who was largely indebted to him, and which was secured by a deed of trust on the leased property; and W. conveyed all his property of every kind to secure his creditors. In a suit by a creditor of W. a decree was made for the sale of the lease, with authority to the

purchaser to set off the debt due from C. to W. against the rent. And this was proper.

Mayo's ex'or & als. v. Carrington's ex'or & als.,

74

4. M. files a bill to have his title to certain real estate established, and to obtain the legal title from a trustee. J. files her bill in the same court against M., claiming, as assignee of the vendor, the purchase money for the land, which she claims is still unpaid. The cases were properly heard together.

Idem, 74

5. The papers in the suit of J. were lost at the time the decree appealed from was made, but there were found decrees and reports of commissioners, and exceptions thereto, made in the two suits, sufficient to enable the court to ascertain the merits of her claim. It was proper to decree upon the claim.

Idem, 74

6. Though all of an answer responsive to a bill is to be received as evidence, the court may believe a part of it, and disbelieve another part.

Idem, 74

7. In a bill by an assignee against the obligor and assignor, the assignment is not questioned by the assignor. There is no necessity of proving it as against the obligor.

Idem, 74

8. M. proposes in writing to purchase of C. certain real estate upon specified terms. This proposition is accepted by C. by a writing at the foot of the proposal, and the real estate is conveyed to M.; and C. then assigns the instrument, by a writing upon it, to J. The assignment is complete, and J. may sue M. upon it in equity in her own name.

Idem, 74

9. J. is not barred by the statute of limitations, her suit being for a specific performance of the contract.

Idem, 74

10. Great laches in prosecuting a suit in equity after it had been commenced, by an assignee of the purchase money of
840 *land against the debtor purchaser, excused under the circumstances.

Idem, 74

11. A tenant in common, occupying and using the common property separately, cannot be held to account for waste or injury to the common property, unless the bill charges it.

Graham & als. v. Pierce,

28

12. Land sold to different purchasers on the same day, though the deeds are of different dates, is subject to satisfy a prior lien according to the day of sale, and not the time of the conveyances; and each is to bear its ratable proportion as fixed by the price given for it. See *Equity Jurisdiction and Relief*, No. 9, and

Alley & als. v. Rogers,

366

13. In such case the decree for the sale of the land being interlocutory, though it is affirmed upon appeal, there may be a decree between the co-defendants when the cause goes back, if it is a proper case for such a decree.

Idem, 366

14. In cases of bills by legatees against executors for the settlement of their accounts. See *Executors and Administrators*, No. 1, 2, 3, 4, 5, and

Corbin & als. v. Mills' ex'ors & als., 488
Robinson's adm'r v. Mills' ex'ors & als., 438

PRACTICE—In Criminal Cases.

See *Criminal Jurisdiction and Proceedings*, *passim*.

PRINCIPAL AND AGENT.

1. Where an agency is of a fiduciary character, the principal may sue his agent in equity for an account of his agency.

Zetelle v. Myers & al., 62

2. An agency to manage, lease and sell property, and pay expenses upon it, to collect debts, and pay over the moneys received to the principal, is of a fiduciary character.

Idem, 62

3. Z. being about to leave the country, executes a power of attorney, by which he gives to M. and C. the amplest power to manage and dispose of all his property here, for his benefit, and collect debts due him. On the same day Z. and his wife conveyed to M. and C. a house and lot in trust, to lease or sell the same, and pay over the proceeds as received to Z. The deed of trust and power of attorney being designed to effect one common object, Z. cannot file a bill against M. and C. for an account of the trust subject of the deed, and bring an action at law for the moneys received from the personal property and debts, under the power of attorney; but, if he chooses to proceed in equity, must embrace the whole in that suit.

Idem, 62

4. The authority of the president of a railroad company to make contracts for necessary labor for the company, is incident to his office. And he may furnish evidence of the amount payable under the contract, either before or after the service, and put that evidence, in his discretion, into the form of a due bill or promissory note; unless such power is restricted by special legislation, or by regulations of the company known to the other contracting party.

Rich. Fred. & Pot. R. R. Co. v. Snead & Smith, 354

RECORDS.

1. At common law, if upon a prosecution for an assault and battery, the defendant pleaded guilty, the record was competent evidence in a civil action for the same assault and battery, to prove it.

Honaker v. Howe, 50

2. But where the defendant, without pleading, throws himself upon the mercy of the court and submits to a fine, the record is not evidence, in a civil action for the same act, to prove it. *Idem*, 50

3. In Virginia, where the defendant, on an indictment for a misdemeanor, without

pleading confesses a judgment for a specific sum as a fine, the record is not evidence, in a civil action for the same cause, to prove the fact. Nor is it evidence to enhance the damages. *Idem*, 50

REMOVAL OF CAUSES.

1. The plaintiff and defendant being corporations of this State, the owners of the stock, in the defendant corporation, though non-residents, are not entitled to have the cause removed to the United States court, to have the validity of the defendant corporation decided.

Wash. Alex. & Georget. R. R. Co. v. Alex. & Wash. R. R. Co., 592

841 *REVERSIONARY INTERESTS.

1. Where there is no actual fraud, and no fiduciary relation between a purchaser of a reversionary interest and his vendor, mere inadequacy of consideration is not sufficient to avoid a sale, unless it is so great as to shock the moral sense.

Mayo's ex'or & als. v. Carrington's ex'or & als., 74

SCALING CONFEDERATE PAYMENTS.

See *Legacies and Legatees*, No. 7, and

Skipwith & als. v. Cabell's ex'or & als., 758

Lee & als. v. Cabell's ex'or & als., 758

SET-OFF.

When notes of a bank cannot be set-off in suit by trustees of the bank for the benefit of the creditors. See *Banks*, and

Exchange Bank of Va. for Camp v. Knox, & c., 739

Farmers Bank of Va. for Goddin, & c. v. Anderson & Co., 739

SHERIFFS.

1. The sheriff and his sureties in office when the county levy is laid, are responsible, at the end of six months from the date of the levy, to all the creditors of the county provided for by it, though the sheriff has not collected the money, or any part of it.

Ballard & als. v. Thomas & Ammon, 14

2. Though after the levy, the sheriff is removed from his office on the motion of his sureties, before the six months has expired, the sheriff and his sureties are liable to the county creditors provided for in the levy.

Idem, 14

3. Though the sheriff is removed from his office on the motion of his sureties, he still has authority to collect the levy, and his sureties are responsible for his failure to account to the county creditors.

Idem, 14

4. The act of 1851, Code, edi. 1860, ch. 49, § 18, which authorizes the county court, where there is a vacancy in the office of

sheriff, from other causes than his death, to appoint a collector of the taxes, levies, &c. is permissive only, not mandatory; and if not acted on, a sheriff removed from office must proceed to collect them; and his sureties are liable for his default.

Idem, 14

5. A county creditor provided for in the county levy, is not bound to apply to the sheriff or his deputies for payment, before he proceeds to enforce payment of his debt by the sheriff and his sureties.

Idem, 14

SPECIFIC PERFORMANCE.

1. When assignee of purchase money of land may sue for specific performance of contract in his own name. See *Vendor and Purchaser*, No. 2, 3, 4, and

Mayo's ex'or & als. v. Carrington's ex'or & als., 74

A vendor of real estate seeking to enforce specific performance of the contract of sale, must not only have a good title, but he must show it.

Griffin's ex'or v. Cunningham, 571

3. Executors sell a house and lot in R. As to five-sixths, the title of their testator is clear; for the other sixth no deed can be found after diligent search in the clerk's office where it should have been recorded, and among the testator's papers. The former owner is dead, and her husband testifies that she did make a deed for it; but there is doubt whether he is not mistaken as to the property conveyed. The purchaser will not be required to complete the purchase.

Idem, 571

4. In this case the testator went into possession of the lot in 1846, and built upon it, and held possession until his death, and authorized his executors to sell it; but it appears that in 1849 he built upon the lot under an agreement with the owner of the one-sixth, as to their respective interest in the property. He cannot be held to have had adversary possession, so as to entitle the executors to enforce specific performance of the contract of sale.

Idem, 571

5. In fact, the owner of this sixth had conveyed the property to the testator, and the deed was of record in the clerk's office, though the parties had failed to find it; but before it was found the property had greatly decreased, both in its annual and fee simple value. The purchaser will not be compelled to take it.

Idem, 571

842

*STATUTES.

1. The act, Code, edi. 1860, ch. 117, § 19, in relation to judgments and decrees for money, construed in

Steptoe v. Read, for &c., 1

2. The act of 1851, Code, edi. 1860, ch. 49, § 18, authorizing the county court, on the vacancy of the office of sheriff, to appoint a collector of taxes, levies, &c. construed in

Ballard & als. v. Thomas & Ammon, 14

3. The act, Sess. Acts 1866-'67, p. 928-9, ch. 207, § 13, construed in

Jones' Case, 478

4. The act of 27th April 1867, Sess. Acts 1866-'67, ch. 118, p. 915, to revise and amend the criminal procedure, construed in

Philips' Case, 485

5. The act, Code, edi. 1860, ch. 16, § 18, on the construction of statutes, construed in

Idem, 485

6. The art. 6, § 20 and 25 of the constitution in relation to the election and appointment of mayors and other officers of cities, construed in

The Richmond Mayoralty Case, 673

7. The act, Sess. Acts 1866-'67, ch. 207, § 15, 16, and 208, § 2, construed in

Wright's Case, 626

Shelly's Case, 653

8. The act, Sess. Acts 1866-'67, ch. 208, § 4, construed in

Whitehead's Case, 640

9. The act of February 12th, 1866, requiring the banks to go into liquidation, construed in

Exchange Bank of Va. for Camp v.

Knox &c., 739

Farmers Bank of Va. for Goddin &c.

v. Anderson & Co., 739

10. The act, Code, ch. 207, § 11, construed in

Sledd's Case, 813

11. The act of April 19th, 1867, § 22, Sess. Acts 1867, p. 822, construed in

Idem, 813

TAXES AND TAX SALES.

1. The principles decided in the cases of *Martin v. Snowden, trustee*; *Bennett v. Hunter*, and *Portner & Recker v. Cazenove*, 18 Grattan 100; and in *Turner v. Smith, &c.*, Id. 830, re-affirmed and acted on.

Dawney v. Nutt, 59

2. A leased property is sold, and is then only valuable for the sand taken from it. The purchaser of the lease builds upon the property, and makes extensive improvements. He is entitled to deduct from the rent the taxes upon the property as he purchased it, but not the taxes occasioned by his improvements.

Mayo's ex'or & als. v. Carrington's ex'or & als., 74

3. What information under the 1st section of the act of February 13th, 1866, Sess. Acts, p. 32, ch. 2, in relation to the assessment of taxes on licenses, must state. See *Indictments and Informations*, No. 1, and

Cousins' Case, 807

4. A butcher carrying on his business in the markets of a city, who goes out into a county and buys cattle, sheep and hogs, and butchers the animals and sells the meat at his stall in the market, comes within the provisions of the act of April 19th, 1867, § 22, Sess. Acts 1867, p. 822, in relation to assessment of taxes on licenses, and must take out a license for so buying.

Sledd's Case, 813

TENANTS IN COMMON.

1. Every tenant in common has a right to possess, use and enjoy the common property, without being accountable to his co-tenants for rents or profits, except under the statute for so much as he may receive beyond his just share and proportion.

Graham & als. v. Pierce, 28

2. Tenants in common are not bound to use the common property jointly, by means of a contract of partnership between them, but may possess, use and enjoy the common property severally, accounting to their co-tenants for so much of the rents and profits as they may receive beyond their just share and proportion. *Idem,* 28

3. As a general rule, where a tenant in common uses the common property to the exclusion of his co-tenants, or occupies and uses more than his just share or proportion, the best measure of his accountability to his co-tenants is their shares of a fair rent of the property so occupied and used by him.

Idem, 28

4. But there may be peculiar circumstances in a case making it proper to resort to an account of issues, profits, &c., as a mode of adjustment between the tenants in common.

Idem, 28

5. In a case of a tenancy in common in lead mines, an account of issues and profits is the proper mode of adjustment.

843 *And in settling the accounts of the operating tenants, they should not be charged a certain sum per ton for the ore raised from the mine, or credited with an estimated sum per ton for raising the ore and manufacturing the lead; but each so operating is to be charged with all his receipts, and credited with all his expenses on account of the operation of the mine. *Idem,* 28

6. In such a case, the operating tenant in common should have a credit in his account for improvements made by him which were necessary to his operation of the mine.

Idem, 28

7. A tenant in common, occupying and using the common property separately, will be responsible to his co-tenants if he wilfully or by gross negligence has wasted or destroyed the common property. *Idem,* 28

8. But he cannot be held responsible for such destruction or waste in a case in which the bill does not charge it. *Idem,* 28

TENDER.

1. C. sends an agent to L. on the day a note of C. held by L. falls due, and the agent tells L. he is sent to pay the money and get the note; and he shows L. a parcel of money which the agent holds in his hand, which is more than the amount of the note. L., without objecting that it is not the precise amount due, refuses to receive payment, because the money has greatly depreciated since the note was made. It was a legal tender.

Lohman v. Crouch & als., 331

TRUSTS AND TRUSTEES.

1. C. executes a deed, in which, reciting that W. had endorsed for C. three notes, which he specifies, he conveys to O. certain property in trust, that if the said notes are not paid by C. when due, O. shall, on the request of W., sell the property, and out of the proceeds pay the notes; and upon further trust, after paying the notes, any surplus of proceeds of sale shall be applied to the payment of any debt which at the time may be due from C. to W. The notes are not paid when due, and three years afterwards, the trustee being about to sell the property, C. pays the notes. The deed is nevertheless a security for any debt that C. then owed to W., and it became such security at least from the time of the default in paying the notes.

Mayo's ex'or & als. v. Carrington's ex'or & als., 74

2. On the 15th of March 1867, H. & P., merchants of New York, execute a deed by which they convey to S. all their effects, in trust to pay their debts, with directions to take possession at once and proceed to execute the trust. Part of the effects are goods shipped to A. & W., commission merchants in Richmond, Va., to be sold for and on account of H. & P. On the 16th of March, R. sues H. & P. in Richmond, and sues out an attachment, which is served on A. & W. as garnishees. A. is not in advance to H. & P. when the attachment is served. W. has advanced on the goods, but afterwards sells them, and has a balance in hand after paying himself. The attachment has preference over the deed, and is first to be satisfied out of the proceeds of the sale of the goods in the hands of A. & W.

A. C. Smith v. R. P. Smith, 545

3. When a substitution of trustee void, and his sale utterly void. See *Corporations*, No. 6, and

Wash., Alex. & Georget. R. R. Co. v. Alex. & Wash. R. R. Co., 592

4. A trustee in a deed to secure debts, who is the attorney in fact and law of the creditor, cannot make a valid sale at auction of of the property to himself. *Idem,* 592

5. Where there are various incumbrances on property, and the priorities are not ascertained, a sale by a trustee under one of the deeds is improper. *Idem,* 592

6. QUÆRE: Whether under the Virginia statute of uses, the trust having ended, the legal title was in the trustee.

Jones v. Tatum, 720

7. An insolvent corporation conveys its property and effects to trustees for the benefit of its creditors; the trustees are the trustees of the creditors, not of the corporation; and they are purchasers for value.

Exchange Bank of Va. for Camp v. Knox, &c., 739

Farmers Bank of Va. for Goddin, &c. v. Anderson & Co., 739

8. As to set-off against such creditors, see *Banks*, Nos. 1, 2, 4, and

Idem, 739

1. QUÆRE: Whether under the Virginia statute of uses, the trust having ended, the legal title was in the trustee.

Jones v. Tatum,

720

VENDOR AND PURCHASER.

1. Where there is no actual fraud and no fiduciary relation between a purchaser of a reversionary interest and his vendor, mere inadequacy of consideration is not sufficient to avoid a sale, unless it is so great as to shock the moral sense.

Mayo's ex'or & als. v. Carrington's ex'or & als.,

74

2. M. proposes in writing to purchase of C. certain real estate upon specified terms. This proposition is accepted by C. by a writing at the foot of the proposal, and the real estate is conveyed to M.; and C. then assigns the instrument, by writing upon it, to J. The assignment is complete, and J. may sue M. upon it in equity in her own name.

Idem, 74

3. J. is not barred by the statute of limitations, her suit being for a specific performance of the contract.

Idem, 74

4. Great laches in prosecuting a suit in equity after it had been commenced, by an assignee of the purchase money of land against the debtor purchaser, excused under the circumstances.

Idem, 74

5. When the court will not, and when it will, impose equitable conditions on a purchaser, and what will be the equitable conditions. See *Confederate Debts*, No. 3, 5, and *Lohman v. Crouch & als.,*

331

6. When vendor of land shall not have a specific performance of the contract. See *Specific Performance*, No. 2, 3, 4, 5, and *Griffin's ex'or v. Cunningham,*

571

7. See *Judicial Sales*, and

Jones v. Tatum,

720

VOLUNTARY GIFTS.

1. It was stated in *Henry v. Graves*, 16 Grattan 244, and re-affirmed in this case, as the result of all the authorities, that a voluntary gift, valid in law and equity, may be made of any property, real or personal, legal or equitable, in possession, reversion, or remainder, vested or contingent, and including choses in action, unless they be of such a nature as that an assignment of them would be a violation of the law against maintenance and champerty; that such a gift, to be valid, must be complete and not executory; that what is necessary to the completion of the gift depends on the nature of the subject and the circumstances of the case; and that it is always sufficient, though not always necessary, to the completion of a gift, at least between the parties, that the donor do everything in his power, or which the nature of the case will admit of, to make it complete.

Mayo's ex'or & als. v. Carrington's ex'or & als.,

74

WITNESSES.

1. In action upon a joint or joint and several contract against two defendants, one of them is not a competent witness for the other, to prove that the witness was the only party to the contract, and is alone bound by it.

Steptoe v. Read, for &c.,

1

2. A witness is not competent to give evidence for one purpose only. If he is competent at all, he may be examined upon any matter upon the record.

Idem, 1

WRITS.

What a *venire facias* must contain. See *Criminal Jurisdiction and Proceedings*, No. 16, and

Whitehead's Case,

640

REPORTS OF CASES
DECIDED IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

BY PEACHY R. GRATAN.

VOLUME XX.

FROM SEPTEMBER 1, 1870, TO JUNE 1, 1871.

JUDGES
OF THE
SUPREME COURT OF APPEALS
DURING THE TIME OF THESE REPORTS.

R. C. L. MONCURE, PRESIDENT.	
WILLIAM T. JOYNES.	WALLER R. STAPLES.
JOSEPH CHRISTIAN.	FRANCIS T. ANDERSON.

Attorney General: JAMES C. TAYLOR.

TABLE OF CASES REPORTED.

Alex. & Wash. R. R. Co. <i>and</i> Wash., Alex. & Georget. R. R. Co.....	31	Jones' Case.....	848
Bank of the Old Dominion <i>v.</i> McVeigh..	457	Jones & als. <i>v.</i> Phelan & Collander	229
Bargamin & als. <i>v.</i> Clarke & als.....	544	Joynes & als. <i>and</i> May	692
Bernard <i>v.</i> Maury & Co.....	434	Kelly & als. <i>v.</i> Love's adm'rs & als.....	124
Beverley <i>v.</i> Walden.....	147	Kraker <i>v.</i> Shields.....	377
Board of Supervisors of Culpeper <i>v.</i> Gorrell & als.....	484	Langhorne & Scott <i>v.</i> Robinson.....	661
Boswell's Case.....	860	Leftwich's Case.....	716
Brown <i>v.</i> Speyers.....	296	Lipscombe <i>v.</i> Rogers & als.....	658
Byrne <i>and</i> Commonwealth.....	165	Love's adm'rs & als. <i>and</i> Kelly & als....	124
Chahoon's Case.....	733	Magill <i>v.</i> Manson.....	527
Chalkley <i>and</i> Commonwealth.....	404	Magill <i>v.</i> Manson & al.....	527
City of Lynchburg <i>v.</i> Eames.....	601	Magill <i>v.</i> Sauer	540
City of Lynchburg <i>and</i> Miller & Franklin.	330	Manhattan Life Ins. Co. <i>v.</i> Warwick ...	614
City of Lynchburg <i>v.</i> Norvell.....	601	Manson <i>and</i> Magill.....	527
City of Lynchburg <i>v.</i> Phelps & Pamplin.	601	Manson & al. <i>and</i> Magill.....	527
City of Lynchburg <i>v.</i> Slaughter.....	601	Marshall's Case.....	845
Clarke & als. <i>and</i> Bargamin & als.....	544	Maury & Co. <i>and</i> Bernard.....	434
Cohen <i>and</i> Home Ins. Co.	312	May <i>v.</i> Joynes & als.....	692
Commonwealth <i>and</i> Boswell.....	860	McVeigh <i>and</i> Bank of the Old Dominion.	457
" <i>v.</i> Byrne.....	165	McVeigh <i>and</i> Southern Express Co.....	264
" <i>and</i> Chahoon.....	733	Midlothian Coal Mining Co. & als. <i>and</i> Winston & als.....	686
" <i>v.</i> Chalkley.....	404	Miller & Franklin <i>v.</i> City of Lynchburg.	330
" <i>and</i> Harris.....	833	Norvell <i>and</i> City of Lynchburg.....	601
" <i>and</i> Jones	848	Parrish & als. <i>and</i> Segar & al.	672
" <i>and</i> Leftwich.....	716	Phelan & Collander <i>and</i> Jones & als.....	229
" <i>and</i> Marshall	845	Phelps & Pamplin <i>and</i> City of Lynchburg.....	601
" <i>and</i> Quinn & als.....	138	Quinn & als. <i>v.</i> Commonwealth.....	138
" <i>and</i> Sands	800	Robinson <i>and</i> Langhorne & Scott	661
" <i>and</i> Taylor.....	825	Rogers & als. <i>and</i> Lipscombe.....	658
" <i>and</i> Thompson.....	724	Sands' Case.....	800
Crawford <i>v.</i> Halsted & Putnam.....	211	Sauer <i>and</i> Magill.....	540
Crockett & als. <i>v.</i> Thomas, &c.....	419	Saunders, &c., <i>v.</i> White & als.....	327
Cullen <i>and</i> Gimmi.....	439	Segar & al. <i>v.</i> Parrish & als.....	672
Cunningham <i>and</i> Griffin's ex'or.....	31	Shields <i>and</i> Kraker.....	377
Daniel <i>and</i> Southside R. R. Co.	344	Slaughter <i>and</i> City of Lynchburg.....	601
Drummond, &c., <i>and</i> Johnson & als.....	419	Southern Express Co. <i>v.</i> McVeigh	264
Duke & als. <i>and</i> Hogan.....	244	Southside R. R. Co. <i>v.</i> Daniel.....	344
Eames <i>and</i> City of Lynchburg.....	601	Speyers <i>and</i> Brown.....	296
Ellyson & als. <i>ex parte</i>	10	Sutherlin <i>and</i> Town of Danville.....	555
Gimmi <i>v.</i> Cullen.....	439	Taylor's Case.....	825
Gorrell & als. <i>and</i> Board of Supervisors of Culpeper.....	484	Thomas, &c., <i>and</i> Crockett & als.....	419
Griffin's ex'or <i>v.</i> Cunningham.....	31	Thompson's Case.....	724
Halsted <i>and</i> Putnam & Crawford.....	211	Town of Danville <i>v.</i> Sutherlin.....	555
Harris' Case.....	833	Walden <i>and</i> Beverley.....	147
Helms & als. <i>and</i> Howery.....	1	Warwick <i>and</i> Manhattan Life Ins. Co...	614
Hogan <i>v.</i> Duke & als.....	244	Wash., Alex. & Georget. R. R. Co. <i>v.</i> Alex. & Wash. R. R. Co.....	31
Home Ins. Co. <i>v.</i> Cohen.....	312	White & als. <i>and</i> Saunders, &c.	327
Howery <i>v.</i> Helms & als.....	1	Winston & als. <i>v.</i> Midlothian Coal Mining Co. & als.....	686
Johnson & als. <i>v.</i> Drummond, &c.....	419		

TABLE OF CASES CITED.

Abbott <i>and</i> Hanger, 6 Wall. U. S. 532...	655	Backhouse <i>and</i> Bonomi, 96 Eng. C. L. 622.....	372
Abdy <i>and</i> Mason, 3 Salk. 390.....	610	Badger <i>v.</i> Badger, 2 Wall. U. S. 87.....	553
Accidental Death Ins. Co. <i>and</i> Simpson, 2 Com. Bench N. S. 257	644	Baily's adm'x <i>v.</i> Robinson, 1 Gratt. 4....	6, 7
Adams <i>and</i> Pratt, 7 Paige 615	562	Baird <i>and</i> Wagner, 7 How. U. S. 234....	553
Adams <i>and</i> Pryor, 1 Call 382.....	154	Baker <i>and</i> Niagara County Bank, 15 Ohio st. 68.....	557
Adams <i>and</i> Whitlock, 5 Rand. 333.....	580	Ballard & als. <i>v.</i> Thomas & Ammon, 19 Gratt. 14.....	178
Addison <i>v.</i> Gandapegin, 4 Taunt. 574...	414	Ballow <i>v.</i> Bangs, 24 Illi. 184.....	47
Etna Fire Ins. Co. <i>v.</i> Tyler, 16 Wend. 385.....	325	Ball <i>and</i> People, 14 Calif. 101	721
Agawan Mutual Fire Ins. Co. <i>and</i> Francis, 6 Cush. 440.....	315	Baltimore Fire Ins. Co. <i>v.</i> Loney & al., 20 Mary. 20.....	315
Agnew <i>and</i> Pullerton, 1 Salk. 172.....	629	Balt. & Ohio R. R. Co. <i>v.</i> Polly, Woods & Co., 14 Gratt. 447.....	315
Aiken <i>and</i> Tucker, 7 N. Hamp. 113...	47, 65	Bangs <i>and</i> Ballow, 24 Ill. 184.....	47
Ainsworth <i>v.</i> Deane, 1 Foster 400.....	181	Bank of Columbia <i>v.</i> Okely, 4 Wheat. 235	481
Aldrich <i>v.</i> Cooper, 8 Ves. 382	234	Bank of Kentucky <i>and</i> Harrison, 2 J. J. Marsh. 140.....	561
Allen <i>and</i> Robinson, not reported.....	105	Bank of Lexington <i>and</i> Cook, 8 Smeedes & Marsh. 544.....	561
Allen <i>v.</i> Smith, 1 Leigh 254.....	180	Bank of State of North Carolina <i>v.</i> Ford, 5 Ired. 692	562, 585
Allen <i>and</i> State, 2 Ind. 183.....	23	Bank of United States <i>v.</i> Owens, 2 Peters 527.....	562
Allen <i>and</i> State, 2 McCord 55.....	193	Bank U. S. <i>v.</i> Waggener, 9 Peters 378	565, 566, 567, 568, 571, 574, 594, 606
Alley <i>v.</i> Rogers, 19 Gratt. 366.....	234, 242	Bank of the Valley <i>v.</i> Stribling, 7 Leigh 59.....	561, 563, 565, 572
Alstadt, &c. <i>and</i> Henkle's ex'x, 4 Gratt. 284.....	242	Bank of Washington <i>v.</i> Arthur, 3 Gratt. 173.....	561, 563, 572
Alvis <i>and</i> Scales, 12 Alab. 617.....	183, 208	Barbour <i>and</i> Shelton, 2 Wash. 64.....	353
Amer. Life Ins. Co. <i>and</i> Dry Dock Bank, 3 Comst. 344.....	560, 595	Barford <i>v.</i> Street, 16 Ves. 135	703, 707
Amer. Life Ins. Co. <i>and</i> Mumford, 4 Comst. 463.....	558	Barnard <i>and</i> Doe, 1 Esp. 11.....	562
Anderson, adm'r, <i>and</i> Burwell's ex'ors, 3 Leigh 348.....	701, 703, 707, 708, 714	Barnard, &c. <i>and</i> Sprague, 2 Bro. Ch. 585	696
Anderson <i>v.</i> Commonwealth, 18 Gratt. 295.....	478	Barnard <i>v.</i> Young, 17 Ves. 44.....	610
Anderson & al. <i>v.</i> Fox & als., 2 Hen. <i>and</i> Mun. 430	6	Barnwell's ex'or <i>and</i> Devaux, 1 Dess. 497.....	713
Anderson & Co. <i>and</i> Farmers Bank of Va., 19 Gratt. 739.....	328	Barron <i>v.</i> Mayor, &c., Baltimore, 7 Peters 243.....	186
Anderson & others <i>and</i> James River & Kanawha Company, 12 Leigh 278.....	514	Bartlett <i>and</i> State, 43 N. Hamp. 224.....	875
Ansell <i>v.</i> Ansell, 14 Eng. C. L. 451.....	221	Bassett <i>v.</i> Porter, 4 Cush. 487.....	194
Appleton <i>v.</i> Hopkins, 5 Gray 530.....	194	Bassey <i>v.</i> Storey, 4 Barn. & Ad. 98.....	767
Apaden & others <i>v.</i> Nixon & others, 4 How. U. S. 467.....	356	Bangas <i>and</i> Long, 2 Ired. 290.....	363
Archer <i>v.</i> Putman, 12 Smeedes & Marsh. 286.....	561	Baylor <i>and</i> Pollard, 6 Munf. 433.....	607
Archibald <i>v.</i> Wright, 9 Sim. 161.....	703	Beatty <i>v.</i> Smith, 2 Hen. & Mun. 395.....	215
Armstrong <i>v.</i> Ruffin, 2 Hawks 411.....	445	Bebee <i>and</i> Fowler, 9 Mass. 231.....	47
Ardivin <i>v.</i> Duhomel, 2 Ves. Sr. 162.....	711	Beebe <i>v.</i> State, 6 Ind. 501.....	53
Arnold <i>v.</i> Shields, 5 Dana 18.....	23, 523	Beirne <i>and</i> McClung, 10 Leigh 394	236, 237, 238, 241, 242
Author <i>and</i> Bank of Washington, 3 Gratt. 173.....	561, 563, 572	Belches <i>and</i> West, 5 Munf. 187.....	563
Ashby <i>and</i> Green, 6 Leigh 135.....	452, 453	Belger <i>v.</i> Dinsmore, 51 Barb. 69.....	282, 286
Aaly <i>v.</i> Rapeleye, 1 Hill N. Y. 9.....	445	Bellamy <i>and</i> Rex, 21 Eng. C. L. 406.....	140
Atkinson <i>v.</i> Dunlap & als., 50 Maine 111..	53	Bell <i>and</i> Smith, 6 Peters 79. 707, 709, 710, 711	711
Atkinson <i>v.</i> Ritchie, 10 East 533.....	645	Bell <i>and</i> Harvey <i>v.</i> Lent, 24 Wend. 230..	445
Attorney-General <i>and</i> Gallego's ex'ors, 3 Leigh 450.....	130	Beloit <i>v.</i> Morgan, Wall. U. S. 619. 78, 110, 111	111
Attorney-General <i>v.</i> Garriguez, 28 Penn. st. 9	29	Bennett <i>v.</i> Smith, 15 John. 355.....	444
Attorney-General <i>v.</i> Hall, Fitzg. 314.....	698	Bennett <i>and</i> Brien, 8 Car. & Payne 724.	283
Ayres <i>v.</i> Hartford Fire Ins. Co., 17 Iowa 176.....	316	Bennett <i>and</i> Carrington, 1 Leigh 374	303, 450, 452, 453, 454
Ayers <i>and</i> State Bank of Elizabeth, 2 Halst. 130.....	562	Bennett <i>v.</i> Hardaway, 6 Munf. 125	300, 303, 451, 452
		Bennett <i>and</i> Wilkinson's adm'rs, 3 Munf. 314.....	360

Bentley v. Griffin, 5 Taunt. 356.....	414	Brill v. Neele, 1 Chitty 619 ..	273
Bernard and Coggs, Ld. Ray. 909, 1 Smith's Lead. Cas. 304.....	281, 283	Bringer and State, 5 Alab. 244.....	875
Bersche v. Globe Mutual Ins. Co., 31 Missouri 546.....	315	Brockenbrough's ex'ors v. Spindle's adm'rs, 17 Gratt. 21.....	
Betty & others and Smith's adm'r, 11 Gratt. 752.....	154	...302, 304, 447, 563, 565, 568, 569, 571,	580
Beverley v. Brooke, 2 Leigh 425.....		Bronson v. Heckman, 10 Ind. 3.....	300
..... 238, 241, 242,	243	Bronson v. Kinzie, 1. How. U. S. 311....	465
Beverley and Kinney, 2 Hen. & Mun. 318	179	Brooke and Beverley, 2 Leigh 425.....	
Bias & al. v. Floyd, Gov., 7 Leigh 640....		..... 238, 241, 242,	243
..... 140,	144	Brooke & als. v. Shacklett, 13 Gratt. 301.	130
Bickford v. Boston & Lowell R. R. Co., 21 Pick. 109.....	225	Brown and Boorman, 43 Eng. C. L. 843, 11 Clark & Fin. 1.....	280, 281, 284, 285
Biddle and Green, 8 Wheat 1.....	465	Brosswell v. Clarksons, 1 J. J. Marsh. 47.	562
Billings and Providence Bank, 4 Peters 514.....	668	Brown and Creel, 1 Rob. 265.....	271
Bingham and Harmony, 12 New York, 2 Kern. 99.....	644	Brownell and Irving, 11 Illi. 402	67
Bissel v. City of Jeffersonville 14 How. U. S. 287.....	564, 581	Brown v. King's County Fire Ins. Co., 31 How. Prac. N. Y. 508.....	316
Blakely and Commonwealth, 1 Va. Cas. 129.....	768, 782, 783	Brown and Moore, 11 How. U. S. 414....	67
Blanchard v. Isaacs, 3 Barb. 388.....	273	Bruce and Taylor, Gilm. 42.....	445, 447, 561
Bland v. Bland, 2 Cox 349.....	698	Brummell & Co. v. Enders, Sutton & Co., 18 Gratt. 873.....	446, 447, 561, 563, 580
Bloom and State, 7 Wisc. 521.....	46, 47, 141	Brune and Enders, &c., 4 Rand. 438.....	243
Blossom v. Griffin, 3 Kern. 569.....	289	Brush and Smith, 8 John. 84	308
Bodle v. Chenango County Mutual Ins. Co., 2 Comst. 53	315	Bryan v. Lewis, Ryan & Moody 386, 21 Eng. C. L. 467.....	300
Boerum v. Taylor, 19 Conn. 122....	272	Buchanan v. Clark, &c., 10 Gratt. 165....	660
Bond and Oatman, 15 Wisc. 20.....	219	Buchanan v. Curry, 19 John. 137.....	635, 652
Bondurant v. Commercial Bank Natchez, 8 Smeedes & Marsh. 533.....	561, 585	Buckles v. Lafferty, 2 Rob. 292.....	6, 7
Bonfant and State, 3 Minne. 123.....	875	Buffalo Fire Ins. Co. and O'Neill, 3 Comst. 122.....	315
Bonomi v. Backhouse, 96 Eng. C. L. 622	382	Bull's case, 14 Gratt. 613.....	303, 452
Boorman v. Brown, 43 Eng. C. L. 843, 11 Clark & Fin. 1.....	280, 281, 284, 285	Bull and Calder, 3 Dall. 386.....	54
Borden and Luther, 7 How. U. S. 1.....	408	Bull and Constable, 15 Eng. L. & E. 424.	711
Borton v. Borton, 15 Sim. 552, 39 Eng. Ch.....	704	Bull and Jackson, 16 John. 10.....	700
Bossieux and Jage, &c., 15 Gratt. 84.....	660	Bull v. Kingston, 1 Meriv. 314	701
Boston & Lowell R. R. Co. and Bickford, 21 Pick. 109.....	225	Bull, &c. v. Redd, 13 Gratt. 78.....	428, 665
Boston & Providence Railroad Corp. and City of Roxbury, 6 Cush. 424.....	477	Bumstead v. Dividend Mutual Ins. Co., 2 Kern. 81.....	315
Boswell v. Clarksons, 1 J. J. Marsh. 47..	606	Burch and Enders' ex'or, 15 Gratt. 64....	140
Boswell and Warfield's adm'rs, 2 Dana 224	560, 561, 591	Burch v. Fisher, 13 Serg. & Rawle 208..	181
Boughton and Knight, 11 Clark & Finn. 551.....	703	Burch v. Newberry, 10 New York 354...52,	86
Boulware v. Newton, 18 Gratt. 708....		Burke v. Elliott, 4 Ired. 355.....	47
..... 342, 343, 403, 563, 575, 585,	608	Burke & wife and Sydnor, 4 Rand. 161..	140
Bourn v. Gibbs, 1 Tamlyn 414, 5 Cond. Eng. Ch. 457.....	701	Burlington and Larned, 4 Wall. U. S. 275.	564
Boussmaker ex parte, 13 Ves. 71.....	635	Burlington and Mitchell, 4 Wall. U. S. 270.....	564, 581
Boyers and Weatherhead, 7 Yerg. 545....	561	Burlington and Rogers, 3 Wall. U. S. 654	557, 564, 581
Bracken v. Griffin, 3 Call 433.....	607	Burnett v. Lynch, 12 Eng. C. L. 327..	281, 285
Bradford and South Car. R. R. Co., 10 Rich. Law, 307	274	Bumstead v. Dividend Mutual Ins. Co., 2 Kern. 81	315, 325
Bradley v. Westcott, 13 Ves. 444..	702, 710, 711	Burwell's ex'ors v. Anderson adm'r, 3 Leigh 348.....	701, 703, 707, 708, 714
Branch Bank of Alabama at Mobile and Crawford & als., 7 How. U. S. 279	482	Butler and Orton, 18 Eng. C. L. 361..	276, 282
Brandon and State, 8 Jones 463.....	875	Butler v. Palmer, 1 Hill N. Y. 324...220,	224
Bretherton v. Wood, 6 Moore 141....	276, 282	Butler and Ragland, 18 Gratt. 323.....	314
Brewster v. City of Syracuse, 19 New York 116	667	Byrd, &c. and Pulliam, 2 Strobb. Eq. 134..	704
Bride and Huskisson, 3 Eng. L. & E. 180	701, 713	Caesar Griffin's Case, 8 Amer. Law Reg. 358.....	409
Bridge v. Larned, 17 Pick. 339.....	711	Calder v. Bull, 3 Dall. 386	52
Brien v. Bennett, 8 Car. & Payne, 724..	283	Caleb v. Field, 9 Dana Ken. 346.....	707
Briggs and Greene, 1 Curtis' C. C. 311....		Callaghan v. Kippers, 7 Leigh 608.....	
..... 179, 180,	192	..... 301, 303, 304,	308
		Calwell v. Commonwealth, 17 Gratt. 391..	140
		Campbell and Chapman, 13 Gratt. 105. 302,	304
		Campbell's adm'r v. Montgomery, 1 Rob. 392.....	222
		Cannon v. Hemphill, 7 Texas, 184.....	219
		Carlile and Rex, 2 Barn. & Ad. 971, 23 Eng. C. L. 226.....	143
		Carney's Case, 4 Gratt. 546.....	727, 729
		Casper v. McDowell, 5 Gratt. 212.....	144

Carrington v. Bennett, 1 Leigh 374.....	454	Comber v. Graham, 1 Russ. & Myl. 450,	450
..... 303, 450, 452, 453, 454	454	4 Eng. Ch. 510.....	703, 712
Carrington v. Goddin, 13 Gratt. 587.....	303	Commerical Bank Natchez and Bondur-	ant, 8 Smedes & Marsh. 533.....
Carthrae v. Clark, 5 Leigh 268.....	362	Commission Co. and Munn, 15 John. 44	444
Caruthers' adm'rs v. Trustees of Lexing-	ton, 12 Leigh 610.....	Comm'rs Alleghany Co. and Middleton,	37 Penn. 237.....
Catlin v. Gunter, 1 Kern, 368.....	445	Commonwealth and Anderson, 18 Gratt.	255.....
Champion & others and People, 16 John.	61.....	.....	478
Chambliss and Cleaton, 6 Rand. 86.....	353	Commonwealth v. Blakey, 1 Va. Cas. 129.	768
Chapin and Trowbridge, 23 Conn. 595....	273	Commonwealth and Calwell, 17 Gratt. 391	140
Chaplain Transportation Co. and Farm.	& Mech. Bank, 23 Verm. 186.....	Commonwealth and Dowdy, 9 Gratt. 727	719
Chapman v. Campbell, 13 Gratt. 105..302,	304	Commonwealth and Dunlop, 2 Call 284	.....
Chapman and Newman, 2 Rand. 93.....	394	.....	491, 492, 522
Chase and Mercantile Mutual Ins. Co., 1	E. D. Smith, N. Y., 116	Commonwealth v. Leech, 44 Penn. 332..	22
Chase v. People, 40 Illin. 358.....	875	Commonwealth v. Miller, 1 Va. Cas. 320.	730
Chenango County Mutual Ins. Co. and	Bodle, 2 Comst. 53.....	Commonwealth v. Murray, 2 Va. Cas. 504.	762
Chicago v. Sheldon, 9 Wall. U. S. 50....	467	Commonwealth and Perry, 3 Gratt. 632	213
Childs v. Shower, 18 Iowa 261.....	219	Commonwealth and Shearman, 14 Gratt.	677.....
Chiles v. Munroe, 4 Metc. Ky. 72	219	Commonwealth and Vaughan, 17 Gratt.	386.....
Church v. Munford, 11 John. 480....281,	290	.....	140, 144
Churn and Ward, 18 Gratt. 801	315	Commonwealth and Walker, &c., 18 Gratt.	13.....
City of Buffalo and Hodges, 2 Denio 110..	557	.....	207
City of Des Moines and Clark, 19 Iowa 199	557	Conman v. Harrison, 17 Eng. L. & E.	290.....
City Fire Ins. Co. and Rathbone, 31 Conn.	194.....	.....	704
.....	315	Conn & als. v. Penn, &c., 1 Peters C. C.	496.....
City of Jeffersonville and Bissell, 14 How.	U. S. 287.....	.....	637, 652
.....	565, 581	Conrad v. Harrison, 3 Leigh 532. ....	.....
City of Muscatine and Meyer, 1 Wall. U.	S. 384.....	.....	236, 238, 241
.....	557	Cook & Maxwell v. Howe, 21 Wend. 29..	275
City of Richmond and Jones & Co., 18	Gratt. 517.....	Cook and People, 4 Seld. 67.....	21
.....	604	Cooper and Aldrich, 8 Ves. 382.....	234, 238
City of Roxbury v. Boston & Providence	Railroad Corp., 6 Cush. 424.....	Cooper and Melson, 4 Leigh 408.....	702, 714
City of Syracuse and Brewster, 19 New	York 116.....	Cooper and State Bank, 2 Yerg. 599.....	192
.....	667	Cooper and Thorpe, 15 Eng. C. L. 387....	366
Claffin & Co. v. Steenbock & Co., 18 Gratt.	847.....	Cooper v. Williams, Prec. Ch. 71....	704, 711
.....	603	Copeland v. Flowers, 21 Alab. 472	271
Clark, &c. and Buchanan, 10 Gratt. 165.	660	Corbett v. Packington, 6 Barn. & Cress.	268.....
Clark v. City of Des Moines, 19 Iowa 199..	557	.....	272, 282
Clark and Flanders, 1 Ves. Sr. 9.....	698	Corporation of Bedford Level and The	King, 6 East 356.....
Clarke and Carthrae, 5 Leigh 268	362	.....	45, 65, 69
Clarke v. Morey, 10 John. 70.....	631, 637	Corporation of Wells and Knight, Lutw.	508.....
Clarke & als. v. Needles, 25 Penn. 338...	289	.....	45
Clark v. Loomis, 5 Duer 469.....	445	Correll and McDaniel, 19 Illi. 226..	109
Clark v. Scisson, 4 Duer 408.....	445	County Levy, case of, 5 Call 139.....	665
Clarksons and Broswell, 1 J. J. Marsh. 47	.....	Courtenay v. Earle, 1 Eng. L. & E. 333	.....
.....	562, 606	.....	272, 281, 282, 285
Clayton and Reynolds, 2 Ander. 15.....	610	Cowan and State Bank North Car., 8	Leigh 238.561, 562, 563, 572, 585, 596, 606,
Cleaton v. Chambliss, 6 Rand. 86	353	.....	608
Cleveland, Columbus and Cincinnati	Railroad Co. and Zabriskie, 23 How. U.	Cox and Giddings & wife, 31 Vern. 607.	219
S. 398.....	557	Cox v. McMullin, 14 Gratt. 82.....	6
Cleveland v. Loder, 7 Paige 557.....	562, 585	Crandall and Fireman's Ins. Co., 33 Alab.	9.....
Clifton and Dickson, 2 Wils. 319.....	281	.....	315
Cline's heirs and Reed, 9 Gratt. 136.....	154	Crawford & al. v. Branch Bank of Ala-	bama at Mobile, 7 How. U. S. 279.....
Clore's Case, 8 Gratt. 606.....	761, 776, 784	.....	482
Clowes v. Dickenson, 5 John. ch. 235....	.....	Crawford and McDowell's ex'or, 11 Gratt.	377.....
.....	235, 236, 238	.....	315
Cockey v. Forest, 1 Gill & John. 482.....	445	Creel v. Brown, 1 Rob. 265.....	271
Cochran v. Trice, 8 Gratt. 442.....	281, 293	Crenshaw v. Moore, 10 Georgia 384... ..	271
Coggs v. Bernard, Ld. Ray. 908, Smith's	Lead. Cas. 304.....	Crenshaw and Wingfield, 3 Hen. & Mun.	245.....
.....	281, 285	.....	519
Cohen's case, 2 Va. Cas. 158.....	729	Crew's, Sir Randolph, case, Cro. Car. 97.	44
Cohoon and Riddick, 4 Rand. 547... 701,	714	Crew v. Vernon, Cro. Car. 97.....	218
Cole's adm'r v. McRae, 6 Rand. 644.....	660	Cronkite v. Wells, 32 New York 247.....	273
Collins and People, 7 John. 549.....	45	Cross v. Harrison, 16 How. U. S. 164...	120
Collins v. Search, 7 Monr. 336... ..	561	Crumph and Goddin, 8 Leigh 120.....	664
		Culver and Franklin Ins. Co., 6 Indi. 137.	316
		Curry and Buchanan, 19 John. 137...635,	652
		Curtis v. Rippon, 5 Madd. 434.....	703
		Custis v. Snead, 12 Gratt. 662.....	6

Cuthbert <i>v.</i> Purrier, Jacob 415, 4 Cond. Eng. ch. 191.....	701, 710	Elton <i>v.</i> Sheppard, 1 Bro. ch. 532....	697, 710
Cutting <i>and</i> People, 3 John. R. 1.....	491	Elwees <i>and</i> Forrest, 4 Ves. 402.....	575
Dale <i>v.</i> Roosevelt, 6 John. Ch. 255.....	154	Emerson <i>& others and</i> Harrison, 2 Leigh 756.....	16
Daniels <i>v.</i> Hudson River Fire Ins. Co., 12 Cush. 417	628	Enders, <i>&c. v.</i> Brune, 4 Rand. 438.....	243
Davis <i>and</i> Flinn, 18 Alab. 132	702, 708	Enders' ex'or <i>v.</i> Burch, 15 Gratt. 64.....	140
Davis <i>and</i> Mayhew, 4 McLean 213.....	779	Enders, Sutton <i>& Co. and</i> Brummell <i>& Co.</i> , 18 Gratt. 873....	446, 467, 561, 568, 580
Davis <i>and</i> Rohr, 9 Leigh 30.....	452	English <i>and</i> Pasley, 10 Gratt. 236....	279, 303
Davone <i>v.</i> Fanning, 2 John. Ch. 252.....	6	Ervine's Appeal, 16 Penn. 256.....	179
Deane <i>and</i> Ainsworth, 1 Foster 400	181	Everett <i>and</i> Doggett, 19 Maine 373.....	194
Dearing's adm'r <i>v.</i> Rucker, 18 Gratt. 425	571, 584, 585, 588, 591, 605	Ewing <i>v.</i> Ewing, 2 Leigh 337...303, 452, 603	
Deas <i>and</i> Thorne, 4 John. 84.....	280	Exchange Bank of Va. <i>v.</i> Knox, <i>&c.</i> , 19 Gratt. 739	328
DeLancy <i>and</i> Jackson, 13 John. 537.....	700	<i>Ex parte</i> Grace, 12 Iowa 208.....	179
Denniston <i>v.</i> Imbrie, 3 Wash. C. C. 396	637, 652	Eyre <i>v.</i> Jacob, 14 Gratt. 422.....	175
Denny <i>v.</i> Mattoon, 2 Allen 361.....	109	Fahnestock <i>and</i> Snively, 18 Mary. 391...	279
Derby <i>and</i> Philadelphia <i>& Reading R. R. Co.</i> , 14 How. U. S. 468.....	281	Fanning <i>and</i> Davoue, 2 John. ch. 252....	6
Desharzo <i>and</i> Yarborough <i>& wife</i> , 7 Gratt. 374.....	225	Fant <i>v.</i> Miller <i>& Mayhew</i> , 17 Gratt. 47..	628
Devaughn <i>v.</i> Devaughn, 19 Gratt. 556....	178	Farish <i>& Co. v.</i> Reigle, 11 Gratt. 697....	303
Devaux <i>v.</i> Barnwell's ex'or, 1 Dess. 497..	713	Farmers' Bank of Va. <i>v.</i> Anderson <i>& Co.</i> , 19 Gratt. 739.....	328
Devoy <i>v.</i> Mayor, <i>&c.</i> , of New York, 35 Barb. 264.....	219	Farmers' <i>& Mech. Bank v.</i> Chaplain Transportation Co., 23 Vern. 186.....	287
Dewit <i>v.</i> Harvey, 4 Gray 486.....	225	Farmers' <i>& Mech. Bank Georgetown and</i> Gaither, 1 Peters 37.....	562
Dickenson <i>and</i> Clowes, 5 John. 235.....	235, 238, 241	Farrar <i>and</i> Irwin, 19 Ves. 86.....	703, 707
Dickson <i>v.</i> Clifton, 2 Wils. 319.....	281	Fay <i>and</i> Simmons, 1 New York, E. D. Smith 107.....	300
Dighton <i>and</i> Tomlinson, 1 P. Wms. 149	697, 707, 710	Fearson <i>and</i> Nichols, 7 Peters 103....	560
Dinsmore <i>and</i> Belger, 51 Barb. 69...282, 286		Fells' Point Savings Inst. <i>v.</i> Weedon, 18 Mary. 320.....	279
Dividend Mutual Ins. Co. <i>and</i> Bumstead, 2 Kern. 81.....	315, 325	Ferguson <i>v.</i> West, 16 Gratt. 270.....	19, 20, 21, 22, 27, 496
Dodge <i>and</i> McDonell, 10 Wisc. 106.....	279	Filliter <i>and</i> Pushman, 3 Ves. 7.....	699
Doe <i>v.</i> Barnard, 1 Esp. 11.....	562	Fetter <i>v.</i> Wilt, 46 Penn. 457	179
Doe dem. Herbert <i>v.</i> Thomas, 3 Ad. <i>& Ell.</i> 123, 30 Eng. C. L. 48.....	703, 707, 712	Field <i>and</i> Caleb, 9 Dana Ken. 346.....	707
Doe dem. Stevenson <i>v.</i> Glover, 50 Eng. C. L. 447.....	713	Field's ex'ors <i>and</i> Freeland, <i>&c.</i> , 6 Call 12.....	140
Doggett <i>v.</i> Everett, 19 Maine 373.....	194	Fireman's Ins. Co. <i>v.</i> Crandall, 33 Alab. 9	315
Doggett <i>v.</i> Helm, 17 Gratt. 96	553	Fisher <i>and</i> Burch, 13 Serg. <i>& Rawle</i> 208	181
Dolby <i>and</i> Remington, 22 B. 176, 58 Eng. C. L. 174.....	523	Fleck <i>and</i> Woodson, 9 Amer. L. R., N. S. 435.....	191
Donald <i>& Co. and</i> Totty's ex'or, 4 Munf. 430.....	355	Fletcher <i>v.</i> Peck, 6 Cranch 87.....	466, 467
Drew <i>and</i> United States, 5 Mason 28..871, 873		Flinn <i>and</i> Davis, 18 Alab. 132....	702, 708
Dry Dock Bank <i>and</i> Amer. Life Ins. Co., 3 Comst. 344	560, 595	Flint, <i>&c. and</i> Smith, <i>&c.</i> , 6 Gratt. 40..	660
Dubuque <i>and</i> Gelpcke, 1 Wall. 175... ..	110	Flowers <i>and</i> Copeland, 21 Mab. 472.....	271
Duhomel <i>v.</i> Ardovin, 2 Ves. Sr. 162.....	711	Floyd, Gov. <i>and</i> Bias <i>& al.</i> , 7 Leigh 640	140, 144
Dunbar's ex'ors <i>v.</i> Woodcock's ex'or, 10 Leigh 628.....	710, 711	Ford <i>and</i> Bank of State of North Car., 5 Ired. 692.....	562, 585
Dunlap <i>and</i> Atkinson, 50 Maine 111.....	53	Forest <i>and</i> Cockey, 1 Gill. <i>& John.</i> 482..	445
Dunlop <i>and</i> Commonwealth, 2 Call 284	491, 492, 522	Forrest <i>v.</i> Elwes, 4 Ves. 402.....	575
Dusgate <i>and</i> Robinson, 2 Vern. 181..697, 710		Forsyth <i>and</i> Harkins, 11 Leigh 294..	144, 146
Eade <i>v.</i> Eade, 5 Madd. 118.....	701	Fowler <i>v.</i> Bebee, 9 Mass. 231.....	47
Earl of Ailsberry <i>v.</i> Patterson, Doug. 20	766	Fowler <i>and</i> Shumway, 4 John. 425.....	308
Earle <i>and</i> Courtenay, 1 Eng. L. <i>& E.</i> 333	272, 281, 282, 285	Fox <i>& als. and</i> Anderson <i>& al.</i> , 2 Hen. <i>& Mun.</i> 430.....	6
Earl of Chesterfield <i>v.</i> Janassen, 1 Atk. 301.....	610	Francis <i>v.</i> Somerville Mutual Ins. Co., 1 Ducher 78.....	315
Eckersly <i>and</i> Hilton, 6 Ellis <i>& Black</i> 47.	310	Franklin Fire Ins. Co. <i>v.</i> Updegraff, 43 Penn. 350.....	315
Eddy <i>and</i> Commonwealth, 7 Gray 583....	785	Franklin Ins. Co. <i>v.</i> Culver, 6 Indi. 137.	316
Ederlin <i>v.</i> Judge, 36 Missouri 350	271	Freeland, <i>&c. v.</i> Field's ex'ors, 6 Call 12	140
Edmond, Davenport <i>& Co. and</i> Merchants' Ins. Co., 17 Gratt. 146.....	645	Fristoe <i>and</i> Gibson, 1 Call 62...561, 563, 610	
Eggleston <i>v.</i> Shotwell, 1 John. ch. 536... 562		Gabbert <i>v.</i> Jeffersonville Railroad Co., 11 Ind. 365.....	219
Elliott <i>and</i> Burke, 4 Ired. 355.....	47	Gaither <i>v.</i> Farm. <i>and</i> Mech. Bank George-town, 1 Peters 37.....	562
Ellyson <i>ex parte</i> , 20 Gratt. 10.....	496	Gallatas <i>and</i> Lanier, 13 La. Ann. 175..	53

Gallego's ex'ors v. Attorney General, 3 Leigh 450.....	130	Grossmayer and United States, 4 Wall. U. S. 72.....	653
Gallego v. Quesnall's adm'r, 1 Hen. & Mun. 205.....	215	Grymes and Sayre, 1 Hen. & Mun. 404..	519
Gandapeqin and Addison, 4 Taunt. 574..	414	Guardian Life Ins. Co. and Hodadon adm'x, 1 Bige. 219, 97 Mass. 144.....	621
Gandapeqin and Patterson, 15 East 63...	414	Gunter and Catlin, 1 Kern. 368.....	445
Gardner v. Gardner, 22 Wend. 526.....	154	Hadley v. Green, 2 Tyrwhitt, 390.....	366
Garriguez and Attorney General, 23 Penn. St. 9	29	Hagan and Mettart's adm'r, 18 Gratt. 231	397
Gelpcke v. Dubuque, 1 Wall. U. S. 175...	110	Hake v. Jones, 2 John. Cas. 60.....	444
Gerard and Judy's adm'r, 4 McLean 360.	590	Hales v. Margerum, 3 Ves. 299.....	697, 710
Gibbons v. Ogden, 9 Wheat. U. S. 1.....	422	Hall and Attorney-General, Fitz. 314....	698
Gibbs and Bourn, 1 Tamlyn 414, 5 Cond. Eng. Ch. 457.....	701	Hall and Payson, 30 Maine 319.....	181
Gibbs v. Tait, 8 Sim. 132, 704.....	711	Halsey and Upwell, 1 P. Wms. 651.....	698, 708, 711
Gibson v. Fristoe, 1 Call 62.....	561, 563, 610	Halsted v. Mayor of New York, 3 Comst. 430.....	557
Gibson and Jones, 1 N. Hamp. 266....	47	Hampden and Springfield, 6 Pick. 501...	221
Gibson v. Skipwith, 4 Hen. & Mun. 490.	561	Hanger v. Abbott, 6 Wall. U. S. 532.....	655
Giddings & wife v. Cox, 31 Verm. 607...	219	Hannel v. Smith, 15 Ohio 134....	182, 202
Gill and Lightburne, &c., 3 Bro. P. C. 250.	698	Hanson and King, 4 Call 259.....	637
Gill v. Lyon & als., 1 John. Ch. 443. 235,	241	Hanson & als. and Pike, 9 N. Hamp. 491.	181
Gilliland and Pittsburg, Fort Wayne & Chicago Railway, 56 Penn. St. 445....	374	Hardaway v. Bennett, 6 Munf. 125	300, 303, 451, 452
Gilman v. Shepoygan, 2 Black. U. S....	668	Hardie and Jenner, 1 Leon. 283.....	697
Gilmore v. Holt, 5 Pick. 258.....	47	Harkins v. Forayth, 11 Leigh 294... 144,	146
Girod and Michoud, 4 How. U. S. 503....	6	Harman and Margate Pier, 5 Eng. C. L. 278.....	45
Globe Mutual Ins. Co. and Bersche, 31 Missouri 546.....	315	Harmony v. Bingham, 12 N. York, 2 Kern. 99.....	644
Glover and Doe dem. Stevenson, 50 Eng. C. L. 447.....	713	Harnsburger v. Kinney, 13 Gratt. 511...	300, 304
Glover and Kingman, 3 Rich. 27.....	194	Harris and Greenhow's adm'x, 6 Munf. 472.....	563
Goddin and Carrington, 13 Gratt. 587...	303	Harris v. Jays, Cro. Eliz. 699.....	45
Goddin v. Crump, 8 Leigh 120.....	664	Harrison v. Bank of Kentucky, 2 J. J. Marsh. 140	561
Godefroy v. Jay, 20 Eng. C. L. 183.....	281	Harrison and Conrad, 3 Leigh 532.....	236, 238, 241, 242, 243
Goodson and Mast, 3 Wils. 348.....	281	Harrison and Conman, 17 Eng. L. & E. 290.....	704
Goodtitle v. Otway, 2 Wils. 6.....	698	Harrison and Cross, 16 How. U. S. 164..	120
Goodwin and Key, 4 Moore & Payne ...	220	Harrison v. Emerson & others, 2 Leigh 765.....	16
Goolsby ex parte, 2 Gratt. 575	16	Harrison Justices v. Holland, 3 Gratt. 247.....	665
Gould v. Town of Sterling, 23 New York 456.....	557	Hartford Fire Ins. Co. and Ayres, 17 Iowa 176.....	316
Govett v. Radnidge, 3 East 62.....	281	Hartford & N. Haven R. R. Co. and Merriam, 20 Conn. 354.....	273, 283
Grace ex parte, 12 Iowa 208.....	179	Harvey and De Witt, 4 Gray 486.....	225
Graham v. Comber, 1 Russ. & Myl. 450..	703	Harvey and Preston, 2 Hen. & Mun. 55	351, 352, 353
Graham v. Commonwealth, 16 B. Monr. 587.....	876	Harvey v. Skipwith, 16 Gratt. 393... 281,	285
Grand Junction R. R. Co. and Pickford, 12 Mees. & Welsb. 766.....	283	Harvey's adm'r v. Steptoe's adm'r & als., 17 Gratt. 290...	134
Granger and Rising, 1 Mass. 47.....	194	Harvey's ex'ors and Steptoe's adm'rs, 7 Leigh 501.....	562, 563, 608, 610
Grant v. Norway, 10 C. & B. 665.....	278	Hawkins and Wynne, 1 Bro. ch. 179...	699
Gratz and Prevost, 6 Wheat. 481.....	551	Hayward and McCracken, 2 How. U. S. 612.....	465
Graves and Stanard, 2 Call 369.....	154	Helm and Doggett, 17 Gratt. 96.....	553
Great Northern Railway Co. and Lawrence, 4 Eng. L. & E. 265.....	373, 374	Helmer v. Shoemaker, 22 Wend. 139....	702
Green v. Ashby, 6 Leigh 135.....	452, 453	Hemphill and Cannon, 7 Texas 184..	219
Green v. Biddle, 8 Wheat. 481.....	551	Henderson and Hoke, 4 Dev. 1	179, 192
Green v. Briggs. 1 Curtis C. C. 311.....	179, 180, 192	Henderson and Jackson's adm'x, 3 Leigh 212.....	450
Green and Hadley, 2 Tyrwhitt 390.....	366	Henderson v. Stinger, 6 Gratt. 130.....	278
Green v. Harvey, 1 Hare, 428.....	701	Henkle's ex'x v. Alstadt, &c., 4 Gratt. 284	242
Green v. Maraden, 21 Eng. L. & E. 538.	704	Hentz v. Long Island R. R. Co., 13 Barb. 646.....	375
Greenhow's adm'rs v. Harris, 6 Munf. 472	563		
Grey v. Montague, 3 Bro. P. C. 316..	699, 710		
Griffin v. Bentley, 5 Taunt. 356.....	414		
Griffin and Blossom, 3 Kern. 569.....	289		
Griffin ex parte, Law times U. S. Cts. 100	47, 72		
Griffin v. Braken, 3 Call 433.....	607		
Griffin v. Mixon, 38 Miss. 424.....	179, 180		
Grigsby v. Weaver, 5 Leigh 197.....	154		
Griswold v. Waddington, 16 John. 438...	632, 653, 654, 655		

Hibblewhite v. McMorine, 5 Mees. & Welsb. 462.....	304, 309	James River & Kanawha Co. and Anderson & others, 12 Leigh 278.....	514
Hickman and Bronson, 10 Indi. 3.....	300	James and Sinclair, 1 Dickens 277..	218
Hilton v. Eckersly, 6 Ellis & Black. 47..	310	Jane and Paradine, Aley 27....	645
Hixon v. Oliver, 13 Ves. 108.....	697, 710	Janssen and Earl of Chesterfield, 1 Atk. 301.....	610
Hoboken Land & Improvement Co. and Murray, 18 How. U. S. 274..	176, 188, 209	Jay and Godefry, 20 Eng. C. L. 183.....	281
Hodges v. City of Buffalo, 2 Denio 110..	557	Jays and Harris, Cro. Eliz. 699.....	45
Hodsdon adm'x v. Guardian Life Ins. Co., 1 Bige. 219, 97 Mass. 144.....	621	Jeffersonville Railroad Co. and Gabbert, 11 Ind. 365.....	219
Hoffman and United States, 4 Wall. U. S. 158.....	23	Jenner v. Hardie, 1 Leon. 283.....	697
Hoke v. Henderson, 4 Dev. 1.....	179, 192	Jeter Philips' case, 19 Gratt. 485.....	785
Holcomb v. Purcell, 1 Rob. Pr. 656.....	519	John Burrow's case, 1 Crim. C. C. 238...	870
Holland and Harrison Justices, 3 Gratt. 247.....	665	John Gile's case, 2 Strange 881.....	492
Holman and Robbins, 11 Cush. 26.....	224	Jones v. Gibson, 1 N. Hamp. 266.....	47
Holt and Gilmore, 5 Pick. 258.....	47	Jones v. Hake, 2 John Cas. 60.....	444
Home and Ld. Camden, 4 T. R. 382.	23	Jones and Nuckols' adm'r, 8 Gratt. 267..	300, 301, 302, 303, 304, 308
Hooker's Case, 13 Gratt. 763	865	Jones' heirs v. Perry, 10 Yerg. 59.....	192
Hooker and McCotter, 4 Seld. 497.....	224	Jones and Pugh's ex'or, 6 Leigh 299.....	216
Hooper v. Wells, Fargo & Co., 5 Amer. Law Reg. N. S. 16.....	282	Judge and Ederlin, 36 Missouri 350.....	271
Hopkins and Appleton, 5 Gray 520.....	194	Judin v. Samuel, 4 Bos. & Pul. 43, 6 East 333.....	281, 285
Hopps v. State, 31 Illin. 385.....	875	Judy's adm'r v. Gerard & al., 4 McLean 360.....	590
Horton and Nannock, 7 Ves. 392.....	702	Julia, 8 Cranch 181.....	453
Horwood v. West, 1 Sim. & Stu. 387, 1 Eng. Ch. 387.....	703	Keigley and Malim, 2 Ves. Jr. 333 ..	699
Howard and Philadelphia, Wilmington & Balt. R. R., 13 How. U. S. 308.....	552	Kelso and Mercer, 4 Gratt. 106.....	159
Howe v. Cook & Maxwell, 21 Wend. 29..	275	Kemp's case, 18 Gratt. 969.....	777, 784
Howell and Leak, Cro. Eliz. 533.....	45	Key v. Goodwin, 4 Moore & Payne.....	220
Hudson River Fire Ins. Co. and Daniels & als., 12 Cush. 417.....	628	Kimball v. Rutland & Burlington Railroad Co., 26 Verm. 247.....	274
Hull v. Supervisors of Oneida county, 19 John. 259.....	492	King v. Corporation of Bedford Level, 6 East 356.....	45, 65, 69
Hunt and Lawrence, 10 Wend. 80.....	364	King's County Fire Ins. and Brown, 31 How. Prac. N. Y. 508.....	316
Hurd's Case, 5 Leigh 715.....	776	King and Hanson, 4 Call 259.....	637
Hurlburt Bank and Stevens, 31 Conn. 146.....	271	King v. Lisle, Andrews 163.....	45, 66
Huskiason v. Bridge, 3 Eng. L. & E. 180	701, 713	Kingman v. Glover, 3 Rich. 27.....	194
Hutting and State, 6 Bennett 474.....	875	Kingston and Bull, 1 Meriv. 314.....	701
Hutson v. Lowry, 2 Va. Cas. 42.....	496	Kinnard v. Kinnard, 5 Watts 100.....	711
Hyatt v. McMahon, 25 Barb. 457.....	481	Kinney v. Beverley, 2 Hen. & Muu. 318.	179
Ide v. Ide, 5 Mass. 500.....	700	Kinney and Hansburger, 13 Gratt. 511..	300, 304
Imbrie and Dunniston, 3 Wash. C. C. 396.....	637, 652	Kinzie and Bronson, 1 How. U. S. 311...	465
Ingraham and Maury, 28 Miss. 171.....	561, 574, 585	Kippers and Callaghan, 7 Leigh. 608....	301, 303, 304, 309
Inh. Durham and Inh. Lewiston, 4 Greenl. 140.....	53	Knight v. Boughton, 11 Clark & Fin. 551	703
Inh. Lewiston and Inh. Durham, 4 Greenl. 140.....	53	Knight v. Corporation of Wells, Lutw. 508.....	45
Inks and Nimocks, 17 Ohio 596.....	271	Knights v. Putnam, 3 Pick. 184.....	445
Irving v. Brownell, 11 Illi. 402.....	67	Knox, &c. and Exchange Bank of Va., 19 Gratt. 739	328
Irwin v. Farrar, 19 Ves. 86.....	703, 707	Knox and Irwin, 10 John. 313.....	366
Irwin v. Knox, 10 John. 313.....	366	Knye v. Moore, 1 Sim. & Stu. 61.....	679
Isaacs and Blanchard, 3 Barb. 388.....	273	Kyle and Price, 9 Gratt. 247	215, 225
Jackson v. Bull, 10 John. 19.....	700	La Crosse and State, 11 Wisc. 51.....	219
Jackson v. DeLancy, 13 John. 537.....	700	Lacy and Orr, 4 McLean 243.....	565
Jackson's adm'x v. Henderson, 3 Leigh 212.....	450	Lacy and Quarles, 4 Munf. 251.....	6
Jackson v. Maxwell, 2 Va. Cas. 636.....	496	Lafferty and Buckles, 2 Rob. 292.....	6, 7
Jackson v. Robins, 15 John. 169, 16 Id. 537.....	700, 707	Lamb and Wise, 9 Gratt. 294.....	154
Jackson ex dem. v. Wood, 3 Wend. 27..	364	Lancaster Canal Co. v. Parnaby, 39 Eng. C. L. 54.....	290
Jacob and Eyre, 14 Gratt. 422.....	175	Lane ex parte, 3 Metc. 213.....	225
Jage, &c. v. Bossieux, 15 Gratt. 84.....	660	Lane and United States, 8 Wall. U. S. 185.....	357
James and Mayo, mayor, 12 Gratt. 17....	20, 22, 23, 469, 523	Langdon & als. and McDowell, 3 Gray 513....	364
		Lanier v. Gallatas, 13 La. Ann. 175....	53
		Larned v. Bridge, 17 Pick. 339.....	711
		Larned v. Burlington, 4 Wall. U. S. 275.	564

Lawrence <i>v.</i> Great Northern Railway Co., 4 Eng. L. & E. 265.....	373, 374	Mason <i>v.</i> Abdy, 3 Salk. 390.....	610
Lawrence <i>v.</i> Hunt, 10 Wend. 80.....	364	Maston <i>v.</i> Goodson, 3 Wils. 348.....	281
Lawrence <i>and</i> People, 41 New York 137, 36 Barb. 177.....	666	Matthews <i>and</i> Garner's case, 18 Gratt. 989.....	755
Law's ex'ors <i>v.</i> Sutherland & als., 5 Gratt. 357.....	445	Matthewson <i>and</i> Satterlee, 2 Peters U. S. 380	
Layley <i>and</i> Noble's adm'r, 50 Penn. 281.	271	Mattoon <i>and</i> Denny, 2 Allen 361.....	109
Leake <i>v.</i> Howell, Cro. Eliz. 533.....	45	Mauro <i>and</i> Moore, 4 Rand. 488..	359, 360, 361
Leech <i>and</i> Commonwealth, 44 Penn. 332..	22	Maury <i>v.</i> Ingraham, 28 Miss. 171.....	561, 574, 585
Lee County <i>and</i> Thompson, 3 Wall. 327..	77, 109, 110, 111	Maxwell <i>and</i> Jackson, 2 Va. Cas. 636....	496
Leland <i>and</i> Wilkinson, 2 Peters U. S. 627	110	Maybin <i>v.</i> South Car. Railway, 8 Rich. 246.....	273
Lent <i>and</i> Bell & Harvey, 24 Wend. 230..	445	Mayhew <i>v.</i> Davis, 4 McLean 213.....	779
Lewis <i>and</i> Bryan, Ryan & Moody 386, 21 Eng. C. L. 467.....	300	Mayo, mayor, <i>v.</i> James, 12 Gratt. 17.....	20, 23, 496, 523
Lewis <i>and</i> Peoria Marine & Fire Ins. Co., 18 Illin. 553.....	315	Mayo <i>and</i> Warrick, &c., 15 Gratt. 528.....	496
Lewis <i>v.</i> Webb, 3 Greenl. 326.....	52	Mayor, &c. Baltimore <i>and</i> Barron, 7 Peters U. S. 243	186
License Tax Cases, 5 Wall. U. S. 462....	311	Mayor, &c. Brooklyn <i>and</i> People, 4 Comst. 419.....	666, 667
Life & Fire Ins. Co. of New York <i>v.</i> Wilson's heirs, 8 Peters U. S. 106.....	141	Mayor, &c. of Jersey City and State, Jersey City <i>and</i> Bergen R. R. Co., 31 New Jer. L. 579	477
Lightburne, &c., <i>v.</i> Gill, &c. 3 Bro. P. C. 250	698	Mayor, &c. New York <i>and</i> Devoy, 35 Barb. 264	219
Lisle <i>and</i> King, Andrews, 163.....	45, 66	Mayor of New York <i>and</i> Halstead, 3 Comst. 430.....	557
Livingston <i>v.</i> Mayor, &c. of New York, 8 Wend. 85.....	186	Mayor &c., New York <i>and</i> Livingston, 8 Wend. 85.....	186
Livingston <i>and</i> People, 6 Wend. 526....	223	Mazetti <i>v.</i> Williams, 20 Eng. C. L. 412...	281, 285
Livingston <i>and</i> Russell, 19 Barb. 346....	282	McCann <i>and</i> People, 2 E. P. Smith, 16 New York 58.....	875
Loder <i>and</i> Cleveland, 7 Paige 557....	562, 585	McCarroll <i>v.</i> Weeks, 2 Tenn. 215.....	193
Loney & al. <i>and</i> Baltimore Fire Ins. Co., 20 Mary. 20.....	315	McCarty <i>v.</i> New York & Erie R. R. Co., 30 Penn. 247.....	284
Long <i>v.</i> Baugas, 2 Ired. 290....	363	McCluer's adm'r <i>and</i> Rogers, 4 Gratt. 81	242
Longbottoms <i>v.</i> State, 11 Humph. 39....	721	McClung <i>v.</i> Beirne, 10 Leigh 394.....	236, 237, 238, 241, 242
Long Island R. R. Co. <i>and</i> Hurtz, 13 Barb. 646.....	375	McClure <i>and</i> U. S. 7 Law R., N. S. 439..	875
Loomis <i>and</i> Clark, 5 Duer 469.....	444	McCotter <i>v.</i> Hooker, 4 Seld. 497.....	224
Lord Camden <i>v.</i> Home, 4 T. R. 382.....	23	McCracken <i>v.</i> Hayward, 2 How. U. S. 612.....	465
Lore <i>v.</i> Truman, Ohio 45.....	364	McCulloch <i>v.</i> State of Maryland, 4 Wheat. 308.....	668
Lott, tax collector, <i>v.</i> Mobile Trade Co., 43 Alab. 578	425	McCullum <i>and</i> Marvin, 20 John. 228....	445
Lowe <i>v.</i> Waller, Dough. 736.....	560	McDaniel <i>v.</i> Correll, 19 Illi. 226.....	109
Lowry <i>and</i> Hutson, 2 Va. Cas. 42.....	496	McDowell <i>v.</i> Dodge, 10 Wisc. 106.....	279
Lunn <i>v.</i> Thornton, 50 Eng. C. L. 379....	300	McDowell <i>and</i> Carper, 5 Gratt. 212.....	144
Luther <i>v.</i> Borden, 7 How. U. S. 1	408	McDowell's ex'ors <i>v.</i> Crawford, 11 Gratt. 377.....	315
Lynch <i>and</i> Burnett, 12 Eng. C. L. 327....	281	McDowell <i>v.</i> Langdon & als., 3 Gray 513.	364
Lyons & als. <i>and</i> Gill, 1 John. Ch. 447	235, 241	McGruder <i>v.</i> Lyons, 7 Gratt. 233....	216, 225
Lyons <i>and</i> McGruder, 7 Gratt. 233..	216, 225	McInstry <i>and</i> Tanner, 9 Johns. 135.....	47
Macdonnell <i>and</i> Robinson, 5 Maule & Sel. 228.	300	McKey's ex'or, &c. <i>v.</i> Young, 4 Hen. & Mun. 430	6
Macomb <i>and</i> Stammers, 4 Wend. 454....	414	McLaren <i>v.</i> Pennington, 1 Paige 102....	447
Madden <i>v.</i> Madden's ex'ors, 2 Leigh 377	701, 703, 707, 708, 709, 710, 711	McMahon <i>and</i> Hyatt, 25 Barb. 457.....	481
Malim <i>v.</i> Keighley, 2 Ves. Jr. 333.....	699	McMasters & als. <i>v.</i> Westchester County Ins. Co., 25 Wend. 379.....	315
Mann <i>v.</i> Mann's ex'or, 1 John. Ch. 231..	583	McMoline <i>and</i> Hibblewhite, 5 Mees. & Welsb. 462.....	304, 309
Margate Pier <i>v.</i> Harman, 5 Eng. C. L. 278	45	McMullin <i>and</i> Cox, 14 Gratt. 82.....	6
Margerum <i>and</i> Hales, 3 Ves. 299....	697, 710	McRae <i>and</i> Coles' adm'r, 6 Rand. 644....	660
Marine Court of New York <i>and</i> People, 36 Barb. 341.....	23	McWherter <i>v.</i> Price, 11 Ind. 199.....	219
Marlow <i>and</i> State, 15 Ohio St. 114.....	22	Mech. Bank <i>v.</i> New York and New Haven R. R. Co., 3 Kern. 599.....	278
Maraden <i>and</i> Green, 21 Eng. L. & E. 538	704	Mechanics Fire Ins. Co. <i>v.</i> Nichols & als., 1 Harrison N. J. 410	316
Marshall <i>and</i> Miller, 1 Va. Cas. 158....	496	Medley <i>v.</i> Pannill's adm'r, 1 Rob. 63....	397
Marsh <i>v.</i> Martindale, 3 Bos. & Pul. 154.	599		
Marsh <i>v.</i> Pier, 4 Rawle 273.....	353		
Martindale <i>and</i> Marsh, 3 Bos. & Pul. 154.	599		
Martin <i>v.</i> McCullum, 20 John. 228.....	445		
Maskelyne <i>v.</i> Maskelyne, Amb. 750. 697, 710			

Meek and Walker, 12 Smeedes & Marsh. 495.....	561	Mutual Benefit Life Ins. Co. and Ruse, 26 Barb. 556.....	621, 644
Mellon and People, 32 Illi. 181.....	219	Myers and People, 20 Calif. 518.....	875
Melson v. Cooper, 4 Leigh 408.....	704, 714	Nailer v. Stanley, 10 Serg. & Raw. 450..	241
Mercantile Mutual Ins. Co. v. Chase, 1 E. D. Smith N. Y. 116.....	282	Nannock v. Horton, 7 Ves. 392.....	702
Mercer v. Kelso, 4 Gratt. 106.	159	Needles and Clarke & als., 25 Penn. 338..	289
Merchants' Bank v. New Jersey Steam Navigation Co., 6 How. U. S. 344....	281	Neele and Brill, 1 Chitty 619.....	273
Merchant's Ins. Co. v. Edmond, Daven- port & Co., 17 Gratt. 146.....	645	Nelson v. Cooker, 4 Leigh 408.....	702
Merriam v. Hartford & N. Haven R. R. Co., 20 Conn. 354.....	273, 2	Newberry and Burch, 10 New York 374..52,	86
Merrill v. Sherburne, 1 N. Hamp. 199 ..	52	Newby and Southern Express Co., 36 Georg. 635.....	282, 283, 286, 287
Metcalf v. Shaw, 3 Camp. 22.....	414	New Jersey Steam Navigation Co. v. Merchant's Bank, 6 How. U. S. 344....	281
Mettert's adm'r v. Hagan, 18 Gratt. 231.	397	Newman v. Chapman, 2 Rand. 93.....	394
Meyer v. City of Muscatine, 1 Wall. U. S. 384	557	Newton and Boulware, 18 Gratt. 708....	342, 343, 403, 563, 575, 585, 608
Mich. E. & N. Ind. R. R. Co. v. Shurtz, 7 Mich. 515.....	274	New York & Erie R. R. Co. and McCarty, 30 Penn. 247.....	288
Michoud v. Girod, 4 How. U. S. 503.....	6	New York Life Ins. Co. and Mech. Bank, 3 Kern. 599.....	278
Middleton v. Com'rs Alleghany Co., 37 Penn. 237.....	581	New York and N. Haven R. R. Co. and Mech. Bank, 3 Kern. 599.....	278
Miller and Commonwealth, 1 Va. Cas. 310.....	730	Niagara County Bank v. Baker, 15 Ohio St. 68.....	557
Miller v. Marshall, 1 Va. Cas. 158.....	496	Nichols v. Fearson, 7 Peters 103.....	560
Miller & Mayhew and Fant & al., 17 Gratt. 47.....	628	Nichols and Mechanics Fire Ins. Co., 1 Harrison N. J. 410.....	316
Miller and Northern Railroad Co., 10 Barb. 260.....	476	Nichols and Smith, 8 Leigh 330.....	561, 562
Miller v. Race, 1 Burr. 452.....	583	Nimocks v. Inks, 17 Ohio 596.....	271
Miller v. The State, 8 Gill 145.....	53	Nixon & others and Apaden & others, 4 How. U. S. 467.....	356
Milwaukee, &c. R. R. Co. and Sheppard- son, 6 Wisc. 605.....	219	Noble's adm'r v. Layley, 5 Penn. 281....	271
Mitchell v. Burlington, 4 Wall. U. S. 270.....	581	North Amer. Fire Ins. Co. and Turley, 25 Wend. 374.....	315, 319, 325
Mixon and Griffin, 38 Miss. 424.....	179, 180	Northern Railroad Co. v. Miller, 10 Barb. 260.....	476
Mobile Trade Co. and Lott, tax collector, 43 Alab. 578.....	425	Norway and Grant, 10 C. & B. 665.....	278
Monseaux v. Urquhart, 19 Louis. 485....	637	Noyes & Co. v. Rut. & Bur. Railway Co., 27 Verm. 110	287
Montague and Grey, 3 Bro. P.C. 316..	699, 710	Nuckols' adm'r v. Jones, 8 Gratt. 267....	300, 301, 302, 303, 304, 308
Montgomery and Campbell's adm'r, 1 Rob. 392.....	222	Oakley v. Morton, 1 Kern. 25.....	314
Montgomery Co. and Sexton, 9 Barb. 191	316	Oatman v. Bond, 15 Wisc. 20.....	219
Moore v. Brown, 11 How. U. S. 414.....	67	Ogden and Gibbons, 9 Wheat. U. S. 1....	422
Moore and Crenshaw, 10 Georgia 384....	271	Ogleton v. State, 28 Alab. 692.....	875
Moore v. Hilton, 12 Leigh 1.....	6	Okeley and Bank of Columbia, 4 Wheat. 235.....	481
Moore and Knye, 1 Sim. & Stu. 61.....	679	Oliver and Hixon, 13 Ves. 108.....	697, 710
Moore v. Mann, 4 Rand. 488....	359, 360, 361	O'Neil v. Buffalo Fire Ins. Co., 3 Comst. 122.....	315
Moore's ex'or v. Vance, 3 Dana 361.....	561, 574, 599	Orr v. Lacy, 4 McLean 243.....	567
Morey and Clarke, 10 John. 70.....	631, 637	Orr and Prothro, 12 Georgia 36	219
Morgan and Beloit, 7 Wall. U. S. 619.	78, 110	Orton v. Butler, 18 Eng. C. L. 361 ...	276, 282
Morgan and Selby, 3 Leigh 625.....	565, 566, 568, 570, 571, 608	Otway and Goodtitle, 2 Wils. 6.....	698
Morris v. Phaler, 1 Watts 389.....	714	Overseers, &c. of Milan v. Supervisors of Dutchers, 14 Wend. 73.....	223
Morton and Oakley, 1 Kern. 25.....	314	Owens and Bank of United States, 2 Pe- ters 527.....	562
Moseley and Wilkinson, 18 Alab. 288 ...	271	Packington and Corbett, 6 Barn. & Cress. 268.....	272, 282
Moss and McCulloch, 5 Denio 567....	557	Paige v. Stone, 10 Metc. 160.....	414
Mumford v. Amer. Life Ins. Co., 4 Comst. 463.....	558	Painter and Plymouth, 17 Conn. 585....	46
Mundy and Young, 4 Maule & Sel. 184..	368	Paradine and Jane, Aleyn. 27.....	645
Munford and Church, 11 John, 480..	281, 290	Parham and Woodruff, 8 Wall. U. S. 123.	430
Munn v. The Commission Co., 15 John. 44.....	444	Parish of Bossier v. Steele, 13 Louis. An. 433.	219
Munroe and Chiles, 4 Metc. 72.....	219	Parker v. Ramsbottom, 3 Barn. & Crea. 257.....	562, 575, 590
Murray and Commonwealth, 2 Va. Cas. 504.....	762	Parnaby and Lancaster Canal Co., 39 Eng. C. L. 54.....	290
Murray v. Hoboken Land and Improve- ment Co., 18 How. U. S. 272..	176, 188, 209		

<i>Pasley v. English</i> , 10 Gratt. 236....	279, 303	<i>Pratt v. Adams</i> , 7 Paige 615.....	562
<i>Passenger Cases</i> , 7 How. 283.....	422	<i>Preston v. Harvey</i> , 2 Hen. & Mun. 55	351, 352, 353
<i>Paterson v. Gandapequin</i> , 15 East. 62.....	414	<i>Prevost v. Gratz</i> , 6 Wheat. 481.....	551
<i>Patterson and Earl of Ailsberry</i> , Doug.	766	<i>Price v. Kyle</i> , 9 Gratt. 247.....	215, 225
20.....	623	<i>Price v. McWherter</i> , 11 Ind. 199.....	219
<i>Paul v. Virginia</i> , 8 Wall. U. S. 168.....	181	<i>Prothro v. Orr</i> , 12 Georgia 36.....	219
<i>Payson v. Hall</i> , 30 Maine 319.....	466, 467	<i>Providence Bank v. Billings</i> , 4 Peters	514.....
<i>Peck and Fletcher</i> , 6 Cranch 87.....	557, 558, 604	.....	668
<i>Peel and Talmage</i> , 3 Seld. 328..	302, 304	<i>Pryor v. Adams</i> , 1 Call 382.....	154
<i>Pendleton and Pleasants</i> , 6 Rand. 473...	652	<i>Pryor v. Taliaferro</i> , 12 Gratt. 277.....	144
.....	477	<i>Pugh's ex'or v. Jones</i> , 6 Leigh 299.....	216
<i>Penn, &c. and Conn & als.</i> , 1 Peters' C.	721	<i>Pullerton v. Agnew</i> , 1 Salk. 172.....	629
C. 496.....	292	<i>Pulliam v. Byrd</i> , 2 Strobb. Eq. 134.....	704
<i>Pennington and McLaren</i> , 1 Paige 102..	45	<i>Purcell and Holcomb</i> , 1 Rob. Pr. old edi.	656.....
<i>People v. Ball</i> , 14 Calif. 101.....	21	.....	519
<i>People v. Champion & others</i> , 16 John.	491	<i>Purrier and Cuthbert</i> , Jacob 415, 4 Cond.	Eng. Ch. 191.....
61.....	666, 667	.....	701
<i>People v. Collins</i> , 7 John. 549.....	223	<i>Pushman v. Filliter</i> , 3 Ves. 7.....	699
<i>People v. Cook</i> , 4 Seld. 67.....	23	<i>Putman and Archer</i> , 12 Smeedes &	Marsh. 286.....
<i>People v. Cutting</i> , 3 John. R. I.....	667	.....	561
<i>People v. Lawrence</i> , 41 New York 137, 36	667	<i>Putman and Knights</i> , 3 Pick. 184.....	445
Barb. 177	223	<i>Quarles v. Lacy</i> , 4 Munf. 251.....	6
<i>People v. Livingston</i> , 6 Wend. 526.....	667	<i>Quesnell's adm'r and Gallego</i> , 1 Hen. &	Mun. 204
<i>People v. Marine Court of New York</i> , 36	875	.....	215
Barb. 341.....	219	<i>Race and Miller</i> , 1 Burr. 452.....	583
<i>People v. Mayor, &c., of Brooklyn</i> , 4	875	<i>Radnidge and Govett</i> , 3 East 62.....	281
Comst. 419.....	141	<i>Ragland v. Butler</i> , 18 Gratt. 323 ..	314
<i>People v. McCann</i> , 2 E. P. Smith, 16	179	<i>Ramsbottom and Parker</i> , 3 Barn. &	Cress. 257.....
New York 58	315	.....	562, 575, 590
<i>People v. Mellen</i> , 32 Illi. 181.....	213	<i>Rapeleye and Asly</i> , 1 Hill N. Y. 9.....	445
<i>People v. Myers</i> , 20 Calif. 518.....	192	<i>Rapid</i> , 8 Cranch 155.....	654
<i>People v. White</i> , 24 Wend. 520	315	<i>Ratcliffe's Case</i> , 5 Gratt. 657.....	729
<i>People and Wynehamer</i> , 3 Kern. 378....	218	<i>Rathbone v. City Fire Ins. Co.</i> , 31 Conn.	194.....
<i>Peoria Marine & Fire Ins. Co. v. Lewis</i> ,	714	.....	315
18 Illi. 553.....	281	<i>Read and Bull, &c.</i> , 13 Gratt. 78....	428, 665
<i>Periburn v. Souster</i> , 14 Eng. L. & E. 415.	552	<i>Read's adm'r & als. and Robertson &</i>	als., 17 Gratt. 544
<i>Perry v. Commonwealth</i> , 3 Gratt. 632...	283	.....	553
<i>Perry and Jones' heirs</i> , 10 Yerg. 59	282	<i>Reed v. Cline's heirs</i> , 9 Gratt. 136.....	154
<i>Peshine v. Shepperson</i> , 17 Gratt. 472....	353	<i>Reed v. Smith</i> , 9 Cow. 647.....	445
<i>Peters v. Robinson</i> , 1 Dickens 116.....	181	<i>Reid v. Shergold</i> , 10 Ves. 370.....	702
<i>Phaler and Morris</i> , 1 Watts 389.....	216	<i>Reid's adm'r v. Strider</i> , 7 Gratt. 76..50,	105
<i>Philadelphia & Reading R. R. Co. v.</i>	870	<i>Reigle and Farish & Co.</i> , 11 Gratt. 697..	303
<i>Derby</i> , 14 How. U. S. 468.....	374	<i>Reith v. Seymour</i> , 4 Russ. 263..707, 710,	714
<i>Philadelphia, Wilmington & Balt. R. R.</i>	511	<i>Remington v. Dolby</i> , 2 Q. B. 176, 58 Eng.	C. L. 174.....
<i>v. Howard</i> , 13 How. U. S. 308.....	304	.....	523
<i>Pickford v. Grand Junction R. R. Co.</i> , 12	46	<i>Rex v. Bellamy</i> , 21 Eng. C. L. 406.....	140
<i>Mees. & Welsb.</i> 766.....	875	<i>Rex v. Carlile</i> , 2 Barn. & Ad. 971, 23 Eng.	C. L. 226.
<i>Pickford & Wyld</i> , 8 Mees. & Welsb. 458..	607	.....	143
<i>Pier & Marsh</i> , 4 Rawle 273.....	315	<i>Rex v. Stokes</i> , 3 C. & K. 138.....	875
<i>Pike v. Hanson & als.</i> , 9 N. Hamp. 491..	194	<i>Rex v. Taylor</i> , 4 Cox C. C. 155..	875
<i>Pinhorn v. Souster</i> , 14 Eng. L. & E. 415,	645	<i>Rex v. Thomas</i> , 7 Car. & Payne, 817....	870
8 Exch. 138.....	224	<i>Reynolds v. Clayton</i> , 2 Ander. 15.....	610
<i>Pirtle v. State</i> , 9 Hump. 665.....	553	<i>Richmond Mayoralty Case</i> , 19 Gratt. 673	.....
<i>Pittsburg, Fort Wayne & Chicago Rail-</i>	701	.....	68, 90, 95, 112, 175
<i>way v. Gilliland</i> , 56 Penn. St. 445....	703	<i>Riddick v. Cohoon</i> , 4 Rand. 547.....	701
<i>Pitzer v. Williams</i> , 2 Rob. 241.....	194	<i>Rippon and Curtis</i> , 5 Madd. 434.....	703
<i>Pleasants v. Pendleton</i> , 6 Rand. 473	645	<i>Rising v. Granger</i> , 1 Mass. 47.....	194
.....	224	<i>Ritchie and Atkinson</i> , 10 East 533.....	645
<i>Plymouth v. Painter</i> , 17 Conn. 585.....	553	<i>Robbins v. Holman</i> , 11 Cush. 26.....	224
<i>Polk v. State</i> , 19 Ind. 170	700, 707	<i>Robertson & als. v. Read's adm'r & als.</i> ,	17 Gratt. 544.....
<i>Pollard v. Baylor</i> , 6 Munf. 433.....	6, 7	.....	553
<i>Polly, Woods & Co. and Balt. & Ohio</i>	697, 710	<i>Robins and Jackson</i> , 15 John. 169, Id.	537.....
<i>R. R. Co.</i> , 14 Gratt. 447.....	300	.....	700, 707
<i>Porter and Bassett</i> , 4 Cush. 487.....	218	<i>Robinsons and Bailly's adm'x</i> , 1 Gratt. 4	.....
<i>Porter and Taylor</i> , 4 Hill 140.....	285	.....	6, 7
.....		<i>Robinson v. Dugate</i> , 2 Vern. 181....	697, 710
<i>Portwardens and Steamship Company</i> , 6		<i>Robinson v. Macdonell</i> , 5 Maule & Sel.	228
<i>Wall. U. S.</i> 31.....		.....	300
<i>Powell and Thatcher</i> , 6 Wheat. U. S. 119.		<i>Robinson and Peters</i> , 1 Dickens, 116 ...	218
<i>Powell v. Waters</i> , 17 John. 176.....		<i>Robinson v. Threadgill</i> , 13 Ired. Law.	39.....
<i>Pozzie v. Shipton</i> , 35 Eng. C. L. 578		.....	281, 285
.....			

Rodgers v. McCluer's adm'r, 4 Gratt. 81.	242	Simmons v. Fay, 1 New York, E. D.	
Rogers and Alley, 19 Gratt. 366.....	234, 242	Smith, 107.....	300
Rogers v. Burlington, 3 Wall. U. S. 654		Simpson v. Accidental Death Ins. Co., 2	
.....	557, 564, 581	Com. Bench N. S. 257.....	644
Rogers and Com., 7 Metc. 500.....	875	Sinclair v. James, 1 Dickens 277.....	218
Rohr v. Davis, 9 Leigh 30 ..	452	Skipwith v. Gibson, 4 Hen. & Mun. 490..	561
Roosevelt and Dale, 6 John. Ch. 255 ..	154	Skipwith and Harvey, 16 Gratt. 393..	281, 285
Roosevelt and Wilkie, 3 John. Cas. 206..	444	Skrine and Taylor, 2 Brev. 696... ..	47
Rosenbaum v. Weeden & al., 18 Gratt.		Slade v. Van Vechter, 11 Paige 21.....	243
785.....	314	Slaughter's Case, 13 Gratt. 767.....	624
Ross v. Ross, 1 Jac. & Walk. 154....	701, 710	Smith's Case, 10 Gratt. 734.....	728, 730
Rucker and Dearing's adm'r, 18 Gratt.		Smith and Allen, 1 Leigh 254.....	180
425.....	571, 584, 585, 588, 591, 605	Smith and Beatty, 2 Hen. & Mun. 395....	215
Ruffin v. Armstrong, 2 Hawks 411.....	445	Smith v. Bell, 1 Peters 79.....	707, 709, 711
Ruse v. Mutual Benefit Life Ins. Co., 26		Smith and Bennet, 15 John. 355.....	444
Barb. 556.....	621, 644	Smith's adm'r v. Betty & others, 11 Gratt.	
Russell v. Livingston, 19 Barb. 346.....	282	752.....	154
Rutland and Burlington Railroad Co. and		Smith v. Brush, 8 John. 84.....	308
Kimball, 26 Verm. 247.....	274	Smith v. Flint, &c., 6 Gratt. 40.....	660
Rut. & Bur. Railway Co. and Noyes &		Smith and Hannel, 15 Ohio 134.....	182, 202
Co., 27 Verm. 110.....	287	Smith v. Nicholas, 8 Leigh 330. ...	561, 562
Samuel and Judin, 4 Bos. & Pul. 43, 6		Smith and Reed, 9 Cow. 647.....	445
East. 333.....	281, 285	Smith v. State, 19 Conn. 493.....	46
Satterlee v. Matthewson, 2 Peters U. S.		Smith & als. v. Thompson's adm'r's &	
380.....	110	als., 7 Gratt. 112.....	553
Sayre v. Grymes, 1 Hen. & Mun. 404....	519	Smith and Ward, 7 Wall. U. S. 447...637,	652
Scales v. Alvis, 12 Alab. 617.....	183, 208	Smith v. White, 37 Eng. C. L. 353....	276, 281
Schenectady & Saratoga Plank Road Co.		Smith v. Wilcox, 5 Wend. 231.....	46
v. Thatcher, 1 Kern. 102.....	476	Snead and Custis, 12 Gratt. 662.....	6
Schermerhorn v. Talman, 14 New York		Snively v. Fahnestock, 18 Mary. 391....	279
93.....	560, 595	Somerville Mutual Ins. Co. and Francis,	
Scission and Clark, 4 Duer 408.....	445	1 Dutcher 78.....	315
Seaburn's ex'or v. Seaburn & als., 15		Sonster and Periburn, 14 Eng. L. & E.	
Gratt. 423 ..	130	415.....	221
Secreh and Collins, 7 Monr. 336.....	561	Sonster and Pinhorn, 14 Eng. L. & E.	
Seddon v. Tutop, 6 T. R. 607.....	366	415, 8 Exch. 138.....	216
Selby v. Morgan, 3 Leigh 625.....		South Car. R. R. Co. v. Bradford, 10	
.....	565, 566, 568, 570, 571, 608	Rich. Law 307.....	274
Sexton v. Montgomery Co., 9 Barb. 191..	316	South Car. Railway Co. and Maybin, 8	
Seymour and Reith, 4 Russ. 263..	707, 711, 714	Rich. 246.....	273
Seymour v. Strong, 1 Hill N. Y. 563....	445	Southern Express Co. v. Newby, 36	
Shacklett and Brooke & als., 13 Gratt.		Georgia 635.....	282, 283, 286, 287
301.....	130	Spencer and State, 1 Zabr. 202.....	875
Shaw and Metcalf, 3 Camp. 22.....	414	Sperry's Case, 9 Leigh 623.....	865
Shearman v. Commonwealth, 14 Gratt.		Spindle's adm'r's and Brockenbrough's	
677.....	723	ex'ors, 17 Gratt. 21.....	
Sheboygan and Gilman, 2 Black U. S....	668	.....	302, 304, 447, 563, 565, 569, 571, 580
Sheldon and Chicago, 9 Wall. U. S. 50... 467		Sprague v. Barnard, 2 Bro. ch. 585.....	699
Shelly's Case, 19 Gratt. 652.....	761, 767	Springfield v. Hampden, 6 Pick. 501....	221
Shelton v. Barbour, 2 Wash. 64.....	353	Stammers v. Macomb, 2 Wend. 454.....	414
Shepardson and Milwaukee, &c., R. R.		Standard v. Graves, 2 Call 369.....	154
Co., 6 Wisc. 605.....	219	Stanisford v. Barry, 1 Aik. 321.....	53
Sheppard and Elton, 1 Bro. ch. 532. 697, 710		Stanley v. Nailor, 10 Serg. & Rawle, 450	241
Shepperson and Peshine, 17 Gratt. 472... 315		Starke and State, 1 Strobb. 479.....	875
Sherburne and Merrill, 1 N. Hamp. 199..	52	Starling and State, 6 Jones 471.....	875
Shergold and Reid, 10 Ves. 370.....	702	State v. Allen, 2 Ired. 183....	23
Sherman v. Wells, 28 Barb. 403.....	282	State v. Allen, 2 McCord 55.....	193
Shermer v. Shermer's ex'ors, 1 Wash.		State v. Bartlett, 43 N. Hamp. 224.....	875
266.....	697, 714	State v. Beebe, 6 Ind. 501.....	53
Shields and Arnold, 5 Dana 18.....	23, 523	State v. Bloom, 17 Wisc. 521....	46, 47, 141
Shipton and Pozzie, 35 Eng. C. L. 578		State v. Bonfant, 3 Minnes. 123.....	875
.....	282, 286	State v. Brandon, 8 Jones 463.....	875
Shoemaker and Helmer, 22 Wend. 139....	702	State v. Bringer, 5 Alab. 244.....	875
Shotwell and Eggleston, 1 John. ch. 536. 562		State, Jersey City & Bergen R. R. Co. v.	
Shumway v. Fowler, 4 John. 425.....	308	Mayor, &c., of Jersey City, 31 New Jer.	
Shurtz and Mich. E. & N. Ind. R. R. Co.,		L. 579.....	477
7 Mich. 515.....	274	State v. La Crosse, 11 Wisc. 51.....	219
Sickles, &c. and Washington, Alexandria		State v. Longbottoms, 11 Hump. 39....	721
& Georgetown Steam Packet Co., 24		State v. Marlow, 15 Ohio St. 114.....	22
How. U. S. 333... ..	357, 364	State of Maryland and McCulloch, 4	
		Wheat. 368.....	668
		State v. Miller, 8 Gill 145.....	53

State <i>and</i> Ogletton, 28 Alab. 692.....	875	Thatcher <i>and</i> Schenectady & Saratoga	
State <i>and</i> Pirtle, 9 Humph. 663.....	870	Plank Road Co., 1 Kern. 102	476
State <i>and</i> Polke, 19 Ind. 170.....	875	Thomas & Ammon <i>and</i> Ballard & als., 19	
State <i>v.</i> Smith, 19 Conn. 493.....	46	Gratt. 14.....	178
State <i>v.</i> Starke, 1 Strobh. 479.....	875	Thomas <i>and</i> Doe dem. Herbert, 3 Ad. &	
State <i>and</i> Swan, 4 Humph. 136.....	870	Ell. 123, 30 Eng. C. L. 48.....	703, 707
State <i>v.</i> Tims, 26 Alab. 165.....	219	Thomas <i>and</i> Rex, 7 Car. & P. 817.....	870
State <i>v.</i> White, 17 Ark. 404.....	300	Thompson <i>v.</i> Lee county, 3 Wall. U. S.	
State <i>v.</i> Willis, 63 North Car. 26.....	876	327.....	77, 109, 110
State Bank <i>v.</i> Cooper, 2 Yerg. 599.....	192	Thompson's case, 3 P. Wms. 195....	218
State Bank of Elizabeth <i>v.</i> Ayres, 2		Thompson's adm'r's & als. <i>and</i> Smith &	
Halst. 130.....	562	als., 7 Gratt. 112.....	553
State Bank of North Carolina <i>v.</i> Cowan,		Thompson <i>v.</i> Took, 1 Dickens 118.	218
8 Leigh 238.....	561, 562, 572, 585, 591	Thorington <i>v.</i> Smith, 8 Wall. U. S. 1	
Steamship Company <i>v.</i> Portwardens, 6		.....	123, 410, 584
Wall. U. S. 31.....	423	Thorne <i>v.</i> Deas, 4 John. 84.....	281
Stearns <i>and</i> Taylor, 18 Gratt. 244.....	446	Thornton <i>and</i> Lunn, 50 Eng. C. L. 379...	300
Steenbock & Co. <i>and</i> Claflin & Co., 18		Thornton's adm'r <i>and</i> Stevens, 1 Wash.	
Gratt. 847.....	603	194.....	360
Stephenson <i>ex parte</i> , De Gex Bankr. Cas.		Thornton & als. <i>v.</i> West's adm'r's, 7	
586.....	239, 243	Gratt. 177.....	553
Steptoe's adm'r's <i>and</i> Harvey's adm'r, 17		Thorpe <i>v.</i> Cooper, 15 Eng. C. L. 387.....	366
Gratt. 290.....	134	Threadgill <i>and</i> Robinson, 13 Ired. Law	
Steptoe's adm'r's <i>v.</i> Harvey's ex'ors, 7		39.....	281, 285
Leigh 501.....	562, 563, 608, 610	Tiernan's case, 4 Gratt. 545.....	729
Stevens <i>v.</i> Hurlburt Bank, 31 Conn. 146	271	Tims <i>v.</i> State, 26 Alab. 165.....	219
Stevens <i>v.</i> Thornton's adm'r, 1 Wash. 194	360	Tomlinson <i>v.</i> Dighton, 1 P. Wms. 149	
Stevens <i>v.</i> Winship, 1 Pick. 318.....	611	.....	697, 709, 710
Stringer <i>and</i> Henderson, 6 Gratt. 130....	278	Took <i>and</i> Thompson, 1 Dickens 115.....	218
St. Lawrence County Mutual Ins. Co. <i>and</i>		Tower <i>v.</i> Utica & Schen. R. R. Co., 7	
Westlake, 14 Barb. 206.....	315	Hill 47.....	273
Stokes <i>and</i> Rex, 3 C. & K. 138.....	875	Town of Guilford <i>v.</i> Supervisors of	
Stone <i>and</i> Paige, 10 Metc. 160.....	414	Chenango county, 3 Kern. 143.....	666
Storey <i>and</i> Bassey, 4 Barn. & Ad. 98....	767	Town of Sterling <i>and</i> Gould, 23 New	
Storm <i>and</i> Williams, 2 Duer 368.....	445	York 456.....	557
Stoyell <i>v.</i> Westcott, 2 Day 418....	281, 285	Town of Sunderland <i>and</i> Hill, 3 Verm.	
Street <i>and</i> Barford, 16 Ves. 135	703, 707	507.....	53
Stribling <i>and</i> Bank of the Valley, 7 Leigh		Trapnall <i>and</i> Woodruff, 10 How. U. S.	
59.....	561, 563, 565, 572	190.....	466, 467
Strider <i>and</i> Reid's adm'r, 7 Gratt. 76. 50,	105	Trice <i>v.</i> Cockran, 8 Gratt. 442.....	281, 293
Strong <i>and</i> Seymour, 1 Hill 563	445	Trowbridge <i>v.</i> Chapin, 23 Conn. 595....	273
Supervisors of Albany City, <i>and</i> Wilson,		Truman <i>and</i> Love, 10 Ohio 45.....	364
12 John. 414.....	492	Trustees of Lexington <i>and</i> Caruther's	
Supervisors of Chenaugo County <i>and</i>		adm'r's, 12 Leigh 610.....	553
Town of Guilford, 3 Kern. 143.....	666	Tuckahoe Canal Co. <i>v.</i> Tuckahoe Rail-	
Supervisors of Dutchess <i>and</i> Overseers,		road Co., 11 Leigh 42.....	514
&c., of Malin, 14 Wend. 73.....	223	Tucker <i>v.</i> Aiken & al., 7 N. Hamp. 113	
Supervisors of Oneida County <i>and</i> Hull,		.....	47, 65
19 John. 259.....	492	Turley <i>v.</i> North Amer. Fire Ins. Co., 25	
Surman <i>v.</i> Surman, 5 Madd. 123.....	711	Wend. 374.....	315, 319, 325
Sutherland & als. <i>and</i> Law's ex'ors, 5		Tutop <i>and</i> Seddon, 6 T. R. 607.....	366
Gratt. 357.....	445, 446	Tyler <i>and</i> Aetna Fire Ins. Co., 16 Wend.	
Swan <i>v.</i> State, 4 Humph. 136.....	870	385.....	325
Swanson <i>v.</i> White, 5 Humph. 373.....	561	Underhill <i>v.</i> Agawan Mutual Fire Ins.	
Sydnor <i>v.</i> Burke & wife, 4 Rand. 161....	140	Co., 6 Cush. 440.....	315
Tait & Gibbs, 8 Sim. 132.....	704, 711, 713	United States <i>v.</i> Drew, 5 Mason 28..	871, 873
Taliaferro <i>v.</i> Pryor, 12 Gratt. 277.....	144	United States <i>v.</i> Grossmayer, 4 Wall. U.	
Talmage <i>v.</i> Pell, 3 Seld. 328....	557, 558, 604	S. 72.....	653
Talman <i>and</i> Schermerhorn, 14 New York		United States <i>v.</i> Hoffman, 4 Wall. U. S.	
93....	560, 595	158.....	23
Tanner <i>and</i> McInstry, 9 John. 135.....	47	United States <i>v.</i> Lane, 8 Wall. U. S. 185	357
Taylor <i>and</i> Boerum, 19 Conn. 122.....	272	United States <i>and</i> McClure, 7 Law R. N.	
Taylor <i>v.</i> Bruce, Gilm. 42.....	445, 447, 561	S. 439.....	875
Taylor <i>v.</i> Porter, 4 Hill 140 179, 186, 187,	192	Updegraff <i>and</i> Franklin Fire Ins. Co., 43	
Taylor <i>and</i> Rex, 4 Cox C. C. 155.....	875	Penn. 350.....	315
Taylor <i>v.</i> Skrine, 2 Brev. 696.....	47	Upwell <i>v.</i> Halsey, 1 P. Wms. 661.....	
Taylor <i>v.</i> Stearns, 18 Gratt. 244..	466	.....	698, 708, 711
Temple <i>v.</i> Temple, 1 Hen. & Mun. 476....	159	Urquhart <i>and</i> Monseax, 19 Louis. 485....	637
Texas <i>v.</i> White, 7 Wall. U. S. 700.....		Utica & Schen. R. R. Co. <i>and</i> Tower, 7	
.....	41, 123, 410	Hill 47.....	273
Thatcher <i>v.</i> Powell, 6 Wheat. U. S. 119..	180	Vaiden's Case, 12 Gratt. 717.....	452

Vance <i>and</i> Moore's ex'or, 3 Dana 361 561, 599	White <i>v.</i> Wright, 3 Barn. & Cres. 273.... 561
Van Houten <i>and</i> Wheeler, 12 John. 311... 366	Whitemore <i>v.</i> Whitemore, 2 New Hamp. 26. 367
Van Vechter <i>and</i> Slade, 11 Paige 21..... 243	Withworth <i>v.</i> Adams, 5 Rand. 333. 444, 445, 447, 560, 561, 563, 580
Vanzant <i>v.</i> Waddell, 2 Yerg. 260..... 192	Wick's Case, 2 Va. Cas. 387... .. 730
Vaughan <i>v.</i> Commonwealth, 17 Gratt. 386..... 140, 144	Wightman <i>v.</i> Western Marine & Fire Ins. Co., 8 Rob. La. 442..... 316
Virginia <i>and</i> Paul, 8 Wall. U. S. 168.... 623	Wilkie <i>v.</i> Roosevelt, 3 John. Cas. 206.... 444
Waddell <i>and</i> Vanzant, 2 Yerg. 260..... 192	Wilkinson's adm'rs <i>v.</i> Bennett, 3 Munf. 314.... 360
Waddington <i>and</i> Griswold, 16 John. 438 632, 654, 655	Wilkinson <i>v.</i> Leland, 2 Peters U. S. 627 110
Waggener <i>and</i> Bank U. S., 9 Peters 378 565, 566, 567, 571, 574, 593, 606	Wilkinson <i>v.</i> Mosely, 18 Alab. 288. 271
Wagner <i>v.</i> Baird, 7 How. U. S. 234..... 553	Williams <i>and</i> Cooper, Prec. Ch. 71...704, 711
Walker & al. <i>v.</i> Commonwealth, 18 Gratt. 13..... 207	Williams <i>and</i> Mazetti, 20 Eng. C. L. 412 281, 285
Walker <i>v.</i> Meek, 12 Smeedes & Marsh. 495..... 561	Williams <i>and</i> Pitzer, 2 Rob. 241..... 511
Ward <i>v.</i> Churn, 18 Gratt. 801..... 315	Williams <i>and</i> Storm, 2 Duer 52..... 445
Ward <i>v.</i> Smith, 7 Wall. U. S. 447.... 637, 652	Williams <i>v.</i> Williams, 1 Sim. N. S. 58, 4 Eng. Ch. 703
Warfield's adm'rs <i>v.</i> Boswell, 2 Dana 225 560, 561, 591	Willis <i>and</i> State, 63 N. C. 26..... 876
Warwick, &c. <i>v.</i> Mayo, 15 Gratt. 528.... 496	Wilmington R. R. Co. <i>and</i> Wells, 6 Jones Law 47..... 274, 283
Washington, Alexandria & Georgetown Steam Packet Co. <i>v.</i> Sickles, &c., 24 How. U. S. 333..... 357, 364	Wilson's heirs <i>and</i> Life & Fire Ins. Co. of New York, 8 Peters 106..... 140
Waters <i>and</i> Powell, 17 John. 176..... 444	Wilson <i>v.</i> Smith, 5 Wend. 231..... 46
Weatherhead <i>v.</i> Boyers, 7 Yerg. 545.... 561	Wilson <i>v.</i> Supervisors of Albany City, 12 John. 414..... 492
Webb <i>and</i> Lewis, 3 Greenl. 326..... 52	Wingfield <i>v.</i> Crenshaw, 3 Hen. & Mun. 245..... 519
Weeden & al. <i>and</i> Rosenbaum, 18 Gratt. 328..... 314	Winship <i>and</i> Stevens, 1 Pick. 318..... 711
Weedon <i>and</i> Fells Point Savings Inst., 18 Mary. 320..... 279	Wisbey <i>and</i> Whitaker, 74 Eng. C. L. 44. 140
Weeks <i>and</i> McCarroll, 2 Tenn. 215..... 193	Wise <i>v.</i> Lamb, 9 Gratt. 294..... 154
Wells <i>and</i> Cronkite, 32 New York 247.... 273	Wood <i>and</i> Bretherton, 6 Moore 141...276, 282
Wells <i>and</i> Sherman, 28 Barb. 403..... 282	Wood <i>and</i> Foster's Case, 1 Leonard 42... 300
Wells <i>v.</i> Wilmington R. R. Co., 6 Jones Law 47..... 274, 283	Wood <i>and</i> Jackson ex dem., 3 Wend. 27.. 364
Wells, Fargo & Co. <i>and</i> Hooper, 5 Amer. Law Reg. N. S. 16..... 282	Wood <i>v.</i> Worsley, 2 H. Bl. 574.. 644
West <i>v.</i> Belches, 5 Munf. 187..... 563	Woodcock's ex'or <i>and</i> Dunbar's ex'ors, 16 Leigh 628..... 710
West <i>v.</i> Ferguson, 16 Gratt. 270..... 19, 20, 21, 22, 27, 496	Woodruff <i>v.</i> Parham, 8 Wall. U. S. 123... 430
West's adm'rs & als. <i>v.</i> Thornton & als., 7 Gratt. 177. 553	Woodruff <i>v.</i> Trapnall, 10 How. U. S. 190 466, 467
Westchester County Ins. Co. <i>and</i> McMasters & als., 25 Wend. 379... .. 315	Woodson <i>v.</i> Fleck, 9 Amer. L. R., N. S. 435..... 119
Westcott <i>and</i> Bradley, 13 Ves. 444..... 702, 710, 711	Wormeley's Case, 10 Gratt. 658..... 761, 762, 776, 784
Westcott <i>and</i> Stoyell, 2 Day 418.....281, 285	Worsley <i>and</i> Wood, 2 H. Bl. 574..... 644
Western Marine & Fire Ins. Co. <i>and</i> Wightman, 8 Rob. La. 442..... 316	Wright <i>and</i> Archibald, 9 Sim. 161, 16 Eng. ch. 161 703
Westlake <i>v.</i> St. Lawrence County Mutual Ins. Co., 2 Comst. 53..... 315	Wright <i>and</i> White, 3 Barn. & Cres. 273.. 561
Wheeler <i>v.</i> Van Houten, 12 John. 311.... 366	Wyld <i>v.</i> Pickford, 8 Mees. & Welsb. 458.. 282
Wheeling Bridge Case, 18 How. U. S. 421 54	Wynehamer <i>v.</i> People, 3 Kern. 378..... 179
Whitaker <i>v.</i> Wisbey, 74 Eng. C. L. 44... 140	Wynne <i>v.</i> Hawkins, 1 Bro. ch. 179..... 699
White <i>and</i> People, 24 Wend. 520..... 141	Yarborough & wife <i>v.</i> Deshago, 7 Gratt. 374..... 225
White <i>and</i> Smith, 37 Eng. C. L. 353..... 276, 281	York <i>and</i> Commonwealth, 9 Metc. 93.... 876
White <i>v.</i> State, 17 Ark. 404..... 300	Young <i>and</i> Barnard, 17 Ves. 44..... 610
White <i>and</i> Swanson, 5 Humph. 373..... 561	Young <i>and</i> McKey's ex'or, &c., 4 Hen. & Mun. 430..... 6
White <i>and</i> Texas, 7 Wall. U. S. 700..... 41, 123, 410	Young <i>v.</i> Munby, 4 Maule & Selw. 184.. 368
	Zabriskie <i>v.</i> Cleveland, Columbus & Cin- cinnati Railroad Co., 23 How. U. S. 398 557

R U L E S

OF THE

Supreme Court of Appeals of the State of Virginia.

[Revised and adopted April 20th, 1871, in the 95th year of the Commonwealth.]

I.

MOTIONS.

No affidavits shall be read in support of, or opposition to, any motion hereafter made to the court, unless reasonable notice be given to the opposite party of the time and place of taking the same, or good cause be shown why such notice has not been given; and every motion which is not a motion of course, shall be supported by affidavit.

II.

BRIEFS.

A clear and concise statement of the points intended to be insisted on by each party in an appeal, writ of error or supersedeas, and the authorities in support thereof, signed by his counsel, and printed, or plainly written, shall be delivered to each of the judges of the court, time enough before the hearing, for his consideration, and no error other than such as shall be pointed out and insisted on in such statement, on the part of the plaintiff or appellant, shall (without leave of the court) be admitted as a ground for argument, on the hearing of the cause. No cause shall be proceeded in without such statement. But a party who has prepared and filed a statement may insist on a hearing when the cause is regularly called, although no statement shall have been made on the part of his adversary. If one of the parties omits to file such a statement, he cannot be heard, and the case will be heard ex parte upon the argument of the party by whom the statement is filed. The plaintiff, or appellant, may adopt the petition as his statement. If no statement be filed by either party when a cause is called, it shall stand continued until the next term. At the close of the argument, each counsel in it shall furnish to each judge a list of xxiv any authorities *referred to by such counsel in his argument, and not cited in his statement, showing the points to which they apply.

III.

ATTORNEYS AND ARGUMENTS.

When there are two or more counsel on the same side, no one of them shall argue twice, except by the leave of the court; nor shall more than two counsel, representing the same interest of one or more party or

parties, be permitted to argue for such party or parties.

IV.

AS TO READING RECORDS AND CITING AUTHORITIES.

In no case is it necessary or proper to read the record of the court; but counsel may refer thereto, and state what they consider as proved, on which they rely. And in all cases it is recommended to the gentlemen of the bar to select and cite only the most pertinent authorities.

V.

ARGUMENTS UPON EXCEPTIONS TO REPORTS.

No oral argument will be permitted upon exceptions to a master commissioner's report except upon naked questions of law, without reference to details of evidence.

VI.

CAUSES HEARD OUT OF COURSE.

No cause shall be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances, to be shown to the court.

VII.

TIME ALLOWED ON REVIVALS.

Where any process to revive a suit, on the death of a party, either plaintiff or defendant, shall be returned executed, there shall be at least sixty days allowed to the party or parties in whose name or names such suit may be revived, to prepare for the trial thereof.

VIII.

CERTIFICATES OF JUDGMENTS, DECREES, &c.

No certificate of a judgment or decree of the Court of Appeals, shall, without the special direction of the court, be transmitted to any inferior court, in less than sixty days from the rendition thereof, unless the court shall previously have adjourned for one or more weeks.

xxv

***IX.**

CONSIDERATION OF GENERAL ERROR.

In any appeal, writ of error, or supersedeas, if error is perceived against any ap-

appellee or defendant, the court will consider the whole record as before them, and will reverse the proceedings, either in whole or in part, in the same manner as they would do, were the appellee or defendant to bring the same before them, either by appeal, writ of error or supersedeas, unless such error be waived by the appellee or defendant; which waiver shall be considered a release of all error as to him.

X.

REINSTATEMENTS OF APPEALS.

No appeal which shall have been dismissed or abated by the court, shall be reinstated or revived after a lapse of sixty days from such dismissal or abatement, except for good cause shown to the court, verified by affidavits, and upon reasonable notice to the adverse party of the time of making the motion; nor then, except in very special cases, unless such motion be made within one hundred and twenty days from the time of such dismissal or abatement; provided, that if the court shall not be in session on the day to which such notice shall be given, a farther time of ten days shall be allowed the party to exhibit his motion after the next meeting of the court.

XI.

CERTIFICATE OF CLERK.

When an appeal, writ of error, or supersedeas, shall be awarded by this court, it shall be the duty of the clerk to issue a copy of the order allowing such appeal, writ of error or supersedeas, to certify the fact of the allowance thereof to the court below.

XII.

NOTICE TO ABSENTEES.

Whenever it is necessary that an absent party should have notice of an order of this court, it should be published once a week, for four successive weeks, in the manner prescribed by the act of assembly, in the case of absent defendants.

XIII.

ORDER OF ARGUMENT.

The court on the first day of each term will commence calling the cases for argument, in the order in which they stand on the docket, and proceed from day to day during the term, in the same order; xxvi and if the parties, or *either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall go down to the foot of the docket. Ten causes only shall be considered as liable to be called on each day during the term, including the one that may be under argument. No cause shall be taken up out of the order of the docket, or be set down for any particular day, except causes which, from their own peculiar character, or the mandate of the law, are regarded as privileged cases.

XIV.

TIME OF ARGUMENTS.

In the argument of causes in this court, no one counsel upon either side of any case shall be permitted to speak more than two hours, except where from the particular character of any case, or other circumstances, the court shall, upon application made before the argument, extend the time to any period which to it may appear reasonable and proper.

Provided, however, that where the same counsel may open and conclude the argument for the appellant, or plaintiff in error, nothing in this rule shall be so construed as to prevent such counsel from speaking two hours in concluding, as well as in opening such argument.

XV.

CALL OF THE DOCKET.

When any case, which shall be called in the due course of the regular calling of the docket, shall be passed, because the proper process has not been executed, though such case shall not lose its place on the docket, yet it shall not be again called until the next regular calling of the docket.

XVI.

CAUSES MAY BE SUBMITTED ON PRINTED ARGUMENTS.

When a cause shall be called for hearing, the court will receive printed arguments (a copy for each judge) if the counsel on either or both sides shall choose so to submit the same, and the cause shall stand on the same footing as if there were an appearance of counsel. But when a case is taken up for trial upon the regular call of the docket and argued orally in behalf of only one of the parties, no printed argument shall be received unless it be filed before the oral argument begins, and the court will proceed to consider and decide the case upon the ex parte argument.

XVII.

PROCEEDINGS IN CRIMINAL CASES.

That when a writ of error in any criminal case shall be awarded by a judge in vacation, the same shall be made returnable the first day of the *next term thereafter, and if awarded by the court when in session, it shall be made returnable forthwith; and in either case the same shall be heard as soon as the record shall be printed in preference to any civil business on the docket. And when judgment shall be given in any criminal case, the same shall be certified forthwith to the court from which it came without further orders.

XVIII.

REHEARING.

No application for a rehearing will be

entertained, unless made within ten days after the decision is announced (except as otherwise authorized by law), and no rehearing will be allowed unless one of the judges who concurred in the decision shall be dissatisfied with it, and desires a rehearing.

XIX.

SESSIONS OF THE COURT.

The sessions of the court at Richmond shall be divided into three terms, to commence on the first day of November, and

the fifth days of January and March respectively.

XX.

ARGUMENT DOCKET.

It shall be the duty of the clerk, at the commencement of each session to make a list of all causes ready for hearing and represented by counsel on either side, which shall constitute the argument docket. A cause may at any time, on motion, without notice, be placed on this docket by order of the court.

CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Howery v. Helms & als.

September Term, 1870, Wytheville.

(STAPLES, J., Absent. *)

1. Partition—Sale of the Land—Objection in the Appellate Court.†—In a suit for partition, the court has no authority to order a sale of the land, unless it

*He had been counsel in the cause.

†**Partition—Equity Jurisdiction.***—The proper proceeding for partition at common law was by writ of partition, but this writ has been in practice almost entirely superseded by the concurrent proceeding of a bill in equity. 3 Min. Inst. (4th Ed.) 482.

The power of a court of equity to grant partition is not *discretionary*, but *ex debito justitias*; and whenever a plaintiff has a right to partition at law, he has the same right in equity. *Wiseley v. Findlay*, 3 Rand. 361. The only indispensable requisite entitling a plaintiff to relief was *formerly* that he must show a clear legal title. *Wiseley v. Findlay*, 3 Rand. 361. But *now* by statute, a court of equity may take cognizance of all questions of *law* affecting the legal title that may arise in any proceeding. Va. Code 1849, p. 526; Va. Code 1897, § 2562.

Same—How Partition Made—in the Absence of Statute.—By common law, the partition must be in kind, however inconvenient; a solution of the difficulty by means of sale seems unknown; and, even in equity, "it was understood, and indeed affirmed * * (by Lord Chn. Parker, in *Clarendon v. Hornby*, 1 P. Wms. 447) that each tenant must have some *substantial* part of the premises, so that, if there were but one house or mill to be divided, and no other lands to make up the co-tenant's share, a division in kind was unavoidable." 3 Min. Inst. (4th Ed.) 489.

Same—Same—Under Statute.—But, by statute, first introducing the Code of 1849, p. 526, this inconvenience was remedied by the provision that in any case in which partition cannot conveniently be made, if the interests of those who are entitled to the subject or its proceeds will be promoted by the sale, etc., a sale may be decreed. *Roberts v. Coleman*, 37 W. Va. 158, 16 S. E. Rep. 487. See also, Va. Code, § 2564.

Thus, now, if necessary the court may order a sale of the land in order to give full relief, but, as laid down in the principal case, it is the duty of the court, before making a decree for a sale, to ascertain by an enquiry by a commissioner, or otherwise, that partition cannot be made in any of the modes provided by the statute without a sale. *Roberts v. Coleman*, 37 W. Va. 158, 16 S. E. Rep. 487; *Beckham v. Duncan* (Va.), 5 S. E. Rep. 695.

But in the partition of real estate, each part owner is entitled to have in severalty a part equal to his interest in the whole subject, if this is practicable, with a due regard to the interests of all concerned. But if such partition cannot be made without impairing the portion of some others, the property may be divided into shares of unequal values, and the inequality may be corrected by a charge of money on the more valuable in favor of

is made to appear by an enquiry before a commissioner, or otherwise, that partition cannot be made in some of the modes provided by the 2d and 3d sections of ch. 128, of the Code. But when it did not so appear, and no such enquiry was asked in the court below, a party who promoted the suit and at whose instance the decree was made, will

the less valuable portion, or by other means recognized in the law of partition. Code, ch. 124, § 2, p. 526; *Cox v. McMullin*, 14 Gratt. 82.

Same—Same—Same—Record.—Now, remembering that the common law gave right to have partition in kind, and this statute being an innovation upon the common law, and taking away from the owner the right to keep his freehold in kind, to justify a sale in any case, it must come within the statute, and it must appear in some way by the record both that partition cannot be conveniently made, and that the interests of the owners will be promoted by sale. *Roberts v. Coleman*, 37 W. Va. 158, 16 S. E. Rep. 486.

Upon a bill for partition of land, as a general rule, the share of each parcener should be assigned to him in severalty; and if from the condition of the subject or the parties, it is proper to pursue a different course, the facts justifying a departure from the rule should, at least when infants are concerned, be disclosed by the report or otherwise appear, to enable the court to judge whether or not their interest will be injuriously affected: hence where the same parties are entitled to lands derived from the father and also to lands derived from the mother, and some or all of them are infants, if these lands are blended in the division, it must appear to the court that the interest of the parties in general will be promoted by this mode of partition, to enable the court to protect the rights of the infants. *Custis v. Snead*, 12 Gratt. 260.

But it is not necessary that facts *necessary* to warrant a decree for sale should appear from the report of commissioners or by the depositions of witnesses. It is sufficient if the facts appearing in the record reasonably warrant the decree of sale: and this especially when the proceeding is to defeat the title of an innocent purchaser. *Zirkle v. McCue*, 26 Gratt. 517.

Same—Collateral Attack.—In a suit for partition of land * * * whether partition can be conveniently made in kind or not, and whether the interest of those who are entitled to the subject or its proceeds will be promoted by a sale of the entire subject or not, are questions for the court in which the suit is pending to decide, and its decision cannot be questioned in any collateral suit, except on the ground of fraud or surprise. In such a case, a sale made pending the suit by agreement of the parties, in person or by counsel, which sale is afterwards approved and confirmed by the court, is as valid as if made under a previous decree of the court in the suit, and can no more be impeached collaterally than if so made. *Wilson v. Smith*, 22 Gratt. 498.

not be allowed to raise the objection for the first time in the appellate court.

2. **Same—Same—Effect of Purchase by the Commissioner.**—When the commissioner appointed by a decree in a partition suit to sell the land, becomes himself the purchaser, the purchase is voidable at the election of any party interested in the land sold. And the law is the same where the purchase is made nominally by a third person, who is reported by the commissioner to the court as

2 *the purchaser, but who really purchased for the commissioner and conveyed the land to him accordingly, after the purchase as reported had been confirmed.

3. **Same—Same—Party Interested Accepts His Share of the Proceeds—Effect.**—Where a party interested in the land, with a full knowledge of all the facts, elects to affirm the sale, he will be concluded by it, and in this case the acceptance, without objection, of his share of the proceeds of sale in Confederate money (for which the sale was made), was held to be such an affirmation.

4. **Same—Same—Same—Party Interested Elects to Avoid the Sale—What Must Be Done.**—Where any of the parties interested elect to avoid the sale, while it has been affirmed by other parties, the entire property, and not merely the undivided interest of the parties objecting to the sale, must be resold; and the original purchaser will be entitled to the shares of the proceeds of the resale, which would otherwise have belonged to those who have elected to affirm the original sale.

5. **Same—Same—Same—Same.**—Where land is resold in cases of this sort, the usual and proper course is to offer the property at an upset price, to be fixed by the decree, according to the cases of *Buckles v. Lafferty*, 2 Rob. R. 292, and *Bailey's adm'x v. Robinsons*, 1 Gratt. 4. But this rule is intended for the protection of the parties who elect to avoid the first sale; and where the decree for resale directed a sale in general terms, without fixing an upset price, it cannot be assigned as error in the appellate court, either by the original purchaser, or by any party who has elected to affirm the first sale.

6. **Same—Same—Purchased by the Commissioner—Original Bill.**†—A bill was filed, during the late war, for a partition of real estate among coparceners, some of whom were non-residents and so continued until after the war, and were proceeded against by publication. A decree for sale was made and a

sale made under it, at which M became nominally the purchaser. The commissioner reported to the court he had made the sale—that M was the purchaser, and desired to pay all the purchase money down, without awaiting the terms of credit provided by the decree, and that he had, under a provision in the decree, accepted the purchase money from him accordingly. In fact, M was only nominally the purchaser, the commissioner himself being the real purchaser, to whom M conveyed the land as soon as the sale was confirmed. The sale was confirmed, and the shares of the non-resident parties were, by direction of the court, invested in their names in the bonds of Floyd county, issued during the war. All this was done during the war. After the war the non-resident defendants, instead of appearing in the original suit, as provided by sect. 13, ch. 170, of the Code, filed their original bill, impeaching the original sale, and asking a resale. **Held:** They were entitled to file an original bill, because.

1. **Same—Same—Same—Fraud.**—The commissioner, by purchasing at his own sale, did an act 3 *which a court of equity treats as a fraud upon the parties interested. And,

2. **Same—Same—Same—Same.**—By reporting to the court that M was the purchaser, and concealing the fact that he was himself the real purchaser, he was guilty of an actual fraud upon the court and the non-resident parties; and thereby obtained from the court a confirmation of the sale, which might not otherwise have been decreed, and ought not to have been, if at all, without further enquiry.

Same—Same—Investments at Risk of Purchaser.—Held, also, that the investments in the bonds of Floyd county were at the risk of the purchaser, and that the bonds should be surrendered to him as his property, the obligees being required, if desired, to assign them to him without recourse.

John W. Helms, of the county of Floyd, died in August, 1862, intestate, leaving eleven children his heirs at law and distributees; and leaving a valuable tract of land and a number of slaves. His son-in-law, Fleming Howery, and his son, George M. Helms, qualified as his administrators.

In September, 1862, a bill was filed in the name of Fleming Howery and his wife,

***Sale of Land by Order of Court—Purchase by the Commissioner.**—In *Hurt v. Jones*, 75 Va. 349, the court, citing the principal case, said: "It is admitted to be the rule that ordinarily a commissioner to sell is not allowed to purchase the subject, either directly or indirectly. Such a purchase, however, is not absolutely void, but voidable only at the election of any party interested in the land."

Also, in *Winans v. Winans*, 22 W. Va. 689, the court, citing *Davoue v. Fanning*, 2 Johns. Chy. 252, and the principal case, said: "To allow a person to occupy the position of both buyer and seller is to subject him to a temptation which neither the law nor good morals can permit. The capacities in which he acts are inconsistent and in direct conflict with each other. The danger of the temptation to serve his own interest at the expense of those whom he represents, out of the mere necessity of the case, disqual-

ifies a commissioner from having any interest in the purchase of property which he is directed to sell. The fact that he has undertaken the office of making the best possible sale for others, incapacitates him from acting on the other side; and consequently, any sale he may make by occupying such an antagonistic position is, at least, voidable at the option of those interested in an advantageous sale of the property."

The principal case is also approved, as to this point, in *Ferguson v. Gooch*, 94 Va. 8, 9, 26 S. E. Rep. 397; *Harrison v. Manson*, 95 Va. 508, 29 S. E. Rep. 420; *Tennant v. Dunlop*, 97 Va. 241, 33 S. E. Rep. 620; *Smith v. Miller*, 98 Va. 541, 37 S. E. Rep. 10; *Walker v. Ruffner*, 32 W. Va. 306, 9 S. E. Rep. 218; *Feamster v. Feamster*, 35 W. Va. 13, 13 S. E. Rep. 57.

See also, *Buckles v. Lafferty*, 2 Rob. 292; *Carter v. Harris*, 4 Rand. 199; *Bailey v. Robinsons*, 1 Gratt. 4; 4 Min. Inst. (4th Ed.) 246, 659, 673; *Bart. Ch. Pr.* (2nd Ed.) 1164.

†**Original Bill.**—See *Pennybacker v. Switzer*, 75 Va. 689.

three of the sons, and the husbands of two daughters and their wives, against Hambleton Helms and four others of the children, all of whom lived out of the State, and were proceeded against by publication, for the sale of the land and the slaves of which John W. Helms died possessed. In their bill the plaintiffs alleged that the land could not be divided among the eleven children without materially impairing the value of the separate interests.

At the February term, 1863, of the County court, a decree was made, by which Fleming Howery and George M. Helms were appointed commissioners to sell the land and slaves—the land upon a credit of one and two years, and the slaves upon a credit of six months; or the commissioners might deduct the interest and receive the whole amount in cash if the purchasers desired it.

Subsequently (but the record does
4 not give the date) *Fleming Howery returned a report, in which he stated that on the 20th of March, 1863, he had made sale of the land and slaves; and, among the other purchases, he reported that the home tract of land, containing four hundred and forty-seven acres, was sold to John W. Helms at \$30 per acre, equal to \$13,410; that he had deducted the interest, as authorized by the decree; and had received in cash, on this tract, \$12,203 10.

He made a supplemental report, stating that proceedings had been instituted against him in Floyd circuit court, by Hambleton Helms' creditors, to get his share of the proceeds of the sale.

The cause afterwards coming on on the report, it was confirmed by the court and a conveyance to Helms was ordered, and the commissioners were directed to collect the bonds given for the slaves, and after paying the expenses of sale and costs of suit, and their commissions, to pay over the balance of the proceeds of the sale of the land and slaves, one-eleventh thereof to each of the children of John H. Helms—the commissioners to retain the share of Hambleton Helms until it is ascertained who is entitled to it.

In February, 1867, Hambleton Helms and the other parties who had been proceeded against as absent defendants, in the suit above mentioned, as well as Roley Simmons and Malinda his wife (the latter a daughter of John M. Helms, deceased, who had been plaintiffs in the previous suit), instituted a suit in the Circuit court of Floyd county against Fleming Howery and Eliza his wife, George M. Helms, John W. Helms and Tazewell Helms, and in their bill they charged that Howery purchased the tract of four hundred and forty-seven acres at the sale made by himself, and reported to the court that the land was sold to John W. Helms; that this report was confirmed and

a conveyance was directed to be made
5 to John W. Helms. They insist*that this was a fraud, that the sale was void, and they ask that it may be set aside.

The bill was dismissed as to Simmons and wife at their own instance, and they

filed their answers as defendants, taking the same grounds as were taken in the bill; and they say that they have not received any money under the decree in the first suit.

Fleming Howery, George M. Helms and Tazewell Helms answered the bill. They objected to the jurisdiction of the court, on the ground that the previous cause was still pending in the County court, in which all the parties to this cause were parties. They said the land was purchased by John W. Helms and the sale reported to the court and confirmed, and Howery was directed to pay the money to the parties, and also to convey the land to John W. Helms. That he had collected the money and paid to John W. Helms, George M. Helms, and Tazewell Helms and his wife, their full distributive shares of said estate. That Howery, under the direction of the judge of the Circuit court of Floyd, funded the shares of the non-resident defendants and of the home defendants who would not receive the money, in bonds of the county of Floyd, in their names respectively. That it is true Howery did bid for the land, but his bidding made it sell for much more than it otherwise would have done. They filed with their answer the deed from Howery to John W. Helms, dated , 1863, but recorded September 29th, and also a deed from John W. Helms to Howery, dated December 27th, 1863, and the Floyd county bonds, in which he had invested the shares of the estate of the parties who lived out of the State or refused to receive the money.

There was no doubt that Howery purchased the land at the sale made by himself; and that it sold for a full price. The sale was, of course, during the war, and for Confederate money.

6 *When the cause came on to be heard, the court made a decree, setting aside the sale, and the deeds from Howery to John W. Helms and Helms to Howery, and Howery was directed to convey the land to the heirs of John W. Helms. And after directing an account of rents, the court being of opinion that the said tract of land cannot be conveniently partitioned, decreed a sale thereof on terms mentioned in the decree, with directions to the commissioners to report to the court. From this decree Howery obtained an appeal.

The Attorney-General, for the appellants, insisted that a sale by a commissioner to himself would not be set aside as a mere matter of course, but that there must have been something unfair in the mode of conducting the sale. *Custis v. Snead*, 12 Gratt. 662; *Cox v. McMullin*, 14 Id. 82; 2 John. Ch. R. 252; *McKey ex'or, &c. v. Young*, 4 Hen. & Munf. 430; *Anderson & al. v. Fox & als.*, 2 Id. 245; *Quarles v. Lacy*, 4 Munf. 251.

Wade, for the appellees, insisted,

1st. That a sale by a commissioner to himself was a fraud in law, for which the sale would be set aside. *Davoue v. Fanning*, 2 John. Ch. R. 252; *Michoud v. Girod*, 4 How. U. S. R. 503; *Moore v. Hilton*, 12

Leigh 1; Buckles v. Lafferty, 2 Rob. R. 292; Baily's adm'x v. Robinsons, 1 Gratt. 4.

2d. That it was no objection that the decree was for a resale out and out, and not at an outset price. That rule is for the benefit of the party who complains of the sale, and the appellee could not complain.

JOYNES, J., delivered the opinion of the court.

The court is of opinion that it appears, from the evidence in the cause, that the appellant, Fleming Howery, was the real purchaser of the land in the proceedings mentioned, at the sale made by him on the

20th day of March, 1863, as commissioner of the *County court, under the decree of that court, rendered at February term, 1863, although John W. Helms was the nominal purchaser, and was by the said Howery reported to the said county court as the real purchaser, and that such purchase by the said Howery, at his own sale, was fraudulent in contemplation of law; and that any party interested was entitled to have the said sale set aside and annulled, as of course, without proof of actual fraud, according to the principles recognized by this court in the cases of Buckles v. Lafferty, 2 Rob. R. 292; and Baily's adm'x v. Robinsons, 1 Gratt., 4. And further, that the said Fleming Howery was guilty of a fraud upon the said County court, as well as upon the plaintiffs in this cause, in falsely reporting to the said County court that the said John W. Helms was the real purchaser; and in procuring from the said County court, by means of the said false representation, a confirmation of the said pretended sale to the said John W. Helms.

The court is further of opinion that, by reason of the said illegal and fraudulent conduct of the said Fleming Howery, it was competent for the plaintiffs in this cause to file their bill in the Circuit court, to have the said sale, and the deed from the said Fleming Howery, commissioner, to the said John W. Helms, and the deed from the said John W. Helms to the said Fleming Howery, set aside and annulled, without resorting to the said County court for relief; and the more especially, since the said plaintiffs were non-residents of this Commonwealth, and were ignorant of the said illegal and fraudulent conduct of the said Fleming Howery until after a final decree had been rendered in the said County court at September term, 1863.

The court is further of opinion, that it was competent for the said Circuit court to proceed in this cause to give the plaintiffs full relief, by a partition or sale of the land in the proceedings mentioned; and

8 that, although, *in a suit for the partition of land, it is the duty of the court, before making a decree for a sale, to ascertain by an enquiry by a commissioner, or otherwise, that partition cannot be made in some of the modes provided by the second and third sections of chapter one hundred and twenty-four of the Code, without a sale;

yet, inasmuch as no such enquiry was asked in the Circuit court, and the appellants did not suggest to the said court, in their answer or otherwise, that partition of the said land could be made without a sale, and as the appellants procured the decree for sale made in the County court, the appellants cannot raise the objection in this court that the propriety of a sale was not ascertained by the Circuit court, and insist upon it as a ground for reversing the decree of that court.

The court is further of opinion that, although it is the usual and proper course in ordering a resale, in cases like the present, to direct the property to be offered at an upset price, that practice is adopted for the advantage of the parties interested in the property, and for whose benefit the resale is to be made, so that the said Fleming Howery cannot object to the decree of the Circuit court upon the ground that it contains no such direction. And as the appellants, George M. Helms, John W. Helms, and Tazewell Helms, have received from said Fleming Howery their several shares of the proceeds of the sale made under the decree of the County court, and with a full knowledge of all the facts, insist that the said sale ought to stand and be confirmed, the court is of opinion that they must be taken to have ratified the said sale, and that the shares of the proceeds of the sale to be made under the decree of the Circuit court, which would otherwise have belonged to them, will belong to the said Fleming Howery; so that the said appellants cannot object to the decree of the Circuit court, because it does not direct the property to be offered at an upset price.

9 *The court is further of opinion that, inasmuch as the sale of the land, and the title of the appellant, Fleming Howery, are set aside and annulled in consequence of the illegal and fraudulent conduct of said Fleming Howery, he has no right to throw upon the appellees any risk of loss from the investment in the bonds of Floyd county; and that all that he can properly ask is that said bonds shall be delivered to him as his own property, as directed by the said Circuit court.

The court is therefore of opinion that there is no error in the principles of the said decree of the said Circuit court.

But the court is of opinion that the said Circuit court ought to have directed an enquiry to ascertain what is the interest of Hambleton Helms in the land in the proceedings mentioned, and that the said land should not be sold until after such enquiry had been made and the result thereof ascertained; and further, that the said Circuit court should not have directed the said Fleming Howery to convey the land in the proceedings mentioned to the heirs of John W. Helms, dec'd, as such a conveyance is not necessary, and it would have the effect of vesting interests in the said land in the appellants, George M. Helms, John W. Helms, and Tazewell Helms, who are not entitled to any such interest; and that the

said decree of the Circuit court ought to be corrected and amended in those particulars. Therefore, it is decreed and ordered that the said decree of the said Circuit court be amended in the particulars before mentioned, and that the said decree, as so amended, be affirmed; and that the appellants pay to the appellees their costs by them expended in this court, and thirty dollars damages; which is ordered to be certified to the said Circuit court of Floyd county.

Decree amended and affirmed.

10 *Ellyson & als. Ex Parte.

November Term, 1870, Richmond.

1. **Statute—County and Corporation Courts Can Vacate an Election.**—Under § 69, of the act to provide for general elections, Sess. acts 1870, p. 97, the county and corporation courts have authority to vacate an election.
2. **Same—Same.**—Though a person voted for has received the return and has qualified and entered upon the discharge of the duties of his office, the court may vacate the election, and direct another election to be held.
3. **Writ of Prohibition—Its Function.***—The writ of prohibition is only a proper proceeding to restrain a judge from exceeding his jurisdiction; and not to correct an erroneous judgment in a case in which he has jurisdiction.

This was an application to this court by Henry K. Ellyson, mayor of the city of Richmond, Thomas U. Dudley, sergeant of the city, and other city officers, for a writ of prohibition, to restrain the judge of the Hustings court of the city and the sergeant of the city from issuing and enforcing the writ of election which the judge had directed to be held for the purpose of electing a mayor of the city and other city officers, and asking that the said writ might be superseded.

***Writ of Prohibition.**—In *Nelms v. Vaughan*, 84 Va. 608, 5 S. E. Rep. 704, the court, citing the principal case, among others, said: "In considering this question we will remark that the writ of prohibition is issued by a superior court directed to the judge and parties to a suit in an inferior court, commanding them to cease from the prosecution of the same, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. The writ of prohibition may also be issued when, having jurisdiction, the court has attempted to proceed by rules differing from those which ought to have been observed, or when by the exercise of its jurisdiction the inferior court would defeat a legal right, the consideration of which has often occupied this court, whose decisions are to be found numerous reported."

In *McConiha v. Guthrie*, 21 W. Va. 148, the court said: "In *ex parte* Ellyson, the court says: 'We cannot enquire whether the court had jurisdiction and authority in the particular case. That would be to convert a writ of prohibition, which proceeds upon an excess of jurisdiction, into a writ of error, which

On the 4th Thursday in May 1870, an election was held in the city of Richmond for mayor, sergeant and the other city officers; and the commissioners of election declared and determined that Henry K. Ellyson was elected mayor, Thomas U. Dudley was elected sergeant, and the other petitioners and others were elected to their respective offices.

On the 4th of June 1870, a petition was filed in the clerk's office of the court of Hustings of the city, by fifteen citizens of Richmond, complaining of the action
11 *of the commissioners of election in declaring Ellyson, Dudley and their associates to be elected. They stated in their complaint, that the judges of the election had made out their returns of the election and delivered the same to the clerk in due conformity to law. That by these returns it appeared that George Chahoon received a majority of the votes cast for mayor, Charles S. Mills received a majority of the votes cast for sergeant, and that other persons named had received a majority of the votes cast for their offices respectively. That notwithstanding this the commissioners of election had declared that Ellyson, Dudley, and their associates were elected; and that the clerk of the court of Hustings had certified accordingly to said parties. And the petitioners pray that the said false and wrongful declaration and determination of the commissioners of election and certificates of the clerk may be annulled and set aside; and that the judge may enquire and determine what is the true meaning and effect of the said returns of the judges of election, and adjudge and determine what persons received a majority of the suffrages of the electors according to said returns; and that the persons so adjudged and determined to have received a majority of said suffrages may be duly certified of that fact.

Ellyson, Dudley and the other parties who had received the certificates, except one,

proceeds upon an error in the exercise of jurisdiction,' 20 Gratt. 24. The rule seems to be well established that, where the inferior court has, originally, jurisdiction of the cause, prohibition will lie only in cases where such court, during the conduct of the trial, clearly exceeds its proper jurisdiction or powers in some collateral matter arising on the trial, but unless it has so exceeded its authority, on an application for a prohibition, the court above will not enquire whether it has decided right or not. 3 Bl. Com. 112; *Washburn v. Phillips*, 3 Metc. 296."

See also, on this subject, *Hogan v. Guigon*, 29 Gratt. 705, and *foot-note*, where cases in point are collected; *French v. Noel*, 22 Gratt. 454, and *foot-note*.

In *Richardson v. Farrar*, Judge, 88 Va. 766, 15 S. E. Rep. 117, the court, citing among others the principal case, said: "The facts in this case disclose a charge of fraud, injurious to all the people of the county of Prince Edward, tainting alike and equally affecting the title to office of one and all the defendants named; and, both at common law and in equity, the defence of misjoinder of defendants is not allowed to be made in cases of 'tort,' nor in cases of fraud."

filed their response to the petition. They deny that the judges of election in several of the precincts made out their returns in conformity with law. They deny that it appeared by said returns of the judges of election that George Chahoon, for mayor, and the other persons for the respective offices named in said complaint, or any of them, received a majority of the ballots cast. On the contrary the respondents aver, that it appeared by the lawful returns made by the judges, that the said Chahoon and other persons did not, but that respondents *did, receive a majority of the ballots cast for the respective offices aforesaid. That it therefore is not true that the said commissioners of election in violation of law declared and determined that these respondents were elected to said offices respectively. And they insist that the said George Chahoon, &c., are not nor is any of them entitled to a certificate of election, &c. And they insist that they are entitled to said certificates on all the grounds and reasons to which appeal can lawfully and justly be made, to wit:

1. That the lawful returns of the judges of said election required said commissioners so to determine and award the certificates.

2. That a majority of all the lawful votes cast in said election were given and cast for respondents severally, for said offices respectively, and not for any other person or persons.

The respondents further averred that a large number of illegal and fraudulent votes were cast at the election; that one thousand and twenty-one illegal and fraudulent votes so given were given or cast for each and every the said George Chahoon, for mayor, and other persons for the respective offices named in said complaint, and against the respondents. And they set out the number of said votes cast at different precincts of election. They aver that in the conduct of said election the election law was grossly disregarded and violated in important and essential provisions. And they each insist, that they should not be involved in a contest over title to an office, except with some one who claims the office himself.

The councilmen and magistrates for Jefferson ward put in a separate response to the complaint, in which they object that the complainants were not proper persons to contest their election; and the complaint was dismissed as to them.

Upon the filing the answer of Ellyson, &c., the complainants *moved the court to strike out and exclude such portions of the answer as related to illegal and fraudulent votes; which motion the court sustained.

After a contest which lasted for nearly a month, the judge declared the election of the general officers mentioned in the complaint to be vacated and void, on two grounds: 1. The severance of the judges of election into two sets, holding two separate elections, in Jefferson ward. 2. The disregard by the judges in that ward of the provision of the statute which requires that

the ballots shall be counted and the number of votes cast for each person voted for ascertained, and the tickets distinctly read and canvassed.

On the first point it appeared, that for the first hour after the polls were opened and the voting had commenced, there were but two judges present; that after an hour a third judge was elected by the two; that for the first hour one judge at the window took the coloured votes, which were listed by one clerk, the other judge took the white votes at the door, which were listed by the other clerks; that when the third judge was appointed he attended to the coloured voters, and so throughout the day; that the voting places were some distance from each other, but in the same room; that the white and coloured were voting at the same time, and the clerks and judges were attending to those votes they were taking, and not to the others.

On the second point it appeared—That the ballots were counted after the voting was over, the white and black together, and the number 1,034 made out; that the ballots were not strung upon a string; that the judges read out and counted each ballot, as required, until about 3 o'clock the next morning, when they got tired and stopped reading them, looked at each ticket to see if it was headed conservative or republican, placed them in two piles, the scratched tickets in a third, giving for each ticket headed conservative or republican, *a vote to each conservative or republican candidate, the offices to be filled numbering twenty-one.

On the 23d of September 1870, A. B. Guigon, judge of the Hustings court of the city, issued his writ directed to the sergeant of the city, in which reciting that a vacancy had occurred in the office of mayor in the city, he directed the sergeant to hold an election to fill the vacancy on the 8th day of November: And similar writs were issued as to the other offices which had been vacated by his previous judgment. And in pursuance of these writs the sergeant gave notice of the elections to be held on that day.

To prevent the election so ordered by the judge this petition was filed; and with it a copy of the record of the case in the Hustings court. The petitioners insisted that the Hustings court having jurisdiction in the premises only in virtue of § 69 of the act to provide for a general election, approved May 11th, 1870, had authority only to determine which of two claimants to any of said offices had right to the certificate of election thereto; and that said Hustings court had not by law, any jurisdiction or authority whatever to annul and vacate the entire election. That the only contest allowable in said court under said section, upon complaint by fifteen citizens or otherwise, is one between individual competitors for the specific office in question, and not a contest between the Commonwealth and a certified claimant or an incumbent of office, to try his title thereto, as if by quo war-

ranto at common law. That there therefore cannot be and has not been a judgment of ouster under said § 69. And the petitioners having been duly elected and certified as elected, and having duly qualified and entered upon the duties of their respective offices as aforesaid, still continue, as they are advised is their right, in the full possession and in the faithful exercise of their offices. They insisted that the judge of

15 the Hustings court had no authority *to vacate their offices, and in awarding writs of election, is acting beyond his jurisdiction and without authority of law; and they therefore pray a writ of prohibition may be awarded to inhibit the said A. B. Guigon from issuing and enforcing the said writs of election and to command him to supersede the same, and to prohibit the sergeant of the city from enforcing said writs, or from holding any election in obedience thereto, or any of them. The case was heard upon the motion for the writ, and was argued by Crump and Neeson for the petitioners, and by Ould for the judge.

For the petitioners. The judge of the Hustings court declared the election which had been held null and void, but he did not award any certificate of election; and the persons who received the certificate have qualified and hold their offices: There has never been an ouster or removal of any of them from their offices. This we take to be an important fact in the case; as the question is not whether the judge of the Hustings court can issue his writ to fill a vacancy, but whether he can order an election for an office where there is an officer in it who holds it by the evidence of authority which the law has provided. We insist that where a party who has received the certificate has qualified and entered upon the discharge of the duties of the office, the office is not vacant, and it can only be vacated by due process of law. And this brings us to the consideration of the election law, and especially of the § 69 of the act, which is the only authority of the judge of a Hustings or county court, to take any cognizance of election contests.

After the adoption of the constitution of 1851, the act of 1852, ch. 71, p. 64, Sess. acts of 1852, was passed, providing for the general elections, of which § 9 is the same as § 69 of the present act, with the addition to the latter of the closing sentence.

16 And in 1858 another *act was passed, of which § 67 is the same as § 9 of the act of 1852. Sess. acts 1857-58, ch. 20, p. 29.

Under the law as it existed prior to 1851, there was no occasion to provide any mode of turning out an incumbent of an office; because the writ of quo warranto provided for the case. The act of 1852 provides for cases where the parties had not been inducted into office. When the writ of quo warranto was served on an officer he was obliged to come in and state and prove his right to it. Angel & Ames on Corp. § 731, &c., § 738 and notes, § 744, § 756 and note. Then there was remedy by mandamus for compelling an officer to perform some spe-

cific duty. Harrison v. Emerson and others, 2 Leigh 765; Ex parte Goodsby, 2 Gratt. 575. And there was the remedy by prohibition, to restrain and keep the officer within the limits of his authority.

This was the state of the law when the constitution of 1851 was adopted, and the act of 1852 was enacted. These common law remedies provided for every case but one; that was to enquire before a person went into office, who was entitled to it: And that is the whole scope and object of these acts. They have now been in operation for eighteen years; and this is the first case in which it has been held that they gave to the court all the powers of the old common law writs.

If we look to the state of the law at the time the act of 1852 was passed, we will see that nothing additional was necessary but a law to provide for the identification of the person elected to an office; all other cases were provided for by the common law remedies. The General Assembly exhibited great ingenuity to provide for a fair and just election; but it was still necessary to entrust important powers to the officers conducting them; and there might be error or misconduct, and this § 69 was intended to provide a remedy in such cases. If this was all that it was necessary to provide

for, can the court under any settled 17 principles of construction, *extend this act to embrace the writ of quo warranto and mandamus, as well as to supply the want which arose under the new system.

It may be that the new law is or was deficient, certainly not an uncommon circumstance, but such defects are to be remedied by the legislature, not by the court. We deny that the proceeding under this act is intended to substitute the high prerogative writ of quo warranto. A proceeding under this § 69 may be had against a man which may be found in his favor. Surely this would be no bar to the proceeding by quo warranto, on the part of the Commonwealth, if after he has gone into office he is found to be constitutionally disqualified. The County courts have never had in Virginia, jurisdiction in quo warranto, mandamus and prohibition. This jurisdiction has been confined to the Circuit courts and the court of Appeals. This act gives to the County courts a certain amount of power, and declares that the judgment of the court shall be final and conclusive. And if this jurisdiction embraces all that is claimed for it, and is exclusive, as is contended, it must all be commenced within ten days after the election; and the act provides no mode by which the Commonwealth may come in and correct the errors or wrongs which may be committed in an election. Now the Commonwealth is not barred by the statute from filing an information in the nature of quo warranto. 2 Va. Cas. 51.

We have been referred to a case from Pennsylvania to show that the State is bound by the decision of the County court. The case is not authority here; and we have

not the Pennsylvania statute. We know nothing of the policy of that State on the subject of elections; what is the character of their court of Common Pleas, whether it has power to issue writs of quo warranto, and can the State intromit in that event in such cases.

18 *Dissatisfaction at the result of elections is very common; will this court hold that a County court may, at its caprice, determine finally in all cases that the elections are void. It is a mooted question whether votes given to a person disqualified legally to hold the office, are to be counted or considered as thrown away. Some say if the disqualification was known at the time of the election they are to be considered as thrown away; if it was not known they are to be counted. Are these County courts to decide such questions as this finally, and without any mode of redress? Suppose it is alleged that the person who has received the largest number of votes is insane: Is that to be tried by this County court? Or suppose the charge is that voters have been intimidated, and thus prevented from voting: Is the County court to decide finally and conclusively what is and what is not the kind or degree of intimidation which will avoid an election? And so the same enquiry may be put as to floods, contagion and many others; all of which may and must come up before these courts, and be finally and conclusively decided by them if the pretensions of the other side are sustained by this court. On the other hand if our construction of this act is sustained, and the writ of quo warranto is to be resorted to, it will be decided by a court into which the Commonwealth may go; there will be a jury; and there may be exceptions and an appeal.

By § 69 of this act a certain privilege is given to fifteen voters. They have no right from any other source. They have no right to ask for a quo warranto or mandamus. These are to be prosecuted by the attorney-general. All they can do is to complain of an undue election, or a false return; and the complainants must set out the facts upon which their complaint is based. An undue election and a false return are distinct facts. There may be a true re-

19 turn and yet an undue *election; and there may be a due election and yet a false return. The complaint in this case was of a false return. And they now contend that when they got into court they had a right to make up an issue on any ground they pleased. They made their election to proceed for a false return; but the court instead of deciding upon that issue, whether or not the return was false, declared the election void.

The election is the choice of the person, not the act of holding an election. The causes of an undue election is a legislative, not a judicial question. These fifteen citizens are to complain that some man has been unduly elected; and on that complaint it is not for the court to say what will occasion an undue election; but whether it is

such according to the provisions of the statute.

When we look to the concluding sentence of this § 69, which is an addition to the previous acts, we are, as we think, forced to the conclusion, that the law is intended only to embrace those cases which might not be corrected by the former common law remedies, and where there are two or more persons contestants claiming the office. That sentence is: "When the contest is decided, a certificate of election shall be issued to the party in whose favor the contest is decided, in the manner prescribed by law, unless a certificate has been previously issued to such person. This is the only judgment which the court is authorized to render. The certificate is to be given to the one or the other claimant; and the authority to set aside an election is excluded by the very terms of the judgment which the statute requires the court to pronounce." We refer to Sedgwick on Const. and St. Law 242, and 296, for rules in construing statutes of this nature. The dictum of the judge, and it is but an obiter dictum, in *Ferguson v. West*, 16 Gratt. 270, "that the contest may be carried on against his knowledge or against his wish,"

20 *could not have been used, if this concluding sentence of this § 69 had formed a part of § 9 of the act of 1852, under which the case of *Ferguson v. West* was decided: Under this act clearly there must be two parties before the court contesting and claiming the office.

Upon the question of the jurisdiction of this court to grant the writ in this case we refer to *Mayo, mayor v. James*, 12 Gratt. 17; and *Ferguson v. West*, 16 Gratt. 270.

For the Judge. The simple question before the court is whether the judge palpably exceeded his jurisdiction in rendering the judgment setting aside the election.

Sections 40, 41, 42, of the statute, provided for five commissioners of election, whose duties were merely ministerial. They are to take the votes, count them, and certify who has secured the greatest number of votes. And so purely ministerial are their duties, that they are bound to give their certificate to the person who has the highest number of votes, though they know that his majority is made up twice or ten times over, by bad votes. And the application to the judge was in the nature of a mandamus to open the votes which the commissioners had refused to do and to count them. This was all that we asked. When the other party came in, they said—Though the commissioners did not count the votes at one precinct, yet they were elected because of fraud in our favor. This we moved the court to strike out, not on the ground taken by the judge, but because it was not responsive to our complaint.

Upon the construction of this statute we insist that this judge had all the powers which could be exercised under the writ of quo warranto and mandamus; and that his authority is exclusive. And the judge held that he had no power to examine a vote;

but that all other frauds or violence might be enquired into.

21 *Under this § 69, of the act, clearly the enquiry is the undue election or false return. The other matters are means to the end. This is the power and jurisdiction of the court. One enquiry is—was there an undue election? If it was not held on the right day, that is conceded to be an undue election. Then what judgment must the judge render? What has that to do with contestants? What other judgment can he render than that there was no election? Suppose it could be shewn that the polls had been kept open but half the day, and that a large portion of the voters had thereby no opportunity to vote. Suppose both candidates were non-residents or under age, or had committed a felony: In all these cases the only judgment that could be rendered is, that there was no election. Suppose only one of the candidates was a non-resident: The great weight of authority is that the election is void. *People v. Cook*, 4 Seld. R. 67. This case gives some cases of irregularity which would not defeat it, and others which would defeat it. Suppose a gang of rowdies take possession of the polls and stuff the boxes or take out ballots: There is certainly an undue election; and these are all cases in which the court must have jurisdiction by the plain letter of the statute.

In New York the proceedings are all in the name of the people; and there the writ of quo warranto is abolished. In Virginia this question has been decided, in the case of *Ferguson v. West*, 16 Gratt. 270. The fifteen citizens are in the place of the people. What is their proceeding but a quo warranto? The returns are the proper subject of a mandamus, the undue election of a quo warranto. The act gives to the court all the authority which would be exercised, either by mandamus or quo warranto. The first clause provides that the returns of elections of county, corporation and township officers shall be subject to the enquiry, determination and judgment of the respective County and Corporation

22 *courts, upon complaint, &c., of an undue election or false return. And it then provides that the said courts, in judging of said elections, shall proceed upon the merits thereof, and determine finally concerning the same. No language could be plainer to give the authority to determine upon the validity of the elections.

I might contend that this first clause confers the jurisdiction; and that the second clause of this section relates merely to proceedings in a particular case. But if the first clause were stricken out of the act, the second gives the authority; the authority to declare that one of two persons is elected is an authority to declare that neither is elected. Why take testimony to invalidate an election, if the court cannot adjudge it invalid? How is the court to proceed upon the merits, if the merits are to be excluded from his determination? As to the sentence added to this section in the

late act, it is merely directory, and is to be applied according to the nature of the case.

I dismiss this branch of the case by saying that, even if, as contended by the other side, the second paragraph of § 69 refers to a contest between two individuals, contestants for the office, the first applies to all matters of complaint concerning an election; and under it the court, in judging of the election (not the contest), shall proceed upon the merits of the election, and determine finally concerning the same. This was the view held by the court in *Ferguson v. West*, 16 Gratt. 270.

But this statutory proceeding is not only plenary; it is exclusive. *Commonwealth v. Leech*, 44 Penn. R. 332; *State v. Marlow*, 15 Ohio St. R. 114.

There is another view to be taken of this subject. Suppose that the true meaning of the statute is as is contended for on the other side. Did the judge of the Hustings court, when he interpreted it otherwise,

23 transcend his jurisdiction, or simply commit an error of judgment? If the latter, then, according to all the authorities, prohibition does not lie; the complaint was certainly within his jurisdiction. *Arnold v. Shields*, 5 Dana R. 18; *People v. Marine Court of New York*, 36 Barb. R. 341. "The writ of prohibition does not issue to correct errors or irregularities in administering justice by inferior courts; but to prevent courts from going beyond their jurisdiction in the exercise of judicial power in matters over which they have no cognizance."

The jurisdiction over the subject matter is conceded, and it is contended by our opponents that the judge, in considering this subject matter within his jurisdiction, should have given a different judgment. This, if true, is only error, to which prohibition does not lie. *Buller, J.*, opinion in *Ld. Camden v. Home*, 4 T. R. 382, 396-7; *Mayo, mayor, v. James*, 12 Gratt. 19. Nor can the writ of prohibition be issued to a ministerial officer; but only to a court or party. 1 Hill's R. 195. Nor can it be issued to a judge after sentence, and he has nothing further to do. *United States v. Hoffman*, 4 Wall. U. S. R. 158.

Suppose the prohibition issues, and the election is prevented: what is the situation of affairs? The prohibition does not reverse the judgment declaring the vacancy: that still stands. The temporary appointments made by the judge stand; and they continue to hold until the general election. Who, under this proceeding, is to fill the offices afterwards? Nor is the dilemma any less if it be replied that the present incumbents will fill the offices; for in that event the court, by its prohibition, determines who shall hold the whole term. *State v. Allen*, 2 Ind. R. 183.

JOYNES, J., delivered the opinion of the court.

This case depends upon the question, whether a county or corporation court has

jurisdiction and authority to decide, in the case of a contested election, that
 24 *there has been no valid election, and thereby to create a vacancy, to be filled in the manner provided by law. If a county or corporation court has such jurisdiction and authority in any case of a contested election, the petitioners have no right to a writ of prohibition. We cannot enquire whether the corporation court of Richmond had or had not such jurisdiction and authority in the particular case. That would be to convert a writ of prohibition, which proceeds upon an excess of jurisdiction, into a writ of error, which proceeds upon an error in the exercise of jurisdiction. It has accordingly been contended, on the part of the petitioners, that the authority conferred upon the county and corporation courts to determine contested elections, applies only to cases in which two or more persons have been voted for, for the office in question; and that, in every such case, the court is bound either to allow the person who has already received a certificate of election from the commissioners, to retain it, or to give it to another person who was voted for at the election; and that it cannot, in any case whatever, decide that there has been no election, so as thereby to create a vacancy.

The authority of county and corporation courts to determine cases of contested elections, is conferred by section 69 of "an act to provide for a general election," approved May 11, 1870. (Sess. Acts p. 97.) This section is a transcript, in all essential particulars, except only the clause comprised in the last four lines, of the 9th and 10th sections of the general election law of 1852, (Sess. Acts pp. 65-6), which were re-enacted in the 67th and 68th sections of the general election law of 1858. (Sess. Acts pp. 29, 30.)

The complaint must be filed within ten days after the election. It is to be heard at the next term of the court, which sits every month, unless good cause be shewn for a continuance. The case is to be
 25 determined *by the court, without a jury. As soon as the complaint is filed, the parties may proceed to take depositions, and the case is to be heard upon the depositions and upon oral testimony, if any. And the decision of the court is declared to be final. It was obviously the purpose of the legislature, in this section, to provide as cheap and expeditious a remedy as the case would admit of, and to close all such controversies in the shortest practicable time.

In the absence of such a provision as this section supplies, it would have been necessary to resort to the writ of quo warranto, to oust an officer alleged to have been unduly elected. That writ could only be obtained from the Circuit court, which sits but twice a year, except in a few towns having Hustings courts with Circuit court powers; and its judgment would not be final, but subject to review upon a writ of error.

In many cases, especially of annual offices, it would have been in the power of a candidate, fortunate enough or dexterous enough, to secure the certificate of the commissioner, by the help of a little management, to wear out the term of office in litigation. And it would often be impossible, with the utmost diligence, to bring a litigation, fairly conducted, to an end, until the term had run out, or so much so that what was left of it would not be worth contending for, or worth having. This obvious policy of the statute must be borne in mind in putting a construction upon it.

The opening clause of the 69th section provides, that the "return of elections shall be subject to the enquiry, determination, and judgment" of the court. From this it is argued, that the authority of the court is limited to an examination of the returns. The complaint of the fifteen voters, however, may be of an "undue election or false return." It is provided that the court, "in judging of said election, shall proceed upon
 26 the merits thereof, and determine finally concerning the same." *Depositions may be taken "to sustain or invalidate said election."

We are not called upon, in this case, to define the scope of investigation and enquiry authorized by those provisions. But it seems to be very clear, that it is not restricted to a mere examination of the returns; and, moreover, that it may be such as to "invalidate" the election: in other words, such as to show that there has been no legal and valid election. The election which is contested, may be invalidated for the reason that the entire election was illegal and void; if the enquiry may take that scope, does it not follow that the judgment of the court may respond to the enquiry? Why authorize the court to enquire into what it cannot determine?

But it is contended that the latter part of the section, and especially the last clause, limits the jurisdiction of the court to cases of contest between competing candidates. This part of the section speaks of the party "whose election is contested," and directs that the court shall proceed, at the next term, to "determine said contests." The first of these expressions obviously refers to the proceeding authorized by the first clause; for no other contest is provided for. So too, "the said contests," which the court is to determine, are those instituted by the complaint of the fifteen voters; for no other is spoken of or provided for in the previous parts of the section. "Each party" is to be allowed to take depositions; which is said to contemplate an array of one competitor against another. But the section contains no provision for making the defeated candidate a party. The complaint is that of the voters; not his complaint. The officer whose election is contested is to have notice of the complaint of the fifteen voters by service of a copy; there is no provision for any intervention by the defeated candidate, or for the filing or service of his claims or allegations.

27 *And what reason can be assigned for restricting the right of the voters to complain of an undue election, to cases in which there were competing candidates, or more than one person voted for?

Then comes the last clause, which is so much relied upon, and which is in these words: "When the contest is decided, a certificate of election shall be issued to the party in whose favor the contest is decided, in the manner prescribed by law, unless a certificate shall have been previously issued to such person."

As I have said before, this clause is not in the act of 1852, sects. 9-10, or in the act of 1858, sects. 67-8, which are the prototypes of the other parts of this section. What has been said already, seems to be sufficient to establish, that there is nothing in the other parts of this section to confine the jurisdiction of the court to cases of contests between competitors. In the case of *Ferguson v. West*, 16 Gratt. 270, it was held by this court that the jurisdiction of the County court, under the act of 1852, sect. 9-10, was not confined to cases of contest between competitors. Judge Robertson, delivering the opinion of the whole court, said: "These proceedings are novel and peculiar in their character, and seem designed rather for the purpose of ascertaining, on behalf of the public, who has been duly elected, than to enable the candidates to litigate, on their own behalf, the question of right to an office. No contest can be commenced unless complaint of an undue election or false return is made by fifteen or more of the qualified voters, two of whom must make oath or affirmation to the truth of the facts stated in the complaint. This must be filed in the clerk's office within ten days after the election, and the party whose election is contested must, within ten days after the complaint, be served with a copy of it. The defeated candidate, who is the only other party that can be supposed to have

28 any personal interest in the matter, cannot, *at his own pleasure, enter upon the contest, and it may be commenced and prosecuted without his knowledge or against his will. He is not a necessary party, in any stage of the proceedings. Indeed, the complaint may be made and the election set aside where there has been no candidate, except the one whose election is contested." These remarks were not obiter, as maintained by the counsel for the petitioners here. They contained the very gist of the ground on which the court put its decision, that costs could not be given to either party in such a proceeding.

Upon familiar principles, the Legislature of 1870 must be presumed to have known of this decision, and to have intended to reenact the 9th and 10th sections of the act of 1852, in the sense thus put upon them by this court, unless a contrary intention is plainly indicated. The only difference between the 9th and 10th sections of the act of 1852, and the 69th section of the act of 1870 being the addition, at the end of the

latter of the clause quoted above, the only question is, whether an intention to make a change in the law is plainly indicated by this new clause.

We think this clause has no such effect. It does not in terms profess to define jurisdiction, or to limit the scope of other parts of the section, as construed by this court. Those parts of the section which define the causes of complaint, and the duty and power of the court, remain as before. This clause prescribes a single thing to be done in those cases where there is a decision in favor of one of several competitors, but says nothing about the cases in which there was but one person voted for. The purpose was to give to the successful party a certificate. But there could be no difficulty, without this clause, in furnishing to the successful competitor a copy of the order of the court, as evidence of his right. This, or something

29 equivalent, must have been done under the acts of 1852 and 1858, *so that this clause was not at all essential to the rights of the party. Besides, no reason appears why the Legislature should have narrowed the jurisdiction in the mode contended for. And it is obvious, that if the law should be thus construed, it would be wholly inadequate to meet many cases of "undue election or false return."

It was further contended, that as the petitioners have qualified and gone into possession of their respective offices, they can only be deprived of them by a judgment of ouster upon quo warranto.

It is true that no express authority is given to the court to annul a qualification to office, and to oust the incumbent. And so no express authority is given to annul a certificate of election, where there has been no qualification. But the judgment of the court, that the election, under which an incumbent holds, was invalid, and which judgment is made by the statute final and conclusive against him, is necessarily fatal to his title derived from that election. This being so, why turn the case over to another proceeding? Why not put the judgment of the court into operation at once, instead of requiring another proceeding, which will cause expense and consume time, and in which nothing can be litigated?

It was contended by the counsel for Judge Guigon, that this statutory proceeding, in cases of contested election, gives to the court as ample authority as might be exercised on the principles of the common law, upon quo warranto or mandamus, and that it is exclusive of those remedies. He cited for the latter proposition the case of *Attorney-General v. Garriguez*, 28 Penn. St. R. 9, decided upon a statute of Pennsylvania, the material parts of which are in the very same words as our statute. We are not called upon to say what is the full extent of the powers of the court in cases of con-

30 tested election, nor whether the statutory remedy is exclusive *of the remedy by quo warranto or mandamus. But this we may properly say, that the court may exercise all such powers,

consistently with the rules and principles of law, as may be necessary to render its jurisdiction effectual, and that there is no necessity to resort to any other proceeding to oust an incumbent, whose title has been adjudged bad.

It was strenuously insisted, that the power to vacate an election is a dangerous power, and that the Legislature ought not to be held to intend the bestowal of such a power, unless the intention is unmistakably expressed. Such a power may be undoubtedly abused; and so, too, may the power to decide between rival candidates. There may be great temptation to abuse this latter power, in times of high party excitement. There can be no danger, on the other hand, in remitting the power of filling an office to the people, to whom it ultimately belongs. In a doubtful case, it ought to be done, rather than have the office filled by the appointment of any court. Such a course is more consistent with sound policy, more just to the voters, more likely to prevent abuse, and more agreeable to the principles of our government.

The motion to award a rule is denied.

31 *Griffin's Ex'or v. Cunningham.

Washington, Alexandria & Georgetown R. R.
Co. v. Alexandria & Washington R. R.
Co. & als.

November Term, 1870, Richmond.

1. **De Facto Judges—Validity of Judgments.**—The judges of the Court of Appeals who were in office under military appointment when the State was restored to the Union, holding over and continuing to exercise their office, their judgments and decrees are valid and binding.

2. **Enabling Act—Proviso—Unconstitutional.**—The proviso to § 2 of the act of March 5, 1870, called the

*Enabling Act—Proviso—Unconstitutional.—In *Antoni v. Wright*, 22 Gratt. 876, the court said: "A majority of this court, in *Griffin v. Cunningham*, 20 Gratt. 31, went very far in the expression of their sacred regard for this doctrine of vested rights, when they held that decrees of certain persons, who had been detailed or appointed by a military commander, to fill the office of judges of the Supreme Court of Appeals of Virginia, during the military rule, and which were pronounced, after whatever of authority they had under the military appointment had ceased, against the protestation of at least one of the parties who complained, could not be reviewed by this court, because rights had been vested by the said decrees. And that an act of the Legislature which expressly authorized this court to review them, upon the petition of any party who felt himself aggrieved, was unconstitutional. J. STAPLES, in delivering his opinion, said: 'The parties interested in them (the decrees) acquired thereby vested rights, of which they cannot be divested by special enactments of a retrospective character.' Two of the judges held that the pretended decrees vested no rights, and that the law was constitutional."

In *Martin v. S. S. L. Co.*, 94 Va. 36, 26 S. E. Rep. 591,

enabling act, which authorized the Court of Appeals organized under the present constitution to rehear and affirm or reverse the decrees made by the military judges at its term, commencing the 11th of January, 1870, the term having ended before the passage of the act, is unconstitutional:

the court, citing among others the principal case, said: "Immediately upon the rendition of a judgment or decree for money, there arises a contract against the party adjudged to pay in favor of him for whose benefit it is awarded, which the legislature has no power to impair. 'Where,' says Blackstone, 'any specific sum is adjudged to be due from the defendant to the plaintiff in an action or suit at law, this is a contract of the highest nature, being established by the sentence of a court of jurisdiction.'"

In *Roberts v. Cocke*, 28 Gratt. 223, the court said: "Judgments and decrees for money being contracts of the highest character, of course and for the reasons before stated, to abate any portion of the interest included in them, would necessarily impair their obligation. Moreover, by such judgments and decrees the rights of the parties, in whose behalf they were rendered, to the money ordered to be paid, whether principal or interest, have become vested, and cannot be divested, as provided by the act of the general assembly. *Griffin v. Cunningham*, 20 Gratt. 31."

In *Danville v. Pace*, 25 Gratt. 24, the court said: "In that case (*Id. e.*, the principal case) a majority of this court held that an act of the legislature authorizing a review, after the term was ended, of the decrees and judgments rendered by the court of appeals, which sat here before the organization of the present government, was in the nature of a judicial act, and was therefore void. This decision was based upon the obvious ground, that a statute which vacates decrees and judgments, grants new trials, or authorizes rehearings, is essentially judicial in its character. Such an act is the very essence of judicial power, and an invasion of the judicial department."

In *Ratcliffe v. Anderson*, 31 Gratt. 107, the court said: "The province of the courts is to decide what the law is or has been, and to determine its application to particular facts in the decision of causes. The province of the legislature is to declare what the law shall be in future; and neither of these departments can lawfully invade the province of the other. This not only results from the nature of our institutions, but it is enjoined by the express provisions of the constitutions; which declares that 'the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers belonging to either of the other.' See *Griffin's ex'or v. Cunningham*, 20 Gratt. 31, and cases there cited."

See also, *Ex parte Low*, 24 W. Va. 624; *Arnold v. Kelley*, 5 W. Va. 447; *Hall v. Webb*, 31 W. Va. 326; *Herring v. Lee*, 22 W. Va. 671.

In *McCraw v. Williams*, 33 Gratt. 512, the court, citing the principal case among others, said: "Under this state of facts, it is plain that JUDGE ARMISTEAD [a judge *de jure*] was certainly exercising the duties of his office under color of the highest legislative and executive authority, and that all his acts, judgments, decrees, and orders, while so acting, were valid and binding, and cannot be enquired into; but must be recognized in all cases where the county court of Halifax has jurisdiction as a final

and the present court has no authority to rehear such cases.

3. **Decision of Court of Appeals—Motion—Rehearing.**†
—A case decided by the Supreme Court of Appeals at one term of the court, at which no motion is made to rehear it, cannot be reheard at a subsequent term of the court.

The January term 1870 of the military Court of Appeals of Virginia commenced on the 11th of that month, and was terminated on the 25th of February following. On the 31st of January the court decided the case of Griffin's ex'or v. Cunningham, reported 19 Grattan 571, and on the 14th of February the court decided the case of The Washington, Alexandria and Georgetown R. R. Co. v. The Alexandria and Washington R. R. Co., reported in the same volume, p. 592.

After the final adjournment of that court, an act was passed called the enabling act, approved March 5, 1870, by which all officers

32 *on or before the 26th of January, 1870, the day when the representatives

of the State were admitted into congress, and who were qualified to hold office under the present constitution, were authorized to continue in office until their successors should be appointed or elected and duly qualified; with certain provisos which need not be stated. By the second section of that act all official acts theretofore done and otherwise lawful, were declared as legal and binding as if they had been done by officers duly elected and qualified under the Constitution of the State; "provided that any judgment, decree or order, rendered or made by the Court of Appeals at the term thereof commencing on the 11th day of January, 1870, shall be subject to the supervision and control of the Supreme Court of Appeals to be organized under the Constitution, upon the motion or petition of any party to the cause for a rehearing; and such judgment, decree or order may be set aside, or annulled or affirmed, as to said Supreme Court may seem right and proper." The motion or petition to be made on twenty days notice, and within six months after the organization of the court.

determination of such cases, except when reversed on appeal or writ of error." See also, Roche v. Jones, 87 Va. 487, 12 S. E. Rep. 965; Henning v. Fisher, 6 W. Va. 246; Clay v. Robinson, 7 W. Va. 351.

In Dial v. Hollandsworth, 30 W. Va. 9, 19 S. E. Rep. 551, the court said: "See, as to who are officers *de jure* and *de facto*, and usurpers, Montelth v. Com., 15 Gratt. 172; Griffin v. Cunningham, 20 Gratt. 31; McCraw v. Williams, 33 Gratt. 513."

†Decree Final.—In Stuart v. Preston, 80 Va. 626, the court, citing the principal case, said: "It is a settled rule of this court, that a question which has been decided upon the first appeal in any cause, cannot be reviewed or reversed upon any subsequent appeal in the same cause." On this point, the principal case is also cited in Stuart v. Peyton, 97 Va. 814, 34 S. E. Rep. 606. See also, *foot-note* to Campbell v. Campbell, 22 Gratt. 649, where numerous authorities on this point are collected.

After the passage of this act, Griffin's ex'ors, and the Washington, Alexandria and Georgetown R. R. Co., moved the court for a rehearing of the cases of Griffin's ex'ors v. Cunningham, and the Washington, Alexandria and Georgetown R. R. Co. v. The Alexandria and Washington R. R. Co., and the other parties to these causes appeared and opposed the motions.

The case was argued for the motion by Lyons and Marshall, and against it by Gilmer, Howison, Geo. Wm. Brent and Merrick.

CHRISTIAN, J. These two causes were decided by the late Court of Appeals, which was constituted, and organized, under the laws of Congress known as the "Reconstruction Acts."

33 *The decisions were pronounced, and the decrees entered in each case, after the admission of senators and representatives from the State of Virginia into the Congress of the United States.

They are now before this court, upon a motion submitted under the second section of the act of the General Assembly, approved March 5th, 1870, commonly called the "Enabling Act," which is in the following words: "§ 2. All official acts heretofore done by any such officers, and otherwise lawful, are hereby declared as legal and binding as if they had been done by officers duly elected and qualified under the Constitution of this State: Provided, That any judgment, decree or order rendered or made by the Court of Appeals at the term thereof, commencing on the 11th day of January, 1870, shall be subject to the supervision and control of the Supreme Court of Appeals, to be organized under the Constitution, upon the motion or petition of any party to the cause for a rehearing; and such judgment, decree or order may be set aside and annulled, or affirmed, as to said Supreme court may seem right and proper; but twenty days notice of the time of making said motion or filing said petition shall be given to the opposite party," &c.

The sole question now presented for our consideration, is whether the Legislature has the constitutional authority to confer upon this court the power to set aside, annul or affirm, "as to this court may seem proper," the decisions of the Court of Appeals established by the military authorities under the reconstruction laws of Congress.

The question thus presented, is one of the gravest import, because it directly involves the validity and constitutionality of a legislative act. It involves itself into this simple enquiry, Is the act of the General Assembly, as expressed in the proviso contained in the second section above referred to, constitutional?

34 *I premise by saying that *prima facie*, every act of the Legislature is constitutional; and, in a doubtful case, the question ought always to be solved in favor of the validity of the act. The power to declare a legislative enactment void, is one which the judge, conscious of the fallibility of human judgment, will always shrink

from exercising in any case where he can conscientiously, and with due regard to duty and official oath, decline the responsibility. The legislative and judicial are co-ordinate departments of the government, of equal dignity. Each is alike supreme in the exercise of its proper functions, and cannot directly or indirectly, while acting within the limits of its authority, be subjected to the control or supervision of the other. The courts may, in a proper case, and must, when the question is free from doubt, declare legislative enactments unconstitutional and void. It is not, however, because the judicial power is superior in degree and dignity to the legislative; but, being required to declare what the law is, in cases which come before them, the courts must enforce the constitution, as the paramount law, whenever a legislative enactment comes in conflict with it. 18 Wend. R. 53; 7 Ind. R. 334.

In exercising this high authority, the courts claim no supremacy over the Legislature. They are only the administrators of the public will. If an act of the Legislature is held void, it is not because the courts have any control over legislative power, but because the act is forbidden by the constitution, and because the will of the people, therein declared, is paramount to that of their representatives, expressed in any law. The power, however, is a delicate one, and is always exercised with reluctance and hesitation. But it is a duty which the courts, in a proper case, are not at liberty to decline, but must firmly and conscientiously perform.

Fully recognizing the force of these
35 general principles, *and distrusting my own judgment (because I differ with some of my brethren), I proceed to state the reasons which force me to the conclusion, that the proviso contained in the second section of the act approved March 5th, 1870, is unconstitutional, and, therefore, inoperative and void.

Now, if it can be shown that the decisions of the late Court of Appeals, which we are called upon to review, were, in law, valid, judicial acts, it will be easy to demonstrate that any attempt on the part of the Legislature to re-open these decisions, by conferring authority upon this court to re-hear and review them, is an exercise of judicial power which is forbidden by the spirit and letter of the constitution.

Let us consider, then, first, were these decisions valid as judicial acts? or, in other words, were they rendered by a tribunal having the authority to make them? It is undoubtedly true, that the laws of Congress, known as the reconstruction acts, subjected this State to the military authority of the United States. The constitution under which we now live, and under which the legislative, executive and judicial departments of the government were organized, was inoperative, by the express terms of the reconstruction laws, until approved by the Congress of the United States. Under these laws, whose authority is recognized

by every department of the State government, because all are organized and acting under them, the late judges of the Court of Appeals were appointed and installed in office. They were not mere usurpers, and did not intrude themselves into the office and attempt to exercise its high functions without color of authority. Their authority, whether valid or not, was derived from the laws of Congress. Their official acts as a Court of Appeals have been acquiesced in, recognized and made valid, if legislative action was necessary to make them valid,

by the act of the Legislature now under
36 consideration; *for, by that act, they are declared to be "as legal and binding as if they had been done by officers duly elected and qualified under the constitution of their State," except only such decisions as were rendered at the "term commencing on the 11th day of January, 1870."

The counsel for the petitioners do not assail the decisions of this tribunal, upon the ground that they acted without authority, as judges of the Court of Appeals, except to this extent, that they had no authority to act after the restoration of the civil government, which was accomplished on the 26th day of January, 1870, by the admission of senators and representatives from this State into the Congress of the United States. But the position is taken, and the argument is pressed with great earnestness and much plausibility, that on that day the reconstruction acts, by their own terms, became inoperative, and that there was a complete restoration of the civil, and instant termination of the military government under which these judges had received their appointments; that they were but the creatures of the military government, and when that government expired by the restoration of the civil, every office at once became vacant; and those persons who were then exercising their respective functions had no authority to perform any official act; consequently, it was competent for the Legislature to submit to the court appointed under its own authority, the causes decided by the court which preceded it, rendered after the 26th day of January, 1870. These are the grounds succinctly but fairly stated, upon which it is insisted that this court must now assume the right to rehear and review the causes finally disposed of by its immediate predecessors, "and annul, set aside, or affirm the same, as to this court may seem proper."

If the right to rehear and review these
37 decisions can be maintained at all, it can only be done on these *grounds, for if it be admitted that these decisions are valid judicial acts, rendered by a tribunal having competent authority to make them; then, as I shall presently show, there is neither judicial nor legislative power which can ever disturb them; but they must stand irreversible and final. Let us then give these positions a careful and candid consideration.

Is it true that immediately upon the re-

establishment of the civil authority and termination of the military, on the 26th day of January, 1870, every office filled by military appointment became vacant instantan-
 38 Is this true, in fact and in law? It will aid the solution of this question, to recur for a moment to the peculiar circumstances under which the civil rule was restored and the military government was terminated. It is a part of the current, public history, of which this court may judicially take notice. It will be remembered that while this State was subjected to the military authority of the United States, all the executive and judicial officers of the State were removed, and their places filled by the appointees of the military governor. These military appointees were filling all these offices, and exercising their respective duties and functions, on the day when the civil government was restored and the military government terminated, to wit, on the 26th day of January, 1870. On that day there was a Governor, Lieutenant-Governor, and Attorney-General, who had been elected under the present constitution. A Legislature had been elected. But no judicial officers had been appointed under the new government, nor could be, because the constitution provided for their election by the Legislature, or by the people. The organization of the State government was not then perfected. The legislative department was alone complete. The executive department had its chief officers but none of its subordinates. The judicial department was wholly unorganized. On that day there was not a
 38 *single judge, or sheriff, or justice of the peace, or Commonwealth's attorney, constable, commissioner of revenue, notary public, or clerk of court, appointed under the new civil government; and all the various and important functions of these offices, affecting all the multiform interests of society, had either to be performed by the persons then filling them, or were not to be performed at all. In point of fact, the incumbents remained in their respective offices until their successors were appointed and qualified. If they had not so remained, there would have been a period of many months, when there was no judge to award a writ of habeas corpus, no clerk to issue a marriage license or record a deed, no justice of the peace to issue a warrant of arrest, no sheriff or constable to arrest a felon, no jailor to secure a prisoner, no superintendent of a penitentiary to receive a convict. Instead of the restoration of civil government, there would have been the annihilation of all government, with anarchy reigning supreme. Now, what was the duty (to say nothing now of the right; of that I shall speak presently) of these officers, thus circumstanced? Was the judge (before his successor under the new government was appointed) to leave his high place, refuse to discharge its functions, so vital to the interests and peace of society, to the protection of the liberties and security of the property of the citizen? Was

the clerk to close his office, and leave the records of courts and all the muniments of title to be destroyed? Were sheriffs to stop enforcing executions and collecting the public revenues? Were jailors and keepers of penitentiaries to leave their posts, and let prisoners starve or escape? Were public archives and public libraries to be abandoned and left to destruction because there was no auditor or secretary of the Commonwealth to preserve them? Was marriage to
 39 be inhibited, or made a crime, because there was no clerk to issue a *marriage license? Was an innocent man to be hung because there was no appellate judge to award a writ of error? All these, and a thousand other appalling consequences, would have inevitably resulted from the sudden and absolute vacation of all the executive and judicial offices of the government. And, if the question had been free from doubt, if it had been certain that the restoration of the civil rule, by the approval of the constitution and the admission of senators and representatives by the Congress of the United States, had the unquestioned effect to remove from office, instantan-
 every appointee of the military government, they might even then have hesitated, in the face of these inevitable and appalling consequences, to retire before their successors were appointed and qualified to take their places. But the question as to their power to hold over was not free from doubt. It was a question about which there was much discussion in the community, and an honest difference of opinion among the most enlightened citizens of the State. It was the subject of excited and embittered litigation and earnest discussion in this court; and the Legislature itself, in assigning its reasons for the passage of the "Enabling Act," sets forth in its preamble the "grave doubts" which had arisen as to the validity of the acts of these officers, "performed since the admission of the State," and as to their right to continue in office. The schedule appended to the constitution of the restored civil government, which schedule, in its own language, was adopted "in order that no inconvenience may arise," prescribed that "The several courts, except as herein otherwise provided, shall continue with like power and jurisdiction, both in law and in equity, as if this constitution had not been adopted, and until the organization of the judicial department under the constitution." These judges might have referred, and no doubt did refer, to this
 40 schedule, as their authority to continue to *hold their offices until their successors were appointed. The Court of Appeals is certainly one of the courts referred to, as one that "shall continue with like power and jurisdiction," until the organization of the judicial department. What the true construction of this provision is, was then, and is still, an open question. It was not passed upon in the late cases of *Dyer v. Ellyson*, and *Bell v. Chahoon*. It was not necessary in those cases. The decision there was, that this provision of the

schedule did not apply to the Mayor's court. Judge Moncure, delivering the opinion of the court, says: "The courts referred to are courts of record, which the Mayor's court is not. They are the courts whose organization is provided for by the sixth article of the constitution, concerning the judiciary department, or such of them as existed under the old constitution; that is, the Court of Appeals, Circuit courts, and Hustings courts. These courts were to continue, except, &c., with like power and jurisdiction, in law and in equity, as if this constitution had not been adopted, and until the organization of the judicial department under this constitution."

This provision of the schedule has not yet received a judicial construction. What is its real scope, meaning and authority, is still an open question. And it is not necessary to the purposes of my conclusions that it shall be solved now. I refer to these things for the purpose of showing that the judges of the late Court of Appeals were not naked usurpers, acting without color of authority, who continued to discharge the functions of an office from which they had been absolutely removed by the termination of the military authority. This unquestionably was not the case. They were, at least, in office under color of authority. If they had no express authority to continue in office after the restoration of the civil government, until their successors were

41 appointed and qualified, if the schedule referred to conferred no such *authority, they had the right to hold these offices, and continue to discharge their functions, until their successors were appointed, upon the principle of public necessity and convenience. In every organic change of government, whenever one government succeeds another, the incumbents in office, in the absence of constitutional or legislative provision, must, *ex necessitate rei*, continue to hold and discharge the duties of their respective offices until their successors are installed. It is true they hold by sufferance only, the established government having the right and the power at any time to put an end to their authority by appointing others to take their places, in the mode prescribed by law. But until this is done, their official acts are as binding and valid as those of their successors. This is true and must be true, from the very necessity of the case, and upon the first of all principles of government, the great principle of "*salus populi*." For otherwise, as I have already shown, the sudden vacation of every office, leaving no person to perform their various functions, would produce such a state of anarchy as would destroy every vestige of civil government and uproot the very foundations of society. And it is fortunate for the peace of society and the security of private rights, in these Southern States, that the highest tribunal in this land, while it repudiates, as null and void, all acts of the Confederate government and State governments which were aimed at the overthrow of the authority of

the United States, yet recognizes and holds to be valid and binding all the judicial acts, otherwise lawful, of courts established and organized under the authority of the Confederate government, or of the States composing that government. See opinion Ch. J. Chase in *Texas v. White*, 7 Wall. U. S. R. 700.

This court ought to be the last tribunal to repudiate this salutary principle. The peace of society, the security of private rights, the confirmation of title to real 42 *estate, the validity of deeds, wills and contracts, the acts of guardians, executors, administrators, trustees, and other fiduciaries, the sanctity of marriage in this State, all depend upon the recognition of this principle, that the official acts of the actual incumbents in office are to be recognized as valid. This principle has always been recognized by this court to a certain extent. In the cases of *Dyer v. Ellyson*, and *Bell v. Chahoon*, already referred to, Judge Moncure, delivering the opinion of the court, says: "The incumbents of office at the time of an organic change of government, continuing to hold over after such change (in the absence of a provision of the new Constitution, or of an act of the Legislature of the new government giving them such authority), hold by sufferance only, and upon a principle of public necessity and convenience," &c. Now, it would be idle to say that such incumbents hold over upon the high principle of public necessity and convenience, and yet that all their official acts are void; that they are entitled to remain in the office, but are not permitted to discharge any of its functions. This is a solecism in law and reason which cannot be entertained for a moment. It seems to me that the soundness of these views cannot be questioned upon candid enquiry.

But if I am wrong in this view of the subject, certainly and beyond all controversy, the Judges of the late Court of Appeals must, at least, be considered judges *de facto*, after the 26th of January, 1870; and if they were officers *de facto*, then, upon the unquestioned and uniform authority of the decisions of the English and American courts, their official acts must be held to be as valid and binding, so far as the public and the rights of third parties are concerned, as if their title to the office had been unquestioned and perfect. Were they, then, officers *de facto*? The distinction between an officer *de jure*, one 43 who is *de facto* *such, and a mere usurper, is well known and clearly settled; and these distinctions are important to be borne in mind. An officer *de jure* has the legal title to, and is clothed with all the power and authority of, the office. He has a title against the world to exercise the functions of the office, and receive the fees and emoluments appertaining to it. He is responsible to the government and injured parties, when he abuses his trust or transcends his authority. But his acts, within the scope of that authority, cannot

be questioned by the citizen or any department of the government. Black. Tax Titles 92; 14 Verm. R. 428.

An officer de facto is one who comes in by the power of an election or appointment, but in consequence of some informality or omission, or want of qualification, or by reason of the expiration of his term of service, cannot maintain his position when called upon by the government to show by what title he claims to hold his office. He is one who exercises the duties of an office under claim and color of title, being distinguished, on the one hand, from a mere usurper, and on the other, from an officer de jure. Ib.; 5 Eng. C. L. R. 278; 5 Wend. R. 234.

A mere usurper is one who intrudes himself in an office which is vacant, or ousts the incumbent without any color of title whatever. Black. Tax Titles 93; 7 New Hamp. R. 140.

Lord Ellenborough gave the following description of an officer de facto, which has been adopted by the courts and by text writers as "accurate and expressive:" "An officer de facto is one who has the reputation of being the officer he assumes to be, and is yet not a good officer in point of law." 6 East. 368. According to this definition, and to the distinctions referred to, the judges of the late Court of Appeals, holding over after the restoration of the civil gov-

44 was without authority), *were certainly judges de facto. They were not usurpers, who intruded themselves without color of title into offices which were vacant. They unquestionably, in the language of Lord Ellenborough, "had the reputation of being the officers they assumed to be." Being in office under the authority of the laws of Congress, and continuing to hold over after these laws became inoperative, and claiming the right to exercise, and actually exercising the functions of their office, they are, within the very definitions of the authorities, officers de facto, acting colore officii. I conclude, therefore, that upon principle and authority, the decisions which we are called upon to review are at least the judicial acts of judges de facto. And I understand the rule of law (established by a uniform course of decision from a very early period to the present time), to be, that the official acts of an officer de facto, when they concern the public or the rights of third parties, are as valid and effectual as though he was an officer de jure. Says a modern text writer on this subject: "The interests of the community imperatively require the adoption of such a rule. The affairs of society could not be conducted upon any other principle; without it, there would be an entire failure of justice. To deny validity to the acts of such officers, would lead to insecurity in public as well as private affairs, and thus oppose the true policy of every well-regulated State." Black. Tax Titles.

This doctrine of the validity of the acts

of officers de facto has been established from the earliest period, and repeatedly confirmed by an unbroken current of decisions down to the present time. In Sir Randolph Crew's case, Cro. Car. 97, a commission to take testimony executed by judges after the demise of James I., when their terms of office had expired, was held good, the court saying that "no inconvenience could arise on such proceedings; but, otherwise, it would draw in 45 *question many trials at nisi prius, and trials and attainders, upon jail delivery, whereupon divers have been arraigned and executed since the king's demise."

In Harris v. Jays, Cro. Eliz. 699, it was conceded by the court, that if one being created bishop, the former bishop not being deprived or removed, admits one to a benefice upon a presentation; this is good, and not avoidable; for that the law favors one in reputed authority. In Knight v. The Corporation of Wells, Lutwyche 508, it was held that, "if one elected as mayor of a corporation, without being legally qualified to be chosen to that office, after such election, puts the seal of the corporation to a bond, this obligation is good; because, by coming into the office by color of an election, he was thereby mayor de facto, and all judicial and ministerial acts done by him are good." See also Leak v. Howel, Cro. Eliz. 533; King v. Lisle, Andrew's R. 163; 2 Strange R. 1090. The same principle has been uniformly adopted in modern English cases. It was distinctly acted upon in The King v. the Corporation of Bedford Level, 6 East. R. 356, 366; and in the more recent case of Margate Pier v. Hannam, 5 Eng. C. L. R. 278, where a statute providing for the appointment of justices of the peace declared that no person should be authorized to act as a justice unless he had taken certain oaths, it was decided that the acts of a justice, appointed under that law, were valid, although he had not taken the oaths required by the statute. Indeed, the doctrine in these cases is universally applied in England to officers de facto, from the lowest officer up to the king. 1 Black. Com. 204, 371; 1 Hale's P. C. 60.

The same principles have been repeatedly adopted by the courts of this country; and there is not a single decision to the contrary. In the People v. Collins, 7 John. R. 549, Chancellor Kent observes that the point,

46 "that the official acts of officers de facto are valid," *was too well settled to be discussed. In Wilcox v. Smith, 5 Wend. R. 231, the court says: "The principle is well settled, that the acts of officers de facto are as valid and effectual, when they concern the public, or the rights of third parties, as though they were officers de jure."

In Smith v. The State, 19 Conn. R. 493, the court uses this language: "No principle of law is better settled, than that public officers de facto, acting colore officii, are held to be as well qualified to act, while

they remain in office, as if legally appointed and duly qualified."

In *Plymouth v. Painter*, 17 Conn. R. 585, where the whole subject was most elaborately examined, it is said "The acts of a de facto officer, whether ministerial or judicial, are valid, so far as the public or third parties having an interest in such acts are concerned; and neither the title of such officer nor the validity of such acts can be indirectly called in question in a proceeding to which he is no party."

In South Carolina and in Illinois it has been held that where a law, under which a judge was appointed, was unconstitutional, and therefore his appointment was void; yet acts done by such judge were valid and binding. 2 So. Car. R. 696; 24 Illi. R. 184. In *State v. Bloom*, 17 Wisc. R. 521, where a judge had been actually ousted on a quo warranto, and a party sentenced to the penitentiary by him, while illegally in office, had been discharged on habeas corpus after the judgment of ouster on quo warranto, the Supreme court reversed the decision of the court below, (discharging the prisoner) and remanded him to the penitentiary, on the ground that the acts of the judge de facto were good against all the world, although he had been afterwards regularly pronounced not to be legally in office.

Cases illustrating the principle contended for might be multiplied to almost any extent. I refer only to the following, in further illustration of this well settled

47 *rule of law: 66 Eng. C. L. R. 686; 5 Eng. L. & Eq. R. 60; 3 House Lds. R. 418; *Tucker v. Aiken*, 7 N. Hamp. R. 113; *Jones v. Gibson*, 1 New Hamp. R. 266; *McInstry v. Tanner*, 9 John. R. 135; *Fowler v. Bebee*, 9 Mass. R. 231; *Burke v. Elliott*, 4 Ired. R. 355; *Gilmore v. Holt*, 5 Pick. R. 258; 4 Zab. R. 409; 2 Metc. Ky. R. 493; 48 Maine R. 79.

This court has adopted the principles of these cases, some of which are cited in the opinion of the court, approvingly, in *Monteith's case*, 15 Gratt. 172, in which it was decided that the acts of a sheriff de facto are valid, and cannot be enquired into in a collateral proceeding to which he is not a party; and the Legislature of this State recognized the same principle of law when they enacted the 7th section of ch. 12, Code 1860, p. 101, concerning disabilities to hold office. § 7, "All judgments given, and all acts done, by any person by authority or color of any office or post, or the deputation thereof before his removal therefrom, shall be as valid as they would be if this chapter had not been enacted." In a late case decided in this city, "*In re Griffin*," where a prisoner had been discharged upon habeas corpus, upon the ground that he had been tried and sentenced to the penitentiary by a judge who was disqualified from holding office under the 14th amendment Constitution United States; upon appeal to the Circuit court held by the Chief Justice of the United States, he was remanded to prison. In that case the Chief Justice, after citing

approvingly the cases of *Taylor v. Skrine*, 2 Brev. R. 696; *State v. Bloom*, 17 Wisc. R. 521, and *Ballou v. Bangs*, 24 Illi. R. 184, already referred to above, and which he says cover the whole ground, both of principle and authority, then proceeds to observe, "This subject received the consideration of the judges of the Supreme court at the last term, with reference to this and kindred cases, in this district, and I am

48 authorized to say, that they unanimously *concur in the opinion, that a person convicted by a jury and sentenced in a court held by a judge de facto, acting under color of office, though not de jure, and detained in custody in pursuance of his sentence, cannot be properly discharged upon a writ of habeas corpus." Law Times (U. S. Cts.), p. 100.

In a still more recent case, decided by the Circuit court of the United States in this district, Chief Justice Chase presiding and delivering the opinion of the court, the same general doctrine was recognized, and in such form that it has peculiar application to the cases before us. A suit for malicious prosecution, brought by Woodson against two members of the common council and sergeant of the town of Harrisonburg, had been removed from the Circuit court of Rockingham to the Circuit court of the United States. The only question was, whether the last-named court had jurisdiction to hear and determine the case? and that depended upon the further question, whether the arrest complained of was made by virtue of a military order, or by the common council and sergeant, under their authority as corporation officers? The Chief Justice, delivering the opinion, says: "It is to be borne in mind that the members of the common council of Harrisonburg had been elected to that office while the insurgent government of Virginia was in entire control of that portion of the State. When that government was dispersed by the superior force of the United States, the civil authorities did not necessarily cease, at once, to exist. They continued in being, de facto, charged with the duty of maintaining order, until superseded by the regular government. Thus, the common council of Harrisonburg remained charged with the government of the town, notwithstanding the temporary occupation of the place by the United States forces. Doubtless it might be superseded; but it was not superseded." And so, it may be remarked

49 in passing, before leaving this *branch of the subject, that the judges whose decisions we are now called upon to review, remained charged with the duties of their office until superseded by the regular government. Doubtless they might have been superseded at any time by the Legislature, but they were not; and though they were sitting every day as a court of Appeals, from the 11th day of January till the 25th day of February—sitting, indeed, in the same building with the Legislature—no action was taken to put an end to their authority; but, on the contrary,

there was an express recognition by the Legislature of their existence as a court, in the fact that a resolution was adopted by that body removing one of their number upon the ground that he held an office under the government of the United States. I barely allude to this as a matter worthy of notice, without taking time to comment upon it.

I have thus traced the decisions of the English and American courts, from a very early period down to the present time, and there is one unbroken current of authority establishing the principle that public officers *de facto*, acting *colore officii*, are held to be as well qualified to act while they remain in office as if legally appointed and duly qualified. This being firmly established, both upon principle and authority, it follows that the decisions of the late Court of Appeals are valid, judicial acts. Being thus valid, has this court any power to review them? If not, has the Legislature the constitutional authority to confer that power upon this court?

In the cases before us, motions had been made in the court which pronounced the decisions for a rehearing, which motions were overruled and the final decrees entered; the mandate of the court was issued, the controversy was closed, and the rights of the parties had rested under these decisions. Has this court, independent of the act of assembly, any power to reopen them?

50 *It is now the well-settled law of this State, that the Court of Appeals cannot review the decisions rendered at a former term. After its term has closed, its adjudications, right or wrong, must stand irreversible and final, and the controversies between the parties whose rights have been adjudicated are closed forever. This doctrine has been firmly established by this court, in the case of "Reid adm'r v. Strider," 7 Gratt. 76. Judge Baldwin, delivering the unanimous opinion of the court in that case, says: "This court is the appellate forum, in the last resort, for the revisal of the judgments and decrees of subordinate tribunals, which it may affirm or reverse, with power, in case of reversal, to render such adjudication as the inferior court ought to have rendered. During the same term its decisions, like those of other courts of record, are within its own breast, and may be modified or rescinded as a more matured consideration may dictate; but after the end of the term, the merits of its adjudications have passed beyond its control. This finality and irreversibility of the judgments and decrees of this court is inherent in the very nature and constitution of the tribunal, and cannot be disturbed without deranging the administration of justice and the introduction of intolerable evils in practice. *Ib.* 81.

In accordance, then, with the principle of this decision, this court has no inherent power to review the decisions of the court that preceded it. Has the Legislature the authority to clothe it with any such power? I think not. It is clear to my mind that

such an attempt, upon the part of the Legislature, would be the exercise of judicial power, and therefore void. It is now too well settled to admit of serious dispute, that the legislative department can no more exercise judicial power than the judicial department can exercise legislative power. Each is supreme in the exercise of its own

proper functions, when acting within the limits of its authority. The boundary line between these powers is plainly defined in every well-ordered government; and in this country it is now a well-established principle of public law, that the three great powers of government—the legislative, the executive, and the judicial—should be preserved as distinct from, and independent of, each other, as the nature of society and the imperfection of human institutions will permit. That system which best preserves the independence of each department approaches nearest to the perfection of civil government and the security of civil liberty.

I believe there is not a single State constitution in this country that does not adopt, as a part of its basis, this principle of separation and independence of the three great departments of government. The constitution of this State, copied in this respect from those which were framed by the wisest expounders of the science of government, and which is the paramount law to all the departments, plainly limits and defines the powers of each. Article II of that constitution is in these words: "The legislative, executive, and judiciary departments shall be separate and distinct; so that neither exercise the powers properly belonging to either of the others."

No particular definition of judicial power is given in the constitution; and, considering the general nature of the instrument, none was to be expected. But the terms used are still sufficient to designate, with clearness, that department which should interpret and administer laws, from that department which should make laws. The former decide upon the legality of claims and conduct; the latter make rules upon which those decisions should be founded. The law is applied by the one, and is made by the other. *Cooly's Const. Limitations* 92: "To declare what the law is, or has been, is judicial power; to declare what the law shall be, is legislative." 7 *John.*

52 R. 498. On general principles *those enquiries, deliberations, decrees or orders, which are peculiar to the judicial department, must in their nature be judicial acts. It may be difficult in some cases to point out the precise boundary line between legislative and judicial duties, and define what is judicial power, and what legislative. But it is well settled, that an act of the Legislature, directing a court to rehear a cause or to grant a new trial, or any legislative action which retroacts upon past controversies, is an invasion of judicial power, which is arbitrary and unconstitutional. In *Merrill v. Sherburne*, 1 N. Hamp. R. 199, it was held that "an act of

the Legislature, awarding a new trial, in an action which has been decided in a court of law, is an exercise of judicial power, and therefore unconstitutional." In *Burch v. Newberry*, 10 New York R. 374, it was held that the Legislature had no power to grant to parties the right to appeal after it was gone under the general law. In *Lewis v. Webb*, 3 Greenl. R. 326, it was held that the Legislature had no authority to pass any act or resolve, granting an appeal or new trial in any cause between private citizens. Ch. J. Mellen, delivering the opinion of the court in that case, says (and I quote his opinion because it has peculiar application in this case): "Can the Legislature set aside a judgment or decree of a judicial court, and render it null and void? This is an exercise of power common in courts of law; a power not questioned; but it is one purely judicial in its nature and its consequences. But it is urged that the resolve is not liable to objection on constitutional grounds; that it goes no further than to authorize a re-examination of the cause" (precisely what was urged in the cases before us), "to empower one judicial court to review the proceedings of another judicial court, and thus to do complete and final justice to all concerned. It is true, the act does not, in terms, purport to transfer property directly from one man to another by mere legislative authority;

53 *but it professes to grant to one party in a cause which has been, according to existing laws, finally decided, special authority to compel the other party, contrary to the general law of the land, to submit his cause to another court for trial, the consequence of which may be a total loss of all those rights and all that property which the judgment complained of had entitled him, and all those claiming under him, to hold and enjoy; that is, it proposes to accomplish, in an indirect and circuitous manner, that which the existing laws forbid, and which, by a direct and legal course, cannot be attained." In *Hill v. Town of Sunderland*, 3 Verm. R. 507, it was held "That a statute which allows an appeal from road commissioners, made before the passage of said statute, is unconstitutional and void." The court in that case says: "The truth is, there must be an end of strife somewhere; and where will it be, if not when a judgment is recovered, which is final by the laws then existing? *Ib.* 514. Professor Cooley, in his admirable work on "Constitutional Limitations," p. 94, says: "Legislative action cannot be made to retroact on past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form; since the Legislature would, in effect, sit as a court of review, to which parties might appeal when dissatisfied with the rulings of the courts." Cooley's Const. Limit. 94-96 and note.

In further support of this doctrine, see,

also, *Atkinson v. Dunlap*, 50 Maine R. 111; *Miller v. The State*, 8 Gill R. 145; *Beebe v. The State*, 6 Ind. R. 501; *Lanier v. Gallatas*, 13 La. An. R. 175; *Stanisford v. Barry*, 1 Aik. R. 321; and *Inh. Durham v. Inh. Lewiston*, 4 Greenl. R. 140.

These adjudications assert no new 54 doctrine, but are *founded on the broad, primary principles of constitutional government, recognized as elementary principles by all writers upon constitutional law. By Sir William Blackstone, when he asserts, that "in the distinct and separate existence of judicial power, consists one main preservative of the public liberty." By Montesquieu, when he exclaims, "there is no liberty, if the power of judging be not separated from the legislative and executive power. The union of these two powers is tyranny." By Mr. Madison and Mr. Jefferson, when the one pronounced such a union "the precise definition of tyranny," and the other "precisely the definition of despotic government."

Nor is the case of *Caulder v. Bull*, 3 Dall. R. 386, decided by the Supreme court U. S., and so much relied upon by the counsel of the petitioners, at all in contravention of these well-settled doctrines. "The decision in that case was placed upon the ground that it was the usage in the State of Connecticut so to legislate, which was taken as evidence of the fundamental law; it, at that time, having no written constitution. Mr. Justice Patterson, in his opinion, puts the case on that distinct ground. He held, the constitution of Connecticut was made up of usage, and it appeared that the Legislature had, from the beginning, exercised the power of granting new trials." Smith's Com. 529.

But the same court, the Supreme court of the U. S., has expressly recognized the doctrine contended for in this opinion, when it declared, in a more recent case, that Congress has no power to interfere with, or set aside, a judgment of that court. See *Wheeling Bridge case*, 18 How. U. S. R. 421.

I have already extended this opinion beyond its proper limits, and have only to add that the principles adopted, in the cases cited, have become settled constitutional law, and are universally recognized and acted upon as such, by all judicial 55 tribunals in this country. *They are found in the doctrines of learned civilians, and the decisions of able judges, without a single decision, or even dictum, to the contrary. They not only grow out of the letter and spirit of the constitution, but are founded in the very nature of a free government, and are absolutely essential to the preservation of civil liberty, and permanent security of rights. I conclude, therefore, that upon reason and authority: 1st. That the decisions of the late Court of Appeals were valid, judicial acts; and, 2d. That, being valid, the act of the Legislature, authorizing this court to rehear and review them, "to affirm, set aside and annul the same, as to this court shall seem proper," is plainly an invasion of judicial

authority, which is unconstitutional and void.

ANDERSON, J. These cases are, by consent, brought up together, upon a preliminary question which arises in both, as to the power of this court to supervise and control decrees pronounced by H. B. Burnham, W. Willoughby and O. M. Dorman, claiming to be judges of the Court of Appeals of Virginia, after the military provisional government had ceased to exist and the constitutional civil government had been inaugurated.

Many important and interesting questions have been raised by counsel in argument, and numerous authorities adduced, which I do not deem it necessary to consider in deciding the question which has been submitted. In stating the reason, therefore, for my opinion, I shall confine myself to the single question, Has this court power to supervise those decrees?

The act of assembly of 5th of March, 1870, expressly clothes the court with that power. It is essentially a healing and remedial act; healing, so far as it gives validity to the acts which have been done; and remedial, so far as it gives to parties who may have been aggrieved the means and method of redress.

56 *But it is contended that section 2, which confers the power claimed for this court, is contrary to the constitution of the State, and therefore null and void. The questions, whether it was wise, or in accordance with sound policy? Whether it was better, as a matter of expediency, to have submitted for a short space to an usurpation, and to allow an unlawful tribunal, consisting of three judges, claiming to be the Supreme court of Virginia, when the constitution then in force required that said court should consist of five judges, to make a final adjudication upon the rights of citizens? Or whether sound policy, and a proper sense of legislative duty and fidelity, might not require intervention, for the protection of the citizen? These were questions for the Legislature, and not for this court. And that assembly has, in its wisdom, considered and decided them in the act under consideration, which is a declaration, by the supreme legislative power of the State, how far those acts shall be valid and binding, and to what extent they shall not be. I come, then, at once, to the consideration of the main question, Is section 2 of the enabling act unconstitutional and void.

It is argued that it is, because it is a judicial act, and therefore contrary to article II of the constitution, which provides "that the legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise powers properly belonging to either of the others." Is this a judicial act? So far as it is involved in this motion, it appears to be purely remedial, and not judicial, because it does not decide upon the rights of parties. It only authorizes the Court of Appeals to decide upon

them. If the legislation which is necessary for organizing the judiciary, defining its jurisdiction and conferring upon it the necessary powers for the exercise of the judicial function, is not judicial, then this act is not judicial, unless its retrospective character makes it so. It is well settled *that a law is not unconstitutional because it is retrospective in its terms. Sedgw. on Stat. and Const'l Law p. 192. The obligation of contracts does not include the remedy. Ib.

Sedgwick says: "There are a large number of cases in which it would be very injurious to assert that the Legislature is incompetent to pass laws having a retroactive effect. Such are laws declaring valid, acts of official persons irregularly elected, altering and amending judicial procedure, &c. In these and many other cases, it is difficult to avoid giving the act a retroactive effect. Every such effect must, or may, influence injuriously some individual case. But the interests of the community are paramount." Sedgw. p. 198.

But it is contended that it divests vested rights. If it is true, that an act which divests vested rights is unconstitutional necessarily, and void, no rights vested by the decrees in question, if they emanated from a tribunal which was not a court, either de jure or de facto. If this should be held to be the case, it is a conclusive answer to both objections; and there is no occasion to review the authorities which were cited, to show that it is a judicial act.

We will now consider the question, were those decrees pronounced by a then lawful court of Appeals of Virginia? Were the persons who pronounced them, then lawful judges, clothed with authority to pronounce them?

I purposely confine this enquiry to the time when those decrees were pronounced, which was subsequent to the 26th of January, 1870, when the acts of Congress, known as the reconstruction acts, had ceased to operate, by an express limitation contained in the acts themselves; when the provisional government was at an end, and all authority under it; and the constitutional government, which superseded it, had been inaugurated, and was then the existing 58 lawful government *of the State, and recognized as such by Congress and the Federal authorities.

If they had this power, whence did they derive it? Not from the provisional government, for that did not exist. Not from the commanding general, for he could not continue his own life. His authority was at an end, and their authority ceased with his. And so was it solemnly ruled by this court in the recent cases of Dyer v. Ellyson, and Bell v. Chahoon.

Judge Moncure, the president, in announcing the unanimous opinion of the court, uses this language: "The authority of the military commander of Virginia ceased when her representatives were admitted into Congress. And when his au-

thority ceased, that of his appointees also ceased. It would be strange, if, after the principal ceased to have any authority, his subordinate agents should continue to have authority." They, then, derived no authority from this source. Whence did they derive it?

It is contended that the last clause of section 2 of the schedule to the constitution, continued them in office. If this be so, it is clear that their authority cannot be questioned. Let us examine and discover, if we can, what was the intention of the convention which ordained it.

In the construction of this schedule, it is our duty, fairly and faithfully, to carry out the intention of the Convention. It is a well-established maxim, that the object, and only object of judicial investigation in regard to doubtful provisions of statute law, is to ascertain the intention of the Legislature which framed the law. Sedgw. on St. and Const. Law 230-'31; 1 Kent Com. p. 468. With this as our guiding star, we will pursue our researches. The language of the clause is: "The several courts, except as herein otherwise provided, shall continue with the like power and jurisdiction,

both in law and equity, as if this constitution had *not been adopted, and until the organization of the judicial department of this constitution." Did the framers of the constitution, by that language, intend to continue the judges in office? Such would not be the literal interpretation of the language. "The several courts." Does that mean the several judges? If that was meant, it would have been more appropriate to have said, the judges, or all the judges, shall continue in office. But it does not say "in office." The language is, "shall continue with the like powers and jurisdiction, both in law and in equity." That language is more appropriate to courts than judges. If it meant judges, it would have continued them, not "with like powers," &c., but in office, until their successors were appointed and qualified. But this it does not do. It continues the courts with like powers, &c., "and until the organization of the judicial department under this constitution." As much as to say, notwithstanding the important changes that have been made by this constitution, in the judicial system, the same courts which are now in existence shall continue, with the powers and jurisdiction they now have, until the judicial system prescribed by this constitution shall be organized.

But if it meant that the judges should continue in office until the judicial department, under the constitution, was organized, there was likely to have been two sets of judges at the same time, for the same court both invested with authority, the military appointees, by section 2 of the schedule, and the constitutional judges, by section 22 of Article VI of the constitution, which authorizes them to discharge the duties of their office from their first appointment and qualification. Now, it is obvious, upon the construction contended

for, that if their appointment and qualification were prior to the organization of the judicial department, which might *have been, there might be two sets of judges, at the same time, to fill the same offices.

But, if they did not use the term "courts" as synonymous with judges, did they mean to include judges in it? That the several courts, and judges thereof, shall continue? That would be very proper language, and it shows that there is a difference between the terms courts and judges—that they convey substantive and distinct ideas. But they did not say the courts and the judges thereof, which they should and would have said, I think, if they meant to have continued the judges in office. To construe the language as including the judges, would also be equally repugnant to the 22d section of Article VI of the constitution.

But I think we cannot be at a loss to know what they did mean, by the language they have employed. It has an exact meaning. Substantially the same language is used in the constitution of 1830, and in the constitution of 1851, with the same meaning in both: and in neither of them was it understood or intended to continue the judges in office. The language in the constitution of 1830, last clause of article VII, Code of 1849, pp. 44-5, is: "All the courts of justice now existing shall continue, with their present jurisdiction, until and except so far as the judicial system may or shall be hereafter otherwise organized by the Legislature." It is evident that this clause was not understood nor intended, by the eminent men who framed that constitution, to continue the judges in office, because they had previously, in article V, sec. 2, expressly provided that the judges should remain in office until the termination of the session of the first Legislature, elected under this constitution, and no longer. It is clear, then, that the framers of that constitution did not understand the clause, that continued the courts, as continuing the judges.

The framers of the constitution of 1851 understood it as they did.

Sec. 15 of the schedule, Code of 1860, page 58, has this clause: "All the courts of justice now existing, shall continue with their present jurisdiction, until and except so far as the judicial system may or shall be otherwise organized." This seems to be an exact copy of the clause contained in the constitution of 1830. Did the framers of the constitution of 1851 understand it as continuing the judges in office, or so intend it? They evidently did not; for, in a previous section, the 13th, they had already provided for continuing the judges, and they continued them in office until such time as the law may prescribe for the commencement of the official terms of the judges, under the amended constitution, and no longer. I think we have in these two constitutions, which were framed by the representative men of Virginia, in successive generations, the sense in which the language in the clause under consideration

has been understood and accepted in Virginia; and that it was not understood to continue the judges in office. And I think that the framers of the present constitution must be understood to have used it in the same sense, and that they did not intend by it to continue the judges in office.

There is another inference to be drawn from the action of the conventions of 1830 and 1851, to wit: that, in their opinion, a change of the organic law vacated all the offices which were held under it; and that, without express provision for continuing the incumbents in office after the new constitution went into operation, they could not continue to exercise the functions of their respective offices. This is clearly inferable, from their carefulness to insert provisions in the constitutions they were forming, or in the schedule, for continuing all officers in office until their successors were appointed under the new constitution.

Code of 1849, p. 44, art. VII; Code of 62 1860, p. 58, sec. 14 of schedule. *And the framers of the constitution of 1864 recognized the rule, by providing in section 4 of the schedule for continuing "All executive, judicial and other officers" then in office, after that constitution went into operation.

Now, can it be conceived that the framers of the present constitution, with the three preceding constitutions in their hands, if they intended and desired to continue the officers, would not have expressly provided for it in the constitution and schedule they were framing. I can come to no other conclusion than that they did not intend it, nor desire it.

And this conclusion is well supported by the historical fact, that, at the time the constitution was framed, the incumbents of the offices of the State were most obnoxious to the dominant power of the convention; and that the 4th clause of section 1 of article III, and the 3d and 7th sections thereof, which they had inserted, but which were rejected by those to whom they were submitted for rejection or approval, would have rendered almost every incumbent of office in the State ineligible to office under the constitution which they had prepared. They also provided, by the election ordinance, for the speedy inauguration of the new government, and for filling the offices with new men immediately on the adoption of the constitution, thus making it not only unnecessary, but incongruous, that they should retain the provisions of the preceding constitutions for continuing the incumbents in office. But it is unnecessary to continue the argument further. I am convinced that the clause in question did not continue in office the judges of the Court of Appeals, appointed by Gen. Canby, after their authority ceased as his appointees. I am of opinion, for the foregoing reasons, that the military appointees were not judges de jure when the decrees in question were pronounced.

But it is contended that they were 63 officers de facto, *and that as such

their acts were valid and binding, so that even the sovereign power of the State could not avoid or invalidate them. I deny that the acts of those men, having no authority either from the State or the United States, are of such supreme and uncontrollable authority that they cannot be questioned or invalidated by the sovereign power of the State, no matter how greatly and flagrantly the rights of the citizen, in his person or property, might have been invaded by them, or the public interests sacrificed, because they were, by technical rules, officers de facto. The great principle of *salus populi* would justify the State to interpose, by its sovereign power, to prevent their enforcement.

But an attempt has been made to show (I think unsuccessfully), that the Legislature has given the assent of the State to this assumption of authority. The only mode by which the Legislature can speak, is by resolution or bill. It has spoken by the enabling act, in the very clause which is sought to be annulled. Is there any evidence to be found, in any part of its proceedings, that this assumption of the judicial function by Mr. Burnham and his associates was with the assent or the approbation of the Legislature. I think not. On the contrary, its journals show that from the first assembling and organization of the two bodies, their authority was questioned.

The assembly met on the 8th of February, and on the 10th, the House of Delegates instructed their committee for courts of justice to enquire whether Mr. Burnham and his associates, who were then exercising the functions of judges of the Court of Appeals, were lawfully exercising that function. This would seem to have been a sufficient intimation to those gentlemen to suspend their proceedings until the question as to their right could be enquired into. This does not look like acquiescence on the part of the Legislature.

But it is said that the committee 64 recommended that *Mr. Burnham's seat should at once be declared vacant on account of his ineligibility to office in Virginia under the constitution; which was done by the vote of both houses of the Legislature. And from this they draw the inference, that the committee and the Legislature acquiesced in the exercise of the judicial function. This argument might be plausible if the record did not show that the committee, when they reported the foregoing recommendation, as to Mr. Burnham, expressly reserved the privilege of reporting thereafter as to the authority of his associates to exercise the judicial function. And if it did not further show that, as the result of all these proceedings, the enabling act was passed, and became the law of the State. It passed the House on the 26th of February, the day the decrees in question were pronounced, and received the approval of the Governor on the 8th of March. We claim that this act, which is the final result and consummation of the proceeding instituted by the House only two days after the

Legislature assembled, repels the idea of any acquiescence, by the Legislature, beyond the terms of the act itself. We claim that the assent of the sovereign power of the State was necessary to bind it, which could only be given by the legislative department; that the act in question is the only valid expression which has been given to the legislative will on that subject; and that only so far as the assent of the State has been given by that act, are the decrees in question binding. To hold otherwise, it seems to me, would be to wrest from the State one of its most important attributes of sovereignty, and would abrogate the 4th clause of article 1 of the constitution, which declares "that all power is vested in, and consequently derived from, the people, and that magistrates are their trustees and servants, and at all times amenable to them."

65 But I think, even upon the narrow view which has *been taken of this great question of State sovereignty, it cannot be shown that Mr. Burnham and his associates were even technically officers de facto.

Upon what principle is it that the acts of de facto officers are binding? According to the old American idea, the right of government is founded in the consent of the governed. And the acts of the officers of government are binding, because they are the authorized agents of the people. From this it follows, that the only obligation of the people to submit to the authority of one man more than another, is, that he is the agent of the government or people.

Upon what ground, then, am I bound to recognize the authority of one who assumes to act officially, but who has no lawful authority from the people or their government? There must be some ground for it, other than that he has possession of the office; some ground upon which the de facto officer can be distinguished from the mere usurper. The only ground that I know of is, that he exercises the office under "a claim and color of title," by election or appointment—the only modes, where hereditary right does not exist, by which public offices can be conferred. It is not sufficient that he acts under a claim of right: for the usurper may do the same. There must also be color of right, by election or appointment.

In this view I find that I am well sustained by the books. Some authorities go farther, and require that he shall also have the reputation of being the officer he assumes to be—which implies that he is regarded and accepted by the public as a valid officer. In the case of *Tucker v. Aikin & al.*, 7 N. Hamp. R. 113, 140, Judge Parker defines an officer de facto to be "one who, under color of an election or appointment, has the reputation of being the officer he assumes to be, but is not a good officer in point of law." This agrees with Chief

66 Justice Ellenborough's definition, in *Rex v. The *Corporation of Bedford Level*, 6 East. R. 356, except that he, living in a country where offices were acquired by hereditary right, does not restrict

the claim and color of title to election or appointment.

The claim of title may not be valid, but that cannot be known until it is ascertained in the mode prescribed by law. And as he is in possession, under a claim and color of title, by election or appointment, accepted by the public as valid, it is the duty of all to recognize his official character, and to submit to his authority until it is legally determined that he is not a lawful officer. And this the good order of society, and security to person and property, require. Blackwell, in his work on *Tax Titles* (p. 92), speaking of an officer de facto, says: "He is one who exercises the duties of an office under claim and color of right, being distinguished, on the one hand, from a mere usurper, and on the other, from an officer de jure. The mere claim to be a public officer, or the performance of a single, or even a number of acts, in that character, will not constitute an officer de facto. There must be some color of a claim, under an election or appointment, or an exercise of official functions, and an acquiescence, on the part of the public, for a length of time, which would afford a strong presumption of a colorable right." That is of an election or appointment. All the books, so far as I have had opportunity to examine them, agree in this, that the "claim and color of title" must be predicated of an election or appointment. *The King v. Lisle*, Andrews R. 172. Now, what are we to understand by "claim and color of title?"

Cases involving questions of adverse possession of land, "which is nothing more nor less than a possession under a claim and color of title," may throw light upon it. Blackwell on *Tax Titles* (p. 566), says, "to repel the presumption of holding under, or in privity with the title of the true

67 owner, it is essentially necessary that the tenant *of the freehold should show a possession under a claim and color of title—under an apparent right." Again, on next page, "anything which clearly defines the extent of the claim which professes to pass the land, and is not obviously defective, will constitute the basis of an adverse possession." In *Moore v. Brown*, 11 How. U. S. R. 414, one of the grounds upon which it was held that the defendant was not entitled to the benefit of the limitation law was, that the deed under which he claimed to have held the adverse possession was void upon its face. It was a deed for a tax title, and recited a sale of the land on December 9th, 1823; when, under the law, it could not have been made before December 15th. Judge Wayne, delivering the opinion of a majority of the court, said: "Being a void deed, possession under it cannot be said to be under color of title."

In the case of *Irving v. Brownell*, 11 Illi. R. 402, the court goes still farther. It is held that, by the words "claim and color of title, made in good faith" (which are the words of the statute,) "must be understood such a title as, tested by itself, would ap-

pear to be good. Not a paramount title, capable of resisting all others, but such a one as would authorize the recovery of the land when unattacked; as if no better title was shown—that is, a *prima facie* title." Let us apply these principles.

We have seen that these gentlemen, when they undertook to decide these causes as judges of the Court of Appeals of Virginia, were not invested with the office by the constitution or schedule, and their office, under the military government, had expired. Could they claim, by color of title, under either? Could they have maintained their right under the constitution or schedule, if no better title was shown? Would their title, as tested by itself, appear to be good? Does the second section, continuing the courts, give them a *prima facie*, or apparent right or title, to the office? I

68 "think not. Those questions have already been fully answered. I think any claim which may be set up for them under section 2 of the schedule, is "obviously defective." The "deed is void upon its face, and possession under it cannot be said to be under color of title." Indeed, if it is not void upon its face, to support a claim and color of title, it would be good to vest perfect title in them upon a *quo warranto*, because the said section presents the whole case. This conclusion, I think, will be confirmed by the further examination of the subject.

Had they a color of right under the appointment by Gen'l Canby? We have seen that by the very terms of the reconstruction acts, the authority of General Canby, and of all his subordinates, ceased the instant that the State was admitted under the new constitution. If they performed any official acts after the act of Congress admitting the representatives of the State was passed and became a law, they could only have been valid if performed before they had notice of that act. By authority of the case of *Dyer v. Ellyson* and *Bell v. Chahoon*, before quoted, the authority of the military commander of Virginia ceased, when her representatives were admitted into Congress; and when his authority ceased that of his appointees ceased also. "It would be strange (said Judge Moncure, speaking for the whole court) if, after the principal ceased to have any authority, his subordinate agents should continue to have authority." I regard that decision of the highest authority to us. But if it were not, having united in the opinion *ex animo*, and seeing no error in it, I shall now adhere to it. They were military appointments and designed only to be temporary: To continue only while the military held the sword over the civil power of the State. When the military supremacy over the civil terminated, as it was to terminate by the express

69 terms of the warrant which called it into existence, *the offices of these judges terminated necessarily, by the inherent principle of its tenure, and the terms of its creation. How, then, can it be held that their appointment could give

them claim and color of title to the office after their term had expired, and the power which had breathed into them the breath of official life had itself expired? When the original induction into office is rightful, but the office has terminated, as the termination of the office of deputy, by the death of his principal, he is not a *de facto* officer, if he holds over. *Rex v. The Corporation of Bedford Level*, 6 East. R. 356. These military appointees were, to every intent and purpose, as effectually *functi officio*, after the expiration of the military power which had given them official life and being, as a deputy officer is by the death of his principal. Neither can re-appoint or revive the office. The incapacity in the one case is as absolute as in the other.

I think the practice in England has been to ratify the acts performed by illegal officers, where public necessity required it, by acts of Parliament operating retrospectively. Hence the healing acts of Parliament. As an instance of such legislation, I will mention the act of Parliament, after the restoration, ratifying and making valid all marriages solemnized during the Protectorate of Cromwell, which, by the laws of England, were illegal and void. 1 Bl. Com. pp. 439-40. The convention or assembly which restored Charles II. was not lawfully constituted, yet it sat for seven months, and legislated for the kingdom, and its acts were ratified and made valid by a subsequent Parliament. The act of ratification doubtless gave legality, quiet and security to all rights and titles, and to all the various interests and relations, in all the ramifications of society, which were affected by the legislation of the previous illegal Parliament. Doubtless that Parlia-

70 ment provided for filling most or all of the public offices of *the kingdom, and the appointees had been invested, and had performed various official acts, executive, judicial and ministerial, by virtue of those acts of an unlawfully convened Parliament, before the acts of ratification of 13 Car. II. ch. 7 and ch. 14, by which, operating retrospectively, they were all made valid. 1 Bl. Com. p. 151. No one seemed to have taken ground that the acts of the first Parliament, and of the officers who derived their authority mediately or immediately from it, could be sustained, because they were *de facto*. The concurrent opinion seemed to be that an act of ratification was necessary. After the revolution of 1688, the settlement of the government was made by an unlawfully-constituted assembly. But its acts were afterwards ratified and confirmed by a lawful Parliament, and have ever since been regarded as valid. 1 Bl. Com. p. 152. In neither of these memorable epochs in the history of Great Britain did the nation rely upon the authority of *de facto* officers for security to the government and people.

In our own State, as we have seen, when a change in the organic law was made, though made without any change of the body politic, and made peacefully, according

to the forms of law, the invariable practice has been to insert a clause in the constitution, or schedule, expressly continuing the officers of the old government, under the new, until their successors were appointed by the new government. As to what has been the practice of the other American States, I am not informed.

But, whether there is any uniform or established rule on this subject, when a change of government is made, without any change of the State or body politic, and the officers of the old and the new governments are the official agents of the same body politic, or whatever that rule should be in such case, I think the case before us

71 differs materially and radically from any that *existed in the changes of government referred to. This was not simply a change of the organic law, or government of the body politic, in which the officers under the old, and the officers under the new, are the official agents or trustees of the same State or body politic. But it is the deliverance of the State from a government which was no part of the State or of the body politic: a government which was not Virginian, but which was outside of Virginia: a government which had been put over us, not by the body politic, but forced upon us by bayonets, by an outside power, and which was withdrawn when our civil government—the government of the body politic—was restored.

Now, if it were true that, when a State changes its government—its organic law—the officers under the former government have a right to continue in office under the new until their successors are appointed, there are reasons for it which do not apply in this case. It may be said that whilst the government has been changed, the body is the same; and that the officers of the government which has been abrogated are the official agents of the same body politic which has adopted the new government, and therefore may be regarded as officers de facto. This principle is recognized, and in fact asserted, by our bill of rights, which is now a part of the constitution, and as such binding upon us, in the declaration "that all power is vested in the people (that is, the body politic), and that magistrates are their trustees and servants, and amenable to them." Constitution of Virginia, Art. I, clause 2. Can it be said that the military appointees were the agents or servants of the people of Virginia, and amenable to them? To the contrary, they were the agents or servants of the military power which appointed them to office, and amenable only to it; a power which was independent of us and had no sympathy

72 with us, and which, in its constitution and nature, was adverse to *civil government. To say that Mr. Burnham and his associates continued in the judicial office, under the civil government of the State, by virtue of their military appointment, or by color of their military appointment (which amounts to the same), is to extend the operation of the reconstruction

acts beyond their own express limitation; for they expressly declare that they shall be inoperative after the representatives of the State are admitted to congress. If even I should feel obliged to recognize those acts of congress as binding, I would not supplement them, if I had the right to do so as a legislator, to continue the military government a day or an hour after the civil government was restored. Especially would I not do so by judicial construction. If they claimed to continue in the judicial office, under the restored civil government, under color of their military appointments, they claim under a deed "which is void upon its face," and are not, therefore, de facto officers. I conclude, therefore, that the military appointments could not give these gentlemen a claim and color of title to continue in the judicial office, under the restored civil government, and that, therefore, they were not de facto officers. To this conclusion my mind is brought irrefragably.

Neither the Cæsar Griffin case, nor the case of John C. Woodson v. The Mayor and Council of Harrisonburg, is in conflict with a single position I have taken. In the former case, Cæsar Griffin had been tried, convicted, and sentenced to the penitentiary, by a court over which Judge Sheffey presided. An application to the Circuit court of the United States was made to release him, upon the ground that Judge Sheffey, at the time of the trial, was disqualified to hold the office by the 14th amendment. It was shown that Sheffey had been elected to the office by the Legislature of the restored government of Virginia, which had been recognized as the

73 lawful government of Virginia, both by congress *and the President; that he had held the office, and discharged the duties of the office, for two years or more; and that he never had been removed from the office. And Chief Justice Chase held that he must be regarded as an officer de facto until he was removed; and that, as such, his acts were valid. In my opinion, he was clearly an officer de facto, if not de jure, until ousted. And the reasoning of the Chief Justice is very conclusive. He was an official agent of the body politic, which Mr. Burnham and his associates were not; and he was in by regular election, by competent authority, for a term which had not expired, and, in the opinion of the Chief Justice, he was not ousted by the constitutional amendment until removed by proceedings, which were necessary to carry it into effect. I think there is no analogy between Judge Sheffey's case and that of Mr. Burnham and his associates.

The other case was a suit by Woodson v. the mayor and some of the councilmen, and sergeant of Harrisonburg, in the Circuit court of Rockingham, and by an order of that court was removed to the Federal court. The question was, in that case, was it one of that class of cases which could be removed, under the act of congress, from the State to the Federal court? The Chief

Justice decided that it was not, and remanded it to the State court. In the course of his opinion he says: "When that government (the government of Virginia, which he calls insurgent,) was dispersed by the superior force of the United States, the civil authorities did not necessarily cease at once to exist. They continued in being de facto, charged with the duty of maintaining order, until superseded by the regular government." I think the Chief Justice was well warranted in giving to these officers the character of de facto officers. I do not think that he would have erred if he had characterized them as officers de jure. They had been regularly inducted

74 into office, and their terms were unexpired; *and the United States recognized them as such, though claiming the right to remove them. A little lower down the Chief Justice says, "the government of the United States was not bound to recognize any authority which originated under the rebel government. But it was not superseded. On the contrary, an order was issued, addressed to the citizens of Harrisonburg, Va., June 16th, 1865, by which the citizens were notified that the mayor and council of the corporation last in office, upon the resumption of their duties, will be sustained in all their acts, consistent with existing laws and proclamations of the government." And the Chief Justice might have shown that, at a later date, the status of the public officers of the State was recognized by the government of the United States. The act of March 2d, 1867, section 3—the first of the series of the reconstruction acts—and the act of July 19th following, section 2—the third of that series—recognize the official character of our State officers, and consents to their continuing to discharge the duties of their offices, but subject to the authority of the military commander to remove them. At a later day they were all removed. A clean sweep was made; and in many counties important offices were made vacant and not filled. But until they were removed, they were in by their first appointment, and, in my opinion, were not merely officers de facto, but were lawful officers, though it was in the power of the military to remove them at any moment. They were characterized by Chief Justice Chase as officers de facto, and I am free to admit that, if Mr. Burnham and his associates had any such foundation for their claim to the office which they assumed, it would be conceded. But I think I have shown they had not.

The desolation and ruin to public and private interests which have been so graphically portrayed in argument; the uprooting of society from its foundations,

75 *and "the reign of anarchy supreme," by the failure of the military judges, clerks, sheriffs, superintendent of the penitentiary, and other officers to continue in office, may be true if those offices could not have been filled by others. But I do not admit that there was not power in the executive to have provided for any such

emergency. And I feel sure that he would have provided for the public safety, and for the protection of the citizen, in his person and property, until the Legislature could have assembled. But admitting that there was a public necessity for any of these military appointees to continue to discharge the duties of the office, that would not make him an officer de facto. Public necessity may be and is a reason why validity should be given to the necessary acts of de facto officers. But necessity cannot make one a de facto officer who is not. There must be a claim and color of title by election or appointment; which implies by some body authorized, or presumed at least, to be authorized, to elect or appoint.

Nor can the holding that they would be de facto officers, meet the necessity; because they were not bound to serve as de facto officers. They could not have been compelled to serve. Suppose that they had refused to be de facto officers, the holding that they would be de facto officers if they served, would not remedy the evil. But since they have acted, the public necessity which required it, though it cannot make them officers de facto, strongly appealed to the legislative power of the State to pass a retrospective act ratifying, as far as was proper, what they had done.

The Legislature has responded to this necessity, by passing what is called the Enabling act, by which it has ratified their acts, as far as in its wisdom it deemed it proper to do, with a just regard to the protection of private right. And, properly regarding the holding over of the military appointees, as being generally

76 *prompted by a feeling of public necessity, commendable in itself, it authorizes them to receive the fees of the office conferred by law, which otherwise they could not have received, even if they had been officers de facto. By holding that they are not officers de facto, no injury is done to the public interest, or to anybody: but a power of discrimination is given to the Legislature, when they pass upon their acts, to prevent wrong, and to protect the right. That power they have not abused. But, regarding the act which they have passed to this end as eminently wise and beneficent in its operation, I think we ought to sustain it, unless it is palpably unconstitutional.

On the other hand, if we undertake to disregard this act of the supreme legislative power of the State, we deny to our citizens the right to be heard, who complain that they have been grievously wronged by the decisions of self-appointed judges, who had no warrant or authority from the State, or the United States, to exercise the judicial function, but who presumed to do so, against their protestations, and, by decisions which the law gave them no authority to make, have divested them of valuable rights of property. We forever close against them the door of relief, and compel them to submit to this wrong. The consequences of our decision may be much wider and far-

ther reaching. We forever deny to the Legislature a power which, in the progress of events, may be essential to personal security and public liberty. I cannot regard a case unimportant which involves such consequences as these. But this court has the undoubted right to declare an act of the Legislature unconstitutional, and, must do so, when it is plainly contrary to the constitution, so that both cannot stand together. But it is a delicate power, and should never be exercised in a doubtful case. And so has it been repeatedly held by the courts.

77 *But one other point remains to be considered.

If the Legislature could have been convened in time, it would have been competent (by authority of the cases recently decided by this court above referred to,) to have filled all these offices temporarily, until they could be filled in the mode prescribed by the constitution. And it might, I apprehend, have authorized them to be filled by the military appointees, whose authority had expired, if it had chosen to do so. But the Legislature could not be convened in time for this purpose. And there was a necessity that many offices should be performed. The good order and safety of society required it.

In this I cannot include the offices performed by the gentlemen who assumed to be judges of the Court of Appeals; for, it has been disclosed in the argument of this motion, that, in one of these cases at least, there was a formal protest made to their assuming jurisdiction or authority to try it; and, furthermore, that, before these causes were heard and determined, the authority which clothed them with the judicial ermine had virtually disrobed them, by plainly intimating that their authority had expired.

But there were other offices which could not be dispensed with, as we have seen, even for the short period which elapsed between the expiration of the military provisional government and the date of the Enabling act, which offices were performed by the military appointees. Now, it seems to me, that if it were competent for the Legislature to have given authority to perform the acts before they were done, it would have power to ratify them after they were done. In the case of *Thompson v. Lee County*, 3 Wall. U. S. R. 327, it was held by the Supreme court, that if the Legislature possessed the power to authorize the act to be done, it could by a retrospective act cure the evils which existed, because the powers thus conferred had

78 been *irregularly executed. And subsequently, in the case of *Beloit v. Morgan*, 7 Id. 619; (see, also, *Sedgw. on Stat. and Const. Law* 192, 198,) the same court held that ratification by the Legislature, in the case of bonds issued by a corporation, is in all respects equivalent to original authority, and cures all defects of power, if such defects existed, and all ir-

regularities in its execution. See, also, *Sedgw. before cited*.

I have cited instances where this power has been exercised by the British Parliament. Other instances might be mentioned; but these are sufficient.

It is true that Parliament is invested with powers which do not belong to the General Assembly of Virginia; but, whilst that is true, it does not, I think, impair the force of the illustration: for it is assumed that the Legislature was fully invested with power to have authorized the acts to be done, and, not having done so, the question is, can an after act of ratification make them valid? If ratification by Parliament gives validity, it seems to me that the same is true as to an act of ratification by the Virginia Legislature; because, in both cases, it depends upon the power of either assembly to have first authorized the act, and not upon the extraordinary powers of Parliament which a State Legislature has not. Parliament has no more power to pass a retroactive law than the Legislature of Virginia has, though it has many other powers which the Legislature has not.

But, if it was competent for the Legislature to ratify the acts which had not been previously authorized, and make them valid, by a retroactive law, which I am strongly inclined to believe, though not necessary to be decided in this case, it cannot help the appellees, inasmuch as the decrees in question have not been ratified by the act of the Legislature. The act in question, in effect, only allows them to stand, provided neither party applies to this court, within a
79 limited *time, and upon the notice prescribed, to review them; and upon such application they are reversed. The Enabling act does not make valid the decrees in these causes; and, consequently, the question as to the power of the Legislature to ratify them is not involved.

From the best reflection I have been able to give to this motion, and for the reasons given, I am of opinion that it is competent for this court to review the decrees in question, and that, therefore, the appellees' objection ought to be overruled.

STAPLES, J. I fully concur in the opinion of my brother Christian. It would be an unprofitable consumption of time for me to attempt a repetition of his admirable and exhaustive argument. I shall content myself with presenting some views merely supplementary to what has been so well said by him.

It has been my earnest wish to affirm the constitutionality of the act now under consideration; to find some way, if possible, consistent with sound and well established principles of constitutional law, by which the decisions of the Court of Appeals mentioned in that act might be reviewed by this court; not because I have any reason to find fault with those decisions, or to distrust the judges who rendered them; but it seemed to me to be due to all parties concerned, they should have an opportunity of

bringing their cases before a court of the last resort, constituted and appointed according to the forms and requirements of the constitution of Virginia. Although the right and the duty of the judiciary to expound legislative enactments and to apply to them constitutional restrictions cannot now be questioned, all concede that the task is a delicate one; and only to be performed upon the clearest and most convincing grounds.

The consequence of declaring this act unconstitutional may be serious injury
80 to the rights of suitors *in two causes before this court. That is the extent of the evil suggested. The effect, however, of a contrary decision will be felt in all classes of society, in unsettling the right of a vast number of persons, and in producing endless litigation and confusion throughout the State.

If we are to hold that the military appointees of the federal government occupying this bench after the admission of Virginia into the Union, were neither judges *de jure* nor *de facto*, but mere usurpers without color of right or title, we must so hold with regard to the incumbents of the Circuit and County courts, and indeed, every other person performing the duties of a public office in the State subsequent to the period mentioned.

Where there is a plain usurpation of an office without any show of title, the acts of the intruder will be undoubtedly void, both in relation to individuals and the public. We must therefore pronounce every decree of judges so appointed for the sale of property, null and void; every judgment for the recovery of money, a nullity; every sale made by a sheriff, a trespass; every relinquishment of dower ineffectual; and the imprisonment of every criminal by the sentence of such courts, an illegal confinement. It is undoubtedly true, that this court, in expounding the constitution and laws, cannot yield to the consideration of expediency nor look to the consequences which may flow from its decisions. But it is equally true, as was said by Judge Chase, in *ex parte Griffin*, in the examination of questions of this sort, great attention is properly paid to the argument from inconvenience. A construction which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither in so great a degree, unless the terms of the instrument absolutely require such preference."

81 *It is insisted, however, that the Legislature has removed the difficulties apprehended, by passing that clause of the Enabling Act which ratifies and confirms the proceedings of all the courts, after the admission of the State, with the single exception of the Court of Appeals.

But if the incumbents of the various judicial offices throughout the State were mere intruders, without color of title, can the Legislature, by subsequent enactment, make them judicial officers? Can it confer au-

thority over persons and things where none existed under the laws then in force? Can it impart to the unauthorized act of a mere private person the force and sanction of a judicial sentence or decree? If an individual, without color of right, should undertake to hold a court, empanel a jury, put upon his trial a citizen, and condemn and execute him, such an act would be murder; and no legislative authority, in this or any other country, could be justly invoked to clothe the proceeding with the sanctity of a judicial decision. The Legislature may prescribe rules for the exercise of judicial power. It may dispense with formalities which do not constitute a part of the jurisdiction of the court even after the proceedings have been taken; but it cannot, by retrospective laws, make valid proceedings had in court, which were originally void for the want of jurisdiction over the parties.

If the judgments and decrees of these military tribunals derive their validity from the Enabling Act alone, they are binding on the parties, not because they are judicial sentences, but because they are legislative sentences, under the form and semblance of legislative enactments. The parties hold, not under the decree, but under the statute. If one Legislature may affirm, another may disaffirm. The next Legislature elected under different auspices, animated by wholly different views of public policy, may repeal the Enabling Act,

82 "and reopen controversies which the best interests of society require should be considered forever settled. It is impossible to escape these conclusions and these results, when once we establish the proposition that the military appointees in question were mere usurpers—without color of right—and that their official acts have no validity other than that imparted to them by statute.

Statutes of the British Parliament have been cited and relied on. The British Parliament is omnipotent in the scale of political and judicial existence, and can mould the constitution at pleasure. "The power and jurisdiction of Parliament (says Sir Edward Coke) is so transcendent and absolute that it cannot be confined, either for persons or causes, within any bounds." But in this State the Legislature is restrained by a written constitution, with clear and well-defined boundaries, separating the co-ordinate departments, and fixing their respective powers and jurisdictions. I am satisfied, however, that British history does not furnish an instance in which the Parliament has attempted an act of the kind, or, if attempted, in which it has been sustained by the courts.

It is clear, upon authority and reason, that the military appointees of the Federal government, discharging judicial functions in this State after its admission, were neither judges *de jure* nor mere intruders; but that they were judges *de facto*; and their acts and decisions, as such, are as valid and binding upon third persons, and

upon the parties, as if made by courts of constitutional authority. These decisions may not be considered authoritative as judicial precedents, but they settle and finally adjudicate the matters in controversy between the parties. Under them vested rights have been acquired; they cannot be impeached in any other court upon grounds that will not equally apply to the decrees and judgments of judges de jure; and

83 *for all the ordinary purposes of society these appointees are to be regarded, while in the discharge of their respective functions, as rightful and constitutional officers. The authorities in support of this proposition are abundant and decisive. It is unnecessary for me to cite them; that has been fully done by Judge Christian.

If, immediately upon the admission of the State, the Legislature had passed an act or resolution declaring a vacancy in the offices of the judges of the Supreme court, or that the decisions they might make should not be respected and obeyed; or, indeed, if, before the final adjournment of the court, it had authorized this court to rehear any case decided during that term, such an enactment would not, in my opinion, be obnoxious to any constitutional objections. But it happens that, although the court was in session when the State was admitted, and continued in session during the month of February, it does not appear that any action was had on the subject until the 14th February, when a resolution was introduced into the House of Delegates by Mr. Marshall, instructing the Committee for Courts of Justice to ascertain and report by what tenure the then incumbents of the State held their offices. Three days thereafter, the committee, construing the resolution as referring to the judges of the Supreme court alone, reported that they had had the matter under consideration; that, in their opinion, the Hon. H. B. Burnham, one of the judges of said court, was not lawfully exercising the functions of a judge of the Court of Appeals, but was disqualified, if for no other reason, by holding a military office under the Federal government; that they deemed it inexpedient to express any opinion as to whether or not Judges Willoughby and Dorman are lawfully exercising the functions of judges of the Court of Appeals,

84 reserving the right to respond further at some future *time, if deemed proper, to so much of the resolution of enquiry as refers to Judges Willoughby and Dorman. And the committee recommended the adoption of a resolution declaring the office of H. B. Burnham vacant. Whether this resolution was adopted does not distinctly appear: it is probable it was not, as judge Burnham immediately thereafter retired from the bench. It does appear, however, that the committee never made any other report, and that neither branch of the Legislature took any further action in regard to Judges Willoughby and Dorman; and these gentlemen continued in the discharge of their judicial duties

until the close of the term, which occurred on the 25th day of February, 1870. It will thus be seen that the Legislature, though fully apprized that these military appointees were holding over and claiming rightfully to act as judges of the Supreme court, declined to take any action, except as to one of them, or even to intimate an opinion that the others were illegally and improperly assuming the functions of Virginia judges. A stronger tacit permission to the two remaining judges, to continue in the exercise of their judicial functions, could not be given by the General Assembly of Virginia. It was so understood by the judges themselves, by parties having cases before the court, and by the public generally. This was true, not merely with reference to the judges of the supreme court, but with reference to all the military appointees throughout the State. The *salus populi*, the peace and good order of society, the protection of public and private interests, required their continuance in office until proper successors could be legally appointed or elected and qualified. The public voice generally approved the policy, and in most of the counties, judges and justices held their respective courts, rendered decrees and judgments, ordered sales of property, issued executions,

85 convicted and imprisoned offenders, and did all *such acts and exercised such functions as rightful courts may perform. Every consideration of a sound and enlightened public policy requires that we should attach to the acts and judicial decisions of these officers, the faith and verity due to all courts of record, until reviewed and reversed in the mode prescribed by the general laws applying to such cases.

The same rules and principles of construction must apply to the judges of the Supreme Court of Appeals. That court, having adjourned without action by the Legislature, and there being no general laws prescribed for rehearing or renewing the decrees and judgments of such court after the term is ended, the parties interested in them acquired thereby vested rights, of which they cannot be divested by special enactments of a retrospective character. That it is not constitutionally competent for the legislative department, by retroactive laws, to authorize courts to rehear adjudicated cases, is well settled by numerous decisions. To use the language of an eminent writer, "If the Legislature cannot indirectly control the acts of the courts by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry." Cooley's Constitutional Limitations, p. 95.

In this State there are limitations upon the powers of the Legislature, in addition to those contained in positive restrictive clauses of the constitution. These limitations result from the division of powers

among the several departments—legislative, executive and judicial. It was never intended that either should perform an act within the constitutional province of the other. As the judiciary cannot legislate, so neither can the legislative department do any act of a judicial *nature.

Such an act is as clearly a violation of the spirit of the constitution as though that instrument had declared, in express terms, that the legislature shall not, in any case, exercise judicial powers. And so it is well settled, that a statute empowering a court to review the decisions of another court, in cases not provided for by the general laws on the subject, is legislation of a judicial character, and directly infringes upon the peculiar and appropriate functions of the judiciary. The reason is obvious. A judicial act is a determination of the existing law in regard to something already done. A legislative act is a rule prescribed for the regulation of future controversies controlled by its provisions. It has been decided, in numerous cases, that a statute granting or authorizing courts to grant a new trial, is in the nature of a judicial sentence or decree, retrospective in its operation, taking away vested rights, and therefore null and void. And so an act granting a right of appeal where it had been lost by lapse of time, is, for the same reason, unconstitutional and void.

In *Burch v. Newberry*, 10 N. York R. 374, the Court of Appeals, in discussing a statute of the kind says, "Thus situated, the Legislature interfered, not to prescribe a rule for all future cases, but to provide a new remedy for the benefit of a class of persons to obtain a rehearing by appeal, in suits in which decrees had been made and become final against them, where the right to a rehearing at the time not only existed, but had been previously and intentionally abandoned, and thereby not only to impose upon the party in whose favor the decree was made, the expense and inconvenience of another hearing, but to subject all his rights and claims in the matters in controversy, which had been determined and become vested and absolutely fixed by the law then in force, to the uncertainty of future litigation, to be lost or saved, as accident and opinion might *afterwards happen to injure or befriend him. Chancellor Kent, in 1 Kent Com. page 455, declares that a retrospective statute affecting and changing vested rights, is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void." It is useless to multiply authorities upon this point. They are well known to the profession and to the courts, and almost universally recognized and approved in every country under the direction and control of an enlightened jurisprudence.

The principles settled by all the cases, apply with as much reason to the decisions of de facto judges, as to judges holding by unquestioned title under legal and valid appointments. The reasons apply as

strongly in the one case as in the other. There can be, in the nature of things, no substantial distinction. In either case the statute is retroactive in its operation; and takes away vested rights; and vacates decrees and judgments which, but for such enactment, could never be impeached. In the examination of decrees and judgments of courts, where the tribunal has jurisdiction over the parties and the subject matter, no enquiry into the title of the judge is ever permitted, further than to ascertain that he is not a mere intruder, but acting under color of a legal appointment. That being ascertained, the validity of the decree or judgment in question is vested and settled by the rules and principles applicable to the sentences of any other judicial tribunal. In *Blackwell on Tax Titles*, it is said that neither the title of an officer de facto, nor the validity of his acts as such, can be indirectly called in question in a proceeding in which he is not a party. The effect of this rule is to render the acts of an officer de facto as valid and effectual as though he was an officer de jure. The interests of the community imperatively require the adoption of such a rule." The only

appropriate *mode of testing his title is by an information in the nature of a writ of quo warranto, in which, after notice and an impartial hearing, he will be ousted from the office, if it turn out that he has been exercising official functions without the warrant of law. Until then he holds the office by the sufferance of the State; and the silence of the government is construed by the courts as a ratification of his acts; which is equivalent to a precedent authority." At the time of the enactment of the proviso now under consideration, the court having adjourned and the term ended, the parties in whose favor the decisions were rendered had obtained decrees or judgments which were final in their character—a complete adjudication of the matters in controversy. Their title to the property or money adjudged them was indefeasible, and could not be impeached by any laws then in force. The effect of the proviso is to vacate those decrees or judgments; to reopen them for a reconsideration and adjudication, upon the merits, by this court; and "to subject all their rights and claims in the matters in controversy to the uncertainty of future litigation, to be lost or saved as accident and opinion might afterwards happen to injure or befriend them."

Whatever may be said of the decisions sought to be reviewed, it is far better they should be considered and treated as final adjudications of the matters in controversy, than that they should be opened by the exercise of doubtful, if not dangerous powers. It is better for us all; better for the repose of society, the protection of property and the happiness of the people, that all the vast and varied controversies growing out of the bloody struggle in which we were involved, shall be adjusted as speedily as possible, and pass forever from the arena

of political and judicial discussion.
 89 *MONCURE, P. I concur in the result of the opinion of Judge Anderson, and in most, if not all, of the views presented by him; but as other judges have delivered opinions in these cases differing from that of Judge Anderson, it may be proper for me to say something more in explanation of my views of the question involved.

I concur in most of the principles laid down in the opinions of Judges Christian and Staples, which are no doubt fully sustained by the many authorities they have adduced in support of them. I differ from them, only or mainly, in the application they have made of those principles to these cases.

The question in these cases is, not as to the effect of an official act of a judge or other officer de facto in the course of a peaceful administration of a government de jure; or of a judge or other officer, de jure or de facto, in the course of administration of a government de facto—such officer claiming authority to act under color of an appointment by such government. In such a case there may be, and I think are, good reasons for giving to the official act of such a person, so far as the public is concerned, all the effect of an official act of an officer de jure of a government de jure.

But the question here is, as to the effect of an official act of a judge or other officer appointed by the military commander of Virginia, while the State was under the military power of congress, such act being done after such military power had ceased to exist, and after the new constitution had taken full effect, but before the government was fully organized under the constitution—that is, before there was in existence any agency of the new government authorized to perform such act.

Had the Legislature, convened to organize the government under the new constitution, the right to say what should be the legal effect of such an act of such an officer under such circumstances, and therefore to

90 *say that the judgments of the acting Supreme Court of Appeals, during the period aforesaid, should be so far subject to the supervision and control of the Supreme Court of Appeals, organized under the new constitution, as that the latter may grant a rehearing of any of the cases in which such judgments were rendered, provided application should be made therefor within six months after the organization of the said court, and upon twenty days' notice to the adverse party? In other words: Is that part of the Enabling Act which provides for that object constitutional or not?

That so much of the act as declares all such acts of such officers valid and binding, with that exception, is not only constitutional, but wise and proper, is admitted on all hands. To that extent, all admit that it is a wholesome and a healing act.

That so much, also, of that act as provides other agents than those officers to perform, in future, the duties of office until

agents could be elected or appointed under the constitution to do so, is constitutional, was decided by this court in the late cases of Dyer v. Ellyson, and Bell v. Chahoon, and is, therefore, res adjudicata.

And it only remains to enquire, Whether so much of that act as contains the exception aforesaid is constitutional?

It is argued that that portion of the act is unconstitutional, because the judges whose judgments are sought to be reheard were, when they rendered them, at least de facto judges; that the judgments of a de facto judge, like the acts of any other de facto officer, are as valid and binding as the judgments or acts of a judge or other officer de jure; that, to grant a new trial of a case in which a judgment has been rendered, is a judicial act, which the Legislature has no constitutional power to perform; and that, therefore, the Legislature had no

constitutional power to authorize the
 91 Supreme Court *of Appeals, as now organized, to grant a new trial of a case decided by the Military Court of Appeals after the new constitution took effect, and before the present court was organized.

A great deal has been said—and very forcibly and justly said—about the convenience and necessity of there being always some person to perform the duties of every office necessary to the due administration of the government; and therefore, it is argued, that it was the duty of the incumbents in office, when the new constitution took effect, to continue to perform the duties of their offices until other persons were duly appointed and qualified to take their places.

I admit that it was proper for these incumbents to continue to perform all such duties of office as the public good required to be performed before the appointment and induction of officers under the new constitution; and that it was the duty of the Legislature to confirm their acts if they required confirmation, as was done by the Enabling Act.

But had not the Legislature constitutional power, according to their discretion, to confirm or to disaffirm those acts, or to confirm them sub modo only?

I think they had; whether these officers be regarded as de jure or de facto officers, or as mere usurpers; which I think is perfectly immaterial; unless they were constitutional officers—a question which I will presently notice.

The Legislature, with the exception aforesaid, confirmed those acts, and nobody doubts the propriety of such confirmation.

A power to confirm, seems to involve, necessarily, a power to disaffirm; or to confirm sub modo only.

So far as the question involved in these cases is concerned, there was a confirmation sub modo. That is, the judgments of these military appointees, rendered after the cessation of the power which appointed

92 them, *were confirmed; subject only to a power, given to the Supreme Court of Appeals organized under the new constitution, to grant a rehearing by that court,

on motion or petition made upon twenty days' notice to the adverse party, and within six months after the organization of said court.

Is not this part of the act constitutional? is the only question we now have to decide.

Whether it be wise or not, whether it would not have been better to have confirmed, unconditionally, all the judgments aforesaid, is not the question we have before us. We may well conceive the motive which induced the Legislature to confirm these judgments as they did, subject to a restricted right of rehearing, as aforesaid. So limited was the sphere of selection of persons to fill the civil offices under the military government, especially during the latter period of its existence, that it was impossible to find persons competent in all cases for that purpose. And the consequence was, that in many cases, probably without the fault of the military commander, civil offices were filled with incumbents wholly unfit and unworthy to fill them. This inconvenience and mischief was seriously felt, especially in regard to judicial offices, which ought to be filled, if possible, with men of the greatest learning and virtue. That some unfit appointments to these offices should have been made, under the circumstances before stated, was naturally to have been expected, and was no doubt unavoidable. Among the offices filled by appointments of the military commander, were the offices of the three judges of which the Supreme Court of Appeals then consisted. The three judges, thus appointed, entered upon the performance of their offices, and continued to perform them after the military government ceased to exist, down to the period of the organization of the court under the new constitution, except that, at the July

93 term of the court preceding *such organization, the court declined further to act, in view of the fact that the new constitution had been adopted by the voters, and was expected soon to be approved by Congress and put into operation, when there would be a Supreme Court of Appeals organized under it; and except, also, that the office of the president of the court was declared by the Legislature to be vacant, in consequence of the fact that the late incumbent of the office, under military appointment, at the same time held an office under the government of the United States. Why this court, after having declined in July further to act as such, because it was probable that the new constitution would soon be approved by Congress and put into operation, yet consented to act, and did act, six months thereafter, when the new constitution had been so approved and was in operation, and even after the Legislature had been convened, and was actually in session, engaged in organizing the government under that constitution, is a question which I cannot answer, but which, however, is not material to the one we have to decide.

I do not mean to say or insinuate that either of the three judges of this court, appointed by the military, was not a com-

petent judge or worthy man, or was influenced by unworthy motives in continuing to act as aforesaid, or that their doing so was an act of impropriety. I will say this much at least, in justice to their capacity, that I have had occasion to examine their opinions in at least one important case, and those opinions seemed to me to be marked by much learning and ability. I have no reason to believe that they were not gentlemen of integrity also, and they may have been well qualified and fitted in every respect for the judicial office. At all events, I doubt not, they were as well qualified and fitted for that office as any persons who could have been obtained to fill it, under the circumstances.

94 *I state these facts as part of the surrounding circumstances under which the Enabling act was passed. The doubts and difficulties which induced the passage of that act, and which were intended thereby to be settled, are fully and strongly set forth in its preamble. It confirms all the official acts, otherwise valid, of the incumbents of office when the constitution took effect, which were thereafter performed, except that in regard to judgments of the court of last resort, it gives to the Supreme Court of Appeals, organized under the new constitution, a right of supervision and control as aforesaid. I think this was not an unreasonable precaution and safeguard against injustice, looking to all the circumstances of the case, supposing the Legislature had power to enact it. Suppose the judges had been incompetent or corrupt, as they might have been for aught the Legislature knew, having been appointed under such unfavorable circumstances. Suppose they had been bribed to render an unjust and illegal judgment. Was the Legislature to permit that judgment to stand irreversible, as the judgment of a court of last resort, or was it not proper to provide the means of preventing such injustice?

The Legislature thought it best to adopt the provisos contained in the second section of the act; and I cannot say that they acted unwisely in so doing. But whether they did or not, cannot affect the validity of their act if they had the constitutional power to enact it; and the only question, therefore, is, Had they such power?

The Legislature represents the sovereignty of the State, except so far as they are limited by the constitution. A law enacted by them is presumed to be constitutional until the contrary is plainly made to appear. So much has been said in this case by other judges on this subject, that it is needless to say more. The question,

then, is, are the provisos of the sec-
95 ond section *plainly unconstitutional?

If it be a question of doubt merely, we all agree that such doubt must be solved in favor of the validity of the law.

I am of opinion that they are not, plainly, unconstitutional.

It is contended that they are: 1st, because the judges in office when the military government ceased to exist, continued in office,

under the second section of the schedule of the constitution, until the organization of the judicial department of that constitution. And 2ndly, that the second section of the enabling act, so far as it confers power on the Supreme Court of Appeals to be organized under the constitution, to supervise and control the judgments of the Court of Appeals at the term thereof commencing on the 11th day of January, 1870, is a judicial act which the Legislature is prohibited by the constitution to perform.

First. Did the judges in office when the military government ceased to exist, continue in office by virtue of the second section of the schedule, until the organization of the judicial department of the constitution? If they did, then the judgments rendered during that period by courts constituted of such judges, have the same efficacy with judgments rendered by any other constitutional court; and the question would arise, whether the Legislature had power to subject the judgment of a constitutional Court of Appeals, organized or continued under the schedule, to the supervision and control of the Supreme Court of Appeals organized under the constitution, both courts being, in that view, constitutional courts. So far as it may be necessary to notice that question, it will be noticed when I come to consider the second ground of objection above stated.

That the powers of all the officers of the military government of Virginia ceased to exist when that government ceased, may be considered, I suppose, as *res adjudicata*.

Dyer v. Ellyson, and Bell v. Chahoon,
96 ubi *supra*. After that period, they could only be officers of the State, if officers at all, and to the extent to which they may be such officers. And they must have derived all the powers they possessed from the laws of the State, written or unwritten; that is, from the constitution or statutes of the State, or the common law still remaining in force therein.

It is not pretended that they derived any powers from any statute law as contradistinguished from the constitution. Did they derive any and what powers from the constitution of the State or the common law thereof?

If they derived any from the constitution, it was only under the second section of the schedule before mentioned; and whether they did or not derive any from that source, is a question I will presently consider. I will now consider whether they derived any and what powers from the common law.

I think it very clearly appears, as was shown and held in the cases before cited, and is also fully shown in the opinion of Judge Anderson in this case, that the framers of the constitution not only did not provide that the then incumbents of office should continue to perform the duties of their offices until their successors should be appointed and qualified; but, on the contrary, intended to vacate all the offices, leaving them to be filled by the Legislature, or as the legislature might provide. If this

be so, it may be difficult to maintain that the incumbents of office could continue to perform any of the duties of office in virtue of the principles of the common law; which, so far as would be applicable to this question, might seem in that view to be abrogated.

Supposing those principles, in their application to this question, not to have been abrogated, I presume that the utmost extent to which they can go is, to make valid all official acts performed by the military
97 appointees, *after the cessation of the military power, which public necessity or convenience required; subject to such modification as the Legislature might choose to prescribe.

Certainly there were some offices, the duties of which were required by public necessity or convenience to be performed, down to the period of their being filled by persons appointed and qualified under the constitution; and in such cases it was undoubtedly proper for the old incumbents to continue to perform these duties till that period. Whether such necessity or convenience required the three military judges of the Court of Appeals to continue to hold that court and hear and decide causes, after the State had been fully restored to her sovereignty, and when her Legislature was in session, and expected soon to appoint the five judges of that court under the constitution, is at least a very doubtful question, though I do not at all doubt the bona fides of their action in this respect.

But, however that may be, it seems to me most obvious, upon principle, that the official acts of persons thus holding over and acting, after their powers, derived from their original appointments, had ceased, were subject to the will of the sovereignty of the State, and to the supervision and control of the Legislature, which is the representative of that sovereignty, save only to the extent to which it may be restricted by the constitution. These persons were certainly not express agents of the State, even if they could be agents at all, in the face of a manifest intention of the convention that their offices should be vacated. They could at most be but implied agents, from the necessity of the case, and, to the extent of that necessity, subject, of course, to the supervision and control of the Legislature, as before stated, which could, as it did, declare the extent to which their past acts should be effectual, and prescribed the terms on which they,
98 or some of *them, might continue to act, until their successors should be appointed and qualified. The period during which any such implied agency could exist, was very brief, being between the time when the constitution took effect and the time when the offices might be filled under the constitution, or the time when they might be temporarily filled earlier by provision of the Legislature.

Now, it is not necessary to decide in this case, whether the official acts of these implied agents required express confirmation

by the Legislature to make them valid. Perhaps they would have become valid, ab initio, by acquiescence of the State afterwards, and the failure of the Legislature to repudiate them, might have been considered as conclusive evidence of such acquiescence. Or, perhaps, they were valid, ab initio, unless and until expressly disaffirmed by the Legislature at its first session under the constitution.

However this may be, I think the Legislature had power to declare whether it would accept for the State the agency of these military incumbents in performing the duties of their offices after the military power had ceased, and to what extent, and on what terms such acts should be valid; and, therefore, that it had power to pass the Enabling act, including the provisos of the second section, subjecting the judgments of the military Court of Appeals, after the constitution took effect, to the supervision and control of the Supreme Court of Appeals to be organized under the constitution, unless the military judges were continued in office by the second section of the schedule to the constitution, a question which I will presently have occasion again to advert, assuming, for the purpose of this branch of my enquiry, that there was no such continuance. The Legislature had power to declare, as it did, in regard to these judgments, that they shall stand, unreversed and irreversible, unless,

99 within six months after the organization *of the Supreme Court of Appeals, a motion or petition for a rehearing should be made by any party, upon twenty days' notice to the opposite party, in which case a rehearing may be granted, and such judgment set aside, and annulled or affirmed, as to said Supreme court may seem right and proper.

And now I resume the enquiry, whether, by the second section of the schedule, the three military judges of the Court of Appeals, in office when the constitution took effect, were continued in office until the organization of the judicial department of the constitution.

If they were so continued, it can only be because the court was continued, and because the continuance of the court necessarily operated a continuance of the judges in office—I say necessarily, because, if such necessity does not exist, the argument is irresistible to show that the framers of the constitution intended to vacate all judicial, as well as other offices of the State, when that instrument took effect. The same argument which applies to other offices, applies with at least equal, if not greater force, to judicial offices. So much has already been said in this opinion, and better said in the opinion of Judge Anderson, on this subject, that I will say no more, but will proceed to consider whether the necessary effect of the second section of the schedule was to continue these judges in office.

A court may exist without the existence

of a judge of such court. A court does not cease to exist when and because the office of judge of such court is vacated by death, resignation, amotion from office, removal from the State, or otherwise. It was certainly competent for the convention to continue in existence the court, as organized under the old constitution, until the organization of the judicial department under the new constitution, without, at the same time, continuing in office during that period, the judges who were in office when 100 *the new constitution took effect.

Suppose, for instance, the convention, after saying, as they did, in the 2d section of the schedule: "The several courts, except as herein otherwise provided, shall continue with the like powers and jurisdiction, both in law and in equity, as if this constitution had not been adopted, and until the organization of the judicial department of this constitution," had added these words: "but the offices of judges of the said courts shall be deemed vacant until filled in the mode prescribed by law," or "by the old constitution." Could there be any doubt as to the propriety of these words, and their perfect consistency with the language used before; or as to the power of the convention so to continue the existence of the court? I think not. The Court of Appeals as organized under the old constitution—I mean that of Alexandria—consisted of three judges, any two of whom might hold a court. The Court of Appeals to be organized under the new constitution was to consist of five judges, any three of whom might hold a court. The convention may well have intended, by the language used in the 2d section of the schedule, to continue the organization of the court under the old constitution until the organization of the court under the new constitution, without, at the same time, continuing the existing judges of the court in office, but leaving the vacant offices to be filled, if necessary or deemed proper, in the mode prescribed by the old constitution, or such other mode as the Legislature might provide. That such was their intention, I think results conclusively from what has already been said. If they had intended to continue the then present judges in office, they would have expressly said so, as did the convention of 1851; notwithstanding that convention expressly continued the existing courts, as did the convention which formed the present constitution. With that

101 and other like examples before their eyes, the latter convention would *not have omitted this express provision of former constitutions for the continuance of the judges in office, if they had intended such continuance; especially, when there were so many other reasons for believing the contrary. But they did not intend it, as is clearly shown, not only by the view just presented, but all the surrounding circumstances.

2dly. The only remaining question is, Whether that part of the Enabling Act I am now considering is a judicial act, which

the Legislature is prohibited by the constitution to perform.

I admit that the Legislature cannot perform a judicial act; and the only enquiry is, Whether that part of the act in question is a judicial act?

If the act had authorized a constitutional court of appeals to grant a rehearing or not, in its discretion, of a case decided by such court at a term which had ended before the passage of the act, it might have been a doubtful question whether it would have been, in that respect, a judicial act.

But it is unnecessary to decide that question, as it does not arise in this case. The court whose decisions were thus subjected to the supervision and control of the present Court of Appeals, is the court which was composed of the three military appointees who were in office when the new constitution took effect, and those decisions were rendered after the military power had ceased. I am of opinion that it was not a judicial act to subject those decisions to the supervision and control of the Supreme Court of Appeals organized under the new constitution, as was done by the Enabling Act.

Now, the only ground on which it can be contended that the Enabling Act, in that respect, was a judicial act, is, that those decisions were, *proprio vigore*, valid decisions of a court of last resort, which, therefore, could not be set aside or drawn in

102 question after the end of the term at which they were rendered. Were *they such decisions, is then the only question; and that question has already been fully answered. They were decisions of persons who had no authority whatever to make them, except what may be derived by implication from the subsequent acts or acquiescence of the State. The only way in which the State ordinarily acts, is by her Legislature, whose power to act for her, in all cases whatsoever, is restricted only by the constitution. It was in the power of that Legislature to say whether those decisions should be wholly valid or wholly void; or valid only on certain conditions, and on what conditions. Accordingly, in a very short time after those decisions were rendered—not longer than a month or two—the Legislature passed the Enabling Act, whereby it was declared that they should be valid, unless, within six months after the organization of the judicial department of the new constitution, a rehearing was allowed by the Supreme Court of Appeals, on petition or motion of any party, on twenty days' notice to the opposite party. The Legislature justly thought that if those decisions, though rendered under such extraordinary circumstances, were right, they ought to stand; but if wrong, they ought not to stand, if objected to in due time and in a proper manner; and referred the question of right or wrong to the decision of the Supreme Court of Appeals, requiring the objection to be made by petition or motion, upon notice, and within the period aforesaid. In all this there was surely nothing of which the parties in whose favor

those decisions were rendered can have any reason to complain, unless it clearly appears that some constitutional right was thereby violated. With all deference for the opinions of my brethren who differ with me, I think the contrary appears, and has been shown, if not by me, at least in the full and able opinion of my brother Anderson.

I have said nothing, in terms, about 103 the objection *made to the part of the act in question on the ground that it interferes with private property or vested rights; because that objection is embraced in the general one I have just been considering, that the part of the act in question is a judicial act. The only ground on which it can be argued that such part of the act interferes with private property or vested rights is, that the decisions in question are final decisions of the Supreme Appellate Court, which cannot be interfered with after the end of the term at which they were rendered, even by an act of the Legislature. But I think it has been demonstrated that they were not, in themselves, such final decisions.

In conclusion, I am of opinion that the part of the enabling act in question is constitutional. But as a majority of the court think otherwise, it must be declared to be unconstitutional, and the petitions for rehearings in these cases must be denied.

JOYNES, J., expressed the opinion orally, that the proviso in § 2 of the enabling act, is unconstitutional.

Motion to rehear refused by a majority of the court.

After the motion to rehear the cases had been overruled, a motion was made to reconsider that motion, and the order overruling the motion was suspended, and time was taken to consider the latter motion. The question was argued in behalf of the motion to rehear the decree, upon printed notes, by Conway Robinson and Lyons.

March 13.

JOYNES, J. The order of this court, upon the petitions for a rehearing of these causes under the second section of the "enabling act," passed March 5, 1870, by which the rehearing was refused, having 104 been suspended *on the application of the petitioners, the petitions come on now to be finally disposed of. I did not file an opinion when the petitions were disposed of in November, and I propose, therefore, to state briefly the grounds of my opinion. Upon a question of such novelty and gravity, I should at any time speak with diffidence, in opposition to the opinion of two of my honored brethren, especially when the result of my opinion is to overrule a provision of an act of assembly. It is a trite observation, but a perfectly just one, that while it is undoubtedly within the competency of the courts to overrule an act of assembly which exceeds the power of the Legislature, under the constitution, it is a power to be exercised with great caution, in deference to the opinion of the Legislature, and only when the excess of authority,

on the part of the Legislature, seems to be beyond question. At the same time, it must be conceded that such an authority in the judiciary is essential to maintain the paramount control of the constitution, and that whatever deference is due to the opinion of the Legislature, still higher deference is due to the constitution. In the exercise of this power, we do not set ourselves against the Legislature; we do not arrogate superiority over that department of the government, to which we are only co-ordinate; we do no more than perform our ordinary function of deciding what is the law of the case before us. It is the plain duty of the court to consider and determine such questions with firmness and according to their best judgment, always remembering that nothing is more essential to the public welfare than a strict adherence to the constitution. The Legislature performs its duty according to its own sense of what the constitution allows or requires; and so we must perform ours.

The term of the Court of Appeals at which the decrees we are asked to review were rendered, closed on the 25th day of February, 1870. Whatever doubts existed
105 *at a former period, it has long been the settled doctrine of this court, that it cannot set aside a final judgment or decree after the expiration of the term at which it is rendered. *Reid's Adm'r v. Strider's Adm'r*, 7 Gratt. 76; *Robinson v. Allen*, March 5, 1855; *Edmunds v. Hicks*, January 20, 1860.

This principle is recognized by the provision of the Enabling act which I am now to consider, which undertakes to give to this court authority to review and set aside judgments and decrees rendered at the term which ended on the 25th day of February. The Enabling act was not passed until the 5th day of March, 1870. If the decrees and judgments rendered at that term were valid in themselves, and without the support of the Enabling act, it was not competent for the Legislature, by an act passed after the expiration of the term, to set them aside, or to confer authority upon us to do so. This proposition rests upon the soundest principles, and is sustained by the amplest authority, as is fully shown in the opinions of my brethren Christian and Staples, delivered at the hearing in November. As far as I remember, this position was not seriously controverted, if controverted at all, in the argument.

It was contended, on behalf of the petitioners, that the judgments and decrees rendered by the Court of Appeals after the 26th day of January, 1870, when the State was admitted to representation in Congress, were wholly void in themselves, for want of any authority in the gentlemen who acted as judges; that the Legislature had power to confirm such void judgments and decrees, either absolutely or sub modo; that, by the Enabling act, it did confirm absolutely the judgments and decrees of all the inferior courts, while it only confirmed, sub modo, the judgments and decrees of the

Court of Appeals, rendered at the term commencing on the 11th day of January, 1870; and that the rehearing now asked from this court is authorized by the proviso
106 *annexed to the confirmation of these latter judgments and decrees.

It does not seem to me to be altogether certain, from a critical reading of the act, whether such was the view of the Legislature; but it is not important to go into that question. The important question is, whether, supposing that the decrees in question were null and void when rendered, it was competent for the Legislature, by the Enabling act, to confirm them and make them lawful and valid, either absolutely or sub modo. If they could be confirmed and made valid absolutely, then I presume they might be confirmed sub modo, with a right to a rehearing in this court. If they could not be confirmed or made valid at all, then there is nothing for us to rehear, no decree to be "set aside or annulled or affirmed," in the language of the statute. Then is every judgment or decree of the Court of Appeals, rendered after the 26th January, 1870, and every judicial act of any inferior court, after the 26th January, 1870, and prior to the 5th day of March, 1870, null and void.

To render a judgment or decree is a judicial act. It is one which the Legislature cannot perform. The province of the courts is to decide what the law is, or has been, and to determine its application to particular facts, in the decision of causes. The province of the Legislature is to declare what the law shall be in the future. And neither of these departments can lawfully invade the province of the other. This not only results from the nature of our institutions, but it is enjoined by an express provision of the constitution, which declares that "the legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the power belonging to either of the others." Article 2.

We have the case, then, as contended, of decrees rendered by persons pretend-
107 ing to be judges, but having *no authority, or color of authority, and which are, for that reason, absolutely null and void. The Legislature subsequently declares that these pretended decrees, which have no legal validity, shall be deemed valid and binding decrees. If they were thereafter to be deemed valid, is it not plain that they owe their validity to the statute alone? It is not a case in which the Legislature cures an irregularity in proceedings in a court having jurisdiction of the case, and held by judges having lawful authority, or color of authority. It is a case in which the Legislature undertakes to supply a total want of authority, or of color of authority, in those who pretended to act as judges. Such persons assembled together could not form a court. They could have no jurisdiction to try and decide a case judicially; so that the Legislature has undertaken to make a decree when there was no jurisdic-

tion in the persons who undertook to decide the case; when, in short, there was no court that could lawfully decide any case. If the Legislature could confirm the void act of these pretended judges, as they are called, why may it not confirm the void act of any other person who undertakes to hold a court and decide a case? Why might not a legislature, if one could be found corrupt enough or lawless enough, confirm the act of a mob which resolved itself into a court, with a grand jury and petit jury, and convicted a man of murder? What could be said against the power to confirm such a judgment, that cannot be said against the power to confirm the decrees now before us, on the hypothesis that the judges who rendered them had no authority or color of authority, and that their acts were null and void as judicial acts?

There are many cases in which statutes have been sustained which undertook to give validity to legal proceedings, notwithstanding irregularities apparent in them. The subject is fully discussed,

108 and the cases *collected, in Cooley on Constitutional Limitations, chap. V. and XI. On p. 107 the author says: "These statutes may as properly be made applicable to judicial as to ministerial proceedings, and although, when they refer to such proceedings, they may at first seem like an interference with judicial authority, yet, if they are only in aid of judicial proceedings, and tend to their support by precluding parties from taking advantage of errors which do not affect their substantial rights, they cannot be obnoxious to the charge of usurping judicial power. The Legislature does or may prescribe the rules under which the judicial power is exercised by the courts, and in doing so it may dispense with any of those formalities which are not essential to the jurisdiction of the court; and whatever it may dispense with by statute anterior to the proceedings, we believe it may also dispense with by statute after the proceedings have been taken, if the court has failed to observe any of those formalities. But it would not be competent for the Legislature to authorize a court to proceed and adjudicate upon the rights of parties, without giving them an opportunity to be heard before it; and for the same reason it would be incompetent for it, by retrospective legislation, to make valid proceedings which had been had in the courts, but which were void for want of jurisdiction over the parties. Such a legislative enactment would be doubly objectionable—first, as an exercise of judicial power, since the proceedings in court being void, it would be the statute alone which would constitute an adjudication upon the rights of the parties; and, second, because in all judicial proceedings notice to parties and an opportunity to be heard are essential; both of which they would be deprived of in such a case. And for like reason a statute validating proceedings had before an intruder into a judicial office, before whom no one is authorized or required to appear, and who could

109 have jurisdiction neither of the *parties nor of the subject matter, would also be void."

In *McDaniel v. Correll*, 19 Illi. R. 226, cited by Cooley, a statute had been passed to render valid certain legal proceedings against non-residents, over whom the court had not obtained jurisdiction, whereby an alleged will was adjudged to be void. The court said, among other things: "If it was competent for the Legislature to make a void proceeding valid, then it has been done in this case. Upon this question we cannot for a moment doubt or hesitate. They can no more impart a binding efficacy to a void proceeding than they can take one man's property from him and give it to another. Indeed, to do one is to accomplish the other." What difference, I ask, can it make, that the proceedings are void, for the reason that the persons who undertook to act as judges had no jurisdiction, or power to acquire jurisdiction, over anybody? The principle is, that if the proceeding is null and void, and not merely defective or irregular, it cannot be confirmed, and it can make no difference on what ground it is thus null and void. If such pretended judges adjudge the property of one man to another, nothing passes by force of the judgment. When the Legislature undertakes to render this judgment valid, does it not undertake "to take one man's property from him and give it to another" as fully as in the case cited? This general subject is elaborately discussed, and the same doctrine laid down, in *Denny v. Mattoon*, 2 Allen R. 361, also cited by Cooley.

It has been said, in support of the power of the Legislature to confirm the void decrees in these cases, that subsequent ratification is equivalent to original authority; and that, therefore, the Legislature may ratify, by subsequent confirmation, the exercise of a jurisdiction which it might have authorized beforehand; and the case of *Thomson v. Lee County*, 3 Wall. U. S. R.

327, was cited to support the proposition. I have not *access to *Thomson v. Lee County* as I write, but I have before me the case of *Beloit v. Morgan*, 7 Wall. U. S. R. 619, which is a case of the same character, and was decided upon the authority, in part, of *Thomson v. Lee County*. In *Beloit v. Morgan* the Legislature had authorized the town of Beloit to subscribe to the capital stock of a railroad company, and to pay for the subscription in the bonds of the town, payable at the expiration of a term named, and at a rate of interest specified. Bonds were issued by the supervisors, professing to execute the authority conferred by this act. It became a question whether the bonds were issued in conformity with the act. The town insisted that they were not so issued, but were issued in violation of the act, and without legal authority, and constituted a corrupt and usurious contract, and refused to pay them. Subsequently the Legislature passed an act providing that the whole principal and interest of those bonds should be paid.

In *Beloit v. Morgan*, the question arose as to the effect of this provision. The Supreme court said: "This is not an open question in this court. Whenever it has been presented, the ruling has been, that in cases of bonds issued by municipal corporations under a statute upon the subject, ratification by the Legislature is, in all respects, equivalent to original authority, and cures all defects of power, if such defects existed, and all irregularities in its execution. [Citing *Gelpcke v. Dubuque*, 1 Wall. U. S. R. 175, 220, and *Thomson v. Lee County*, 3 Id. 327.] The same principle has been applied in the courts of the States. [Citing 1 Maryland ch. 56; 5 Gray 180.] This court has repeatedly recognized the validity of private and curative statutes, and given them full effect where the interests of private individuals were alone concerned, and were largely involved and affected." [Citing *Satterlee v. Matthewson*, 2 Peters 380; *Wilkinson v. Leland*, Id. 627, and other cases in the Supreme court.]

111 **Beloit v. Morgan*, and *Thomson v. Lee County*, were cases of contracts deliberately entered into, and professedly under authority of a statute, though not in conformity with its terms; of which the obligors had received the benefit, and which justice and good conscience required them to fulfil. The effect of the statute, in such case, was to support the intention of the parties and the equity of the contract. Cases of this kind are numerous. The principles on which such statutes are sustained, and the extent to which such legislation may go, are fully discussed and explained in the 5th and eleventh chapters of *Cooley*, already referred to. These principles, I submit with deference, have no application to such cases as are now before us. Here is no case of contract improperly or irregularly entered into; no case of judicial proceedings conducted irregularly. It is, according to the view I am considering, the case of decrees which were not merely irregular, but null and void, when they were rendered, and in which it is claimed that the Legislature has power to give them validity, by a statute subsequently passed. The question is, whether a statute designed to give validity to such void decrees, is not the exercise of judicial power, and, therefore, unconstitutional and void. Nothing, it seems to me, can be clearer than this.

I submit, therefore, that it is clear, that if the decrees before us were void when rendered, from the want of authority in those who rendered them, to render any decree whatever, they are void now, as they were at first, because it was not in the power of the Legislature to make them valid by confirmation.

It might be suggested, perhaps, that this difficulty might be gotten over, by construing the Enabling act as giving a right of appeal from the decree of the Circuit court. But that will not do. Such is not the provision of the statute. And it might

112 happen that a *party, who would desire a rehearing and review of the decree of the Court of Appeals, would not desire an appeal from the decree of the Circuit court. That is always so when the decree of the Circuit court is reversed by the Court of Appeals.

I do not think it necessary to go into the question, whether these decrees were valid or void when they were rendered, if I am right in the views I have been presenting. But, perhaps, I ought not to pass that question by.

I am not of opinion that the gentlemen who sat in this court, under the military government, had any title, on general principles, to retain their positions until judges should be elected and qualified under the constitution. Their title expired on the 26th January. By this I mean that, on general principles, they had no title that they could set up against the power of the Legislature to supply their places. I say nothing now of their right to hold over by sufferance. This is in accordance with our decision in the case of *The Mayoralty*, 19 Gratt. 673, and the principle is well sustained by authority. 8 Louis. Ann. Rep. 122; 4 English Rep. 283; 24 Ark. R. 78; 44 Maine R. 406; 2 Maryl. R. 341; 9 How. U. S. R. 235; 14 Ib. 227. And this principle has been generally, if not universally, recognized and acted upon in the conventions in which constitutions have been framed for the States. The usage has been to provide for the case by a provision in the body of the constitution, or in a schedule, so that the State may not be without officers in the interval which necessarily elapses between the expiration of the former constitution and the election or appointment of officers under the new one. See 8 Louis. Ann. Rep. 122.

The convention by which our present constitution was framed, commenced its session on the 3d day of December, 1867, and adjourned on the 17th day of April, 1868. The first reconstruction act 113 was passed *on the 2d day of March, 1867, and the powers of the military commander had been enlarged to their utmost extent, in respect to the removal and appointment of officers, by the act of July 19, 1867. There had, no doubt, been some removals and appointments before the assembling of the convention, and many more before its adjournment. Gov. Pierpont was removed, and Gov. Wells appointed in his place during the session of the convention. There was every reason to expect that removals and appointments would become still more numerous. Gen'l Schofield, who was then commanding the district, used his power of removal and appointment with a rather sparing hand. But there was a great clamor in Congress and out of it, and as much in Virginia as elsewhere, among a certain class of citizens, in favor of a general removal of all officers who could not submit to the test oath prescribed by the act of July, 1862, known as the "iron-clad" oath. This agitation culmi-

nated, in February, 1869, in a joint resolution of Congress, requiring such a general removal of officers. The convention, of course, knew the power of the commanding general in respect to the removal and appointment of officers, and they must be presumed to have known of the agitation in favor of a general removal.

The convention recognized the necessity of a schedule to bridge over the interval between the termination of the military government and the organization of the government under the constitution, and accordingly one was adopted. Among its provisions was this: "The several courts, except as hereinafter provided, shall continue with the like powers and jurisdiction, both in law and in equity, as if this constitution had not been adopted, and until the organization of the judicial department of this constitution." Section 4 of the schedule is in these words: "That all re-

114 cognizances, bonds, obligations, and all other instruments, *entered into or executed before the adoption of this constitution, to the people of the State of Virginia, to any State, county or township, or any public officer or public body, or which may be entered into or executed under existing laws, to 'the people of the State of Virginia,' to any such officer or public body, before the complete organization of the department of government under this constitution, shall remain binding and valid, and rights and liabilities upon the same shall continue, and may be prosecuted as provided by law. All crimes and misdemeanors and penal actions shall be tried, punished and prosecuted, as though no change had taken place, until otherwise provided by law."

In what sense is the word "courts" used in the second section of the schedule? The word "court," as is well known, is often used to describe a legal tribunal, in an abstract sense, without a judge, and it is as often used to describe the tribunal with the judge. So we often speak of the judge, while presiding in the tribunal, as "the court." The sense in which this word is used in the schedule, must be ascertained by construction. The question is, what did the convention intend?

If the word "courts" was used to describe the tribunals in an abstract sense, without the judges, the intention must have been that they should not sit, for they could not sit without judges. What could be the reason for continuing over these naked, abstract tribunals, without any power to act? These would be naked, abstract tribunals, without such a provision. Courts were provided for by the constitution, though they could not act until judges were elected or appointed for them. These tribunals could do no conceivable good as long as they remained thus dead and powerless; what more good could be done by the old tribunals continued over, in the same lifeless and powerless condition? The courts are

115 continued over "with the *like powers and jurisdiction." Of what use could

it be to continue the "powers and jurisdiction" of the courts, if they could not be exercised? What good could that accomplish to anybody? The courts are to be continued "until the organization of the judicial department of this constitution." The judicial department was established by the constitution; it could not be said to be organized until judges were elected or appointed to carry it on. The "courts" then were to be continued until judges should be elected under the constitution. Does not this indicate that the intention of the convention was to provide judges to administer justice, until other judges could be provided, under the constitution, to take their places? Why continue the courts over, until judges under the constitution should be appointed, except that the object of the provision would then be spent; the means of administering justice would then be provided from another source? The meaning seems to me to be, that the courts, as organized when the constitution shall take effect, shall continue, &c., until the organization of the judicial department under the constitution: that is to say, one organization shall continue, with all its powers and jurisdiction, until another is ready to take its place and perform the same duties.

There was an obvious propriety—nay, there was a necessity—to supply judges for this tribunal. It was unavoidable that occasions for their services should frequently occur, to prevent the greatest injustice and oppression, against which there could be no other relief. Writs of habeas corpus, appeals, writs of error, injunctions, must frequently be demanded by the most urgent necessity. Without judges, every man must have taken care of himself: without any power to appeal to the law, he must have resorted to force. To that extent, and a most grave and serious one, society would have been resolved into barbarism.

116 We are not *at liberty to suppose that the members of the convention were insensible of these mischievous consequences, or that they could have been willing to bring them upon the people of the State. We must suppose that they intended to guard against inconvenience and mischief, during the interval referred to, by providing the necessary officers for the performance of judicial duties, and the schedule must be construed accordingly, if the language will allow such a construction. The schedule is not to be subjected to a strict and literal construction when that will tend to mischievous consequences; it should be construed liberally, to "suppress the mischief and advance the remedy." Here, as we have seen, there is no occasion to contradict the meaning of the words, or to wrest them out of their ordinary sense; we have only to determine which of two ordinary senses is to be put upon the word "courts"; a sense which must lead to a construction full of mischief, without any possible good, or a sense that will accomplish a highly convenient and beneficial result.

The schedule must be presumed, in the absence of anything to show the contrary, to have been intended to cover the whole period between the expiration of the former constitution and the organization of the judicial department of the present constitution; to apply to every part of that period. The 4th section of the schedule provides for recognizances, bonds, &c., "which may be entered into or executed under existing laws, to the people of the State of Virginia, to any such officer or public body, before the complete organization of the department of government under this constitution."

"All crimes, misdemeanors, and penal actions, shall be tried, punished, and prosecuted, as though no change had taken place, until otherwise provided by law." Does not this section contemplate bonds and recognizances taken in court? The greater part of such bonds and recognizances are taken in court. And how

117 are *crimes to be tried, prosecuted and punished, except through the agency of courts? Every man is entitled to a speedy trial. It might well happen, if no courts could be held during the interval I am speaking of, that a party accused of crime would be held in custody, without the possibility of trial, for an unreasonable and oppressive length of time. A man might be ruined for want of an injunction or appeal, or cruelly oppressed for want of a writ of error or habeas corpus; the people would be subjected to all the evils of a suspension of the courts, which are too numerous and various to admit of enumeration.

It has been said, however, that the convention could not have intended to continue the judges over, because those who were then in office were obnoxious to them politically, and were the subjects of disfranchisements inserted in the constitution. Admit that the incumbents, at the time of the adoption of the constitution, were thus obnoxious; I submit it affords no ground for judgment upon the question I am considering. The convention knew that the commanding general had the amplest power of removal and appointment; that he had already exercised his power in relation to the chief executive and other officers; and they no doubt hoped and believed that he would exercise it as to other officers.

The convention could not tell how long the admission of the State to representation might be delayed. They could not possibly know but that most, if not all, of the offices would, at that time, be filled by military appointees. In point of fact, every judgeship, except one or two, was so filled at the time the State was admitted. The convention was desirous that the State government should be organized as soon as practicable, and accordingly passed an ordinance providing for submitting the constitution to the people on the 2nd day of June, 1868,

118 and for an election of State officers *and members of the general assembly at the same time. The convention knew, however, that it had no authority to carry this ordinance into effect; and it ac-

cordingly requested the commanding general to do so. They may have designed, therefore, that there should be no interval between the inauguration of the constitution and the organization of the government under it; that the officers should all have been elected when the constitution took effect. But they must have known that the commanding general might decline, as he did, to carry this ordinance into effect. And that they contemplated that there might be such an interval, seems to be manifest from the fact that they thought it proper, if not necessary, to adopt a schedule.

Besides, a mere conjecture, founded upon the known or supposed political opinions or prejudices of the majority of the members of the convention, is not a proper guide to the construction of the schedule. Unless the contrary should be made plainly to appear, if not indeed even then, we must give the convention credit for good faith, and an honest desire to provide for the public welfare, and must construe the schedule according to the rules which we apply to other instruments of like character.

When I first heard the opinion of my brother Anderson in November last, I thought that he made good the proposition that the schedule did not apply to the judges, and I consequently laid that subject out of my mind. I have now reconsidered it, however, giving full attention to the views of Judge Anderson. The result of my best reflection is, a confident opinion that the schedule does embrace the judges, and authorized the judges of the Court of Appeals to sit at the time those decrees were rendered. I say nothing of the length of time that they were so entitled to sit. Whether they were entitled to act as judges until the regular election and qualification of judges under the constitution, 119 *or whether the Legislature might remove them by the appointment of judges ad interim, or by a declaration that their places shall be deemed vacant, need not be considered; because the Legislature had not, before the 25th day of February, undertaken to effect their removal in any form; nor did they do so at any other time, until they made a regular election of judges for the term provided for by the constitution.

In the case of the mayoralty, this court used the following language: "The incumbents of office, at the time of an organic change of government, continuing to hold over after such change (in the absence of a provision of the new constitution, or of an act of the Legislature of the new government, giving them such authority), hold by sufferance only, and upon a principle of public necessity or convenience, not in virtue of any individual or private right. They cannot set up any claim against the Legislature, which has ample power to put an end to their official authority at any time, and appoint others to take their places, subject only to any constitutional restrictions which may appear to exist." This

language clearly implies that the mayor, who did not come within the scope of the schedule, had "official authority" while he thus held over by sufferance, so that his acts, otherwise lawful, done during that period, were valid. Chief Justice Chase applied the same principle to the common council of Harrisonburg, in the case of *Woodson v. Fleck*, 9 Am. L. Reg. N. S. 435. He said: "It is to be borne in mind that the members of the common council of Harrisonburg had been elected to that office while the insurgent government of Virginia was in entire control of that portion of the State. When that government was dispersed by the superior force of the United States, the civil authorities did not necessarily cease at once to exist. They continued in being de facto, charged with the duty of maintaining order, until suspended
120 *by the regular government. Thus

the common council of Harrisonburg remained charged with the government of the town, notwithstanding the temporary occupation of the place by the United States forces. Doubtless it might be superseded. The government of the United States was not bound to recognize any authority which originated under the rebel government. But it was not superseded." These views were founded upon public necessity; the *salus populi*; the great inconvenience and mischief resulting from a state of anarchy. A like principle was acted upon by the Supreme court of the United States in *Cross v. Harrison*, 16 How. U. S. R. 164. California was acquired by conquest in 1846. In 1847 a civil and military government over the conquered country was established by authority of the President, with power to impose duties on imports and tonnage. Duties were imposed accordingly, by a war tariff, under which they were collected until notice was received by the governor of the conclusion of the treaty with Mexico, whereby California had been ceded to the United States. The governor directed that duties should be thereafter collected in conformity with such as were, by the acts of Congress, to be paid in other parts of the United States, though no act had been passed extending the revenue system over California. This was approved by the Executive department of the government of the United States. Mr. Buchanan, Secretary of State, in a despatch, expressed himself as follows: "In the meantime, (that is, until Congress should legislate on the subject of a territorial or other government for California,) the condition of the people of California is anomalous, and will require, on their part, the exercise of great prudence and discretion. By the conclusion of the treaty of peace, the military government, which was established over them by the laws of war, as recognized by the
121 practice of civilized nations, *has

ceased to derive its authority from this source of power. But is there, for this reason, no government in California? Are life, liberty and property under the protection of no existing authorities? This would

be a singular phenomenon in the face of the world, and especially among American citizens, distinguished as they are, above all other people, for their law-abiding character. Fortunately, they are not reduced to this sad condition. The termination of the war left an existing government, or government de facto, in full operation, and this will continue, with the presumed consent of the people, until Congress shall provide for them a territorial government. The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest."

A suit was brought against the collector, to recover back the amount of certain duties paid to him, between February 3, 1848, the date of the treaty of peace, and November 13, 1849, the time when the collector, appointed by the President, according to law, entered on his duties, on the ground that they had been illegally collected. The Supreme court held, that the duties were lawfully collected; that the government established during the war, by right of conquest, was lawfully established; that it was the existing government when the conquered territory was ceded to the United States, and did not cease, as a matter of course, or as a consequence of the restoration of peace, and that it was rightfully continued after peace was made, and until Congress legislated otherwise by providing another government.

122 *The continuance of the judges and other offices of the military government in Virginia, to perform their duties after the 26th of January, 1870, was universally acquiesced in by the people. They realized the necessity of practical government, to avoid a state of anarchy, and did not trouble themselves about nice questions.

Their salaries were regularly paid by the State. The governor made no complaint. The Legislature assembled on the 14th day of February, 1870. The governor, in his message, did not call the attention of the Legislature to the continuance of these officers as a usurpation. The Legislature did not remonstrate against their continuance, or undertake to prevent it. The first thing the Legislature did upon the subject, was on the 22d day of February, 1870, when a joint resolution was passed, declaring the office of Judge Burnham, of the Court of Appeals, to be vacant. It is well known that this declaration was based on the ground that he held an office under the United States, and was, therefore, disqualified under the constitution and statutes of Virginia. Nothing was said about the other judges. Could there be a stronger implication, that the Legislature regarded Judge Burnham as holding the place of a judge of the State of Virginia? Else, why apply to

him a test of competency prescribed by the laws of Virginia? And, is it not plainly to be inferred, that they considered the other judges as holding lawfully, when they did not declare their offices vacant likewise? Then came the act of March 5, 1870. That act approved the course of the officers in holding over, declared them to be legal officers, and their acts valid.

Under all these circumstances, it seems to me that these officers must be regarded as de facto officers, whose acts are valid in respect to the public and third persons. A

de facto government may exist with-
123 out *any color of authority. Thus

the Supreme court treats the governments of the seceded States during the war as unlawful—mere usurpations; and yet they regard them as de facto governments, whose acts are valid and binding as to matters connected with the internal, domestic economy of the States, not inconsistent with the constitution and laws of the United States. *Texas v. White*, 7 Wall. U. S. R. 700; *Thornington v. Smith*, 8 Wall. U. S. R. 1.

So the government established over Virginia by the reconstruction acts, did not come into existence by any color of authority from the laws of Virginia. And yet, was it not a de facto government; were not its officers de facto officers, whose acts were valid as to the public and third persons? Is not that construction demanded by the most imperious necessity, whatever may be thought of the constitutional power of Congress to pass the reconstruction acts? Is it possible that the acts of all officers under that government are to be held void? No man can comprehend the full extent of the mischief that would result from such a doctrine. The Legislature did not entertain that opinion, for it did not think it necessary to confirm what was done under that government.

This opinion has extended to such length, that I will not prolong it further. My opinion is, that the motion to review the decrees in these cases ought to be overruled, and the decision made by us on the 14th November, 1870, should be adhered to.

CHRISTIAN and STAPLES, Js., adhered to the opinions they had expressed.

MONCURE, P., and ANDERSON, J., adhered to their opinions.

Motion to rehear refused.

124 *Kelly & als. v. Love's Adm'r & als.*

November Term, 1870, Richmond.

Charitable Trusts—Education.—B., by his will, dated in November, 1848, and admitted to probate in February 1850, gave land and personal estate for the establishment and support of a school in a certain neighborhood in Washington county; and he appointed certain persons trustees to

carry out his devise, with power to fill vacancies in their body. L was appointed one of the trustees, and president and treasurer of the board, and he was also executor. The treasurer was to receive ten *per cent.* on the money he paid out. The school was established; and L settled his accounts before a commissioner, which shewed a balance in his hands of principal and interest \$3,701 44, on the 1st December, 1859. He died during the war; and in 1866 the then acting trustees filed their bill against his administrator and securities to recover the money in his hands. **Held:**
1. **Same—Same—At Common Law—Void.**—At common law the devise and bequest was illegal and void.

2. **Same—Same—Statute—Valid.***—But by the act of April 2, 1859, concerning devises and bequests made to schools, &c., and the act of 1840-41, Code, ch. 80, § 2, it was made valid, though it had not been reported to the general assembly, as directed by § 7 of said first act, and no act had been passed incorporating the institution.

3. **Same—Same—Parties to Suit—Decree.**—The trustees could maintain the suit. But an act having been passed, since it was commenced, incorporating the institution, the corporation should be made a party, and the decree should be for the payment of the money to the corporation.

4. **Same—Same—Interest.**—L. is not to be charged interest upon the whole balance found against him in December, 1859, but is to be charged interest on the principal from that date.

5. **Same—Same—Executorial Account.**—The commissioner having made a special statement of the account, at the instance of the defendants, they cannot object that it is not stated on the basis of an executorial account.

Solomon G. Barrick, late of the county of Washington, departed this life prior
125 to the 25th day of February, *1850.

By his will, which bears date on the 6th of November 1848, after giving to his mother the tracts of land on which she lived, and the personal property upon the place, for her life, and at her death giving the same to his half sister Catharine for her life, and to her children, if she should have any, at her death, he directs that if Catharine should die without children the land left to her, as well as all other property, shall be sold by his executor, and the

*Charitable Trusts—Validity—Statute.—In *Kinnaird v. Miller*, 25 Gratt. 119, the court said: "The case of *Kelly & c., v. Love's Adm'r & c.*, 20 Gratt. 124, is the only decision of this court in regard to the construction and effect of chapter 80 of the Code of 1860, and it has an important bearing upon this case. It was held in that case (all the judges concurring in the opinion delivered by JUDGE STAPLES), that the devise there in question was void at common law upon the authority of numerous decisions of this court (which are cited), but that it was valid under chapter 80 of the Code. The charity was at least as indefinite in that case as it is in this." See also, *foot-note* to *Kinnaird v. Miller*, 25 Gratt. 107.

See principal case cited and approved in *Bible Soc. v. Pendleton*, 7 W. Va. 88; *Wilson v. Perry*, 29 W. Va. 190, 1 S. E. Rep. 317; *Wilmoth v. Wilmoth*, 84 W. Va. 436, 12 S. E. Rep. 734; *Handley v. Palmer*, 91 Fed. Rep. 954.

*For monographic note on Charities, see end of case.

proceeds appropriated in manner and form as hereinafter directed.

The third clause of his will is, omitting useless words, as follows: I give and devise to Leonidas Love, three certain tracts of land lying in the county of Washington, (describing them) for which said tracts of land the said Leonidas Love has already executed his bond to me for the sum of \$2,200, due and payable on the 1st day of January, 1848, bearing interest from the date; and I direct this sum of \$2,200, and the proceeds of the sale of the two tracts of land, and all the other property devised to my mother during her life, and at her death to my half sister Catharine, during her life, should she die without issue, as well as the proceeds of a tract of land I own in Indiana, and all other property of every description of which I may die possessed, after the payment of the devises hereinafter mentioned, to be held by my executor, or invested by him, on undoubted security, as a school fund; and the interest, after the first day of January 1853, is to be appropriated towards the payment of the salary of a competent teacher to teach school at a school-house which I wish to be erected on a certain piece of land upon which myself and James Cole consented a church and school-house might be erected some years ago. And for the erection of said school-house, I hereby direct that \$200 of the interest on Leonidas Love's bond to me for \$2,200, which may be due before 1853, be

appropriated by my executor. And I 126 further direct that no one sect *or denomination shall have any power or control over said school-house. And if it should be that the school-house should not be erected on said piece of land, or that there should be objection thereto, then I wish the school-house to be erected near that piece of land, so as to be convenient to the neighborhood in which the said piece of land lieth. It is further my will and desire, that the interest upon the fund hereby created be expended yearly under the direction of Leonidas Love, David Jones, Oscar Love and Charles Meeke, and they are hereby appointed commissioners for the purpose; and any vacancy which shall at any time occur, either by death, resignation or removal, in the board hereby constituted, I direct shall be filled by the survivors of those remaining, and those who may be patrons of the school when such vacancy occurs. I constitute Leonidas Love as the president and treasurer of this board of commissioners; and if at any time hereafter, another treasurer should be appointed for this board, I direct that he be required to give undoubted security for the faithful discharge of his duties; and I order and direct that the treasurer of the said school fund shall be paid, or receive for his services, ten per cent. on the money which he pays out as heretofore directed, i. e., the interest for the school fund.

The testator appointed Leonidas Love executor of his will, and directed that he should be allowed three hundred dollars for

his services as such; and if it should be necessary for him, as executor, to make a trip to the west, that he should receive the sum of one hundred and fifty dollars, in addition, from his estate. And he directed, also, that Love should be required to give ample security for the faithful discharge of all the duties required of him by the will.

Leonidas Love qualified as executor of the will, and gave security, as required by it; and in 1859 he settled his administration account before a commissioner of 127 *the court, showing a balance in his hands, on the 1st of December, 1859, of \$3,701 44, of which it would seem that \$328 16 was interest. One of the items of charge against the executor is under date of March 12th, 1854, for cash received of R. T. & G. Harris, of Indiana, \$650 00; which seems to have been assumed, in the Circuit court, to be for the Indiana land mentioned in the will, there being no other charge for that land.

In October, 1866, James Kelly, David Jones, James Buchanan and Matthew Houston filed their bill in the Circuit court of Washington county, against the administrators of Leonidas Love and his sureties in his official bonds, in which they set out the will of Solomon G. Barrick, stated that Love had paid the legacies, and had settled his account, showing the balance as above stated; that it did not appear what had become of the Indiana land, unless the item of \$650 be the proceeds of the sale of it; that Love did not put out the money intended for the school fund, but retained it in his own hands; that the school-house had been erected, and the \$200 appropriated for that purpose had been properly expended; that of the trustees appointed by the testator, the plaintiff Jones is still acting, Charles Meeks has resigned, Oscar Love has removed from the country, and Leonidas Love was killed during the war; that the plaintiffs, James Buchanan, Matthew Houston and James Kelly, had been chosen, as directed by the will, to act as commissioners or trustees; that James Kelly is the president and treasurer, and has given bond and security; and they pray for a decree against the defendants for the amount of the school fund, and for general relief.

The defendants answered the bill. The administrators claim some credits for payments made by Leonidas Love on account of the school; and the sureties insist that,

as it was impossible to invest the fund 128 safely during *the war, they shall not be held liable to pay interest upon it during that period.

In January, 1867, the judge made an order in vacation, directing that M. M. Taliaferro, who was appointed a commissioner for the purpose, do proceed to take an account in the cause, and report to the court the amount to which the plaintiffs are entitled under the will of Solomon G. Barrick, together with any matter deemed pertinent by himself, or required by either party to be specially stated.

The commissioner made his report. Taking the account reported by the commissioner in 1859, viz: \$3,701 44, he charged the interest annually, deducting from this interest the payments made during the year, and making the balance of interest bear interest from the end of the year, thus charging the executor with compound interest; and he ascertained the amount due on the 1st of December, 1866, to be \$4,622 25. He also made a special statement, at the instance of the defendants, charging the executor with simple interest; and on this statement the amount found due from the executor is \$4,516 28; of this sum, beside the interest included in the first item of \$3,701 44, the interest included in the balance found due by the commissioner is \$814 84.

The administrators of Leonidas Love excepted to the report, because,

1st. The commissioner had failed to report the balance against or in favor of Love's estate, upon the hypothesis that no interest is properly chargeable against him from the date at which he entered upon his duties as treasurer.

2. That the principle upon which the interest is charged, in both statements, is contrary to the principle of *Granberry v. Granberry*, 1 Wash. 249, as explained and settled, 3 Leigh 348.

3. Because, by the will, Leonidas Love was entitled *to ten per cent. upon all disbursements; and this the commissioner has not allowed.

Before a decree was made in the case, Henry Lovell and Catharine his wife, who was the half-sister of the testator Barrick, and others who were his heirs at law, filed their petition in the cause, stating that they were about to file their bill to contest the validity of the provision of Barrick's will in favor of the school, and to claim the fund as his heirs at law.

At the April term, 1867, the court overruled the exceptions to the report, and confirmed the special statement; but Lovell and wife and others having filed their petition, the court declined to decree the payment of the money to the plaintiffs, and gave the heirs at law leave to file a cross bill in the cause by the special term of the court.

At a special term of the court, on the 13th of November, 1867, the defendants demurred to the bill; and the cause coming on to be heard, the court overruled the demurrer, and made a decree in favor of the plaintiffs against the administrators of Leonidas Love and his sureties, for the sum of \$4,516 28, with interest from the 1st of December, 1866, till paid, and the costs; the decree against the administrators to be paid by them out of the assets of their intestate. From this decree the administrators obtained an appeal to the District Court of Appeals at Abingdon, where the decree of the Circuit court was reversed, and the plaintiffs below then applied for and obtained an appeal from that decree.

John W. Johnston for the appellants.
Baxter for the appellees.

STAPLES, J. That the devise contained in the will of Solomon G. Barrick, for the establishment of a free school, is void at common law, must be taken to be 130 *well settled in Virginia, upon the authority of numerous decisions. *Gallego's Ex'or v. Attorney-General*, 3 Leigh 450; *Brooke & als. v. Shacklett*, 13 Gratt. 301; *Seaburn's Ex'or v. Seaburn & als.*, 15 Gratt. 423.

If the said devise can have any effect, it is only by force of the act passed 2d April, 1839, entitled an act concerning devises and bequests made to schools, academies and colleges. Sess. Acts, pp. 11 and 13, ch. 12. That act was in force at the death of the testator, and the question is, Does it legalize the devise under consideration?

The first section of the act provides that all devises and bequests thereafter made for the establishment or endowment of any unincorporated school, academy or college, for the education of free white persons, shall be valid in law and equity, except as hereinafter provided; that the trustees appointed by the testator shall have the same right to maintain suits in law and equity, that they would have had if the beneficiary had been a certain natural person; and if the trustees so appointed should decline to act, or if none were appointed, the Circuit courts should appoint trustees to carry the devise into execution.

The act further provides, that if any will, containing devises or bequests of the character mentioned, shall be admitted to probate in any court other than a Circuit court, the clerk of such court shall certify the fact of such probate, and an attested copy of such will, to the Circuit court having jurisdiction over the county; and the Circuit court, at the next term after such certificate is received, is required to appoint a commissioner to ascertain the character and value of the property devised.

The seventh section of the act provides that, at the next term ensuing such probate, or the reception of such copy, the Circuit court shall report the case to the Legislature, together with the report of the 131 commissioner, *and any other matter it may deem proper; and if the Legislature shall refuse, or within two successive sessions after the receipt of said certificate, shall fail to incorporate said school, academy or college, the said devise or bequest shall be void.

It has been argued, that the true intent and meaning of this statute is to refer all questions, touching the validity of charitable bequests and devises, to legislative action; and the Legislature having failed to incorporate the school within the time prescribed by the act, this provision in the will of Solomon G. Barrick cannot now take effect.

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The act further provides, that if any will, containing devises or bequests of the character mentioned, shall be admitted to probate in any court other than a Circuit court, the clerk of such court shall certify the fact of such probate, and an attested copy of such will, to the Circuit court having jurisdiction over the county; and the Circuit court, at the next term after such certificate is received, is required to appoint a commissioner to ascertain the character and value of the property devised.

The seventh section of the act provides that, at the next term ensuing such probate, or the reception of such copy, the Circuit court shall report the case to the Legislature, together with the report of the 131 commissioner, *and any other matter it may deem proper; and if the Legislature shall refuse, or within two successive sessions after the receipt of said certificate, shall fail to incorporate said school, academy or college, the said devise or bequest shall be void.

It has been argued, that the true intent and meaning of this statute is to refer all questions, touching the validity of charitable bequests and devises, to legislative action; and the Legislature having failed to incorporate the school within the time prescribed by the act, this provision in the will of Solomon G. Barrick cannot now take effect.

I think the object of the Legislature, in passing the act, was to change the rule of law laid down in the cases before cited,

controlling bequests and devises for the establishment of schools and colleges, leaving it in full effect and operation, so far as it applied to bequests and devises for religious purposes. This adherence to the rule in the latter case, originated in legislative and popular jealousy, and opposition to the incorporation of religious societies, and a just apprehension that the accumulation of property by such institutions would be incompatible with sound republican polity.

It was not intended, however, by this statute, to place the whole subject of devises and bequests, for literary purposes, beyond the control of the Legislature. The effect of the act was simply to take from the heirs the right to object to the validity of such devises and bequests. It made them valid, so far as the heirs were concerned, but reserved to the State the right to determine, through its Legislature, acting upon the facts of each case, as reported by the Courts, whether the devise should be carried into effect or not.

The reasons for this legislation are apparent. Cases might, and probably would, occur, in which the execution of devises and bequests, of the character mentioned, would be inexpedient and unwise, 132 upon considerations *of a public nature, or impracticable by reason of a change of circumstances or events not foreseen by those who made them. The Legislature, therefore, reserved the right to declare them void, when a proper case should be presented, and a mode was indicated by which, in a reasonable time, the question might be brought to the attention of that body, and its action invoked by persons interested.

It was the duty of the courts to report such cases to the Legislature; but the validity of the devise or bequest was not dependent upon a compliance by the courts with the requirements of the statute. Their validity was clearly and unequivocally established by the provisions of the 1st section, before cited, subject only to the exception contained in the seventh section. That exception applies, and only applies, to those cases in which the Circuit court has certified a copy of the will to the Legislature, and the latter has refused or failed to incorporate the school within the period prescribed. This construction is confirmed by the language of the 2d section of ch. 80 of the Code of 1860, which declares that any gift, grant or devise, made since April 1839, for literary purposes, shall be valid, except such devises or bequests as have failed or become void by virtue of the 7th section of that act.

According to the legislative view, there was a class of devises and bequests invalid under the act of 1839; but they were those only provided for in the 7th section; cases which had been reported by the courts to the Legislature, and had failed to take effect by reason of the refusal or failure of the Legislature to pass an act of incorporation.

But if, as is contended, it is the true construction of the act of 1839, that those devises and bequests for literary purposes, only are valid which have been accepted by the Legislature, I think such acceptance is found in the provisions of the 2d section, chapter 80, *of the Code 1860, already cited. By that section, the Legislature relinquished the right, previously reserved to the State, of determining whether it would or would not accept the devises and bequests for literary purposes made since 1839; and declared its pleasure to be, that all such devises and bequests should be valid, except those only which had become void by the provisions of the 7th section of that act. This legislation operated as a general act of acceptance in all cases, and instead of a special acceptance in each particular case. The heirs could not complain of such legislation, as it took nothing from them; their rights having been already divested under the provisions of the 1st section of the act of 1839.

It appears, however, that the Legislature, to place its acceptance of the devise, in this case, beyond all dispute, on the 20th December, 1866, passed an act incorporating "the Barrick Institute, in the county of Washington." The provisions of the act of 1839, already cited, were intended to bring the subject as speedily as possible to the attention of the Legislature, and to furnish that body with information necessary to enable it to judge of the propriety of accepting the grant, and to provide suitable means to give it effect. The Legislature having acquired such information otherwise, and passed an act of incorporation accordingly, everything has been done that is necessary to give effect to the devise in question. For these reasons, I am of opinion there is no error in the decree of the Circuit court of Washington in holding the devise in the will of Solomon G. Barrick, for the establishment of a school, to be good and valid in law.

Another error assigned in the petition is, that the account reported by the commissioner, in the mode of calculating interest therein adopted, violates the rule laid down in this State for the settlement of fiduciary accounts.

134 *It is unnecessary to decide whether the rule laid down by this court in Harvey's adm'or v. Steptoe's adm'or & als., 17 Gratt. 290, for the settlement of trust accounts under deeds for the payment of debts, applies or has been violated in this case. It is sufficient to say that the special statement reported by the commissioner, and adopted by the court as the basis of its decree, was made at the instance of the appellants.

It appears, however, that the commissioner has charged the estate of Leonidas Love with \$1,534 60 interest, upon a balance of \$3,701 44, reported by Commissioner Lynch. This balance is, in part, composed of \$328 16 interest, estimated in a previous settlement, thus charging the estate with compound interest.

And, again, the commissioner credits the estate with \$739 76 for disbursements, and deducts this sum from the principal and interest aggregated; and the decree of the court is for this balance, with interest thereon from the 1st day of December 1866; and in this way the estate is again charged with compound interest.

It does not appear that said estate has been credited with the ten per cent. commission, to which the treasurer is entitled under the will of Solomon G. Barrick, upon his disbursements of the school fund.

In these respects the decree of the court below is clearly erroneous, and should be reversed with costs, and an account taken, in conformity with the decree of this court.

It seems that the testator, at the time of his death, owned a tract of land in the State of Indiana, embraced in the devise now under consideration. What disposition, if any, has been made of this tract does not distinctly appear.

Should the plaintiffs in the court below desire to proceed against the real estate, it is proper they should be required to amend their bill and make the heirs of
135 *Solomon G. Barrick parties to the suit, before any decree is rendered affecting said real estate.

The Legislature, since the institution of this suit, having passed an act incorporating the Barrick Institute, in the county of Washington, the said corporation should have been made a party thereto by its corporate name, and the decree for any balance due on account of the school fund should have been rendered in its favor.

The other judges concurred in the opinion of Staples, J.

The decree was as follows:

Upon an appeal from a decree of the District Court of Appeals for the seventh district, rendered on the 24th day of July, 1868, reversing a decree of the Circuit court of Washington county, rendered on the 13th of November, 1867, in a suit in which the appellants were plaintiffs and the appellees and others were defendants.

This day came the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the argument of counsel, is of opinion, for reasons stated in writing and filed with the record, that the provision contained in the will of Solomon G. Barrick, dec'd, for the establishment of a school, is valid; that the appellants had a right to institute this suit; and that the Circuit court did not err in overruling the demurrer to the bill.

The court is further of opinion, that the estate of the said Leonidas Love is properly chargeable with interest on the fund which was in his hands as executor of said Solomon G. Barrick, or as trustee of the school fund created by the said will, and that the Circuit court did not err in overruling the

appellees' first exception to commissioner Taliaferro's report.

But the court is also of opinion, that the estate of the said Leonidas Love is
136 not chargeable with compound *interest on the said fund, or any part thereof, and is entitled to a credit of ten per cent. commission on the money paid out by him as treasurer of the said school fund, according to the will of the testator, and that the Circuit court erred in overruling the appellees' second and third exceptions to the said report, so far as said exceptions are in accordance with the opinion herein expressed.

The court is further of opinion, that although the appellants properly brought this suit in their own names, yet, as since its institution the said school has been incorporated, by an act of the general assembly passed December 20th, 1866, entitled "an act incorporating the Barrick Institute of the county of Washington," the said corporation, by its corporate name, should have been made a party to the said suit, and the decree for the balance due on account of said fund should have been in its favor.

The court declines to express any opinion upon the construction of the devise to Catharine Buchanan, as that question is not before this court upon this appeal.

The court is further of opinion, that if the plaintiffs desire to proceed against the real estate of Solomon G. Barrick, embraced in the said devise, if any such there be, they should be required to amend their bill, and make the heirs of said Barrick parties to this suit.

It is therefore decreed and ordered, that the said decree of the said District court be reversed and annulled, and that the appellees, out of the estate of their testator, Leonidas Love, do pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And this court, proceeding to pronounce such decree as the said District court ought to have pronounced, it is further decreed and ordered, that so much of said decree of the said Circuit court as is inconsistent with the foregoing opinion, be reversed and annulled, and that the appellants, John
137 *Kelly, David Jones, James Buchanan and Matthew Houston, do pay to the appellees their costs by them expended in the prosecution of their appeal aforesaid in the said Circuit court, the amount of which said costs is to be a charge against the school fund in the hands of the said appellants.

And it is further ordered and decreed, that this cause be remanded to the said Circuit court for further proceedings to be had therein, in conformity with the foregoing opinion.

Which is ordered to be certified to the said Circuit court of Washington county.

Decree of District and Circuit court reversed.

CHARITIES. (SEE CHURCH PROPERTY.)

- I. In General.
- II. Jurisdiction of Chancery Courts.
- III. Beneficiaries.
 - A. Beneficiaries Uncertain.
 - B. Corporation Not-in Esse.
 - 1. Executory Trusts—Perpetuities.
- IV. Contributors—Donors.
 - A. Control of Fund.
 - B. Resulting Trusts.
- V. Trustees.
 - A. Who May Be Trustee.
 - 1. Unincorporated Associations.
 - 2. Corporations.
 - 3. Who Trustee for Poor.
 - B. Rights.
 - C. Estoppel.
- VI. Devises and Bequests.
- VII. Taxation.
- VIII. Procedure.
 - A. Forum.
 - B. Person Interested—Enforcement of Rights.
 - 1. Trustees.
 - 2. Beneficiaries.
 - C. Evidence.

I. IN GENERAL.

Definition.—"A charity, in a legal sense, may be more accurately described as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable." *P. Episcopal Ed. Society v. Churchman*, 80 Va. 718.

Creation—Purpose Need Not Be Universal.—The assistance of the indigent members and the families of its members of an association is a charitable purpose, where the revenues of the association are wholly applied to paying its current expenses, and in such case it is not necessary that the purposes should be universal. *City of Petersburg v. Petersburg Ben. Ass'n*, 78 Va. 431.

Public Policy—Religious Uses.—The legislation of this state has never exhibited any hostility to bequests for religious uses. *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. Rep. 318; *Protestant Episcopal Ed. Soc. v. Churchman*, 80 Va. 718.

Charitable Corporation—State's Control.—Charitable corporations are "quasi public" in nature, and being created for public purposes are subject in all respects to the state's control. *Wambersie v. Orange Hum. Soc.*, 84 Va. 446, 5 S. E. Rep. 25.

II. JURISDICTION OF CHANCERY COURTS.

Early Virginia Doctrine.—The general powers of a court of equity over charitable bequests has been a subject of much uncertainty, and has given rise to two lines of cases in direct conflict, one denying that courts of chancery exercised at common law any general jurisdiction over charities, and declaring that such powers as these courts have were given by 43 Elizabeth, and that 43 Elizabeth, if it ever existed in Virginia, was repealed in 1792, with the

result that charitable bequests, except in so far as made certain by statutory provisions, which are very limited in Virginia, are void for vagueness and uncertainty. This doctrine was first declared in Virginia in the year 1832, in the case of *Gallego v. Att'y General*, 8 Leigh 450, which case followed the doctrine as set forth in *Baptist Asso. v. Hart*, 4 Wheat. (U. S.) 1, decided by MARSHALL, C. J., in 1819; *Gallego v. Att'y General*, 8 Leigh 450, was followed, and the doctrine therein approved, by a long and continuous line of cases down to the year 1885, including *Seaburn v. Seaburn*, 15 Gratt. 428; *Brooke v. Shacklett*, 13 Gratt. 301; *Kelly v. Love*, 20 Gratt. 124; *Janey v. Latane*, 4 Leigh 327; *Literary Fund v. Dawson*, 1 Rob. 402; *Bible Soc. v. Pendleton*, 7 W. Va. 79; *Knox v. Knox*, 9 W. Va. 124; *Carskadon v. Torreyson*, 17 W. Va. 48; *Brown v. Caldwell*, 23 W. Va. 187; *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. Rep. 302.

Later Virginia Doctrine.—The doctrine of *Gallego v. Att'y General*, 8 Leigh 450, however, was overruled in *P. Episcopal Ed. Soc. v. Churchman*, 80 Va. 718, decided in 1885, which latter case was approved in *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. Rep. 318 (1889), and *Gallego v. Att'y General*, 8 Leigh 450, was directly overruled. And in both cases *Baptist Asso. v. Hart*, 4 Wheat. (U. S.) 1, which was the basis of decision in *Gallego v. Att'y General*, 8 Leigh 450, was disapproved and the later case of *Vidal v. Girard*, 2 How. (U. S.) 127, decided in 1844, and overruling *Baptist Asso. v. Hart*, 4 Wheat. (U. S.) 1, was approved. According to these decisions chancery courts had general jurisdiction over charitable bequests at common law, independently of the statute of 43 Elizabeth, this statute merely creating an auxiliary remedy to encourage and enforce charities, and not conferring any new power.

Present Virginia Law—Original Doctrine Restored.—The doctrine as expounded in *Prot. Episcopal Ed. Soc. v. Churchman*, 80 Va. 718, continued to be the law until 1897, when this case and *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. Rep. 318, were themselves overruled, and the original doctrine as set forth in *Gallego v. Att'y General*, 8 Leigh 450, was restored by the decision in *Fifield v. Van Wyck*, 94 Va. 557, 27 S. E. Rep. 446. In the course of the opinion the court declared that the dicta in the cases of *Prot. Episcopal Ed. Soc. v. Churchman*, 80 Va. 718, and *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. Rep. 318, announce views contrary to a long line of decisions of very able judges; and although this line of decisions may have been based upon erroneous views as to the powers of courts of chancery over charities at common law, and as to the extent to which the statute of 43 Elizabeth had been or was in force in this state, still those decisions had settled the law upon the subject, except as changed by the legislature from time to time.

III. BENEFICIARIES.

A. Beneficiaries Uncertain.—Where the person or object referred to in a bequest is uncertain, or imperfectly described, or where there are two or more objects which answer the description equally well, resort must be had to parol evidence and the surrounding circumstances to show what the testator intended by the expressions which he used. *Roy v. Rowzie*, 25 Gratt. 599; *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. Rep. 318.

Widows.—A bequest of money to be distributed among "needy, poor and respectable widows" is void as to uncertainty of beneficiaries. *Gallego v. Att'y General*, 8 Leigh 450.

Other Persons in Distress.—In *Hill v. Bowman*, 7 Leigh 650, it is said, that "it is agreed on all hands that the words 'any other person or persons who may be in distress,' are too vague and uncertain, and that the declaration of trust as to such persons is altogether inoperative and void."

Incorrectly Named.—In a suit to construe a will leaving a legacy to "the secretary of the board of foreign missions of the Presbyterian Church in the United States," and known as the "Southern Presbyterian Church," it was proved by parol testimony that testator had been a member and elder in a Presbyterian church which was part of the corporation known as the "Southern Presbyterian Church," and was specially interested in foreign missions, and had said he meant to leave a legacy for that cause, the court held that the legacy was not void for uncertainty of the beneficiary, but should pass to the corporation for the use of the executive committee of foreign missions. *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. Rep. 318; *Ross v. Kiger*, 42 W. Va. 402, 26 S. E. Rep. 193.

Not in Existence.—A bequest "to the school commissioners and their successors of South Farnham district, Essex county, for the schooling of the poor children of that district, to be put out at interest, and the interest only applied for the schooling of said poor children," was held to be void; there being school commissioners for that county, who, however, did not form a corporate body; and there being no school commissioners of South Farnham district, nor indeed any such district, that being the name only of an ancient parish. *Janey v. Latane*, 4 Leigh 327.

Congregation as Beneficiary.—A testator directed that in case a certain Roman Catholic chapel should be continued at the time of his death, \$1,000 be paid towards its support; and directed that, if the Roman Catholic congregation should come to a determination to build a chapel at Richmond, \$3,000 should be paid towards its accomplishment; and devised a lot in Richmond to four trustees in fee, upon trust, to permit all and every person belonging to the Roman Catholic Church, as members thereof, or professing that religion, and residing in Richmond at the time of his death, to build a church on the lot for the use of themselves and all others of that religion who might thereafter reside in Richmond. Upon information filed by the attorney general in chancery, to enforce the charitable bequests and devise, it was held that they were uncertain as to the beneficiaries, and therefore void. *Gallego v. Att'y General*, 3 Leigh 450. See, in this connection, *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. Rep. 318; *Stonestreet v. Doyle*, 75 Va. 357; *Bible Soc. v. Pendleton*, 7 W. Va. 79; *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. Rep. 302; *Brown v. Caldwell*, 23 W. Va. 187; *Gallagher v. Rowan*, 86 Va. 823, 11 S. E. Rep. 121.

Promotion of Religion.—A bequest to a wife for life or during her widowhood, to use as much thereof as she thought fit, and the balance, on her death, to go to a missionary society, is not rendered invalid for uncertainty by a provision that such society should expend the money on the Indian mission. *Missionary Soc. of M. E. Church v. Calvert*, 32 Gratt. 357.

Propagation of Gospel.—Neither is a devise void for uncertainty of devisee, which gives estate "to the propagation of the Gospel in foreign lands." *Carpenter v. Miller*, 3 W. Va. 174.

Youths Unable to Pay Teachers' Fees.—A testator devised and bequeathed to his executors real and

personal estate, for the purpose of creating three seminaries of learning, in certain places specified, and directed that any surplus of the property given for that purpose should "be used for the education of such youths as are not able to pay teachers' fees." Held, that the devise and bequest were void for uncertainty as to the beneficiaries thereof. *Literary Fund v. Dawson*, 10 Leigh 147.

Mistake in Name Does Not Defeat Bequest.—Where the name or description is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake will not defeat the bequest; and the same rules apply to corporations as well as individuals. *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. Rep. 302.

Cemetery.—A bequest of realty and personalty in trust, with provision that it be sold and invested, and proceeds devoted solely to repairing and keeping in good order a cemetery, is void because it creates an indefinite trust. *Knox v. Knox*, 9 W. Va. 124.

Foreign Charity.—A direction that a bequest shall be expended on a foreign mission, named, does not avoid the bequest for uncertainty. *The Miss. Soc. M. E. Church v. Calvert*, 32 Gratt. 357.

Foreign corporations may take bequests of charities, under a will made in this state, when and to the extent authorized by their charters. *University v. Tucker*, 31 W. Va. 621, 8 S. E. Rep. 410; *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. Rep. 302; *Roy v. Rowzie*, 25 Gratt. 599.

Educational Purposes—Schools.—A devise of lands and personal estate to trustees for the establishment and support of a school, although void at common law, is made legal by the act of April 2, 1839 (Va. Code 1887, §§ 1420, 1421), providing for the validity of endowments to schools, and declaring that gifts, grants, or devises for literary purposes shall be valid. *Kelly v. Love*, 20 Gratt. 124; *Kinnaird v. Miller*, 25 Gratt. 107; *Roy v. Rowzie*, 25 Gratt. 607.

Theological Seminary—What Is One.—A will contained the following provision: "I have subscribed \$2,000 towards the founding of an academy in or near the town of Martinsburg, to be under the control and direction of the presbytery of Winchester (old school), which, if not sooner paid by me, I hereby direct my executor first of all to pay, out of the proceeds of the aforesaid land (in Pennsylvania), as soon as the same may come into his hands, to such a person or persons as the said presbytery may authorize to receive the same, the sum of \$2,000." The bequest was held to be void as for the use of a "theological seminary," within the exception to Va. Code 1849, § 2 (Va. Code 1887, § 1420), authorizing bequests for educational purposes. *Bible Soc. v. Pendleton*, 7 W. Va. 79.

Foreign Theological Seminary.—A bequest to an incorporated theological seminary located in another state is valid if the corporation is authorized to take by will and the amount of the bequest is within the charter limit. *Roy v. Rowzie*, 25 Gratt. 599.

B. Corporation Not in Esse.—"Wherever a devise or bequest is made to a corporation, to be afterwards, within a period not too remote, created by law for the purpose of carrying into effect a charitable intention of the testator, expressed in his will, the same may be good and valid as an executory devise or bequest, and will become absolute and executed, if, and when, such a corporation shall be created accordingly." *Kinnaird v. Miller*, 25 Gratt.

107; Literary Fund v. Dawson, 10 Leigh 147; Literary Fund v. Dawson, 1 Rob. 402.

No Charter of Incorporation Intended.—A devise of land to certain persons as trustees to build a school-house for the purpose of a free school, and further extending the education of poor children, the testator not contemplating that a charter of incorporation shall be obtained for it, is null and void at law, on the ground of the uncertainty of the beneficiaries intended. *Stonestreet v. Doyle*, 75 Va. 356.

1. Executory Trusts—Perpetuities.—"The corporation must of necessity be created, if at all, within the period prescribed by law in regard to perpetuities; that is, within the term of a life or lives in being and twenty-one years thereafter." *Kinnaird v. Miller*, 25 Gratt. 107; *Literary Fund v. Dawson*, 10 Leigh 147.

When Trust Personal.—When the trust is to be executed by the executor, and is personal, the limitation is not too remote, as in such case it is only limited by life or lives in being. Therefore when the executor is to obtain an act from the legislature the contingency of its passage is within life or lives in being and is not too remote. *Literary Fund v. Dawson*, 1 Rob. 402.

When Trust Official.—An executory trust in executors being official, violates the rule against perpetuities, and is void, and there is no limitation of the time of its execution. It could be executed by an administrator *de bonis non* with the will annexed, a century hence, as well as now. *Literary Fund v. Dawson*, 1 Rob. 402.

IV. CONTRIBUTORS—DONOR.

A. Control of Fund.—Where contributors have subscribed to a fund for a charitable purpose and have paid it over to the hands by which it is to be received and applied, their interest and control over it cease and determine, and whatever jurisdiction is thereafter entertained by the courts with respect to the disposition and control of this fund, must be called into active exercise either by the attorney general, acting on behalf of the public, or by the trustee charged with its custody and administration, or, by some person having a beneficial interest in the object of the trust. *Clark v. Oliver*, 91 Va. 421, 22 S. E. Rep. 175.

Misappropriation.—*Clark v. Oliver*, 91 Va. 421, 22 S. E. Rep. 175, is also authority for the proposition that where money is contributed for a certain purpose, in trust, the contributors cannot require trustees to account for a misappropriation of the trust fund, merely because the trustees appropriated a part of the fund for a church.

B. Resulting Trust.—Where the whole interest of a donor in a fund devoted to charity has passed out of him, and the charity fails, there is no resulting trust to the donor and his heirs. *Clark v. Oliver*, 91 Va. 421, 22 S. E. Rep. 175.

But in *Venable v. Coffman*, 2 W. Va. 310, the court seems to establish a contrary doctrine. The view expressed in that case is, that where the purpose for which it was created fails, by reason of the organization to which it was donated ceasing to exist, the charity reverts to the donor or his heirs.

When Trust Fails to Vest.—The trust having failed by reason of partial invalidity, the intention cannot be carried out, and the heirs are entitled to come in and claim lands devised on such trusts, in absence of other provisions. *Com. v. Levy*, 23 Gratt. 21.

V. TRUSTEES.

A. Who May Be Trustees.

1. Unincorporated Association.—A devise to an unincorporated association as trustee is a good devise. *Charles v. Hunnicutt*, 5 Call 311.

But a bequest to the trustees of a church or unincorporated religious society is void. *Mong v. Roush*, 29 W. Va. 119, 11 S. E. Rep. 918.

2. Corporations.—A private corporation may take a bequest in trust for religious uses. *Prot. E. Ed. Soc. v. Churchman*, 80 Va. 718.

3. Who May Be Trustee for Poor.—A charity given to the minister and vestry, in trust for the poor of a parish, rests in the overseer of the poor for the parish, when there ceases to be a minister and vestry. *Richmond County v. Tayloe*, Gilmer 336.

B. Rights.

When Selection Discretionary.—When the testator leaves the mode of investing the fund discretionary with the trustee, a court of equity should not interfere by directing the manner of investment. *Richmond County v. Tayloe*, Gilmer 336.

The court in this case further said, that the court would not interfere to control the discretion of the trustee, unless in case of manifest incapacity to carry out the trust, or some failure or abuse.

Enforcement of Rights.—See Procedure.

Misappropriation—Division.—Where money was contributed to establish an industrial school for colored youths, the contributors cannot require trustees to account as for a misappropriation of the trust fund, merely because the trustees appropriated a part of the fund for a church. *Clark v. Oliver*, 91 Va. 421, 22 S. E. Rep. 175.

C. Estoppel—To Deny Acceptance.—Acceptance of a trust estops the trustee from denying the title of him from whom such trustee holds. Such trustee can set up no claim to the property against the beneficiary under the trust. *Morris v. Morris* (W. Va. Dec. 1900), 37 S. E. Rep. 570.

VI. DEVISES AND BEQUESTS.

Expounded Liberally.—Devisees in favor of charities, and particularly those in favor of liberty, should be expounded liberally. *Charles v. Hunnicutt*, 5 Call 311. See generally, upon the subject of interpretation and construction of charitable bequests and devises the monographic notes on "Interpretation" and "Wills."

Agencies for Carrying Out Bequest Changed.—Where agencies have been appointed for carrying out a bequest, such agencies being but a secondary consideration with the testator, the object being consistent with the constitution and laws, the bequest is valid, though the agencies existing at the time of the bequest have since been changed. *Kinnaird v. Miller*, 25 Gratt. 107.

Statute Authorizes "Conveyances," Not "Bequests."—The W. Va. Code (1899) ch. 57, § 1, which authorizes "conveyances of lands" for the residence of a minister, does not authorize a bequest. *Bib. Soc. v. Pendleton*, 7 W. Va. 79.

Future Devises.—Va. Code, 1849, ch. 77, § 8 (Va. Code 1897, § 1398), which provides that "conveyances, and devises which have been made, and conveyances of land which shall hereafter be made to charitable uses, shall be valid, etc.," does not include future devises. *Seaburn v. Seaburn*, 15 Gratt. 423.

Exemption from Taxation.—Though the statute exempts from taxation the property of orphan asylums and other charitable institutions, this exemption does not include a tax on a devise or bequest of

property to such institutions. *Miller v. Com.*, 27 Gratt. 110.

VII. TAXATION.

Constitutionality of Property Exemption.—The constitution of Virginia, art. X, § 3, empowers the legislature to exempt all property from taxation which is "used exclusively for state, county, municipal, benevolent, charitable, educational and religious purposes." The grant of power to exempt all property used for the purposes enumerated, carries with it the power to exempt property, the proceeds of which are devoted to any of those purposes. Hence Code 1873, ch. 33, § 14, and acts amendatory thereof (see Va. Code 1887, §§ 457, 488), exempting from taxation property owned by benevolent associations, is constitutional and valid. *City of Petersburg v. Petersburg Ben. Mech. Asso.*, 78 Va. 431.

Collateral Inheritances.—A succession tax is not a "tax on property," and hence does not fall within the statute exempting charitable institutions from taxation. See *Schoolfield v. City of Lynchburg*, 78 Va. 371; *Peters v. City of Lynchburg*, 76 Va. 980; *Miller v. Com.*, 27 Gratt. 110; *Eyre v. Jacob*, 14 Gratt. 423. See also, in accord, *Plummer v. Coler*, 178 U. S. 115.

Devise to Charitable Institution.—Though the statute exempts from taxation the property of orphan asylums and other charitable institutions, this exemption does not include a tax on a devise or bequest of property to such institutions. *Miller v. Com.*, 27 Gratt. 110.

VIII. PROCEDURE.

A. Forum.—The general jurisdiction of chancery embraces all questions arising upon legal bequests, for charitable uses or otherwise, and if any error is committed in such case, it is an error in the exercise of jurisdiction, not in the assumption of an unauthorized jurisdiction. *Elcan v. Lan. School*, 2 Pat. & H. 53.

B. Person Interested—Enforcement of Rights.

1. **Trustees.**—A bill may be filed by trustees or one of them asking the aid of a court of equity. *Clark v. Oliver*, 91 Va. 431, 23 S. E. Rep. 175.

When Beneficiary.—Trustees of a college, interested as beneficiaries in a will, may file a bill in equity to enforce their rights under the will. *Trustees E. & H. College v. Shoemaker College*, 92 Va. 320, 23 S. E. Rep. 765.

2. **Beneficiary.**—A bill may be filed in equity by any beneficiary of a trust, calling upon the court to compel its due execution. *Clark v. Oliver*, 91 Va. 431, 23 S. E. Rep. 175.

A bill in equity will lie at the instance of trustees of a college, named as beneficiaries in a will, to enforce their rights under the will. *Trustees E. & H. College v. Shoemaker College*, 92 Va. 320, 23 S. E. Rep. 765.

C. Evidence—Beneficiary or Subject Uncertain.—Where the person or object referred to, or the subject matter of the bequest is uncertain, or imperfectly described, or where there are two or more objects, which answer the description equally well, resort must be had to parol evidence and the surrounding circumstances, to show what the testator intended by the expressions which he used. *Roy v. Rowzie*, 25 Gratt. 599; *Trustees v. Guthrie*, 86 Va. 125, 10 S. E. Rep. 318; *Ross v. Kiger*, 42 W. Va. 402, 26 S. E. Rep. 193. See generally, monographic note on "Interpretation."

138 *Quinn & als. v. Commonwealth.

November Term, 1870, Richmond.

JOYNES, J., absent, sick.

1. **Court Records—Regular on the Face—Parol Evidence Inadmissible to Show Irregularities.***—Where the record of a court appears on its face to have been regularly signed by the judge who presided at the trial of a cause, parol evidence is not admissible to shew that the proceedings had not been read in court, and that the record was not signed by the judge until some days after the adjournment of the court for the term.

2. **De Facto Judges—Validity of Judgments.**†—A judge by military appointment in Virginia, holding a court and trying a criminal after the admission of the State into the Union, his act is valid.

At the February term 1870, of the Hustings court of the city of Richmond, James Quinn, Wm. Clarke and James Logan were indicted for house-breaking. They were tried at the same term of the court, and on the 25th of February were found guilty, and the jury ascertained their term of imprisonment in the penitentiary at three years. They thereupon moved the court for

***Court Records—Regular on the Face—Parol Evidence Inadmissible to Show Irregularities.**—In *Snodgrass v. Com.*, 89 Va. 687, 17 S. E. Rep. 238, the court said: "The thirteenth assignment is because the court orders were not read in court each day, but signed at the conclusion of the trial during the term—citing *Quinn v. The Commonwealth*, 20 Gratt. 143, decided November, 1870, as showing that the law required that the record of the court's proceedings should be signed immediately after the proceedings are read, except the last day, which should be read immediately before adjournment. But the law in force at that time was essentially different from the law now in force.

"Section 5, ch. 161, of the Code of 1860, in force in 1870, required that the records should be read in a county court either on every day the court sits or on the next day, except the last day, which should be read the same day, and, after being read and corrected, if necessary, should be signed by the presiding judge or justice.

"The law now in force on this subject (section 3114 of the Code of Virginia) requires that the proceedings shall be drawn up by the clerk and read *during the term*, which was done in this case."

See also, on this subject, *Weatherman v. Com.*, 91 Va. 797, 23 S. E. Rep. 349 *et seq.*, where the proposition laid down in the principal case that the failure of the judge to comply with the directions of the statute cannot impair the rights of the commonwealth or those of a citizen, is approved.

In *State v. Vest*, 21 W. Va. 800, the court, citing as authority, among others, the principal case, said: "It is certainly a rule invariably recognized by the courts, that a record imports such absolute verity, that no person against whom it is pronounced will be permitted to aver or prove anything against it. This rule is well established, and we now here refer to but a few of the many cases, in which this doctrine has been held."

†**De Facto Judges—Validity of Judgments.**—See principal case cited in *Bolling v. Lersner*, 26 Gratt. 43; *McCraw v. Williams*, 33 Gratt. 513 *et seq.* See also, foot-note to *Griffin v. Cunningham*, 20 Gratt. 31.

a new trial, which motion was continued until the 12th of March, during the same term, when the motion was overruled by the court: and the prisoners excepted.

In April, 1870, the prisoners applied for a writ of habeas corpus, to the judge of the Circuit court of the city of Richmond, alleging that they were illegally detained in custody by the sergeant of the city, for transmission to the penitentiary; and they state two grounds of objection to the legality of their imprisonment. The first is, that

139 *in custody, purports to have been made by the judge of the Hustings court on the 12th of March, 1870, whilst, in fact, said order was made and signed in the clerk's office of said court (the court not being then in session), on the 22d day of March, 1870; ten days after the term had expired at which the order purports to be made.

The second objection was that C. H. Bramhall, who signed the proceedings of the Hustings court, and claimed to act as judge of the court, was not in law and in fact the judge of the court, and that he exercised the functions of said office without authority of law, at the time of said trial and conviction of the petitioners; and that all his acts as such judge were illegal, null and void.

The writ was awarded; and upon the hearing the petitioners proposed to introduce parol evidence to prove the fact alleged in the petition, as the ground of their first objection. The introduction of this evidence was objected to by the attorney for the Commonwealth; but the objection was afterwards waived, with the reservation of the benefit of the objection upon the hearing of the case.

It was then proved by the clerk and deputy clerk of the court, that the minutes of the court of the 12th of March, 1870, were not read in open court and signed by the judge thereof on the same day; but that they were written in full as they now appear upon the order book, and prepared for signature on that day; but they were not in fact signed until the 22d of March subsequent. That the said Bramhall, after the adjournment of the court, on the 12th of March, 1870, left the city, as they understood, for the city of Washington, and did not return in time to hold the March term of the Hustings court upon the first day appointed by law for the holding thereof; that on the day afterwards, to wit: the 22d

140 of March, 1870, he came to the court-house, *and in the clerk's office adjoining the court-room, in the presence of the clerk, signed his name to the minutes of March 12th; and that the record of said 12th of March was not at any time before signing read in open court.

On the second objection, it appeared from the record that Charles H. Bramhall had been appointed by General Stoneman, commander of District No. 1, judge of the Circuit court of the city of Richmond; and had duly qualified as such; and that he had

been transferred by an order of General Canby, made on the 8th of November, 1869, to be judge of the Hustings court of the city of Richmond; and had duly qualified as such; and as such judge he presided on the trial of the prisoners.

The judge refused to discharge the petitioners, and remanded them to the custody of the sergeant of the city; and they thereupon applied to this court for a writ of error; which was allowed them.

Turner, for the appellants, to sustain the first ground of objection to the validity of the judgment of the Hustings court, referred to Styles' Practical Register, 302; 10 Viner's Abr. 62, §§ 4, 5, old paging; 14 Id. Title Judgment 582-3; Whitaker v. Wisbey, 74 Eng. C. L. R. 44; Rex v. Bellamy, 21 Id. 406; Bias & al. v. Floyd, Gov., 7 Leigh 640; Enders' Ex'or v. Burch, 15 Gratt. 64; Free-land, &c. v. Field's Ex'ors, 6 Call 12; Sydnor v. Burke & Wife, 4 Rand. 161.

The Attorney-General, for the Commonwealth.

As to the authority of Judge Bramhall, this court has just decided that question.

On the other point, he insisted that no parol evidence was admissible to contradict the record. That is only to be proved by producing it; and it imports absolute verity. He referred to 2 Tuck. Com. 278; Vaughan v. The Commonwealth, 17 Gratt. 386; 141 Calwell *v. The Commonwealth, Id. 391; The Life and Fire Ins. Co. of New York v. Wilson's Heirs, 8 Peter's U. S. R. 106.

STAPLES, J. The petitioners were convicted of grand larceny at the February term, 1870, of the Hustings court of the city of Richmond, and sentenced to three years' confinement in the penitentiary. They applied to the judge of the Circuit court of said city, for a writ of habeas corpus, which was awarded; and upon a final hearing the petitioners were remanded to the custody of the proper officer.

The case is before this court upon a writ of error to the order of the Circuit judge.

The petitioners base their application for a discharge, upon two grounds: First, that the Hon. Charles H. Bramhall, who presided at said term, being a military appointee of the Federal government, was not authorized to exercise the functions of a judge after the restoration of civil government in Virginia.

In State v. Bloom, 17 Wisc. R. 521, it was held that where a party was indicted, convicted and sentenced, at a term of a Circuit court held by a person who exercised the office of judge of said court, under an appointment by the governor without authority of law, there being another person entitled to said office, the sentence was, nevertheless, valid and binding. It was so decided upon an application for a writ of habeas corpus after a judgment of ouster had been pronounced against the judge, upon the ground he had been so illegally appointed.

In the *People v. White*, 24 Wend. R. 520. it was said that where an officer, having an apparent authority to do the act, had rendered judgment between the people and the prisoner, neither party can, in a collateral way, call in question the title of the judge. The government may try the title

142 by quo warranto; but until that *is done his acts are valid and effectual, so far as the public and third persons are concerned. And at the present term a majority of this court have decided that the military appointees of the Federal government, exercising judicial functions in this State after its admission into the Union, were de facto judges, and their acts and decisions as such must be respected and obeyed as fully as though they had been officers de jure. And while two of the judges held that the decisions rendered by those who were exercising the functions of judges of the Appellate court might be reviewed by this court, under the provisions of the Enabling Act, they were clearly of opinion that the effect of that act was to make valid the decision of every other court held in Virginia by military appointees after the restoration of civil authority in the State. This decision must be regarded as conclusive against the petitioners upon the question of jurisdiction.

The second ground urged for the discharge of the petitioners, is, that the record of the proceedings of the February term was not read in open court by the clerk, nor signed by the judge before the adjournment of the court; but was in fact signed by him in the clerk's office more than ten days after the adjournment.

Petitioners offered parol testimony to establish this fact, which was objected to by the Commonwealth, but was afterwards admitted by consent, with the understanding that the objection might be renewed or insisted on at the hearing.

The provisions contained in section 5, chap. 12, Code of 1860, require that the proceedings of every court shall be entered in a book and read in open court. After being corrected, where it is necessary, the record shall be signed by the presiding judge or justice.

The statute does not, in express terms, prescribe the time when the record is to be signed. The reasonable inference to be

143 deduced from the language is, that it is *to be done immediately after the proceedings are read and corrected, and on the last day of the term, immediately before the adjournment. But the failure of the judge to comply with the directions of the statute could not impair the rights of the Commonwealth, or those of a citizen, in the record as an instrument of evidence, or a muniment of title, or an absolute guaranty against a second prosecution and conviction for an offence already passed upon by a jury. Had the petitioners been acquitted, they could never have been questioned a second time for the same offence, although the judge had failed to sign the record. In the event of such failure, or a

refusal on his part so to do, he might be compelled by mandamus to perform that duty.

However that may be, if it is essential to the validity of a record, it should be read by the clerk and signed by the judge before the adjournment, and nothing upon the face of the record indicates the contrary, the law conclusively presumes it was so read and signed; and no averment to the contrary will be received. Being regular upon its face, it cannot be assailed by testimony tending to show it is not what it purports to be.

The effect of the evidence offered by the petitioners was to utterly invalidate the writing as a record, and to deprive it of all faith and verity as such, or it was entirely irrelevant for any purpose. Its admission would have violated a rule universally recognized by the courts, that a record imports such absolute verity that no person against whom it is pronounced shall be permitted to aver anything against it. In 1st Inst. 260, Lord Coke says, the rolls being the memorials of the judges, import in themselves such absolute verity as they admit of no averment to the contrary. And if such a record be alleged, and it be pleaded there is no such record, it shall be tried only by itself.

In *Rex v. Carlile*, 2 Barn. & Ad. 971, 23 Eng. C. L. R. 226, the defendant had 144 been convicted of a seditious *libel, and brought a writ of error in the Queen's bench, assigning for errors in fact, that there was but one of the justices named in the command present when the jury gave their verdict. It appeared, however, from the record, that a sufficient number of justices were present; and the court held it not competent to question the fact so stated.

In *Carper v. McDowell*, 5 Gratt. 212, 236, the clerk of the County court endorsed upon a deed that it was acknowledged before him in his office by the parties, and admitted to record, when in fact the deed was executed and acknowledged in an attorney's office, some distance from the clerk's office, though in the same village. It was objected the deed was not good as a recorded deed. Judge Baldwin, delivering the opinion of the court, entered into an elaborate review of all the authorities. He said there might be some force in the objection if the defect appeared on the face of the certificate, but that the proceeding being the final act of an exclusive jurisdiction, regular upon its face, and manifestly that record evidence which the law appointed for the very purpose, could not be impeached by extraneous testimony. Numerous decisions of this court establish the same principle. *Harkins v. Forsyth*, 11 Leigh 294; *Taliaferro v. Pryor*, 12 Gratt. 277; *Vaughn & als. v. The Commonwealth*, 17 Gratt. 386; and other cases.

The case of *Bias & als. v. Floyd*, Governor, 7 Leigh 640, relied on by petitioners' counsel, asserts nothing in opposition to these views. In that case a recognizance had been taken by a justice of the peace for the

appearance of the accused before the Circuit court, and was altered without the consent of the parties, in a material manner, after acknowledgment. In its original form the recognizance was utterly void, for the reason that it did not specify the offence with which the prisoner was charged. As

amended, it bound the sureties
145 *for the appearance of their principal to answer a specific charge of felony. Judge Tucker said the authorities were abundant to prove that where a record had been falsified by erasure or interlineation it might be amended and restored to its original form. The absolute verity attributed to records could not be used to give sanction to a forgery, or a fraudulent erasure of the record. It was also held in that case, that the verity of a record could not be assailed incidentally or by plea; but only by motion or rule to correct it in the court where the record is.

It is obvious there is not the slightest analogy between this case and the one under consideration. The petitioners do not pretend they were not regularly tried and convicted, or that they were prejudiced by the failure of the judge to attach his signature in the manner prescribed by the law. If such were the fact the remedy in the one case would be by writ of error, and in the other by motion or rule in the court where the record is, to make the necessary amendment. All the reasons forbidding the introduction of testimony to contradict the material averments contained in a record equally conspire to forbid its introduction, in the case under consideration, for the purposes indicated. What would the solemn adjudications of the courts avail parties if at any distance of time they are liable to be assailed by parol evidence, resting upon "the uncertain testimony of slippery memory?" What security for the protection of property, or the punishment of crime, would the judicial tribunals afford if one of the parties to every controversy might refuse obedience to the most solemn judicial sentence, or a criminal might demand his discharge from confinement, upon parol proof, that the judge who held the court had omitted the observance of some formality, or even material statutory requirement, regarded as essential to the

validity of the record of his proceed-
146 ings, or the jurisdiction *of his court?

In the language of Judge Tucker, in *Harkens v. Forsyth*, "the demon of mischief could not suggest a notion better calculated to throw all things, in relation to titles, into their original chaos, than the establishment of the principle here contended for." For these reasons the second, error relied upon by petitioners is overruled and the judgment of the Circuit court must be affirmed.

CHRISTIAN, J., concurred in the opinion of Staples, J.

MONCURE, P., and ANDERSON, J., concurred, with the explanation that Bram-

hall was judge only because confirmed by the act of March 5, 1870, called the enabling act.

Judgment affirmed.

147

*Beverley v. Walden.

November Term, 1870, Richmond.

JOYNES, J., Absent, sick.

1. *Issue Out of Chancery—Question of Judicial Discretion.**—Whether a court of equity will direct an issue to be tried by a jury is a question of discretion; but it is a sound judicial discretion, and if improperly exercised, an appellate court will correct it.

2. *Same—No Issue Ordered Until Burden of Proof on the Defendant.*†—When the allegations of the bill are positively denied by the answer, and the plaintiff has failed to produce two witnesses, or one witness and strong corroborating circumstances, in support of the bill, it is error in the chancellor to order an issue. No issue should be ordered until the plaintiff has throw the burden of proof on the defendant.

**Issue Out of Chancery—Question of Judicial Discretion.*—The proposition laid down in the first head-note, that whether a court of equity will direct an issue to be tried by a jury is a question of sound judicial discretion, subject to be reviewed by the appellate court, has been approved in several subsequent cases, the principal case being cited as authority. See *Carter v. Carter*, 82 Va. 636; *Miller v. Wills*, 96 Va. 351, 28 S. E. Rep. 337; *Rohrer v. Travers*, 11 W. Va. 154; *Jarrett v. Jarrett*, 11 W. Va. 637. See also, generally, monographic *note* on "Issue Out of Chancery" appended to *Lavell v. Gold*, 25 Gratt. 473. See also, *Stannard v. Graves*, 2 Call 369; *Reed v. Cline*, 9 Gratt. 136; *Wise v. Lamb*, 9 Gratt. 302; *N. Y. L. Ins. Co. v. Davis*, 94 Va. 431, 26 S. E. Rep. 941.

†*Same—No Issue Ordered Until the Burden of Proof on the Defendant.*—The rule laid down in the second head-note has been followed in several subsequent cases, citing the principal case as authority. See *Elder v. Harris*, 75 Va. 73; *Snouffer v. Hansbrough*, 79 Va. 177; *Keagy v. Trout*, 85 Va. 395, 7 S. E. Rep. 320; *Beverly v. Rhodes*, 86 Va. 419, 10 S. E. Rep. 572; *Jones v. Christian*, 86 Va. 1031, 11 S. E. Rep. 934; *Vangilder v. Hoffman*, 22 W. Va. 8; *Sands v. Beardsley*, 32 W. Va. 598, 9 S. E. Rep. 926.

In *Carter v. Carter*, 82 Va. 639, the court said: "In *Beverley v. Walden*, *supra*, this court said: 'It seems to be the settled rule that in no case ought an issue to be ordered to enable a party to obtain evidence to make out his case: that when the allegations of the bill are positively denied by the answer, and the plaintiff fails to furnish two witnesses, or one witness and corroborating circumstances in support of his bill, it is wrong in the chancellor to order an issue; that no issue should be ordered until the plaintiff has thrown the burden of proof on the defendant; that until the onus is shifted and the case rendered doubtful by the conflicting evidence of the opposing parties, the defendant cannot be deprived by the order of the court for an issue, of his right to a decision by the court on the case made by the pleadings and evidence.' Thus has the rule for the guidance of the chancellor in such

3. **Deed—Unsound Mind;—Denial in Answer—Quere.**—Plaintiff seeks to set aside his deed and contract, on the ground that he was, at the time, of unsound mind and incapable of making the contract. *Quere:* If the denial, in the answer, of the unsoundness of mind and incapacity, is the denial of a fact which puts the plaintiff upon the proof of it by two witnesses, or one witness and strong corroborating circumstances, or merely puts him upon proof of the fact by such evidence as may be satisfactory to the court?

4. **Same—Same—Witnesses of the Execution—Weight of Testimony.**—In such case the testimony of witnesses present at the *factum*, and the written acts of the party attesting his capacity, is more to be relied on than the opinions of other witnesses, based upon facts which may be true, and yet not be the result of unsoundness of mind.

By a contract in writing, dated the 4th day of June, 1863, John Walden sold to Robert Beverley, his farm in the county of Fauquier, on which he lived, containing about eight hundred and seventy acres, for forty dollars per acre, payable in Confederate money; of which \$20,000 was to be paid on or before the 1st day of August,

cases, long been succinctly, clearly and correctly defined."

But this rule has been changed by statute in Virginia; and it is provided that the court may, in its discretion, direct an issue to be tried before any proof has been taken by either the plaintiff or defendant if it shall be shown by *affidavit* or *affidavits* after reasonable notice that the case will be rendered doubtful by the conflicting evidence of the opposing party. See Va. Code, § 3381, as amended in Acts 1897-'8, p. 942.

§**Unsound Mind.**—In *Porter v. Porter*, 89 Va. 122, 15 S. E. Rep. 500, the court said: "It is a familiar and well-settled rule of law that 'the legal presumption is that all men are sane; the burden of proof is on him who alleges unsoundness of mind in an individual.' *Miller v. Rutledge*, 82 Va. (Hansbrough) 867, 1 S. E. Rep. 202. 'Mere weakness of the understanding is no objection to a man's disposing of his own estate.' *Minor's Institutes*, 572. See *Samuel v. Marshall*, 3 Leigh 567; *Greer v. Greers*, 9 Gratt. 332-'3; *Beverley v. Walden*, 20 Gratt. 147." See also, *Miller v. Rutledge*, 82 Va. 867, 1 S. E. Rep. 202; *Hiett v. Shull*, 36 W. Va. 563, 15 S. E. Rep. 147.

In *Whittaker v. S. W. Va. Imp. Co.*, 34 W. Va. 224, 12 S. E. Rep. 509, the court said: "The mere fact that a person is of inferior, or even weak, understanding, so he be not an idiot, lunatic, or *non compos mentis*, is no objection to his ability to make a contract binding him, as courts in such questions cannot undertake to measure understanding and capacity. *Beverley v. Walden*, 20 Gratt. 147; *Dennett v. Dennett*, 84 Amer. Dec. 97."

§**Deed—Witnesses of the Execution—Weight of Testimony.**—In *Buckey v. Buckey*, 38 W. Va. 175, 18 S. E. Rep. 383, the court said: "It has been often laid down that the very time of the factum of a deed is the critical point of time for inquiry as to the capacity of the party making it. 'The evidence of witnesses present at the execution of a deed' is entitled to peculiar weight.' *Jarrett v. Jarrett*, 11 W. Va. 584; *Anderson v. Cranmer*, *Id.* 503; *Nicholas v. Kershner*, 30 W. Va. 251; *Beverley v. Walden*, 20 Gratt. 147, 158."

1863, and the balance by the 1st of January, 1864; to which time Walden was to retain possession *of the farm, and a deed was to be made on or before the 1st of August, 1863.

Beverley appears to have anticipated the payment of the purchase money at the request of Walden; and Walden, by a deed dated the 8th day of July, 1863, and wholly written by himself, conveyed the land to Beverley. The deed was prepared to be executed by Mrs. Walden, but she declined to do it.

On the 1st of January, 1864, Beverley and Walden executed another paper, by which Beverley rented to Walden the mansion house, yard, garden, &c., for the year 1864; for which Walden was to pay him \$100, keep farm, fences, buildings, &c., in as good order as possible, and also to attend to the renting of other parts of the farm for Beverley. And on the 1st of January, 1865, this contract was renewed for that year.

In 1866, Beverley instituted a proceeding of unlawful detainer against Walden, to recover possession of the land, and recovered a judgment in that case. And then Walden filed his bill in the Circuit court of Fauquier against Beverley, to restrain Beverley from taking possession of the land, and to set aside the contract of June 4th, 1863, and the deed of July 8th of the same year. The grounds of relief set up in the bill were, first, that the contract and conveyance had been procured by fraud; second, that it was a contract for Confederate money, which, it was insisted, was illegal and void; and, third, that the plaintiff, at the time of said contract and conveyance, was not of sound mind, capable of making a contract.

Beverley demurred to the bill and filed his answer, in which he denied the fraud, and denied that Walden was of unsound mind, incapable of contracting at the time said contract and deed was executed.

An immense mass of testimony was taken, and the cause coming on to be heard on the 9th day of April, 1868, the court over-ruled the demurrer, and made a *decree directing that an issue be made up and tried on the common law side of the court, before a jury, to ascertain whether or not John Walden, at the time of the execution of the contract and deed aforesaid, was of sound mind and understanding, capable of executing said contract and deed.

And from this decree Beverley obtained an appeal to the District court of Fredericksburg, where the decree was affirmed; and he thereupon obtained an appeal to this court.

The material statements of the bill and answer are set out in the opinion of Christian, J. It is impossible to give a statement of the evidence. The view taken of it by this court will be seen in the opinion.

Forbes and Tucker for the appellant.
Brooke and Green for the appellee.

CHRISTIAN, J. John Walden filed his bill in the Circuit court of Fauquier county,

in which he alleged that Robert Beverley had instituted against him an action of unlawful entry and detainer, to recover from him the possession of a certain tract of land, lying in said county, containing 870 acres, on which the said John Walden then resided. He further charged, that in the month of May, 1863, he was approached by Beverley with offers to purchase his farm. That, prior to these negotiations for the purchase of his farm, Beverley had sought and effected various purchases of horses, cattle, &c., and had discovered that he was in a frame of mind which incapacitated him from protecting his just rights in contracts with bold and unscrupulous men; that, emboldened by his success in this minor traffic, Beverley conceived the plan of bargaining the said Walden out of his valuable homestead." That, accordingly, Beverley made offers for said land, which resulted in a contract of sale, dated June 4th, 1863, which was afterwards consummated in due form by deed bearing date July 8th, 1863.

150 *He further charged, that "at the time he sold his farm to Beverley, and for months before and afterwards, his health was extremely delicate; that he was affected with a chronic inflammation of the bladder, which oftentimes brought him in mortal agony to the verge of the grave; that he was never free from bodily pain, although there were intervals when the paroxysms subsided, in which he could engage in an active watchfulness over his property. That at that period, the whole country was under constant excitement and alarm; that the marches of hostile armies, the visitation of ruffian marauders, and the general insecurity of life and property, filled every man with trouble and anxiety." That, in addition to all these sources of irritation and depression, "he was borne down with difficulties and troubles of a domestic nature" (the character of which he declines to state), which he says were enough to have unsettled his judgment.

He further states, that he looks back upon the facts he narrates, "with astonishment at the part he enacted, and that he is satisfied that, possessed of his proper reason, he never would have played such a role." Then proceeding, says "he believes, and therefore charges, that, at the time of entering upon the sale of his land, of executing the said contract and deed, he was not of a sound contracting mind and judgment;" and that the disease under which he was laboring, with other causes of anxiety and trouble, had so far unsettled his reason, as to make him an easy prey to the unscrupulous avarice of Beverley.

After referring to certain sales of personal property to Beverley at different times, at low prices, which he says he would not have made if he had possessed his natural shrewdness, Walden further charges in his bill, "that it was after this experience of his incapacity to protect himself in matters of contract, and with a perfect knowledge

151 *mind, that Beverley opened nego-

tiations for the purchase of his homestead. That, by earnest and persistent solicitations, he succeeded in procuring the contract for sale, and finally the formal execution of the deed, whereby, for the grossly inadequate price of \$40 per acre in Confederate currency, under the forms of law, he deprived himself and family of their home."

The bill further alleges, that the whole of the purchase money, to wit: the sum of thirty-four thousand seven hundred and ninety dollars, was fully paid in August, 1863; that, by the terms of the original contract, Walden occupied the land till the 1st of January, 1864, paying, as rent for the same, a certain part of the hay raised on said farm. That, on the 1st January, 1864, the parties entered into a written contract, under seal, by which Walden rented the farm for the year 1864, and, by a written memorandum at the foot of this agreement, the same contract of rent was continued for the year 1865.

The bill further alleges, that about the time of the contract of rent, to wit: on the first day of January, 1864, he (Walden) "began to realize the ruin which, by his own acts, he had brought upon himself; that he found himself a renter of his own farm, and managing it as agent for another; that, though not yet restored to his proper health of mind and body, he now, nevertheless, begun to assert a claim to his farm, determining that, when the proper time came, he would contest Beverley's right, under all his contracts and deed. That, in July, 1865, the country having become settled, and there being a fair prospect that courts of justice would again assume their sway, he deemed it a fit time to disclose to Beverley the position he designed to take in regard to the land;" which he accordingly did early in July, 1865.

Upon these facts, and others not necessary to refer to, stated in his bill with great elaboration and minuteness,

152 *he prays that Beverley may be enjoined and restrained from further proceedings at law to enforce the judgment which Beverley had obtained in an action of unlawful entry and detainer, until the question of title could be fully adjudicated between them; that the contract and deed might be declared null and void; and that he might be restored to his rights, in like manner as if the same had never been executed.

To this bill the defendant, Beverley, promptly filed his answer, in which he indignantly denied every imputation of fraud, and "all contrivance, artifice and deception, either expressed or to be implied from the statements of the plaintiff's bill, and all intent to defraud the complainant, based upon his ignorance and discovered imbecility or weakness, in his intercourse with him about the sale of horses, referred to, or at any other time." But, on the contrary, he found him to be a man of sense in business matters, with whom he dealt fairly, without any attempt at imposition

or fraud. That so far from procuring the contract for the sale of his land, by earnest and persistent solicitations, the proposition to sell came from Walden. That he did not seek him to make the purchase; but that, being at Walden's house on other business, he happened to mention that he was going to look at a farm some miles distant, which had been offered for sale, when Walden said he would sell either of his two farms: the farm on which he resided at \$40 per acre, or his farm known as "Carter's Run" at \$25 per acre. That he declined to purchase, saying he would first look at the other farm he had mentioned, and if he did not buy that farm he would return in a week or two and look at Walden's farm. That not having made the purchase he was contemplating, he did return in two weeks after, and rode over both of Walden's farms. That he declined purchasing the "Carter's Run" farm at \$25

per acre, but agreed to purchase the
153 farm on which Walden resides *at \$40 per acre, that being the price at which Walden offered it. The contract was then written and signed between them, by which it was agreed that \$20,000 should be paid on the 1st August, 1863, and the residue on the 1st January, 1864. That some time afterwards, complainant, in person, requested respondent to pay the first instalment before the 1st August, in order to his making an investment in eight per cent. Confederate bonds; which request was complied with by respondent paying \$20,000 on the 11th July, 1863. The residue of the purchase money having been fully paid, a deed for the land was prepared, dated July 8th, 1863, written wholly in the handwriting of John Walden (the complainant), and was executed in the absence of respondent; nor was he present when the deed was acknowledged for record. And that the whole sale was thus begun, conducted and consummated, by the complainant Walden, freely, without even the presence of respondent to influence or control his action in its execution.

Beverley also denies that Walden was laboring under any imbecility or weakness of understanding. He denies that he knew anything of any bodily infirmity or domestic troubles. Indeed, he denies all the material averments of the bill. He also calls attention to the manner and form in which Walden insinuates his own incapacity as a deduction of his present reasoning from the facts of the case, as stated by him, to show that "he could not bring himself to aver his own incapacity as a fact, but insists on it as a logical inference in order to avoid his deed."

The depositions of numerous witnesses were taken by both plaintiff and defendant; and the cause coming on to be heard at the April term, 1868, before the Circuit court of Fauquier county, that court entered a decree directing that an issue be made up and tried on the common law side
154 of this court, before a jury to be *impaneled therefor, to ascertain whether or not John Walden, at the

time of the execution of the contract dated June 4th, 1863, and of the deed dated July 8th, 1863, in the bill and proceedings set forth, was of sound mind and understanding, capable of executing said contract and deed. It is from this decree that an appeal has been allowed to this court.

While it is true that directing an issue to be tried by a jury is a matter of discretion in a court of equity, it is equally true that such discretion must be exercised upon sound principles of reason and justice. A mistake in its exercise is a just ground of appeal; and the Appellate court must judge whether such discretion has been soundly exercised in a given case. *Wise v. Lamb*, 9 Gratt. 294; *Stannard v. Graves*, 2 Call 369; *Gardner v. Gardner*, 22 Wend. R. 526; *Dale v. Roosevelt*, 6 Johns' Ch. R. 255; *Reed v. Cline's heirs*, 9 Gratt. 136.

It seems to be now well settled, that, in no case, ought an issue to be ordered to enable a party to obtain evidence to make out his case; that, when the allegations of the bill are positively denied by the answer, and the plaintiff has failed to furnish two witnesses, or one witness and strong corroborating circumstances, in support of the bill, it is error in the chancellor to order an issue; that no issue should be ordered until the plaintiff has thrown the burden of the proof on the defendant; that, until the onus is shifted, and the case rendered doubtful, by the conflicting evidence of the opposing parties, the defendant cannot be deprived by an order for an issue, of his right to a decision by the court on the case as made by the pleadings and proofs. *Smith's Adm'r v. Betty and others*, 11 Gratt. 752; *Pryor v. Adams*, 1 Call 382; *Wise v. Lamb*, 9 Gratt. 294; *Grigsby v. Weaver*, 5 Leigh, 197. In the language of Judge Carr, in the case last cited: "It is

the bounden duty of the plaintiff, who
155 calls for the solemn *judgment of the court, to furnish that court with something like certainty on which to rest that judgment; he may draw this from the defendant if he can; he may prove it by witnesses; he may establish it by documents; but in some way he must shew it, or he fails, and his bill must be dismissed."

These well established principles are now to be applied to the case before us. It is first, however, worthy of remark, that the chancellor was so well satisfied that the plaintiff had entirely failed to sustain, by the proofs, the charge of fraud and undue influence, which was a prominent feature of his bill, that he directs no issue upon that subject; and I am constrained to say, looking carefully to all the evidence contained in the voluminous depositions in the record, that there is nothing, outside of the charges in the bill, to create the slightest suspicion of fraud or undue influence on the part of Beverley. There was nothing in the relation of the parties, or in the character of their intercourse and dealings with each other, which can give rise to such an imputation. The chancellor seemed to be of the same opinion, for he

confines the issue which he ordered, to the single question of the capacity or incapacity of the plaintiff to make a contract. Whether he should have directed that issue, is the question we are now called upon to decide.

Before we consider the proofs in the case, to ascertain whether it comes within the principles of law already laid down as governing such cases, it is worthy of notice, that the plaintiff, in his own statement of his case, hesitates, if he does not fail, to distinctly allege his own incapacity. He seems, himself, to doubt the fact of his own incapacity. It seems to require, to satisfy his own conscience, a statement of facts, and a process of reasoning upon those facts, to bring himself reluctantly to the allegation of his mental unsoundness. He says

156 that, "looking back" to the facts he *has narrated, "he is astonished at the part he enacted;" that he "is satisfied that, possessed of his proper reason, he never would have played such a role;" and then says that he believes, and therefore charges, that he was not of sound mind at the time he executed the contract of sale and deed to Beverley. No one can read the plaintiff's bill without discovering a manifest hesitation and reluctance to bring himself to aver his own incapacity, and at the most, he rather insists upon it as a logical inference than avers it as a fact. He admits, too, that there were intervals, even during the time of his alleged incapacity, when "he could engage in an active watchfulness over his property."

There is another noticeable feature in the plaintiff's bill, which, to say the least of it, does not commend his case very strongly to the favorable consideration of a court of equity. He states that in January, 1864, (when it is admitted on all hands, even by himself, that he was under no disability for want of capacity,) he began to realize the ruin which by his own acts he had brought upon himself, and began to prepare to assert a claim to his farm, determining that, when the proper time came, he would contest Beverley's right under the deed. And so it seems, that, though he executed then, when there was no incapacity existing or alleged, a contract under seal, renting the land from Beverley, which contract recognized the conveyance from himself to Beverley, in express terms, yet he admits, in a bill which asks relief from fraud and imposition, that he was himself practicing deceit and false dealing, in order to retain possession of the land. Such allegations of the plaintiff's own duplicity and deceit, present his case in no favorable aspect to a court of equity.

The answer of Beverley denies all the material allegations in the bill, and puts them all in issue. According to the well

157 established rule, to overcome this answer *there must be two witnesses, or one witness and strong corroborating circumstances produced by the plaintiff. To relieve this case from the operation of that rule, the learned counsel for the

appellees insist that the denial of the incapacity of Walden by Beverley, is not entitled to the usual weight given to the answer of a defendant denying the allegations under oath of a plaintiff's bill; because, as they argue, the defendant Beverley did not know and could not be informed of the fact, whether he was of unsound mind or not. I do not perceive the force of this position, nor is it supported by the authorities cited. Beverley is charged with procuring fraudulently and by undue influence, the deed in question, from the plaintiff, at a time when he was laboring under mental incapacity. He not only denies all fraud and undue influence imputed to him, but denies that he was of unsound mind, and asserts his mental soundness and capacity. His answer is not a mere denial of his incapacity, but he shews that he had opportunities of knowing his condition by intercourse and dealings with him. He refers to pregnant facts to shew upon what his opinion of plaintiff's mental condition was founded, and to establish the mental capacity and soundness of the plaintiff. He refers to the deed itself, written wholly in the handwriting of the plaintiff, most carefully prepared, with great minuteness as to boundaries. He exhibits letters which in themselves exhibit the most unmistakable evidence of the emanations of a sound mind. Relying upon these facts, and shewing in his answer his opportunities for his knowledge of what he states, he denies the mental incapacity of the plaintiff; and this denial, made under such circumstances, not only puts the fact of sanity in issue, but must have the same weight as the denial under oath, of any other material allegation in the bill.

Now let us see what is the evidence
158 which the plaintiff *introduced to overcome the force of the defendant's answer.

He proves, by a number of witnesses, that he was laboring under a painful malady, from which, at times, he suffered great agony; that he had serious domestic troubles; that he was much depressed by the unhappy condition of the country; and that he was an old man bordering on seventy years.

These witnesses give it as their opinions, that all these causes combined, had borne so heavily upon him as seriously to impair his mind to a degree of insanity or mental weakness, and to render him incapable of making a contract. This is their opinion; but when we come to analyze their evidence, we find the facts upon which their opinions are based do not justify this conclusion. Take all the facts narrated by all the witnesses who testify as to his mental unsoundness as true, and they are not inconsistent with the sanity and mental capacity of the plaintiff. And then it must be remembered that among this host of witnesses examined by the plaintiff, there is not one of them who was present at the factum of the contract or deed.

On the other hand, an equal number of

witnesses, among them three physicians, two of whom had practiced on the plaintiff for many years, testify to his sanity. Three of these, who are unimpeached and intelligent witnesses, were present at the factum of the deed. Two, Gaines and Smith, were justices of the peace, who were present to take the acknowledgment of Walden and his wife to the deed, and who came at Walden's request for that purpose. All of them strongly, and without hesitation, testify to the sanity of the plaintiff at the time the deed was executed. Gaines says he had known Walden since 1825; that he lived with him in his store as assistant in the years 1826 and 1827; that he had had many transactions with him, both as merchant or otherwise, and that nothing
159 ever *occurred to indicate a want of mental soundness; and that he never had any such suspicion even. He says that on the occasion referred to when the deed was executed, he had never heard Walden talk to greater advantage; that his mind was clear, and that he was well informed upon the state of the country, which was the topic of conversation; that he was much better informed than witness had supposed he was.

There is no evidence in the record to contradict these witnesses. There is not a word of testimony conflicting with these statements of the witnesses present at the factum. But they are confirmed by evidence which Walden himself furnishes. By the deed written by himself with great particularity and technical precision, and by letters relating to the sale and the execution of the deed, expressing his regret that his wife had refused to unite in the deed, and on other subjects, all furnishing intrinsic proof of a sound mind. Evidence of this character has always been held by the courts to be entitled to far more weight and importance than the opinions of witnesses based upon the erratic conduct and eccentricities of the party of whom they speak. *Temple, &c. v. Temple*, 1 Hen. & Mun. 476; *Mercer v. Kelso*, 4 Gratt. 106; 3 Rob. Pract. o. e. 335; 1 Lomax Ex'ors 9-10.

But great stress is laid, by the learned counsel for the appellees, upon the fact that Walden, who had always been a prudent and judicious man, should have sold, for Confederate currency, at a time when it was so greatly depreciated (July, 1863) his valuable real estate, which was worth fully or nearly as much in gold as the price he received in that currency; and it is insisted that this was in itself an act of such stupendous folly as plainly to indicate his mental imbecility. It is argued, that the very fact that he was willing to receive the sum of \$40 per acre in Confederate money, when he might have gotten from \$60
160 to \$80 in that currency, *was the strongest evidence that he was not capable of making a contract.

Upon this point I have to say first, that there is no evidence that he could have gotten more than \$40 per acre at that time. It is certain his land had been offered for

sale at that price, and no purchaser was found until he offered it to Beverley. Several witnesses say the land was for sale, and the price was \$40 per acre. Walden had told his neighbors and others his land was for sale, and that was the price he fixed upon it as its value. Beverley did not seem to regard it as a very low price, or he would have been swift to purchase it. But he did not accept it when it was first offered to him; but went off to look at another farm, and did not return until two weeks afterwards. It is true witnesses say that in their opinion the land ought to have brought from \$60 to \$80 per acre in Confederate money. It must be remembered, however, that this contract of sale between Walden and Beverley was made just before the battle of Gettysburg. At that time General Lee, at the head of a victorious army, had crossed the Potomac and marched into Pennsylvania. The heart of the Confederacy beat high with hope and surely anticipated triumph, and land and other property, at that time, bore much firmer prices than afterwards. But when that army was forced to return, there was a sudden depreciation of Confederate money, and property proportionately and suddenly advanced in price.

But, if Walden sold his land for an ante bellum price, Beverley, who is held up by the plaintiff and his counsel as a man of uncommon shrewdness, did identically the same thing. It is shewn that he sold his farm just one month before he contracted to buy Walden's, at \$27 50, in Confederate currency. It is true, Beverley invested the purchase money of his land in real estate, while Walden invested his in Confed-
161 erate bonds. This *may have indicated superior judgment and forecast in Beverley, or it may indicate that he was less hopeful of the success of the Confederacy. Looking to the evidence, we find that Walden was a firm believer in the justice and final triumph of the Confederate cause. He had an unwavering faith in its triumphant success. When remonstrated with by his neighbors for selling his fine estate at such a sacrifice, his reasoning, from the standpoint from which he viewed the subject, was cogent and convincing, and, so far from indicating mental imbecility, was evidence of a sound and well-balanced mind. To one witness, to whom he said (before he sold the land to Beverley) that he desired to sell the farm on which he resided, and that his price was forty dollars per acre in Confederate money; he explained that lands, after the war, would be of little value; that he had already lost some of his slaves; that labor would be disorganized; that lands could not be made available because of the great scarcity of labor; that he thought that the money which he could get for his land, invested, would be far more profitable and much less trouble to him. To another witness, he said that he was getting too old to manage such an estate, and that the money, invested, would give him much less trouble.

To another witness, he said he had no fear that the Confederate bonds would not be paid; that they would be held by the fathers of the soldiers who fought the battles of the Confederacy, and he was confident there would be no repudiation of the Confederate debt. And to several witnesses he stated his price to be \$40 per acre.

Now, to determine whether this sale, as is earnestly insisted by the counsel for the appellee, was in itself evidence of mental imbecility, we must consider the circumstances which, at that time, surrounded the plaintiff. The section in which he

162 lived was within *the neutral ground of the belligerents. No man could tell how long the war would last. During its continuance, his farm would be of little or no value. Its improvements were in constant peril; its cultivation was doubtful. If he sowed, he could not tell who might reap. When he planted and raised a crop, he could not tell who might gather it. If the Southern cause triumphed, labor, near the border, would be uncertain and disorganized. If it failed, lands might be confiscated. A present income from an investment, which the success of a cause until that time victorious, would make good, was better than no income from land that might be confiscated in case of failure, or be valueless in case of success.

Such circumstances, and such reasoning as this, with the tempting bait of eight per cent. and exemption from taxation, induced thousands to part with their homesteads, to sell their real estate, and invest the proceeds in Confederate bonds. It is a part of the current public history of the times, that this was done in every county in the Commonwealth, and that, too, by the most prudent and judicious men. In the light of the present, we may say these were acts of folly; but I am yet to learn that they are to be regarded as evidence of insanity or mental imbecility. If they are so to be regarded, then the whole land is filled with lunatics and imbeciles; for, everywhere all over this southern country, there are hundreds and thousands of unfortunate men, whose families are suffering the privations of poverty, and whose hearts are yearning for the old homesteads, where they once lived in comfort, peace and plenty, which, in an unlucky moment, was sold for that which has become trash on their hands. It may be said now, their conduct was unwise and injudicious; but it cannot be said to be evidence of an unsound mind. It was

163 a testimony of their earnest devotion *and living faith in the cause they loved so well, and which they felt sure would ultimately triumph, but no testimony against their mental soundness.

If the war had terminated differently, the conduct of these men, instead of exciting the animadversions and commiseration of their fellow men, would be pointed to as evidence of forecast and shrewdness. If John Walden, to-day, was receiving eight per cent., upon thirty-five thousand dollars, the purchase money for his farm, we should

not find him here seeking the aid of a court of equity to set aside his solemn deed, upon the ground of his mental incapacity to make a contract.

The record presents the case of an old man, of some eccentricities of character, the victim of a painful malady, and harassed by domestic troubles, bemoaning the great folly of his life in having sold his valuable estate for that which has proved of no value; and looking back upon that unfortunate act, persuades himself, in the light of present circumstances, that he, in his own language, "could not have been possessed of a sound mind and understanding, or he never would have enacted such a part." All this may awaken sympathy and excite pity, but I am constrained to say it presents no case for the intervention of a court of equity. I am therefore of opinion that the Circuit court of Fauquier erred in ordering an issue. It ought to have dissolved the injunction and dismissed the plaintiff's bill.

STAPLES and ANDERSON, Js., concurred in the opinion of Christian, J.; except that they did not think the denial of the answer, of the incapacity of the plaintiff, was such as to require two witnesses, or one witness with strong corroborating circumstances, to overthrow the answer; but only to put the plaintiff upon proof.

164 MONCURE, P., concurred in the opinion. He thought *the denial of the answer of the insanity of the plaintiff did require two witnesses, or one with strong corroborating circumstances, to overthrow it.

Decrees reversed and bill dismissed.

165 *Commonwealth v. Byrne.

January Term, 1871, Richmond.

JOYNES, J., absent, sick.

1. Assessment of Taxes—Statutes—Constitutional.—

The section 68 of ch. 57, in relation to the assessment of taxes on licenses, Sess. Acts 1866-67, p. 849, is not in conflict with the constitution of Virginia.

2. Constitution of United States—Fifth Amendment—

To What Applicable.—Article 5 of the amendments of the constitution of the United States, was designed as a limitation of the powers of the national government, and is inapplicable to the legislation of the States.

3. Virginia Bill of Rights—Does Not Forbid Imprisonment for Taxes.*—

The bill of rights of Virginia, which declares that no man shall "be deprived of his liberty except by the law of the land or the judgment of his peers," does not forbid the State to enforce the collection of the tax on licenses, by imprisonment of the delinquent, when no personal property can be found by the officer out of which to make the tax.

4. Statute—Authority of Commissioners to Appoint an Assistant—Collateral Attack.—

A commissioner of

*See Iverson Brown's Case, 91 Va. 762, 21 S. E. Rep. 357.

the revenue under § 7 of the act of 1867, in relation to the assessment of taxes on licenses, appoints an assistant commissioner, and the appointment is approved by the proper court. The question whether the facts existed which authorized the commissioner to appoint an assistant, cannot be made in a collateral proceeding.*

5. **Same—How Certificates Issued.**—The act authorizing the assistant to perform all the duties which his principal is authorized to perform, it is not necessary that the certificates given by him shall be given in the name of the principal, or that the name of the principal shall be signed to the certificate.

6. **Assessment of Tax—Levy by United States—Imprisonment.**—The assistant commissioner having delivered to the sheriff a certificate of the tax assessed on B, for a license to distill spirits, and B failing to pay the tax, the sheriff levys upon personal property of B, and leaves it in his possession. On the day appointed for the sale of the property the sheriff goes to the place and finds the property in possession of a United States revenue

officer, who claims it under a levy for the tax due from B to the U. S. government; *this levy having been made subsequent to the levy by the sheriff. Thereupon the sheriff takes no further steps to obtain possession of the property, and it is sold for the tax due the U. S. government. The sheriff not being able to find any other property of B, takes and holds him in custody. B is legally in custody.

This is a writ of error to a judgment of the Hustings court of the city of Richmond, rendered on a writ of habeas corpus. The defendant in error, in his petition for a writ of habeas corpus, complained that he was unlawfully detained in the county jail of the county of Henrico; and he stated that he was not so held for any crime or misdemeanor, but was informed and believed that the sheriff claimed to hold him in confinement in said jail for the non-payment of an alleged assessment made against him in favor of the Commonwealth, for the manufacture of spirituous liquors, amounting, as was claimed, to about \$2,600; and he charged that if any such assessment had been made it was contrary to law and void; that the person who claimed to have made it was not, at the time of making it, an officer or person authorized to make any assessment of any tax; that such imprisonment was contrary to the constitution and laws of the United States and of this State; that no debt had been proved or legally established against him; that he had not been tried or impleaded for the recovery of said pretended tax, nor had any judgment been rendered against him by any court having jurisdiction in the premises. He therefore prayed for a writ of habeas corpus, and that he might be discharged from such imprisonment.

The writ was accordingly awarded, directed to the sheriff of Henrico county, who made his return thereon as follows:

"To the honorable judge of the court of Hustings for the city of Richmond, Va.:

*See the opinion of JUDGE MONCURE for the statute.

In obedience to the within writ, to me directed, I *here produce the body of A. J. Byrne, the party named in said writ. I am the sheriff of Henrico county, and was such on the 3d day of February, 1870. There was handed to me for collection the following certificates, which were in the words and figures, to wit: 'The sheriff of Henrico county will receive of A. J. Byrne thirteen hundred and seventy-five dollars, the tax imposed by law for the extension of his license to manufacture fifty-five thousand gallons of spirituous liquors, at his distillery in said county, assessed by me as As't Com'r of the Revenue for the first district of said county, until the 30 day of April, 1870. Given under my hand the 24th day of November, 1869. John A. Eacho, As't Com'r of Revenue, 1st district of Henrico county.' And 'The sheriff of Henrico county will receive of A. J. Byrne, twelve hundred and seventy-five dollars, the tax imposed by law for continuing to manufacture fifty-one thousand gallons of spirituous liquors at his distillery in said county, until 30th day of April, 1870, assessed by me as Ass't Com'r of the Revenue in the 1st district of said county. Given under my hand the 15th October, 1869. Signed, John A. Eacho, Ass't Com'r Rev. 1st district Ho. co'ty.' "

These assessments, amounting to the sum of twenty-six hundred and fifty dollars, and being due and unpaid by the said A. J. Byrne or any one for him, and being unable to find sufficient property of the said A. J. Byrne to satisfy the said taxes so assessed against him, I, as sheriff of said county, proceeded, and did on the said 3d day of February, 1870, arrest the said A. J. Byrne, and have since so held him, being required to do so by the act of the General Assembly passed April 19, 1867, section 63, page 849, and the said taxes so assessed against the said A. J. Byrne being still unpaid, and I being unable to find sufficient property belonging *to him to satisfy the same, I still hold him in arrest, and for no other cause known to me.

"H. J. Smith,

"Sheriff of Henrico county.

"February 4th, 1870."

This return was traversed by the petitioner as follows:

"First. That it is not true, as stated in the said return, that any tax was duly assessed against this defendant, as therein stated.

"Second. That John A. Eacho, therein styled assistant commissioner of revenue, was not legally at that time such assistant commissioner of revenue, nor had he any legal authority to make the said assessments or either of them.

"Third. It is not true, as stated in said return, that the said H. J. Smith, sheriff, was unable to find sufficient property out of which to make the said tax; that, on the contrary, there was, at the date when the said assessments were delivered to the said sheriff, sufficient personal property belonging to the said Andrew J. Byrne, out of

which the said tax could have been made, and that, in point of fact, the said sheriff did, on or before the 20th of November, 1869, levy upon and take into his possession, property of said Byrne more than sufficient to pay said tax, and the said sheriff did, on or about said 20th day of November, advertise the said property for sale, and if said tax was not made out of the same, it was the fault and neglect of the said sheriff.

"Fourth. That the provisions of the said statute of 1867, referred to in the said return, have not been complied with in such manner as to authorize the arrest of the said Byrne.

"Fifth. That the arrest of said 169 Byrne is contrary to *law, and in violation of the constitution of this Commonwealth, and that so much of the provisions of said act of 1867, so referred to in the said return, as authorizes the arrest and confinement of the person, in the manner and way therein pointed out, is unconstitutional and void, and in violation of the constitution of the United States, and of the constitution of this Commonwealth. A. J. Byrne."

After several continuances and adjournments of the case, it came on for trial in the court of Hustings, on the 12th day of March, 1870, when the court, having fully heard the cause, and considered the same upon the law, facts and arguments of counsel, determined and adjudged that the said Andrew J. Byrne should be discharged from custody.

All the facts proved on the hearing of the cause, are set out in a bill of exceptions taken by the attorney-general in behalf of the Commonwealth, to the judgment aforesaid; which bill states that the Commonwealth, to sustain the issue made up in the cause on his part, introduced and read to the court the orders No. 1 and 2 of the County court of Henrico, which are in the words and figures following, to wit:

No. 1.

"In Henrico County court, 5th April, 1869, Sidney W. Blankinship, who has been, by an order of George Stoneman, Brev. Major-General U. S. A., commanding, dated the 20th day of March, 1869, appointed commissioner of the revenue for the first district of Henrico county, to fill the vacancy caused by the removal of John A. Eacho from office, in accordance with general orders No. 24, dated March 15th, 1869, and empowered to perform all the duties of the said office, according to law, until his successor shall be duly elected or appointed

and qualified, this day appeared in 170 *court, and, together with E. D.

Eacho, his security (who first justified on oath as to his sufficiency), entered into and acknowledged a bond, in the penalty of five thousand dollars, conditioned for the faithful performance of the duties of his said office, which said bond is ordered to be recorded by the clerk of this court, who is also directed to transmit a copy of the said

bond to the auditor of public accounts, and also a copy of this order; and thereupon the said Sidney W. Blankinship took the oath of fidelity to the Commonwealth, the anti-duelling oath, the oath to support the constitution of the United States, and the oath of office. And also produced to the court a certificate of John Woodworth, a justice of this county, accompanying the oath prescribed by the act of Congress of July 2d, 1862. A copy—Teste:

"R. M. Thorne, C. H. C."

No. 2.

"In Henrico County court, 5th April, 1869:

"On motion of Sidney W. Blankinship, John A. Eacho is appointed assistant commissioner of the revenue for the first district, Henrico county; and thereupon the said Eacho took the several oaths prescribed by law. A copy—Teste:

"R. M. Thorne, C. H. C."

And further to sustain the issue on her part, the Commonwealth introduced and read the certificates signed by John A. Eacho, assistant commissioner, &c., set out in the return to the writ of habeas corpus, and hereinbefore set forth; and also introduced a witness, Henry J. Smith, sheriff of Henrico county, who proved that the said John A. Eacho was the only person known to him as commissioner of the revenue for the first district of said county. That said

Blankinship, who was appointed commissioner, and qualified as *specified 171 in said first recited order of the said county court, did not act; but that the said Eacho continued to act just as he did before his removal from office, kept all the books, and did all the business appertaining to the office of commissioner of said district. The said Blankinship never performed any act as commissioner. He came to the court to sign his official bond. He then appeared to be in good health, and the witness had no knowledge of his being disqualified from acting as commissioner by physical cause. He has resided since his appointment in the said county of Henrico, and has been seen by witness occasionally in the city of Richmond. The witness, as sheriff of the said county, made the arrest of the said A. J. Byrne on the 3d day of February, 1870, under the two certificates aforesaid. The tax therein specified has not yet been paid. He made a levy under the first in date of said certificates, but did not sell the property levied on. After making the levy, he advertised the property levied on for sale. An extract of said advertisement, from one of the Richmond newspapers, was shown to witness, and identified as the one made by him. It is as follows:

"Sheriff's Sale.—Will be sold on Monday, 29th of November, 1869, at the distillery of A. J. Byrne, about one mile below the corporate limits, on the Osborne turnpike, 138 hogs, levied upon by me to satisfy State taxes against said Byrne, amounting to about \$1,300, or so many thereof as may be

necessary to satisfy said claim. Sale to take place at 12 o'clock, M.

"Wm. M. McGruder,

"D. S. for H. J. Smith, sheriff of Henrico county."

On the day designated for the sale, he sent his deputy to sell the property, which, after the levy, had been left on the premises occupied by the said Byrne,

172 *and later in the day went down to the place himself. He was stopped from selling by some one connected with the United States internal revenue office, who stated that all the property levied on was in the hands of the government of the United States. The levy which had been made by the said witness was upon 138 hogs, though at the time of the levy there was a larger number of hogs on the premises. Witness did not levy under the last in date of the said certificates. The property levied upon under the said first certificate, was taken from the said witness as sheriff, and was sold by the collector of internal revenue for the government of the United States. The person who had been put in charge of the property levied on, and was in charge of it on the day advertised for said sale, pretended to be a government officer, and Mr. Burgess, the said collector, acknowledged afterwards to witness that he acted by his authority. After the day of sale, the witness made no further levy or attempt to levy. The United States held the property, and he did nothing more. He never went to the premises again, or attempted to levy after he received the second in date of said certificates. He received from the assistant commissioner this last named certificate some ten days after its date, and did not have it in hand until after the day on which the sale was to have taken place under said advertisement. At the time witness made the levy under the first certificate, the said hogs were in the possession of said Byrne, and there had then been no seizure or levy by the government of the United States.

And the Commonwealth, further to sustain the issue on her part, introduced another witness, Rush Burgess, who proved that he is and was the collector of internal revenue of the United States for the Richmond district; that, as such, he made two different levies on the property of said

Byrne; that he sold his property on a

173 levy *made on the 4th January, 1870; that the first levy made by him on said Byrne's property was made in the latter part of November, 1869, and was made six or seven days after the levy made by sheriff Smith, which is spoken of by him. Said Burgess, as collector, did not sell under his said first levy, because he was not willing to take the responsibility of doing so. The sale, by law, was required to be made within thirty days after the levy, and more than thirty days having elapsed under the first levy, the same ceased to operate, and no further proceedings were taken by him under said first levy. Byrne objected to the payment of the tax charged against

him by the United States, and asked an abatement of it, which was refused by the department at Washington. Witness let the first levy run out, because it was not, in his opinion, safe to sell under it. At the time he made said first levy, he placed a keeper or guard over the property levied on, and directed him to allow no person to take or interfere with any part of it. When he made the second levy, which was on the 4th day of January, he again put the property levied on in the possession or custody of a keeper or guard. At the time he made the first levy, he found the property in the possession of said A. J. Byrne. He would not have levied on it if it had been in the sheriff's custody. He saw the sheriff after he had made the seizure, and the sheriff then told him that he had made a prior levy. He never had any written notice of the levy by sheriff Smith. If he had found the property in the possession of the sheriff he would have held it subject to the sheriff's lien. About a week elapsed between the time the first levy expired and the time of making the second levy. His second levy was made on the 4th January, 1870, and the sale under it on the 3d February, 1870. A particular account of the assessment against Byrne, and of the amount of sale made 3d February, 1870, to satisfy it,

signed by the witness as collector, 174 *was introduced as evidence, and is embodied in the bill of exceptions, from which it appears that the amount of the sale was \$5,079 00

And the amount of the assessment and cost of collection, 4,943 79

Leaving due to A. J. Byrne, \$135 21

The petitioner, on his part, introduced no evidence. And the above being all the material facts proved on the hearing of the application, the court refused to remand the petitioner to the custody of the sheriff, but discharged him therefrom. To which judgment of the court the Commonwealth excepted.

And this is the judgment to which the writ of error in this case was awarded.

The Attorney-General for the Commonwealth.

The important question in this case is upon the constitutionality of the act of 1866-67, p. 849, § 63, under which Byrne was arrested and held in custody. It is true that this is a new provision, first introduced into the tax bill of 1866; but it was re-enacted in the act of 1867, and has been continued in the act of 1870, passed with a knowledge that this case was pending. The General Assembly has thus shewn that it was not hasty and inadvertent legislation, but commends itself to the judgment and the sense of justice of that body. But although it was introduced into the tax bill for the first time in 1866, it was not the only new provision introduced into that act. On the contrary, that act for the first time dispensed with the payment of the license tax before the issuing of the license;

and it was because of this relaxation of the former rule, that this provision was introduced, and indeed, became a necessity. And if this law shall be held to be unconstitutional, then the law requiring the tax to be paid in advance will, of necessity, be restored; and thus to relieve
 175 *an exceptional case, the whole business community is to be injured. The case does not, therefore, appeal very strongly to the justice of the court, or to any considerations of a wise policy.

It is true that this court will declare a law to be unconstitutional which is plainly so; but as has been often said by the court, it is a very delicate duty, and it is especially so when the court is called upon to decide upon the matured and well considered act of the general Assembly; and it will never be done unless the act is plainly unconstitutional. *Eyre v. Jacob*, 14 Gratt. 422-6-7; *The Richmond Mayoralty Case*, 19 Gratt. 673.

The act is charged to be unconstitutional because it authorizes a person to be taken in custody upon the mere certificate of a commissioner of the revenue, without a hearing, and not even based upon a record; and that, too, with no means of deliverance, unless he can pay the money or give security to pay the tax and the fine.

It is to be borne in mind that this is a proceeding by the Commonwealth to enforce the payment of the taxes due to it. It is not pretended that this party has been assessed with a greater amount of tax than is just. Indeed, the law provides carefully against any such imposition. The ratio of tax is fixed by the law, and the party asking for the license himself gives the quantity of liquor he expects to distill in a certain time; and it is only when he declines or fails to give it that the commissioner is authorized to estimate the quantity. And he may, at any time within two years, apply to the court and have any injustice done him, corrected.

It is a principle which has long been recognized in Virginia, that the prerogatives vested in the crown of Great Britain for public purposes at the time of our separation from the mother country, so far as they are suited to our condition, are vested in the government of Virginia; and this is especially so in relation to taxation

176 *and the enforcement of the payment of taxes and other public dues. Without wasting time or labor in the citation of authorities, it is enough to refer to the case of *Murray's lessee v. Hoboken Land and Improvement Co.*, 18 How. U. S. R. 272, in which the subject is fully investigated, and in which the power of the government to proceed, by summary remedies, against its debtors, is vindicated with signal ability, by Justice Curtis, delivering the opinion of the court. And it will be seen that this authority in the United States government is based upon the power of the crown of Great Britain, acted on by the colonies, and among them Virginia, from the earliest

period, and continued after they became States; and this power extended as well to the body and the lands as the goods. See on this subject Paschall's annotated constitution, p. 260, where the cases are compiled, and the meaning of the phrases in the constitution on which the prisoner, by his counsel, rests his argument, is fully explained.

It is complained that this proceeding is not based upon a record. The only record in the case in 18 Howard, was the statement, by an accounting clerk of the government, of the account of the debtor, shewing the balance against him. And in the case of other assessed taxes, there is no other record and no better evidence of the tax being due than there is in the case now before the court. A commissioner of the revenue takes a list of each man's taxable property, and entering it in a book, he hands that to the collector of taxes, who makes off his tax tickets from it: and that is the only record upon which all assessed taxes are collected. In the case of licenses the same officer ascertains in the same way, viz: from the person to be taxed, what is to be taxed; and hands it to the collector to be collected. What record is there in the one case that there is not in the other.

But then the great complaint is that
 177 there is no way *of getting out of jail when once put into it. The law provides two modes by which such a party may be relieved. One is by paying what is due; and the other is by giving bond and security to satisfy the judgment of the court. That any man shall apply for a license to carry on a business, who is unable to pay the tax, is scarcely to be contemplated by the law, and would of itself indicate a fraudulent purpose. But in the few exceptional cases that can occur where a man cannot pay, the remedy may operate harshly, but it cannot be held for that reason to be unconstitutional, unless the court is prepared to hold that our system of legislation for the recovery of debts, commencing from the early days of our colonial existence and coming down almost to the present time, and recognized and enforced by the courts during all that period, was unconstitutional. Down to 1850, the plaintiff, in an action of debt on a bond or note, by endorsing on the writ that bail was required, subjected the defendant to be taken into custody or to give bail for his appearance; and that in the absence of any evidence that the debt was due. And on a judgment in any case for debt or damages, the plaintiff might sue out an execution against the body of the debtor, have him taken into custody, from which he could only deliver himself by paying the debt or taking the oath of an insolvent debtor; and this last mode of relief did not exist for some time; and was then introduced by statute. This was allowed in the case of individual creditors and debtors; and surely that which was allowed in such cases, cannot be successfully impeached as unconstitutional in the case of the Commonwealth

seeking to enforce the payment of taxes due to it.

It is insisted further for this part, that Eacho was not legally appointed an assistant commissioner of the revenue; and if he was, that his certificate is null
178 *because he acts in his own name and does not sign the name of his principal.

The act says a commissioner, unable from sickness or other cause, to perform the duties of his office, may, at his own expense, with the consent of the County or Corporation court, employ a person (approved by the court) to assist him. Such assistant, after taking the proper oaths, may discharge any of the duties of the commissioner, &c. Act of March 2, 1867, ch. 298, § 7, p. 728. The commissioner may not have been sick, but he may have been unable, from some other cause, to perform the duties of his office. The cause was to be considered and adjudged by the court, and the person appointed was to be approved by the court. It is not denied that the court acted in this case and approved the person appointed; and the court being a court of general jurisdiction, its action cannot be questioned in this collateral proceeding. Ballard & als. v. Thomas & Ammon, 19 Gratt. 14; Devaughn v. Devaughn, Id. 556.

The act provides that the assistant may discharge all the duties of the commissioner, and it does not require, as is done by statute in the case of sheriffs, that the assistant shall sign the name of his principal. Then what is to be gained in requiring the assistant to sign the name of his principal, as well as his own.

Wells and Young, for the appellee.

1st. We insist that there was no error in the proceedings below.

The arrest was illegal and in violation of the constitution of the United States and the constitution of this Commonwealth. The 5th article of the amendment to the constitution of the United States, and section 10 of the Virginia Bill of Rights,
179 are relied upon. The former *provides that no person shall be deprived of "life, liberty or property without due process of law." The latter, that "no man may be deprived of his liberty except by the law of the land or the judgment of his peers."

The words "due process of law," as used in the constitution, are equivalent to the phrase "the law of the land." Story on Cons., sec. 789; Sedgwick on Stat. & Const. Law, p. 610. The words "the law of the land" mean due process of law, which includes the right to contest the charge and to be discharged unless it is proven. Greene v. Briggs, 1 Curtiss C. C. R. 311.

By "the law of the land" is meant the general law which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial. The meaning is, every citizen shall hold his life and liberty under the protection of general laws; and the words by "the law of the land" do not

mean a statute passed for the purpose of working the wrong. Sedgwick on Stat. and Const. Law, p. 537; note on foot of p. 539. Taylor v. Porter, 4 Hill's R. 140; Wynehamer v. People, 3 Kern. R. 378; 2d Kent Com. 600; Hoke v. Henderson, 4 Dev. R. 1, 15; Fetter v. Wilt, 46 Penn. R. 457; Griffin v. Mixon, 38 Miss. R. 424; Exparte Grace, 12 Iowa R. 208; Kinney v. Beverley, 2 Hen. & Mun. 318; Ervine's Appeal, 16 Penn. R. 256; Blackwell on Tax Titles, p. 18 to 25 inclusive.

It is clear that Byrne was arrested, deprived of his liberty, and imprisoned without due process of law, without the judgment of his peers or a trial by jury, and has had no opportunity in court to defend himself, or of contesting the legality of the charge against him, and cannot have without the payment of, or giving a bond for the payment of, the claim.

The objection is not in anywise removed by the provisions of the section which authorize a party in arrest to give bond, for the condition of the bond is, that he

180 *is to appear and answer to an action of debt, to an indictment or information, and to satisfy not only the fine imposed, but to pay the tax assessed. The defendant is clearly deprived of the right of trial by jury, because he is to remain in confinement until the tax is paid.

In Greene v. Briggs, 1 Curtiss R. 325, before referred to, the court, considering this very question, says, "to require security for the payment of the penalty and costs as a condition of having a trial, is not only essentially unjust, but in conflict with that clause of the constitution which secures the accused from being deprived of his life, liberty or property, unless by the judgment of his peers. We therefore say that the law is unconstitutional and void."

2d. The imprisonment is attempted to be justified under the power which the State confessedly has to enforce the payment of taxes. It is conceded that the power to levy tax belongs to the Legislature. The collection of the tax involves the exercise of judicial and executive functions. The proceedings are summary, founded upon a public necessity; but that necessity begets another necessity, to wit: that, in the execution of such a power, the law shall be strictly and completely complied with in all its requirements.

The courts will never permit a penalty, imprisonment or double tax, to be enforced in a summary manner, under the vague and indefinite name of taxation. Griffin v. Mixon, 38 Miss. R. 424, cited in Blackwell on Tax Titles, p. 29-30; Allen v. Smith, 1 Leigh 254.

Where special authority is conferred upon an inferior tribunal, or upon commissioners, or upon an individual who acts quo ad hoc in a judicial capacity, the authority must be strictly pursued, and appear upon its face to have been so pursued. Or, as it was stated by Marshall, Chief Justice, in Thatcher v. Powell, 6 Wheat. U. S. R. 119. "In summary proceedings, where extraor-

dinary powers are exercised under special statutes, the *course marked out by the statute should be exactly pursued."

Where a right is claimed under the proceedings of one who purports to have acted in an official capacity, the fact that he was such officer, and that the acts were performed by an officer of the law, and not simply by one who assumed to act as such, must affirmatively appear. *Blackwell on T. T.*, p. 91.

In *Pike v. Hanson & als.*, 9 N. Hamp. R. 491, it appeared that the assessor had not taken the oath. It was held that the collector could not justify because the statute had not been complied with. In *Ainsworth v. Deane*, 1 Foster R. 400, a sale of land was held void because there was no evidence that the assessment was made under the sanction of an oath. In *Burch v. Fisher*, 13 Sergt. & Rawle R. 208, the evidence showed that the persons who made the assessments were recognized as officers by the county commissioners, and acted as such. The sale was held void. The court say, "Can it be pretended that such an assessment will be valid. In *Payson v. Hall*, 30 Maine R. 319, it was held not to be sufficient to show that the person making the sale had been chosen as collector and acted in that capacity.

The principle upon which all of these cases rest is, that the act of the assessor is a judicial act and cannot be performed without a strict compliance with the provisions of law; that no presumptions or intendments are to be made in favor of the regularity of such acts, even in controversies involving merely questions of property, while it is even more strongly enforced where personal liberty is involved.

Apply, then, these rules to this case: The statute authorizes the commissioner of the revenue to assess the tax and to deliver the list to the sheriff. From the two lists in the record it appears that the act was not done by a commissioner, but by an assistant commissioner, a person or officer not known to the law. It does not *appear to be upon its face, then, the act of the commissioner at all. These lists, we insist, gave no authority to the sheriff, because they were not attested with the signature of the commissioner nor made in his name.

In *Hannel v. Smith*, 15 Ohio R. 134, cited in *Blackwell on Tax Titles*, 250 and 346, the tax list was signed "John Brough, auditor, by J. B. Thomas." The court held the sale was void because the list was not attested by the signature of the auditor.

So we say in this case, that this act must have been performed in the name of the commissioner himself; that though the commissioner might employ an assistant, the acts must appear to be done by and be authorized in the name of the commissioner. We therefore insist that the assessments in this case were nullities, and furnished no authority for the imprisonment.

3d. It does not appear that the facts necessary to authorize the appointment of an assistant commissioner existed in this case. The former commissioner, Mr. Eacho, was removed by military authority, because of his inability to take the oath required by the act of Congress, and Blankenship was appointed by the same authority to be the commissioner; but on the very day of his appointment, an order was made appointing Eacho assistant commissioner, without assigning any of the grounds required by the 7th section of the act of '66-67, p. 728, which are made the foundation for such an appointment, and the duties of the office was thereupon devolved exclusively upon the assistant commissioner, who alone appears to have discharged the duties of the office; which was not only in manifest contravention of the law on the subject, but the policy of the act of Congress under which Blankenship was appointed, and could give no authority for the arrest or imprisonment of the defendant Byrne.

4th. The arrest was illegal again, because, by the *terms of the statute, the sheriff had authority to arrest only when he was unable to find sufficient property to satisfy the tax and the same remained unpaid. The non-payment of the tax is admitted, but the other portion of the condition utterly fails, because the sheriff not only could find property of the petitioner on which to levy and out of which the tax could be made, but long prior to the arrest, he actually levied upon personal property belonging to Byrne, more than enough to satisfy the whole claim, and he advertised it for sale on November 29, 1869; and where the power of levy and a thing to be seized in existence is shown, the right to attach the person is forever at an end.

In *Scales v. Alvis*, 12 Alab. R. 617, the statute under consideration provided, that where the person "had no personal property in the county, his real estate could be seized." It appeared that the person had a yoke of oxen which were exempt from levy and sale, but the court held that the land could not be seized because, by the terms of the statute, the right of seizure was made to depend upon the fact that he had no personal property.

This record discloses the fact, that several days after the levy by the sheriff upon the property of Byrne, the collector of internal revenue, for the third collection district, levied upon the same and other property, to collect a tax alleged to be due to the United States, amounting to \$4,943, and that on the day when the sale was advertised to be made by the sheriff, finding that a keeper was in possession of the property, placed there by the collector of internal revenue, the sheriff omitted to sell and abandoned his property.

The lien of the collector for the tax due to the United States was not paramount to that due to the State: the priority of each depended solely upon the time when the levy was made; for the United States has no other priority, except upon specific

184 property upon *which a specific tax is made a lien. The internal revenue laws provide upon what property and class of articles the government shall have a specific lien for the spirit tax. By sec. 8, act of July 20, 1868, the government has a lien upon the real estate. By sec. 44 of the same act, a great variety of articles and property of various descriptions is subject to forfeiture by reason of its illegal use and for attempts made to defraud the United States.

By sec. 14, act of March 2, 1867, the tax on distilled spirits was made a lien "upon the distillery, the spirits, stills, vessels, fixtures and tools therein, and on the lot or tract of land whereupon the said distillery is situated, together with any building thereon." But it will be observed that this levy was exclusively upon live hogs, a species of property upon which the government had no specific lien for the tax.

For these reasons we insist that the sheriff had no authority to seize the person, and that the arrest and imprisonment was illegal.

MONCURE, P. The petitioner does not claim his discharge from imprisonment upon the ground that the Legislature had not a right to impose the tax, for the non-payment of which he was arrested; nor upon the ground that he did not use and enjoy the privilege on which the tax was imposed; nor upon the ground that he has paid the tax, or any part of it; nor upon the ground that, at the time of his arrest, he had any property out of which the tax, or any part of it, could have been made by a levy thereon. He does not even show, or say, that he has not, in his pocket, or at his command, the means of paying the tax. But he places his defence upon the grounds: First. That the law authorizing an arrest and imprisonment in such cases is unconstitutional and void, because contrary to the constitutions both of the United States and of this State. *Secondly.

185 That it does not appear that the facts necessary to authorize the appointment of an assistant commissioner of the revenue existed in this case; and, if they did, and the assistant was duly appointed, he had no authority to make the assessment, which could only have been legally made by the principal commissioner himself; and, if he had such authority, he could exercise it only in the name of his principal, which should, but does not, appear on the face, or at the foot, of the certificates of assessment. And, Thirdly. That, while the said certificates were in the hands of the sheriff of Henrico county for collection, there was ample personal property of the petitioner, Byrne, for their payment, on which they might have been levied, and ought to have been levied, before any arrest of the person was made; and long prior to the arrest, the said sheriff actually made a levy upon the personal property of Byrne, more than enough to satisfy the whole claim, and advertised it for sale.

I will now proceed to consider these three grounds of defence in the order above stated; and,

First, as to the constitutionality of the law under which the petitioner was arrested.

That law is the 63d section of chapter 57 of the acts of the General Assembly, passed at the session of 1866-67, Sess. Acts, p. 849, and is in these words:

"63. Within ten days after a commissioner of the revenue shall have granted a certificate to obtain a license, he shall deliver to the sheriff or other collector of the taxes on such licenses, a list of all such certificates, as far as he may have progressed with the same; which list shall be the guide of the sheriff or collector in collecting the taxes imposed by law on such license. If the taxes be not paid, the sheriff or collector shall distrain, immediately upon the receipt of such list, for the amount with which any person may have been as-

186 assessed; and he may sell, upon ten days' notice, so *much of such person's property, subject to distress, as may be necessary to pay the taxes so assessed, and the costs attending its collection. If the sheriff or collector shall be unable to find sufficient property to satisfy the taxes so assessed, and the same shall not be immediately paid, the said sheriff or collector shall arrest the person so assessed, and hold him in custody until the payment is made, or until he enter into bond, with sufficient security, in a penalty at least double the amount of the taxes so assessed, conditioned for his appearance before the Circuit court of his county or corporation, to answer to such action of debt, indictment or information as may be brought against him, and to satisfy, not only the fine imposed, but to pay the taxes assessed; and it shall be lawful for the court, upon the trial of such action of debt, indictment or information, to render judgment upon such bond for the fine imposed and the taxes which may be assessed."

It is contended that this law is contrary to Article V. of the amendments to the constitution of the United States, which declares that no person shall "be deprived of life, liberty, or property without due process of law;" and is also contrary to that part of clause 10 of the Bill of Rights, being Article I. of the constitution of Virginia, which declares that no man shall "be deprived of his liberty except by the law of the land or the judgment of his peers."

In regard to the provision of the constitution of the United States above referred to, it is enough to say that it "was designed as a limitation of the powers of the national government, and is inapplicable to the legislation of the States." Nelson, C. J., in *Taylor v. Porter & Ford*, 4 Hill's R. 140; citing *Barron v. The Mayor, &c.*, of Baltimore, 7 Peters U. S. R. 243; *Livingston v. The Mayor, &c.*, of New York, 8 Wend. R. 85; and 2 Cow. R. 818, and note (c).

Then,

187 *Is the law in question contrary to

that part of the Bill of Rights of Virginia which declares that no man shall "be deprived of his liberty, except by the law of the land or the judgment of his peers?"

That a man may be deprived of his liberty by the law of the land, is conceded by the very terms of the provision just mentioned. That he cannot "be deprived of his liberty except by the law of the land," necessarily implies that he may be deprived of it by the law of the land; and this is certainly an undeniable fact. Our Code contains many laws by which a man may be deprived of his liberty, and such laws are enacted every year. At the same time it must be admitted that these words of the constitution, "law of the land," do not include every enactment which has the form of law. In the language of Bronson, J., in *Taylor v. Porter*, 4 Hill's R. 140, 146, they "do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses: 'you shall be vested with the legislative power of the State, but no one shall be deprived, &c., 'unless you pass a statute for that purpose.' In other words, 'you shall not do the wrong unless you choose to do it.' " In the language of Mr. Webster, in his celebrated argument in the Dartmouth college case, 5 Webster's Works, 487, 488: "The meaning is" (speaking of the provision in the constitution of the United States), "that every citizen shall hold his life, liberty, property, and immunities, under the protection of general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered as the law of the land. If this were the case, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance, completely inoperative and void."

What, then, is the meaning of these words, "law of the land," in this connection, and do they embrace the law under consideration? These are the questions we now have to dispose of.

The provision of our bill of rights in which these words are found, is similar to but not so extensive as the provision of the constitution of the United States before referred to; and a like provision is contained in the constitution of every State in the Union. The meaning of such a provision has been the subject of consideration and decision in many cases. The most important of them all seems to be the case of *Murray's lessee, &c. v. Hoboken Land and Improvement Co.*, 18 How. U. S. R. 272-286, decided by the Supreme court of the United States at December term, 1855. Mr. Justice Curtis delivered the opinion of

the court, which was unanimous. In that case it was held, among other things, that a distress warrant issued by the solicitor of the treasury, under the act of Congress passed on the 15th of May, 1820 (3 Stats. at Large 592), is not inconsistent with the constitution of the United States; that it was an exercise of executive and not of judicial power, according to the meaning of those words in the constitution; and that it is not inconsistent with that part of the constitution which prohibits a citizen from being deprived of his liberty or property without due process of law. "The words 'due process of law,' (say the court) were undoubtedly intended to convey the same meaning as the words 'by the law of the land,' in magna charta. Lord Coke, in his commentary on these words (2 Inst. 50), says they mean 'due process of law.' The

constitutions which had been adopted 189 by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words 'but by the judgment of his peers, or the law of the land:' (and this is, substantially, the language of the bill of rights of Virginia). The ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words." "That the warrant now in question" (the court further say) "is legal process, is not denied. It was issued in conformity with an act of Congress. But is it 'due process of law?' The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are intended to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will. To what principles then are we to resort, to ascertain whether this process, enacted by Congress, is due process? To this the answer must be two-fold. We must examine the constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition, by having been acted on by them after the settlement of this country. We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown; and especially those due from receivers of the revenues. It is difficult, at this 190 day, to trace, with precision, all the proceedings had for these purposes in the ear-

liest ages of the common law. That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of magna charta treats of their restraint." It declares, "We, or our bailiffs, shall not seize any land or rent for any debt, as long as the present goods and chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to satisfy therefor," &c. "By the common law, the body, lands and goods of the king's debtor were liable to be levied on to obtain payment. In conformity with the above provision of magna charta, a conditional writ was framed commanding the sheriff to enquire of the goods and chattels of the debtor, and if they were insufficient, then to extend on the lands." "But it is said that since the statute 33 Hen. 8, c. 39, the practice has been to issue the writ in an absolute form, without requiring any previous inquisition as to the goods. Gilbert's Exch. 127. To authorize a writ of extent, however, the debt must be matter of record in the king's exchequer," &c.

After giving an account of the practice pursued at different times in England in such cases, the court say: "This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due from receivers of the revenue in England, is sufficient to show that the methods of ascertaining the existence and amount of such debts, and compelling their payment, have varied widely from the usual course of the common law on other subjects, and that as respects such debts due from such officers, 'the law of the land' authorized the employment of auditors, and an inquisition without notice, and a species of execution, bearing a very close resemblance to what is termed a warrant of distress in the act of 1820, now in question.

191 "It is certain that this diversity in 'the law of the land,' between public defaulters and ordinary debtors, was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the States, after the declaration of independence and before the formation of the constitution of the United States. Not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, issuing against the body, goods and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it. Without a wearisome repetition of details, it will be sufficient to give one section from the Massachusetts act of 1786." After giving which, the court refers to similar provisions contained in the acts of Connecticut, Pennsylvania, South Carolina, New York, Virginia and Vermont, passed before the formation of the constitution of the United States, and in the acts of Louisiana and the United States, passed since that period; and then say: "This

legislative construction of the constitution, commencing so early in the government, when the first occasion for this manner of proceeding arose, continued throughout its existence, and repeatedly acted on by the judiciary and the executive, is entitled to no inconsiderable weight upon the question, whether the proceeding adopted by it was 'due process of law.'" "Tested by the common and statute law of England, prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820, cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the constitution some other 192 provision *which restrains Congress from authorizing such proceedings. For, though 'due process of law' generally implies and includes actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings (2 Inst. 47, 50; Hoke v. Henderson, 4 Dev. N. C. R. 15; Taylor v. Porter, 4 Hill R. 140, 146; Van Zant v. Waddel, 2 Yerg. R. 260; State Bank v. Cooper, Id. 599; Jones' Heirs v. Perry, 10 Id. 59; Greene v. Briggs, 1 Curtis C. C. R. 311), yet this is not universally true. There may be, and we have seen that there are cases, under the law of England after magna charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands and goods of certain public debtors, without any such trial; and this brings us to the question, whether those provisions of the constitution, which relate to the judicial power, are incompatible with these proceedings?"

The court then proceed to examine this question, and arrive at the conclusion, that no such incompatibility exists. In the course of their remarks on this subject, they say: "As we have already shown, the means provided by the act of 1820 do not differ in principle from those employed in England from remote antiquity, and in many of the States, so far as we know, without objection, for this purpose, at the time the constitution was formed. It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or on the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to."

193 "I have made these long quotations, because the case from which they are taken is one of the highest authority, and seems to be conclusive of the main point of controversy in this case, and because the

language of the court in that case expresses the views which I wish to present, much more strongly and aptly than I can do, by any language of my own. Many other cases might be cited in support of the same views, but I will refer to one or two of them only. In the *State v. Allen*, 2 McCord R. 55, Mr. Justice Nott says: "This method of collecting taxes is as well established by custom and usage as any principle of the common law. A similar practice prevailed in all the colonies, from the first dawn of their existence; it has been continued by all the States since their independence, and had existed in England from time immemorial. Indeed, it is necessary to the existence of every government, and is based upon the principle of self-preservation." "I think, therefore, that any legal process, which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent; must be an exception to the right of trial by jury, and is embraced, by the alternative, 'the law of the land.' Such I consider to be the summary proceeding allowed in the collection of taxes." In *McCarroll v. Weeks*, 2 Tenn. R. 215, the court hold the following language, in sustaining the constitutionality of these summary tax laws: "It is certainly true that they have the character of summary proceedings, and it is equally true that they must of necessity be so; for, if the government were necessitated to take the cautions and tedious steps of the common law," "it would cease to exist for want of money to carry on its necessary operations; loss of credit and a total extinction of the national faith, the basis of all regular government, must be the inevitable consequence." See, 194 also, 6 Monroe R. 430; *9 Georgia R. 352; 11 Id. 82; 6 Missouri R. 64; 1 Halst. R. 352; 10 La. Ann. R. 764.

In *Blackwell on Tax Titles*, p. 176, edition of 1864, chapter 9, the writer says: "Where the person against whom a tax has been legally assessed neglects or refuses to pay the tax voluntarily, after a notification and demand made by the collector in the manner prescribed by law, the necessities of the State compel a resort to coercive means. In some States the law requires the body of the delinquent to be arrested and imprisoned, in satisfaction of the tax." *Bassett v. Porter*, 4 Cush. R. 487; *Daggett v. Everett*, 19 Maine R. 373; *Rising v. Granger*, 1 Mass. R. 47; *Appleton v. Hopkins*, 5 Gray's R. 530. "In other States, the law requires the tax to be collected out of the personal estate of the delinquent if a sufficiency can be found to satisfy it. In South Carolina the statute thus marshals the remedies: 1. A distress of the personal estate of the delinquent; 2. The sale of the land; 3. The seizure and imprisonment of the body (*Kingman v. Glover*, 3 Rich. R. 27). A violation of the order of remedies thus prescribed invariably renders the act of the officer illegal. It is the policy of the law to resort to the land itself only when all other remedies fail to enforce a

satisfaction of the tax. The person or personal estate of the delinquent is regarded as the primary, the land the dernier, resort. The tax never becomes a charge upon the land until the other remedies have been exhausted." "The law admits of no substitution or change in the order thus established. It is therefore held that the land of the delinquent cannot be sold in those States which authorize imprisonment, if his body can be found, nor can a resort be had to the land, in States where the personal estate is regarded as the primary fund, as long as a sufficiency of personal estate can be seized and sold in satisfaction of the tax: a sale of the land, under such circumstances, is illegal and void."

195 *I presume no one will contend, and I did not understand the learned counsel for the defendant in error as contending in this case, that the law in question is unconstitutional in authorizing the sheriff or collector to distrain the property of the person assessed with taxes, as therein mentioned, if they be not paid. The necessity of such a power, and its constant exercise from time immemorial, as we have seen, places its constitutionality on an impregnable basis. But it seems to be supposed that the law is unconstitutional in authorizing the sheriff or collector, if unable to find sufficient property to satisfy the taxes so assessed, and the same shall not be immediately paid, to arrest the person so assessed and hold him in custody until the payment is made, or until he enter into bond with sufficient security, as therein mentioned. Why should this power to arrest the person so assessed make the law unconstitutional any more than the power to distrain his goods? The ground of the objection is that a person cannot be deprived of his liberty except by the law of the land. But a person cannot be deprived of his property, any more than his liberty, except by the law of the land; and yet it is well settled, and must be admitted, that a person's property may be seized for non-payment of his taxes, upon the mere assessment of the commissioner of the revenue, and without any judgment of any court against him. Why may not his person be arrested for the same cause, when the law expressly authorizes such an arrest? We have seen that the authorities place the seizing of the property, and arresting of the person of the tax debtor, on the same footing, in regard to the constitutional question we are now considering; and so they undoubtedly are. The power to arrest the person may not be so often given by tax laws as the power to distrain property; but a power to arrest the person is often given by such laws, and is sometimes necessary to make them efficient; and whenever *it is necessary, the Legislature, which is charged with the important duty of raising a revenue for the support of government, may constitutionally confer such a power. It is not contrary, as has been shown, to the provision of the Bill of Rights before referred to, nor is it contrary to any other provision

of the constitution. There is no provision in our constitution, as there is in some of the other State constitutions, which forbids imprisonment for debt. And it is well known that, until a recent period, a person might be imprisoned in this State, not only on final process in a civil action, but on original process in a bailable action, by a mere endorsement by the plaintiff's attorney on the process, requiring bail. And though the law has been changed in this respect, yet the old law may at any time be restored, at the will of the Legislature. There is nothing in the constitution to prevent it. Even if imprisonment for debt were forbidden by the constitution, such a provision would not, I imagine, forbid imprisonment as a means of enforcing the payment of taxes, if the Legislature found it necessary to resort to such means in order to raise a revenue. But such a question does not arise in this case, and of course is not intended to be decided.

But it is objected that imprisonment may be perpetual under this law, as it makes no provision for the discharge of the prisoner, even though he be insolvent.

If this be true, it may show the law to be harsh in its operation, but does not therefore show it to be unconstitutional. It may be a bad exercise of legislative discretion, but not an excess of legislative power. The courts may control the latter, but have nothing to do with the former.

In vindication of the law against this imputation of harshness it may, however, be said that no person is compelled to obtain a license, unless he chooses to exercise the privilege for which it is required. He

197 sees *the law and knows the terms on which alone he can obtain a license; and by obtaining it, assents to all those terms, so far at least as they may be constitutional. One of those terms is, that if the tax be not immediately paid, and the sheriff or collector be unable to find sufficient property to satisfy the tax, he is required to arrest the person assessed with the tax, and hold him in custody until payment is made, or bond given as prescribed by law.

The act in relation to the assessment of taxes on licenses, under which the assessment in this case was made, prescribes what is to be done where a person wishes to engage in a licensed business. It is his duty to apply to the commissioner of the revenue of the district where the business is to be prosecuted, for an assessment of the tax imposed by law on the license he desires to obtain. It is thereupon the duty of the commissioner to administer the oath required by the act, and deliver to such person a certificate showing the business which may be pursued, the place at which it may be prosecuted, and the amount of tax to be paid by such person for the licensed privilege. This certificate is required to be produced to the proper sheriff or collector, whose duty it is to receive the taxes named therein and grant to such person a receipt therefor written upon the certificate, which certificate and receipt, made

in conformity to law, are declared to be a license to prosecute the business named therein. Acts of Assembly 1866-67, p. 846, § 52.

In regard to the manufacture of wine, ardent spirits and malt liquors, it is provided, with certain exceptions immaterial to be stated, that there shall be a specific tax for the privilege of distilling or other manufacturing of wine, ardent spirits or malt liquors, and there shall also be a tax on the quantity thereof to be manufactured or distilled, which shall be stated in the license. If the person desiring such
198 license make application *therefor, he shall state on oath the probable quantity, which, in his opinion, he will distill or manufacture during the time the license is to continue, and the tax shall be assessed, as well for the specific amount as upon the quantity to be produced. If the application shall not be made to the commissioner for an assessment, he shall assess the specific tax as in other cases of default, and shall ascertain, upon the best information he can obtain, the probable quantity which the distillery will produce during the time the license will continue, and shall thereupon assess the actual rate per gallon provided for in the act. If the quantity to be manufactured or distilled under such license shall have been made, and the person desires to make an additional quantity, he may apply for a new assessment and a new license for the additional quantity desired, which shall be granted upon the payment of the tax on the gallon, without the specific tax to distill or manufacture. Id. p. 837-8, § 25. The act affords ample redress against an erroneous assessment, by giving to the person aggrieved thereby a right, at any time within two years after it is made, to apply for relief to the court in which the commissioner gave bond and qualified, and by making it the duty of the court thereupon to give such relief. Id. 853-4, § 79, and seq.

Under all these circumstances what good reason has a person assessed with this tax to complain of the severity of this law? It is his duty to pay the tax for the privilege before he exercises it. If, in defiance of the law, he disregards his duty, and manufactures ardent spirits to any amount he pleases, without paying any tax therefor, and without having any visible property on which it may be levied, can he complain that the law subjects him to arrest and imprisonment until the payment is made? His pockets may be filled with the profits of the business, and there may be no way
199 of reaching them but by arresting his person and holding him *in custody.

Without that only effectual means of getting the tax, the Commonwealth would be deprived of a most important source of revenue, which she can illy afford to spare. There is really no hardship in the case, and certainly none of which a person assessed with the tax has any just cause to complain. If it be settled that he may be arrested and imprisoned if he fail to pay the tax and

have not sufficient visible property on which it can be levied, there will rarely, if ever, be any occasion for resorting to this remedy. The tax will almost always be paid, as it ought to be. If in any instance it should not be, and this remedy should be resorted to, the Legislature could and would interpose to discharge the prisoner whenever it was found that his continued imprisonment was not likely to produce the amount of the tax, or any part of it.

But it is said that the law is harsh, and indeed unconstitutional, in requiring the person arrested to give bond, &c., for his appearance before the Circuit court of his county or corporation, to answer to such action of debt, indictment or information as may be brought against him, and to satisfy, not only the fine imposed, but the taxes assessed.

The law does not require him to give such a bond. He may discharge himself from custody by payment of the tax. What is said about the bond is for his benefit. He may give the bond, and obtain his discharge in that way, if he cannot, or does not choose, to pay the money. There is nothing unreasonable in the condition of the bond which he is thus authorized to give. He has incurred a fine, for which an action of debt, or an indictment, or an information lies, and he also owes the taxes assessed. The condition of the bond is not to pay the fine absolutely, but to answer to such action of debt, indictment or information as may be brought against him, and to satisfy the fine imposed; that is, the fine which
200 may be imposed on the trial of *such action of debt, indictment or information; and also to pay the taxes assessed.

I therefore think the law under which the petitioner was arrested is constitutional; and I will now proceed to consider the next ground of defence, which is,

Secondly. That it does not appear that the facts necessary to authorize the appointment of an assistant commissioner of the revenue existed in this case; and, if they did, and the assistant was duly appointed, he had no authority to make the assessment, which could only have been legally made by the principal commissioner himself; and, if he had such authority, he could exercise it only in the name of his principal, which should, but does not, appear on the face, or at the foot, of the certificates of assessments.

The law under which the assistant commissioner, who made the assessment in this case was appointed, is in these words: "A commissioner, unable from sickness or other cause to perform the duties of his office, may, at his own expense, with the consent of the County or Corporation court, employ a person (approved by the court) to assist him. Such assistant, after taking the proper oaths, may discharge any of the duties of commissioner, and the principal and his sureties shall be liable for the faithful performance of such duties." See p. 728, § 7.

Whether the facts necessary to authorize

the appointment of an assistant commissioner existed in this case, was a question for the County court of Henrico to determine. That court accordingly determined that they did exist, by appointing John A. Eacho assistant commissioner, who qualified as such according to law; which appointment was made on the motion of Sidney W. Blankinship, the commissioner. And that determination is conclusive of the question, being a judgment of a court of competent jurisdiction, upon a subject matter within such jurisdiction. The said

201 assistant *was, therefore, duly appointed, and took the proper oaths; and he thereupon became expressly authorized by law to "discharge any of the duties of the commissioner." Of course he was authorized to make an assessment and grant a certificate to obtain a license. And he could do so in his own name, as assistant commissioner, without, necessarily, adding the name of the principal commissioner, either to the assessment or certificate. Being expressly authorized, as assistant commissioner, to perform any of the duties of commissioner, it seems to follow, as a matter of course, that he may certify, in his own name, as such assistant commissioner, that he did perform them. It was a rule of the common law, that an under-sheriff, or deputy sheriff, acted only in the name of his principal. 8 Bac. Abr. Sheriff, H. 1.

"To prevent disputes between sheriffs and their several deputies, which of them may have acted in serving of executions or process," our statute, at a very early period, required, that, when any under-sheriff hath served any process, he shall subscribe his name, as well as that of his principal, to the return of such process. 1 Rev. Co. 1819, p. 283, § 31; Code of 1860, p. 284, § 27. But there is no such analogy between the offices of under-sheriff and assistant commissioner of the revenue, as to make it necessary, or proper, that the latter should act in the name of his principal. There is, in contemplation of law, but one sheriff, though many and different kinds of deputies. And, although an under-sheriff may perform the duties of the office generally, yet there are, or were, many duties of the office which the high sheriff could perform only in person: at least such was the case at common law. 8 Bac. Abr. Sheriff, H. 3. But the assistant commissioner is expressly authorized, as we have seen, to "discharge any of the duties of commissioner." There seems to be no reason or propriety, there-

202 fore, in requiring the assistant commissioner to *act in the name of his principal in performing any of the duties of the office. In Hannel v. Smith, 15 Ohio R. 134, cited by the counsel for the defendant in error, the law required that the list, which was thereby directed to be transmitted by the auditor of State to the county auditor, of all lands which had been forfeited for non-payment of taxes, should be certified and signed by the auditor of State, and have thereto affixed his seal of office. The list which was transmitted in

that case was a letter signed "Jno. Brough, auditor of State, by J. B. Thomas." The court held the authority insufficient and the sale void, on three grounds: 1. The list was not certified to be correct. 2. It was not attested by the auditor or his chief clerk. 3. It was not verified by the official seal of the auditor. The distinction between that case and this is too palpable to require further comment.

I will now proceed to consider the next and last ground of defence, which is,

Thirdly. That while the said certificates were in the hands of the sheriff of Henrico county for collection, there was ample personal property of the petitioner Byrne for their payment, on which they might have been levied, and ought to have been levied, before any arrest of the person was made; and long prior to such arrest, the sheriff actually made a levy upon personal property of Byrne, more than enough to satisfy the whole claim, and advertised it for sale.

It is not pretended that the petitioner had any property on the 3d of February, 1870, at the time of his arrest. Nor that he had any property on which the second certificate, bearing date the 24th day of November, 1869, could be levied at the time it came to the hands of the sheriff for collection. At that time the property of said Byrne was in the hands of the collector of internal revenue of the United States, under

a levy made thereon for taxes due the United States, for the *payment of which taxes it was ultimately sold, and the proceeds (except a small balance, no doubt paid to Byrne, were applied to such payment accordingly, before the arrest by the sheriff. And although it appears, from the statement of the said collector, that the sale made by him, as aforesaid, was not under the said levy, but that he suffered that levy, for reasons which he states, to run out, and a few days thereafter, to wit: on the 4th of January, 1870, he made a second levy on the same property, under which second levy he made the sale aforesaid, it is not pretended, and certainly cannot be maintained, that because of the intermission of a few days between the two levies made by the collector, as aforesaid, there was such a liability of the property to a levy by the sheriff as to make his arrest of Byrne illegal. We may therefore well conclude that the arrest for the non-payment of the taxes assessed by the second certificate was lawful. So that, even if the arrest could not lawfully have been made for non-payment of the taxes mentioned in the first certificate, yet, as the arrest for non-payment of the taxes mentioned in the second certificate was lawful, the petitioner would not have been entitled to be discharged from custody on the writ of habeas corpus in this case; but ought to have been remanded to custody until payment was made of said last-mentioned taxes, or until bond was given, as required by law.

But was not the arrest also lawful for the non-payment of the taxes mentioned in the first certificate, bearing date on the 15th

day of October, 1869? I think that it was. It is true, it seems, that when that certificate came to the hands of the sheriff, the petitioner Byrne had sufficient property to satisfy said taxes, which property was liable to be levied on, and was actually levied on, for the same. But it is also true, that very soon after such levy, and before the

day fixed for the sale of the property under said levy had arrived, *the same property was levied on by the collector of internal revenue of the United States, for taxes due the United States by the said Byrne; and when, on the day which had been fixed by the sheriff for the sale, he went to the premises of Byrne to make the sale accordingly, he was stopped from selling by some one connected with the United States internal revenue office, who stated that all the property levied on was in the hands of the government of the United States. The property levied on under the said first certificate was taken from the sheriff, and was sold by the collector of internal revenue for the government of the United States. The person who had been put in charge of the property levied on by the collector, and was in charge of it on the day advertised for said sale, pretended to be a government officer, and the collector acknowledged afterwards to the sheriff that he acted by his authority. After the said day fixed for said sale, the sheriff made no further levy or attempt at a levy. The United States held the property, and he did nothing more.

Now, the question we have to decide is, not whether the government of the United States, or the government of this State, were entitled to priority of satisfaction out of the property thus levied on for the payment of the taxes due by Byrne to these two governments respectively; nor whether the sheriff did not incur a personal liability to the government of the State for not having summoned a posse comitatus to take the property out of the hands of the government of the United States, or the revenue officers thereof; but whether the taxes due to the State of Virginia, for which this ineffectual levy was made, were so far satisfied by the force and effect of such levy, as that payment thereof could not be enforced by the arrest of the debtor, though at the time of such arrest he had not a particle of property upon which a levy could be made?

*That is the question; and I am clearly of opinion that it ought to be solved in the negative—that is, that the taxes due the State of Virginia, for which the levy was made, have not been satisfied to any extent, or for any purpose, by such abortive levy, and that the arrest made was a lawful arrest, as well for the non-payment of those taxes as for the non-payment of the taxes mentioned in the second certificate.

Suppose, after the levy by the sheriff, the debtor himself had sold the property and applied it to his own use; or had removed it out of the reach of the sheriff; could the debtor then have said that the taxes were satisfied by the levy, or that there could be

no arrest, because there had been a levy on property sufficient to satisfy the taxes? Certainly not. And why can he any more say so, when the property has not been applied to the payment of the taxes due the State, which were levied thereon, but was taken by officers of the United States government and applied to the payment of taxes due by Byrne to that government? When the property was applied to the payment of taxes due by Byrne to the United States, it was applied to his use just as much as if the proceeds of the sale had been paid to him, and there can be no reason or justice in considering this property, at the same time, as a payment of the debt due by him to the State of Virginia; and thus giving him the benefit of a double payment with the same money. The debt of Byrne to the State is yet, in fact, unpaid. She may have a recourse against the sheriff and his sureties for his official default; but her recourse against her primary debtor is not satisfied, or at all impaired. All her remedies for the recovery of that debt remain in full force; and those remedies are: 1st. A right to distrain the property of the debtor; and if the sheriff or collector is unable to find sufficient property to satisfy the debt, and the same is not immediately paid;

2dly. A right to arrest the person of
206 *the debtor and hold him in custody until the payment is made or a bond be given, as aforesaid. When the arrest in this case was made, the debt existed and these remedies existed in full force; and the debtor having then no property on which a levy could be made, his arrest was lawful.

Suppose the sheriff had made no levy under either certificate, and the United States, or execution creditors of the debtor, had levied upon his property and applied it all to the payment of debts due to them: would the taxes due by him to the State have been considered as satisfied, because they might have been levied on the property in preference of the other debts, and because the sheriff, by failing to make such levy, may have incurred a personal liability to the Commonwealth? Certainly not. In that case, clearly, the debt to her would still remain unpaid, and all her remedies against the debtor would still exist in full force. How does that case differ from this? Here, it is true, there has been a levy, as it is called, for part of the debt. But did that injure the debtor? Has he lost his property in consequence thereof? Has he even been deprived of it for a single day? Certainly not. The property was not taken out of the debtor's hands. No other person was even put in charge of it. It does not, indeed, appear that the debtor was informed of the levy by the sheriff. He seems to have merely made what I have heard called "a sight levy:" that is, he merely looked at the property, and advertised it for sale. But before the sale, the United States made a levy on the same property; which, however, was no "sight levy." The collector seized the property, placed a keeper or guard over it, and directed him to allow no person

to take or interfere with any part of it. At the time he made the first levy, he found the property in the possession of Byrne. He would not have levied on it if it had been in the sheriff's custody. He saw
207 the sheriff *after he had made the seizure, and the sheriff then told him that he had made a prior levy. He never had any written notice of the levy by the sheriff. If he had found the property in the possession of the sheriff, he would have held it subject to the sheriff's lien. It does not appear that Byrne gave the collector any notice that the property was subject to the sheriff's levy, or claimed to have it applied to the payment of the taxes due the State, to protect his person from arrest. Perhaps he did not know that there had been such a levy; or, more probably, he considered it unimportant whether the property was applied to the payment of one or the other set of taxes, or in what order it was applied to their payment. Then, when the arrest was made, the matter stood, in every substantial respect, as if there had been no levy for any part of the taxes due the State. Even if the levy had been of an execution, it would not of itself have been a satisfaction of the debt. It is a satisfaction only when it produces the money, which is the fruit of the execution; or when it is so treated by the creditor, or the sheriff, who is in this respect his agent, as to occasion loss to the debtor, and then it is a satisfaction to the extent of such loss. If the property levied on be lost to the defendant by the misconduct or neglect of the sheriff, the execution is thereby satisfied to the extent of the value of the property; and the plaintiff can then only look to the sheriff for indemnity. *Walker, &c. v. The Commonwealth*, 18 Gratt. 13. So also here, if the sheriff had destroyed or wasted the property, or otherwise, by his misconduct or neglect in regard to it, had occasioned a loss to the debtor, the debt, to that extent, might, on the same principle, have been thereby satisfied. But such is not the case, and the matter stands precisely as if there had been no levy by the sheriff. It cannot be said that non constat there was any debt due to the United States for which a levy
could be made. The presumption
208 *is that there was such a debt; and, at all events, that if they have done any wrong to the supposed debtor, they will afford him ample redress. Byrne objected to the payment of the tax charged against him by the United States, and asked an abatement of it, which was refused by the department at Washington.

I have not deemed it material to enquire what remedies the United States may have had to enforce the payment of taxes due to them, or whether they might have arrested the person of the debtor if he had not had sufficient property to satisfy their claim, as they certainly may in some cases, or at least in one case, as under the law, which was the subject of adjudication in the case in 18 Howard, before referred to. These laws are extensive and complicated, and I

have not examined them fully. Whatever they may be, they cannot affect the result in this case.

I have examined all the authorities referred to by the counsel for the defendant in error, at least all of them I could find in the State library, and do not think that any of them are in conflict with the views I have maintained; or if any of them are, I think they are outweighed by the authorities I have relied on in support of those views. I deem it unnecessary to notice in detail the cases cited in the argument. *Scales v. Alvis*, 12 Alab. R. 617, was much relied on by the counsel for the defendant in error, to show what strictness is required in the proceedings where land is made liable for the payment of taxes when the debtor has no personal estate. In *Blackwell on tax titles*, p. 177, the author says: "The strongest case upon this point is that of *Scales v. Alvis*;" and yet there is nothing in that case which is in conflict with the views I have expressed in this. The facts in that case were, that the delinquent had a yoke of oxen in the county of value suffi-

cient to satisfy the tax, but they were
209 exempt by law from execution *for the debts of the owner. The court held the sale of the land void under these circumstances, the statute of Alabama providing that "where the delinquent has no goods and chattels within the county, then" his lands, &c., may be sold. The court, in their opinion, say: "It will thus be seen that the power of the collector to sell lands is limited to those cases where the delinquent has no goods and chattels within the county. There is no provision for cases where the collector is unable to find, or the delinquent is unwilling to surrender, goods. The power exists only when there are no goods; and conforming to the principle of the many cases on this subject, we are constrained to decide that as there was personal property of the delinquent within the county, the collector had no discretion to sell the land." The court held that the statute exempting oxen from execution did not apply to taxes, and therefore that the oxen in this case were liable for the payment of the taxes due. There is a very important difference between the Alabama statute and our statute in this; that the former gives power to sell land only where there are no goods, while the latter gives power to arrest the person "if the sheriff or collector shall be unable to find sufficient property to satisfy the taxes so assessed, and the same shall not be immediately paid." But it does not appear in this case that the debtor had any goods when his person was arrested, much less that the sheriff was then able to find sufficient property to satisfy the taxes due. In the case of 18 Howard 286, before referred to, the court say that "the return of the marshal, that he had levied on the lands by virtue of the warrant, is at least prima facie evidence that his levy was not irregular by reason of the existence of goods and chattels of the collector, subject to his process."

So here, the arrest of the person of the delinquent is prima facie evidence that the sheriff could not find sufficient property to satisfy the taxes due at the time of
210 the arrest, and *indeed he expressly so declares in his return to the writ of habeas corpus, and there is not a particle of evidence to contradict the return in this respect.

Upon the whole, I think the judgment of the court below is erroneous and ought to be reversed, and the defendant in error remanded to the custody of the sheriff of Henrico county.

The other judges concurred in the opinion of the President.

The judgment is as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said judgment of the Court of Hustings for the city of Richmond is erroneous. Therefore it is considered that the same be reversed and annulled, and that the plaintiff recover against the defendant her costs by her expended in the prosecution of her writ aforesaid here. And this court proceeding to enter such judgment as the said Hustings court ought to have entered, it is further considered that the said defendant be remanded to the custody of the sheriff and jailor of Henrico county, and that he pay the costs of the proceeding in the said Hustings court, and before the judge thereof; which is ordered to be certified to the said Hustings court.

211 *Crawford v. Halsted & Putnam.

January Term. 1871, Richmond.

JOYNES, J., absent, sick.

1. **Statute—Effect on Incomplete Depositions.***—A deposition of a party, to be read in a pending cause at law, was commenced before the passage of the act of March 2d, 1866, Sess. Acts, 1865-66, p. 86, which required that parties should testify, *ore tenus*, but it was not completed until that law went into effect. The deposition is inadmissible as evidence, if objected to.†
2. **Same—Repeal—What Statutory Rights Lost.**—Inchoate rights derived under a statute, are lost by a repeal of the statute before they are perfected, unless they are saved by express words in the repealing statute.
3. **Statute—Interpretation.**—The act, ch. 16, § 18, of the Code, ed. 1860, does not save the right to a party to a suit to give evidence by his deposition, where the

***Statute—Retrospective Effect.**—As to the retrospective effect of statutes, see the principal case cited in *Price v. Harrison*, 31 Gratt. 121; *Carter v. Hale*, 32 Gratt. 119; *Curran v. Owens*, 15 W. Va. 224, and *foot-note* to *Price v. Harrison*, 31 Gratt. 114, where many cases on the point are collected.

†**NOTE BY THE REPORTER.**—By the act of February 7, 1867, Sess. Acts, p. 615, the first section of the act of March 2, 1866, was amended; and under this last act a party in a cause may give his evidence as any other witness may; except that, "in any case at law, the court may, for good cause shewn, require any party to attend in person and testify, or exclude his deposition upon his failure to attend."

taking of it was commenced before the passage of the act of March 2, 1866, but was not completed until that act was passed.

4. **Same—No Conflict with Alexandria Constitution.**—

The act of March 2, 1866, held under the circumstances not to be in conflict with § 16, article 4, of the Alexandria constitution.

This was an action of assumpsit in the Hustings court of the city of Richmond, brought in February, 1866, by Halsted & Putnam, merchants and partners doing business in the city of New York, against Wm. Crawford and Robert C. McPhail, alleged to be partners doing business under the name and style of Crawford & Co., in the city of Richmond. The process

212 does *not appear to have been served on McPhail; but the action was proceeded in against Crawford. The only question in the case was upon the admissibility of the depositions of the plaintiffs as evidence. The commission to take the depositions in New York was issued by the court on the 20th day of February, 1866. The notice to Crawford that the depositions would be taken on the 6th of March, is dated on the 20th February, and was delivered to him on the 22d. On the 6th of March the notary commenced the taking the depositions, and it was regularly continued from day to day until the 12th of April, when they were completed, and returned to the clerks' office of the Hustings court: and the defendant, ten days before the trial of the cause, gave notice to the plaintiff's counsel, of his intention to object to the reading the depositions on the trial, on the ground that parties to a suit, when coming forward on their own behalf, must testify ore tenus. And accordingly when upon the trial the depositions were offered in evidence, the defendant objected to them; but the court overruled his objection; and the defendant excepted.

On the 23rd of October, 1866, there was a verdict and judgment for the plaintiffs for the sum of \$1,470 75, with interest and costs, and Crawford thereupon applied to the judge of the Circuit court of the city of Richmond for a supersedeas, which was awarded. How the case was decided in that court does not appear; but it was taken to the District Court of Appeals at Williamsburg, where the judgment of the Hustings court was affirmed; and then Crawford brought the case to this court.

Young, for the appellant.

I. It is within the clear power of the Legislature, at any time, to prescribe the remedies by suit to enforce a contract; the mode of proceeding in such suit; 213 the *rules of evidence; and the manner in which the evidence shall be given. It has power, at its pleasure, to alter the existing form of remedy, or the rules of evidence, and to substitute, in any class of cases, oral for written testimony. In all such cases the law at the time of the trial must govern. A party to a contract has no vested right in any particular rem-

edy or form of proceeding or mode in which the witnesses in his case shall testify. The above principles apply as well to suits which have been brought to enforce contracts as to those in which suits have not been brought. The only limitation to this power is that, under color of changing the remedy or the rules of evidence, a party shall not be deprived of all effectual remedy, as, by depriving him of the right to sue, or by the Legislature destroying the validity of the evidence upon which his claim rests. Sedgwick on Stat. & Const. Law, p. 659-691; Perry v. Commonwealth, 3 Gratt. 632-637.

II. The Legislature having, in the exercise of an unquestionable power, by the passage of the act of the 2d March, 1866, (Sess. Acts of 1865-6, p. 87), repealed the Alexandria act of the 29th January, 1864, (see Acts of 1863-4, p. 17), so as to alter the mode in which the evidence of parties to suits should be thereafter admissible, the new mode prescribed must govern in all trials had after the date of the new law; and this, without any regard to the steps that may have been taken under the Alexandria law to take the depositions of such parties. This must necessarily be so unless there be either some general statute or some special clause in the repealing act which shall clearly indicate the legislative purpose that the new law shall not apply to existing suits and proceedings which have taken place in them.

III. The act concerning "statutes and rules of decision" (Code of 1860, ch. 16, § 18) cannot have such an effect. The "rights accrued and claims arising," 214 *which are referred to in that act, are not those which relate simply to the mode in which evidence is to be given on a trial. Nor is the simple giving of a notice to take depositions "an act done" which can confer any such "right" or "claim." A party to a suit can have no legal right or claim to any particular mode in which his witnesses are to testify. The proceedings at the trial of the case must, however, of necessity "conform to the laws in force at the time of such proceedings;" i. e. at the time of the trial.

IV. The terms of the act of March 2d, 1866, are comprehensive, and contain no exception that can by possibility embrace the present case. There is nothing in it to indicate that the Legislature intended to except from its operation pending cases. If that had been the intention, why was not some phrase used to indicate it? It is impossible to believe that the phraseology of the act would not have confined its operation to future "cases," or that pending "cases" would not have been embraced in the exception if such had been its purpose. If the construction of the exception contained in the law, which is contended for by the appellees, be the true one, there can be no reason why the admissibility of the evidence of the parties therein referred to, should not extend to all "cases" then pending, whether the deposition of the parties had been then taken or not. The evidence of the parties, under the laws then in force,

would have been just as "admissible" if the depositions had not then been taken as if they had been. Nor is there any reason why, under such a construction, the exception should not apply to future "cases," brought for causes of action existing at the time the new law was passed. The new law would thus have been rendered practically inoperative, and the repealed law still left in full vigor as to all existing suits

or causes of action, even to those
215 *which had arisen or been instituted prior to the passage of the Alexandria act itself!

V. The objection taken by the appellees that the act of March 2d, 1866, is unconstitutional, on account of alleged defects in its title, is not well taken. The objects and provisions of the act are entirely germane to the subject matter of its title, and to the provisions of the act repealed. The court, it is submitted, will never declare an act of the Legislature, so important as this, null and void, except upon the clearest and most imperative reasons, and none such exist in the present case. The same objection might, with equal force, be made to the Alexandria act itself. The effect of the act is, at all events, to repeal the Alexandria act, upon which alone the appellees rely.

Page & Maury, for the appellees.

The defendants in error rely upon the following points of law, and the following authorities in support of them:

I. Where a party, upon the faith of an existing statute, has actually asserted and claimed, by a proper suit or other proceeding instituted for the purpose, a right given him by such statute, though it be merely a right to a particular remedy, or a right relating only to the remedy, as distinguished from a right of property, or of action or defence, such right will be so far regarded as a vested right that it will not be construed to have been taken away by a subsequent statute, without express words for the purpose, or clear and necessary implication. This is the plain result of the authorities as well in Virginia as in England. See *Beatty v. Smith*, 2 Hen. & Mun. 395, on construction of the act of 1804, 3 Shepherd's Statutes at Large, p. 98, § 2; *Price v. Kyle*, 9 Gratt. 247, 251 (last paragraph of the report), a decision on the construction of the 1st clause in sect. 35, ch.

182 of the Code, edi. of 1869, p. 750;

216 *Gallego v. Quesnall's Adm'r*, 1 Hen. & Mun. 204, a decision by Chancellor Taylor upon the act in 3 Shepherd's Statutes, p. 98, § 3; *Pinhorn v. Sonster*, 14 Eng. Law & Eq. 415, S. C. 8 Exch. R. (Welsby H. & Gordon) p. 138. The principle established by these adjudications is in no wise contravened by the case of *McGruder v. Lyons*, 7 Gratt. 233; for there the petition for an appeal was not filed until after the first of July, 1850, when the new Code went into operation. Here the plaintiffs below (appellees in this court) had not only brought their suit, but had actually sued out a commission for taking their own

depositions as witnesses in the case, and had given the defendant due notice of the time and place of taking them, while the act of 29th January, 1864 (Acts of Assembly held at Alexandria, commencing 7th Dec'r, 1863, p. 17, ch. 12), was in full force, and before the passage of the act of 2 March, 1866 (Acts of 1865-6, p. 87), by which it is contended that those depositions were rendered inadmissible as evidence on the trial.

The principle of the decisions above cited (to which that of *Pugh's Ex'or v. Jones*, 6 Leigh 299, 311, 313, 314, is very analogous), would be exactly applicable to the present case, if the question here were merely whether the pre-existing competency of those depositions under the law of 1864 had been impliedly annulled by the provisions in the law of 1866 and if the law of 1866 had neither expressly repealed the law of 1864, nor contained any saving clause. There is, however, such express repeal, and there is a saving clause; and it becomes necessary to consider the effect of them.

II. Even if the act of 2 March, 1866, had consisted merely of a clause repealing the act of 29 January, 1864, such repeal, it is insisted for the appellees, would not have repealed their pre-existing right to have their depositions taken in the cause, and read at the trial of it. See ch. 16, § 18 of the Code, edi. of 1860, p. 115,
217 *16; and the opinion of the court in *Philips v. Commonwealth*, 19 Gratt. 485.

III. The act of March 2, 1866, provides in the first section, that "in all cases, both at law and in equity, the evidence of parties, except in cases in which such evidence is admissible under laws now in force, shall be given ore tenus, and not by deposition." The law of January 29, 1864, notwithstanding its repeal by the 5th section, was clearly one of the laws referred to by the exception in the 1st section as "laws now in force." And the cases excepted were clearly some sort of cases which had arisen under pre-existing laws, and which, at the time of enacting the law of March 2, 1866, were already in some state or stage of existence. All pre-existing cases may be arranged under some one or other of the following classes: 1. Cases in which the cause of action arose prior to the act of 1864; 2. Cases in which the cause of action arose after the act of 1864, but no suit had been brought before the act of 1866; 3. Cases in which the cause of action arose, and the suit was brought, after the act of 1864 and before that of 1866; 4. Cases in which the cause of action arose, the suit was brought, and the commission or notice for taking the deposition of a party to the suit was sued out, or served, after the act of 1864 and before the act of 1866; 5. Cases in which, in addition to the facts under the last head, the deposition of the party to the suit had been actually taken and filed before the act of 1866. Here the plaintiffs had sued out the commission (which was required by law, they being residents of New York), and had given notice to the defendant of the time and place of taking the

depositions, before the act of 1866 was passed; and in those respects, as well as in others recited as constituting the 4th of the above classes, their case belongs, according to its literal facts, to that fourth class. But it may well be questioned whether they

are not legally entitled to have
218 *their case regarded as favorably as if it belonged to the 5th class; as if their depositions had been taken and filed before the passage of the act of March 2, 1866; for, from the settled practice in Virginia of tardy promulgation of acts of the Legislature, it may be assumed as certain that the plaintiffs, their counsel in New York, and the commissioner there for taking the depositions, were, on the 6th of March, 1866, when the taking of the depositions commenced, and thenceforward until the 12th of April, 1866, when the depositions were closed, totally ignorant (as the plaintiffs' counsel in Richmond were also) that the act of March 2, 1866, had been passed: and under such circumstances of ignorance, at the time and place of taking depositions that facts had supervened which, in strictness of law, annulled the authority to take them, the depositions were nevertheless adjudged to be admissible as evidence in the cases of *Crew v. Vernon*, Cro. Car. 97; *Thompson's case*, 3 P. Wms. R. 195; *Sinclair v. James*, 1 Dickens R. 277; *Thompson v. Took*, 1 Dickens R. 115; and *Peters v. Robinson*, 1 Dickens R. 116. But whether the case of these plaintiffs belong to the 5th class above stated, or only to the 4th, it is insisted that the exception in the statute of 1866 must, upon the narrowest construction that can possibly be given to it, embrace both the 4th and 5th classes at least, if no others, since in both of those it is an element, that the party had already made and declared (by adopting the mode of proceeding prescribed by law for the purpose, that is, by suing out a commission, or serving notice upon the opposite party, or both,) his election to give his evidence by deposition, instead of ore tenus; in doing which, the incurring of some cost, more or less, would also be a necessary concomitant.

IV. The act of March 2, 1866, was null and void, for want of compliance with the requisition of the constitution that "no
219 *object, which shall be expressed in its title." (Constitution adopted by the Alexandria convention which assembled Feb'y 13, 1864, art. iv, sect. 16, p. 13; the same provision, in the same words, being also found in art. iv, sect. 16, of the constitution of 1852, and in art. v, sect. 15, of the existing constitution.) The title of the act in question is merely this: "An act to repeal an act entitled an act relating to witnesses, passed by the General Assembly of the restored government of Virginia on the 29th day of January, 1864." The only object expressed in the title is that of the fifth section, which singularly happens to be the only immaterial section in the act; and the omission of reference to which in the title, if that had expressed the object

of the previous sections, would have been of no consequence. See *Gabbert v. Jeffersonville Railroad Co.*, 11 Ind. R. 365; *Giddings & wife v. Cox*, 31 Verm. R. 607. That this defect in the title rendered the act null and void is shown by the cases of *Parish of Bossier v. Steele*, 13 Louis. An. R. 433; *McWherter v. Price*, 11 Ind. R. 199; *Prothro v. Orr*, 12 Georgia R. 36; *Chiles v. Munroe*, 4 Metc. Ky. R. 72; *Cannon v. Hemphill*, 7 Texas R. 184, 208; *People v. Mellen*, 32 Illi. R. 181. The case last cited, which is exactly similar to the present, shews also that in such a case the defect of the title annuls the whole of the act, including the repealing clause, notwithstanding the object of that clause may have been fully and clearly expressed in the title. See also *Oatman v. Bond*, 15 Wisc. R. 20; *Childs v. Shower*, 18 Iowa R. 261, 272; *Tims v. State*, 26 Alab. R. 165, 170; *State v. La Crosse*, 11 Wisc. R. 51, 54, 56; *Devoy v. Mayor &c. of New York*, 35 Barb. R. 264; *Shepardson v. Milwaukee &c. R. R. Co.*, 6 Wisc. R. 605. Here it is impossible to suppose that the Legislature could ever have intended that, under any circumstances whatever, the repealing clause should operate alone and without the other provisions of the act, thereby reviving the
220 *whole common law disqualification of witnesses on account of interest.

The Legislature itself appears to have been satisfied that the act of March 2, 1866, was vitiated by the defect of the title; for a subsequent act was passed, on the 29th of April, 1867, for the sole purpose of amending the title. Acts of 1866-7, ch. 122, p. 948.

It follows that the motion to exclude the depositions of the plaintiffs on the trial of the present case was properly overruled.

STAPLES, J., delivered the opinion of the court.

It is settled that vested rights, acquired under a statute, are not affected by its repeal. The rule is, however, different with regard to rights that are merely inchoate and executory, unless, indeed, they amount to a contract within the meaning of the constitution. As was said in *Butler v. Palmer*, 1 Hill N. Y. R. 324, the true principle to be deduced from all the case is, that inchoate rights, derived under a statute, are lost by its repeal, unless saved by express words in the repealing statute; otherwise, in respect to such civil rights as have been perfected far enough to stand independent of the statute; or, in other words, such as have ceased to be executory and have become executed. In *Key v. Goodwin*, 4 Moore & Payne, a deposition had been taken, which was perfect and complete in every respect, except that the party had inadvertently omitted the act of enrolment until after the repeal of the statute under which it was taken. A strong effort was made to read the deposition as evidence; but the court, after much consideration, decided against the application. Lord Ch. J. Tindall said, "I take the effect of a repealing statute to be to obliterate it, the

statute repealed, as completely from the records of Parliament as if it had never been passed, and that it must be considered as a law that *never existed, except for the purpose of those actions or suits which were commenced, prosecuted and concluded whilst it was an existing law."

In *Ansell v. Ansell*, 14 Eng. C. L. R. 451, Lord Tenterden decided that the statute requiring a written promise to take a case out of the operation of the statute of limitation, had relation to the time of trial; and a parol acknowledgment made before the statute came into operation was insufficient. This decision was grossly unjust to the plaintiff, to say the least of it. He commenced his suit, founded on a verbal promise, which at the time was sufficient ground for the action; but upon the trial he was told, the statute having passed in the meantime, he must produce a writing or fail. Whether this construction be a sound one or not, it was followed by the court of Common Pleas, and by the King's Bench in *Fowler v. Chatterton*, and by some of the most eminent judges of England at nisi prius. *Periburn v. Sonster*, 14 Eng. Law & Eq. R. 415, cited by counsel for appellee, was decided expressly upon the ground that the common law procedure act, abolishing special demurrers, had reference to future pleadings exclusively, by the very terms of the enactment. This case does not conflict with any of those cases which decide that statutes merely affecting the remedy may be repealed at the pleasure of the Legislature, unless such repeal impairs the obligation of a contract.

The rule as to acts done under a statute repealed, is clearly laid down in *Springfield v. Hampden*, 6 Pick. R. 501. Parker, C. J., said: "The position that anything done under a statute while in force, remains valid, though the statute may afterwards be repealed, is undoubtedly true; but goes no farther than to render valid things actually done; but when the things themselves are merely preliminary, the principle does not authorize a further proceeding in

order to render them *effectual. There is no such thing as a vested right to a particular remedy.

In *Campbell's Adm'r v. Montgomery*, 1 Rob. R. 392, a similar principle was announced in applying the statute of 1831, which authorized equitable defences to be made at law, to a suit pending when the statute took effect, because it merely affected the remedy and not the right.

These principles apply most strongly to statutes affecting rules of evidence, which are universally regarded as pertaining to the remedies a State may afford its citizens, and not as constituting a part of a contract, or as being the essence of a right. They are, therefore, at all times, subject to the modification and control of the Legislature, like other rules affecting the remedy, and the changes which are enacted may be made applicable to existing causes of action, even in those States where retrospective laws

are forbidden. Cooley's Constitutional Limitations, p. 367.

Let us apply these plain and well-settled principles to the case under consideration. The deposition was taken on 6th March, 1866: four days after the repeal of the act of the 29th January, 1864. It was, therefore, taken under a statute which had no existence. The right to use it as evidence depended upon a law which was as completely obliterated from the records as if it had never been passed. The act March 2d, 1866, not only repeals the act of 29th January, 1864, but declares that, in all cases, parties should give their testimony ore tenus. No distinction is made, or attempted, between pending cases and such as should thereafter be brought. So that we have not merely the repeal of the statute, which alone conferred the right to take the deposition, but also an express legislative declaration that parties should testify orally and not by deposition.

*It is, therefore, perfectly clear, that the deposition could not be read under either or both of these statutes standing alone, or as modified by the general principles of law, applicable to vested rights. Can the defendants in error derive any aid from the provision contained in sec. 18, chap. 16, Code of 1860. That section declares that no new law shall be construed to repeal a former law as to any act done, or any right accrued, or claim arising, under the former law; or in any way whatever to affect any act so done, or any right accrued or claimed, arising before the new law takes effect, save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings.

Provisions almost identical with this enactment are found in the revised statutes of New York and Massachusetts. In both States they have been the subject of discussion and judicial decisions; and in neither State have they been held to have the effect sought to be given to similar language in our statute. According to the New York decisions, when a statute is repealed, under which a suit has been commenced, and no provision is made for the prosecution of such suit, it is to be conducted under the repealed statutes. But when the revised statutes have modified the proceedings in such suits, then such modification is to be adopted. *Overseers, &c., of Milan v. Supervisors of Dutchers*, 14 Wend. 73.

In *People v. Livingston*, 6 Wend. R. 526, a creditor had acquired a right of redemption under a certain form, under the then statute of executions, which, by an enactment in 1828, was to be repealed from and after the 31st Dec., 1829. The repealing statute substituted a new form of redemption. It was held that an attempt, after the 31st December, to redeem after the old form was nugatory. The right to redeem in a certain form being inchoate, and not expressly reserved *by the repealing statute, ceased with the old law. The

same doctrines were applied in *Butler v. Palmer*, 1 Hill's R. 324.

In *McCotter v. Hooker*, 4 Seld. R. 497, 514, a question arose as to the right to read a deposition taken under a statute afterwards repealed. The New York Code of 1848 permitted the deposition of witnesses within the State to be taken in certain cases where they could not be taken at common law, and declared they should be received in evidence on the trial. It was held that the repeal of these provisions, without any saving clause, left depositions taken under them incapable of being read on the trial. Judge Gardner, delivering the opinion of the court, said the repeal deprived the defendant of no right; it did not shut out the evidence by particular facts, but merely regulated the manner in which it should be given to the jury.

Similar decisions have been made in Massachusetts under the revised statutes of that State. In *Robbins v. Holman*, 11 Cush. R. 26, a motion was made to enter a nonsuit, in consequence of the failure of the plaintiff to answer certain interrogatives within the time required by an act passed during the pendency of the suit. It was objected that it was manifestly unjust to apply the act to pending cases.

The court held that the mode of conducting a suit, or the rules of practice regulating it, are not the subject of vested rights. It might as well be contended that the party had a right to have his action tried in the court under the same organization as it existed when the suit was instituted, or by the same number of jurors, as to contend that the rules of evidence, or form of proceeding, the form of the plea and answer, may not be changed so as to affect all future trials, whether of actions then commenced or subsequently instituted. If the law is objectionable as violating vested rights then pending, why not equally so as

225 to all causes of *action then existing.

The mere fact of having instituted a suit does not give any additional vested rights. It is the demand or claim that cannot be interfered with by legislative enactment. See, also, *ex parte Lane*, 3 Metc. R. 213; *De Witt v. Harvey*, 4 Gray's R. 486; *Bickford v. Boston & Lowell R. R. Comp.*, 21 Pick. R. 109.

The case of *Price v. Kyle*, 9 Gratt. 247, relied upon by counsel for defendant in error, is not in conflict with these decisions. In that case it was decided that the judgment of the court below should be affirmed without damages, the petition for a supersedeas having been presented before the 1st of July, 1850, though the writ of error and supersedeas was awarded after that day. The reason is apparent. The preferring a petition to the appellate court is the commencement of the proceedings in the court; and the appeal is regarded as pending from that time. It was, therefore, a pending case from the day of the presentation of the petition. And as the second section of chap. 216 of the Code of 1849, provided that the repeal therein mentioned

should not affect any suit, prosecution or proceeding pending on the 11th day of July, 1850, the appeal was to be decided according to the law in force before that day.

In *McGruder v. Lyons, and Yarborough & wife v. Deshago*, 7 Gratt. 233 and 374, the application for the appeal was made after the 1st day of July, 1850, from decrees rendered previous thereto. In the first case it was held that the law, as contained in the revised Code of 1849, limiting appeals to \$200, applied to the case. In the other case the party had presented his petition and delivered the record to the clerk within five years, and was therefore entitled to an appeal under the law in force when the decree was rendered; but five years had elapsed

before the bond was given as required 226 by *the law in the Code of 1849; and it was held that the appeal was not taken in sufficient time.

The provision in the Code now under consideration protecting "rights accrued" was especially relied on in each of these cases. The court, however, was of opinion that as laws allowing appeals merely affect the remedy, the section in question did not operate so as to save the party a right of appeal. A party may, under the faith of existing laws, postpone his application for an appeal, or he may employ counsel and incur the expense of procuring voluminous records, and before his petition can be presented the Legislature changes the law under which he reposed with entire confidence, and deprives him effectually of all remedy.

Injustice so gross led to the adoption of a special provision in the act of 22d June, 1870, declaring that a right of appeal, under the old law, should not be affected by the provisions of the new law limiting a right of appeal to two years. But if, under such circumstances, a right of appeal is not "a right accrued" within the purview of section 18, chap. 16, of the Code, it is difficult to understand by what process that section can be so construed as to confer a right to testify by deposition, because a commission has been procured and notice given that the deposition would be taken. The notice is for the benefit of the opposite party, and the commission the warrant to the non-resident officer. They are conditions imposed, and do not confer a vested right, nor the essence of a vested right. These acts, and others of a similar character, the manner in which juries are to be empaneled, rules to be held, and witnesses are to testify, are merely the proceedings in a cause required by the statute to be in conformity to the laws in force when they are had.

In this case it was not proved, or even suggested upon the trial, that the ob- 227 jection to the deposition operated *as a surprise to the plaintiffs, or that they would sustain any loss or damage by its rejection. It might have been more inconvenient and expensive to them to attend the trial and testify *ore tenus* than by deposition but it could divest no right to require them to do so. The argument of mere per-

sonal inconvenience cannot prevail against the plain letter of the statute; nor can it serve as the foundation of a right to a particular remedy after the law is repealed affording such remedy; more especially where the Legislature has furnished another, equally beneficial and efficacious.

It is insisted, however, that the act of March 2d, 1866, is null and void, because it does not conform to the constitutional provision, which declares that "no law shall embrace more than one object, which shall be expressed in the title." Some of the judges are of opinion that the act is substantially in compliance with this provision of the constitution; that it was intended and operates as a repeal of the act of July 29th, 1864, independent of the repealing clause therein contained. And further, the Legislature having amended the title to the act of 1866 at an early period, and the said act, both before and subsequent to said amendment, having been accepted and recognized without objection throughout the State as a rule of action, it is now too late to raise the question of its constitutionality.

Again it is to be considered how far the repealing clause in the act of 1866 is operative, although every other clause in that act may be liable to the constitutional objection suggested. The rule is certainly well established, that where the act is broader than the title the courts will give effect to so much of the act as is covered by the title. Whether such a construction could be given in this case consistent with the manifest purpose of the Legislature, is a question upon which there is also some difference of opinion.

Again, some of the judges are
228 strongly inclined to *hold that this provision in the constitution is simply directory; intended not as an absolute limitation upon the power of the Legislature, but as a guide to its judgment. The question is a grave one, upon which there is much conflict of authority, and will be decided by this court, if ever presented, only upon the most careful and deliberate consideration.

This diversity of opinion among the judges does not change the result to which they arrive; as all concur in the opinion that the Circuit court erred in permitting the depositions to be read; and for this reason the judgment of the Hustings court, and that of the District court, must be reversed.

Judgment reversed.

229 *Jones & als. v. Phelan & Collander.

January Term, 1871, Richmond.

Absent, JOYNES, J., sick, and CHRISTIAN, J.

1. **Deeds of Trust on Personality—Distress Warrant for Rent.**—G is tenant of a house and lot leased of S, and he gives a deed of trust on a part of the per-

***Deeds of Trust—Marshaling.**—In Russell v. Randolph, 26 Gratt. 718, the court said: "This is a familiar doctrine of the equity courts: the rule being that if

sonal property in the house, to secure a debt to P, which is recorded. He afterwards gives another deed of trust on all the property in the house, to secure a debt to J. S distrains for a year's rent upon the property embraced in the deed to secure P. By consent of all the parties, all the property conveyed in the deeds is sold, and after paying the rent there is a balance left. **HOLD:**

1. **Same—Same—Priorities.**—S is entitled to be paid first his year's rent, out of the proceeds of the whole property, if necessary; but the proceeds of the property not embraced in P's deed is to be applied first to pay G.

2. **Same—Same—Same.**—After S is satisfied, P is entitled to have the balance of the proceeds of the property, embraced in his deed, applied to pay *pro tanto* his debt.

This was a bill filed in the Circuit court of the city of Richmond, by Phelan & Collander, merchants and partners doing business in the city of New York, against Jones & Griswold and Thomas M. Jones.

The facts of the case, so far as it is material to state them, are, substantially, as follows: On the 2d of October, 1865, Jones & Slater, a firm composed of Thomas M. Jones and L. T. Slater, leased to Jones & Griswold, a firm composed of J. C. Jones and W. B. Griswold, the building on the south side of Franklin street, near the Exchange hotel, in the city of Richmond, known as the "Canterbury Hall," from the 2nd day of October, 1865, the date of

one party has a lien or interest in two funds for his debt, and another party has a lien on or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties: Provided always this course does not trench upon the rights or operate to the prejudice of the creditor entitled to the double fund. In such cases, the equity of the creditor having but one fund, is not against the double creditor, but only against the common debtor; that the accidental resort of the paramount creditor to the double fund shall not enable the debtor to get back the second fund discharged of both debts. When, therefore, the paramount creditor is satisfied out of the doubly charged fund, the other creditor has a right of substitution to all his rights against the remaining fund. 1 Story's Eq. Jur., § 633; Adam's Eq., mar. 272; Vance v. Monroe, 4 Gratt. 52; Jones *et als.* v. Phelan & Collander, 20 Gratt. 220."

In Watkins v. Dupuy, 87 Va. 92, 12 S. E. Rep. 294, the court said: "It is the rule that where one debt is payable out of only one fund, and another is payable out of two, to pay first out of the fund in hand that debt which cannot be satisfied from any other source. 1 Pom. Eq. Jur., § 396; Vance v. Monroe, 4 Gratt. 52; Russell v. Randolph, 26 Gratt. 718; Jones v. Phelan & Collander, 20 Gratt. 220; Seldon on Subrogation, §§ 61-62."

The syllabus of the principal case was quoted and sustained in Gracey v. Myers, 15 W. Va. 203.

See *foot-note* to Russell v. Randolph, 26 Gratt. 705, for a collection of cases on marshaling.

See generally, Alley v. Rogers, 19 Gratt. 306, and *foot-note*.

the lease, for the term of three
230 *years, thence next ensuing, to expire
on the second day of October, 1868;
yielding therefor, during the said term, the
sum of \$2,700 annually, payable in monthly
instalments of \$225 each, at the expiration
of each month. The other terms of the
lease need not be set forth. The building
was used, and rented to be used, by the les-
sees as a billiard saloon and bar-room.

In about three months after the date of
the lease, the lessees, Jones & Griswold,
purchased of Phelan & Collander, of New
York, nine billiard tables and their appur-
tenances, and brought them to the demised
premises, and used them thereon. For
\$3,600 of the purchase money, Jones & Gris-
wold executed their two notes to Phelan &
Collander, for \$1,800 each, bearing date the
3d day of January, 1866, and payable, re-
spectively, ninety and one hundred and
eighty days after their date. On the same
day of the date of said notes, Jones & Gris-
wold executed a deed of trust, whereby
they conveyed the said nine billiard tables
to John A. Coke, in trust to secure the pay-
ment of the said two notes to Phelan & Col-
lander; which deed of trust was acknowl-
edged and certified for record on the day of
its date, and was recorded, accordingly, in
the office of the court of Hustings for the
said city, on the 5th day of January, 1866.

More than four months after the execu-
tion and recordation of the said deed of
trust, to wit: on the 14th of April, 1866,
Jones & Griswold executed their note to
Thomas M. Jones for \$3,000, payable on de-
mand; and executed a deed of trust,
whereby they conveyed, besides the said
billiard tables and their appurtenances, the
bar, bar fixtures, gas fixtures, and furni-
ture on the demised premises, and all debts
due the firm of Jones & Griswold; in trust
to secure the payment of the said note to
Thomas M. Jones; which deed of trust was
duly recorded in the said Hustings court.
This note of \$3,000 was claimed to be
due to Jones & Slater, instead

231 *of Thomas M. Jones; having been
given, as was said by them, to secure
money loaned to, and advanced for, Jones &
Griswold, by Thomas M. Jones, acting for
the firm of Jones & Slater, of which he
was a member. Whether the fact was so or
not, was deemed by the court immaterial.
Sometime after the execution of the last-
mentioned deed of trust, the lessors, Jones
& Slater, sued out a distress warrant for
the rent due them by their lessees, Jones &
Griswold, which warrant was levied upon
the billiard tables and their appurtenances
aforesaid. But before any sale was made
under the distress warrant, it was agreed
between the parties, by their counsel, that
the property conveyed by the deeds of trust
might be sold under the same; but that the
rights of the parties in the fund to be real-
ized by such sale should not be affected by
such agreement, but should be the same as
if the said billiard tables and their appurte-
nances had been sold under the said distress
warrant for rent. Accordingly, on the 24th

of July, 1866, a sale was made by Grubbs &
Williams, auctioneers, for and on account of
the said trustees, of all the property con-
veyed by the said deeds of trust, and after
paying out of the proceeds of said sale one
year's rent to Jones & Slater, and the
amount of taxes due and chargeable on the
property, a net balance remained of \$834 48,
which is the subject of controversy in this
suit between the parties claiming under the
deed of trust aforesaid respectively. The
suit was brought by Phelan & Collander
against Jones & Griswold, Jones & Slater,
and Thomas M. Jones and others. In the
course of the suit, the Circuit court decreed
that a commissioner should ascertain and
report who, of the parties, was entitled to
the fund in controversy. Commissioner
Pleasants accordingly executed this order,
and was of opinion, and so reported, that
the fund was apportionable, pro rata, be-
tween the parties claiming under the said
deeds of trust respectively; Phelan &
232 *Collander, claiming under the first
deed, being entitled to \$489 80, and
T. M. Jones, claiming under the second
deed, being entitled to \$344 68; which two
sums make up the amount of the fund in
controversy, \$834 48. Both claimants ex-
cepted to this report; both of them claim-
ing the whole of the fund in controversy.
The cause then came on to be finally heard
on the papers formerly read, and the report
and exceptions, when the court, being of
opinion that the plaintiffs, Phelan & Col-
lander, were entitled to the whole fund in
controversy, made a decree accordingly.
And from that decree the defendants, Jones
& Slater and Thomas M. Jones, applied for
and obtained an appeal to this court.

Lyons, for the appellant.

The appellants insist that they are enti-
tled to the whole fund.

I. Because their lien, as landlords, cov-
ered the whole property in the house, to the
extent of their rent, and was superior to all
others.

II. Because they had the right to sell the
billiard tables for the satisfaction of their
rent, without selling the other property, of
which they were purchasers for valuable
consideration. In respect to which they
stand in the same relation as any other pur-
chaser of the same property would have
done; who would have been under no liabil-
ity to the appellees to make good their debt
out of his property upon which they had no
lien.

III. The doctrine of marshalling securi-
ties does not apply to the case. That doc-
trine applies only to a case in which one
party has two funds liable for one debt, and
another party has an inferior lien upon one
of the funds. The court of chancery may
require the first lienor to exhaust the fund
upon which he alone has a lien, before he
resorts to the other fund; but when there
are two debts and two funds, the court has
no authority to require the entire
233 surrender of them in *order to pro-
tect a lienor who has no lien upon it.

That would be to take one man's property and give it to another, which no court can do.

In support of the first point, I submit:

First. That the 11th and 12th sections of chapter 138, concerning rents, Code of Virginia, p. 618, is absolutely conclusive of the case. By those sections it is provided that, where a lien is created after the lease, the property, which is the subject of the lien, is still liable to the landlord's distress for rent. Indeed, I do not understand the counsel for the appellee to deny that. That being true, there is no authority whatever for requiring the landlord to select any particular portion of the rents for his distress, and especially none for requiring him to select that upon which he has another lien, to the destruction of that lien, for the benefit of a third party.

If the landlord were claiming like the appellees, by virtue of a prior deed of trust which covered the whole property, and by another deed of trust which covered only a part of it and was posterior to it, could there be any pretence for saying that the claimant under the first lien in such a case could be compelled so to use his first lien as to destroy his second lien, for the benefit of the claimant under the third. There is an old maxim, fully recognized, "*Sic utere tuo ut non alienum lædas.*" But I have never heard of one which said, "*Sic utere tuo ut tuum lædas.*"

The doctrine of marshalling securities is founded in the first maxim, and will be found to be fully treated of by Story, vol. 1, chapter 13, sec. 633, et seq. page 598, and is thus stated: "The general principle is, that if one party has a lien on, or interest in, two funds for a debt, and another party has a lien on, or interest in, one only, for another debt, the latter has a right, in equity, to compel the former to resort to the other

234 fund in the first instance for satisfaction of the claims of both parties, whenever it will not trench upon the rights, or operate to the prejudice, of the party entitled to the double fund." This doctrine was so clearly expounded by Lord Eldon, in the case of *Aldrich v. Cooper*, 8 Ves. R. 382, that I cannot deem it even beneficial to enlarge upon it.

I content myself with saying, that here the appellee asks the court so to apply the doctrine as to violate it in both respects.

Thus—First. The landlords, qua landlords, have not two funds liable to them as landlords, which puts the case beyond the rule of marshalling. Secondly. The court is asked to make such an application of the rule as would be "to the disadvantage of the party holding the double fund," which is forbidden by the rule.

Again: Jones & Slater, as claimants under the deed of trust, are not the Jones & Slater who claim as landlords; and the question is to be decided as if the parties claiming under the deed of trust were Simpson & Jenkins or any others. Then the question is, what right has the court so to interfere with Simpson & Jenkins as to

compel them to give Phelan & Collander an advantage over Simpson & Jenkins? Everybody will say, I am sure, it has none whatever; and so this court said in the case of *Alley v. Rogers*, 19 Gratt. 366.

Dunlop, for the appellees.

We contend that the personal property on the premises stood subject to the following liens, and in the following order, viz:

First. The bars, bar fixtures, furniture, &c., subject first to the landlord's lien.

Second. The billiard tables, subject second to landlords' lien; but the bar, bar fixtures, &c., must first be exhausted before the landlords can go against the billiard tables; or if they choose to proceed against the billiard tables first, then they must place Phelan & Collander *in their shoes, and give them their (the landlords') rights against the bar, bar fixtures, furniture, &c.

Third. If the other effects on the premises alone are sufficient to satisfy the rent, then the billiard tables, or if the other effects and a part only of the billiard tables are required, then the remaining part of said billiard tables are subject to the lien of Phelan & Collander.

Fourth. After the satisfaction of the rent, and of the two notes to Phelan & Collander for \$1,800 each, then whatsoever remains would be subject to the payment of the bond to Thomas M. Jones.

This order of these several liens, and the principles of equity established thereby, have been long the settled opinions of the highest courts of this land.

In *Gill v. Lyon & als.*, 1 Johns. Ch. R. 447, Chancellor Kent decided, if a mortgagor sold part of the mortgaged premises, and the remainder was sold under subsequent judgments and executions, the mortgage must first be satisfied out of the lands purchased under the judgments; and that the first purchaser from the mortgagor was not bound in equity to bear any portion of the mortgage debt, unless the residue of the mortgaged premises should not be sufficient to satisfy it. The subsequent purchaser took only such right as the mortgagor had in the remainder of the mortgaged premises, and the mortgagor was bound to apply the land he had retained to discharge the mortgage debt, and not to suffer the debt to fall upon the portion of land he had sold.

In *Clowes v. Dickenson*, 5 Johns. Ch. R. 235, 240, the same great chancellor says: "If there be a judgment against a person owning at the same time three acres of land, and he sells one acre to A, the two remaining acres are first chargeable in equity with the judgment debt, whether the land be in the hands of the debtor himself or of his heirs. If he sells another acre to B, the remaining acre is then chargeable, in the first instance, *with the debt as against B, as well as against A; and if it should prove insufficient, then the acre sold

to B ought to supply the deficiency, in preference to the acre sold to A, because, when B purchased, he took his land chargeable with the debt in the hands of the debtor, in preference to the land sold to A; he must take the land with all its equitable burdens; it cannot be in the power of the debtor, by an act of assigning or selling his remaining land, to throw the burden of the judgment, or a ratable part of it, back upon A."

It cannot be in the power of Jones & Griswold, by the act of assigning the remaining effects, to throw the burden of the rent, or a ratable part of it, back upon Phelan & Collander, who have already given such an extremely valuable consideration for the conveyance of the billiard tables and their appurtenances to Coke for their benefit. In *Conrad v. Harrison*, 3 Leigh 532, it was held that the third mortgagee has no right to call on the second mortgagee to contribute pro rata to the satisfaction of the debt due the first mortgagee.

In *McClung v. Beirne*, 10 Leigh 394, 403, Tucker, P., referring to *Clowes v. Dickenson*, and *Conrad v. Harrison*, above quoted, says: "The argument seems to me unanswerable, that the right of the prior vendee to demand that his vendor's land should, for his relief, be first charged under an *elegit*, cannot be taken away without his consent. The consequences of the contrary doctrines are also worthy of the gravest consideration. A debtor who, after judgment, has sold part of his lands, has every temptation to defraud his grantee of his right to resort to the residue for his relief. He has every inducement to sell that residue and pocket the price, the purchaser holding it free from more than a pro rata charge. It is worth nothing in his own hands, but by selling it to another it brings profit to himself. It is said, indeed, that the law has settled the rights of the alienees. It has

declared that all are in *æquali jure*,
237 *and that equity cannot control the law. I do not think so. Admit that all are upon an equal footing at law, the question still recurs, whether one may not have superior equity to another. This is admitted, as it respects the vendor himself. If the *elegit* takes (as in strictness it must take, and as in fact it usually does take,) all the lands, as well the alienee's as the debtor's, the alienee has no relief at law, but yet he may have relief in equity against the debtor himself? Why? Because he has superior equity. So, if all are alienees, they are all in *æquali jure* at law; but the prior has superior equity over the latter. He had, before the last alienation, an equitable right to charge the land so aliened. Has he lost that right by the last alienation? Does not the last alienee take subject to that equity? Assuredly, if he purchased with notice of it." Vid. 1 Lomax Dig. 19.

Thomas M. Jones took subject to the equity of Phelan & Collander. He cannot plead want of notice of the conveyance to Coke for the benefit of Phelan & Collander, as the deed of trust to Coke was recorded in the Hus-

tings court of the city of Richmond; and the Acts of Assembly especially provide that, when a deed of trust or mortgage, conveying real estate or goods and chattels, shall have been duly admitted to record, it shall be notice as to creditors and subsequent purchasers. Vid. Code, ch. 118, § 5.

Tucker, P., continues, in *McClung v. Beirne*: "If he had notice that there were other lands which were bound by it (the judgment), and which were previously aliened, he had notice that what he was buying was, in his vendor's hands, bound for their indemnity. If, therefore, it be admitted that the last alienee can protect himself at all, it is not upon the principle that he is in equity in *æquali jure*, but upon the ground that he purchased without notice of the equity, and is therefore not affected

by it. It is enough here to say, that
238 *where the last alienee cannot so protect himself, he must be the first to suffer."

Beverley v. Brooke, 2 Leigh 425, is supposed to be adverse to these principles of law. But of that, Tucker, P., in *McClung v. Beirne*, says it was decided without the question now at issue being fully discussed, and without the respectable authorities (10 Serg. & Rawle 450; *Clowes v. Dickenson*, 5 Johns. Ch. R. 235) being brought before it; and as one of the three judges then sitting, afterwards, in *Conrad v. Harrison*, expressly renounced it, "it stands now as the decision of only two judges, and so is no longer an authority."

In conclusion, I will simply refer to a case reported by De Gex in his *Bankruptcy Cases* (Vid. *Ex parte Stephenson*, De Gex's *Bankruptcy Cases* 586), which runs singularly on all fours with the present cause. In it a landlord distrained upon goods of his tenant, and sold part of them, which were subject to a mortgage. The tenant became bankrupt. Held: That the mortgagee was entitled to stand in place of the landlord, and to be paid the amount of his mortgage debt out of the proceeds of the goods taken under the distress which were not comprised in his security." This was decided by Vice Chancellor Knight Bruce, in December, 1847, in accordance with *Aldrich v. Cooper and als.*, 8 Vesey 382.

MONCURE, P., after stating the case, proceeded:

If Phelan and Collander had taken a deed of trust from Jones and Griswold on the billiard tables to secure the purchase money, and caused the deed to be recorded before the property was carried on the leased premises, the lien of the deed would have been good against the lessor's claim for rent, and only the lessees' interest in the property, to wit, the equity of redemption, would have been liable to distress. But the deed

of trust to Coke to secure the debt to
239 Phelan & Collander, *was executed after the billiard tables had been carried on the premises, and while they were thereon; and therefore, at the time of the execution of the deed, the said property was

liable to distress; but for not more than one year's rent, whether accrued before or after the creation of the said lien. Code of 1860, p. 618, ch. 138, § 11. There was at that time only three months' rent actually due but still the property became liable to distress to the extent of one year's rent. That liability existed, however, only for the security of the lessors to that extent; and if, when they sued out their distress warrant, there was unencumbered property of the lessees on the leased premises, that property ought to have been distrained and subjected to the payment of the rent due, before the property conveyed by the said deed of trust; which latter property ought to have been subjected to the payment only of the balance of the rent remaining unpaid after applying to the payment thereof the net proceeds of the sale of the unencumbered property.

This would undoubtedly have been the case had no subsequent deed of trust been executed by the lessees on the property on the leased premises not included in the first deed of trust. If no such subsequent deed had been executed, and if, by an agreement between the lessors, lessees and creditors secured by the first deed, all the property on the leased premises, as well that included in the first deed as that not so included, had been sold for the purpose of having the proceeds of sale distributed among the parties according to their respective rights; could there be any doubt as to the manner in which the distribution would be made? Is it not clear that the proceeds of the property not included in the deed of trust would first be applied to the payment of the rent due to the lessors, and that the proceeds of the property included in that deed would

only be applied to the payment of any rent which might remain unpaid after applying the proceeds of the other property as aforesaid? I presume there can be no controversy on this subject. The lessees owe the rent to the lessors, who have a lien (by their right of distress) for its security, on all the property on the leased premises. But the lessees owe another debt, for the security of which they have executed a deed of trust on a part of the said property, leaving the other part unencumbered by the deed. Are not the lessors bound to resort, for the payment of the rent due to them, first to that part of the property on which they have a lien which is not included in the deed of trust, before they can resort to that part which is so included? To state the case is to answer the question. None of the rights or remedies of the lessors can be taken away or impaired; but they must be so used as not to injure the rights of others.

Such would be the state of the case if the second deed of trust had not been executed; that is, the deed to Guigon to secure a debt alleged to be due by the lessees to Thomas M. Jones. How does that deed affect the case? Does it impair those rights to which we have seen the creditors claiming under the first deed would clearly have been entitled if the second deed had not been executed?

When the second deed was executed, the lessors had a lien for the rent due them, on all the property on the leased premises, and Phelan & Collander had an inferior lien, by deed of trust, on a part of that property, which deed of trust was duly recorded. These trust creditors had a right, as between themselves and the lessors and lessees, to require that the property on the leased premises, and not included in the deed of trust, should be applied to the payment of the rent due to the lessors, before the property included in the deed should be resorted to for that purpose. The second

deed of trust was obtained by Thomas M. Jones, the creditor thereby secured, with knowledge, actual or constructive, of the existence of the first deed, and of the rights of the creditors thereby secured; the second deed embracing, not only the property included in the first deed, but also the property on the leased premises, not included in that deed. How, then, can the creditors, claiming under the second deed, stand on any higher ground, in regard to the rights of the creditors claiming under the first, than the lessees themselves, from whom he was a purchaser, with notice of those rights, and in whose seat alone he can sit? That he cannot stand on higher ground than they, in regard to those rights, is clear, both upon principle and authority; and is well established by the decisions of this court. See *Conrad v. Harrison, &c.*, 3 Leigh 532; *McClung v. Beirne*, 10 Id. 394; and cases therein cited, especially the cases of *Gill v. Lyon*, 1 John. Ch. R. 447; *Clowes v. Dickenson*, 5 Id. 235; and *Nailer v. Stanley*, 10 Serg. & R. 450. In *Beverley v. Brooke*, 2 Leigh 425, it was held, that "all the alienees of the lands of a debtor bound by a judgment or recognizance, no matter in what order the alienations were made, are bound to bear equally the burden of satisfying the judgment, by mutual contributions, pro rata, according to the value of the property held by them; all being considered as in *æquali jure*, without regard to the priority of their purchasers or conveyances." It is remarkable that in that case the decisions of Chancellor Kent, in the cases above cited from 1 and 5 John. Ch. R. were not referred to by the counsel who argued, or the court which decided the case; though Mr. Johnson, one of the counsel, urged in argument the same general reasoning on which those decisions are founded. Judge Carr, one of the three judges who decided that case, afterwards changed his views, and expressed a contrary opinion in *Conrad v. Harrison*. And in *McClung v. Beirne*, a contrary decision was made to that of *Beverley v. Brooke*; the majority, who decided *McClung v. Beirne*, being of opinion that, after the change of the views of Judge Carr, *Beverley v. Brooke* should be regarded as the decision of only two judges, and, therefore, not as a binding authority. But *McClung v. Beirne* was, itself, a decision of only two judges. So that that case only balanced the case of *Beverley v. Brooke*, and left the

law on the precise question involved in those two cases in an unsettled state. In the later cases decided by this court on the subject, *McClung v. Beirne* has been followed, and *Beverley v. Brooke* has been considered as overruled. *Rodgers v. McCluer's Adm'r, &c.*, 4 Gratt. 81; *Henkle's Ex'x &c. v. Allstadt, &c.*, Id. 284; *Alley, &c. v. Rogers*, 19 Gratt. 366. The case of *Beverley v. Brooke* was the case of a judgment, and the decision was founded upon the peculiar nature of that lien. *Conrad v. Harrison* was the case of a mortgage, and was distinguished on that ground by two of the judges, who decided it from the case of *Beverley v. Brooke*.

But all the judges who sat in *Conrad v. Harrison* concurred in the decision of that case, and its authority has never been doubted. It plainly applies to the case now under consideration, which is not the case of a judgment lien, but that of a lessor's lien for rent, which stands on the same principle with the lien of a mortgage in regard to the subject of the present enquiry. I therefore think that *Conrad v. Harrison* is conclusive of this case, and that, upon the principles declared in that case, the appellees, *Phelan & Collander*, are entitled to the entire fund in controversy in this case.

It can make no difference that the distress warrant of the lessors in this case was levied on the property conveyed by the first deed of trust, instead of the property not conveyed by the first but conveyed by the second deed of trust. The lessors could not, in that way, defeat or impair the
243 right of the creditors secured *by the first deed, who may obtain by subrogation what they might have obtained by marshaling the securities.

It was contended by one of the counsel of the appellants, that the doctrine which was applied in *Conrad v. Harrison*, and is sought to be applied in this case, is not applicable to personal, but only to real estate. I think it is applicable as well to personal as to real estate. The same reason exists for its application to each, and I have never before heard a question raised as to its being applicable alike to both. Of course the doctrine of *Beverley v. Brooke* could have been applicable only to real estate, because a judgment is a lien only on real estate.

Since writing the above, I have been reminded by my brother Staples of the case of *Enders, &c. v. Brune*, 4 Rand. 438; and referred by him to the case of *Slade v. Van Vechter*, 11 Paige R. 21, as being not only cases of the application of the doctrine of *Conrad v. Harrison* to personal estate, but also cases strongly sustaining the decision of the court below in this case. I have also examined the case of *ex parte Stephenson*, De Gex's Bankruptcy Cases 586, referred to in the brief of the counsel for the appellees (to which case I had not access when I prepared the foregoing opinion), and I find it to be, as maintained by that counsel, singularly applicable to the present case. The subject in that case also was personal estate.

I am of opinion that there is no error in the decree of the Circuit court, and that it ought to be affirmed.

The other judges concurred in the opinion of the President.

Decree affirmed.

244

**Hogan v. Duke & als.*

January Term, 1871, Richmond.

Absent, JOYNES and CHRISTIAN, Js.*

1. *Deed of Trust—Debt Uncertain—Sale Improper.*†—It is improper, in a trustee in a deed to secure a debt, to make a sale so long as it remains uncertain what amount is due on account of the debt; and if the amount due is uncertain, or if credits properly applicable thereto be not so applied, it is his duty before making a sale, to ascertain the amount to be raised by the sale, and to bring a suit in chancery to procure a settlement by a commissioner for that purpose, if necessary; or if he fails to do this the debtor may do it, and in the meantime enjoin the sale.

*JUDGE JOYNES was sick, and JUDGE CHRISTIAN had decided the case in the Circuit court.

†*Deed of Trust—Debt Uncertain—Sale Improper.*—In *Hartman v. Evans*, 38 W. Va. 679, 18 S. E. Rep. 814, the court said: "In deeds of trust, especially those of long standing, where the amount due and to be raised by a sale is uncertain, (*Hogan v. Duke*, 20 Gratt. 244, 353,) where there are various deeds of trust or other incumbrances, (*Horton v. Bond*, 28 Gratt. 815; *Cole v. McRae*, 6 Rand. [Va.] 644,) where the legal title is outstanding, (*Rossett v. Fisher*, 11 Gratt. 492, 498,) where there is a cloud upon the title, (*Lane v. Tidball*, Gilmer, 130,) or, in conclusion, any impediment to a fair execution of the trust, the trustee, who is the agent of both parties, and bound to act impartially between them, may and ought of his own motion to apply to a court of equity for his own safety, as well as for the interest of those concerned, to remove the impediment and direct his conduct; and if he should fail to do this, the party injured by his default has an unquestionable right to do so. *Rossett v. Fisher*, 11 Gratt. 492, 498, opinion of JUDGE MONCURE, who refers to 1 Lomax, Dig. 322-326; 1 Tuck. Comm. bk. 2, pp. 101, 106; *Quarles v. Lacy*, 4 Munf. 251; *Gay v. Hancock*, 1 Rand. (Va.) 72; *Chowning v. Cox*, Id. 306; *Gibson v. Jones*, 5 Leigh 370; *Miller v. Argyle*, Id. 460; *Wilkins v. Gordon*, 11 Leigh 547. See opinion of same judge in *Hogan v. Duke*, 20 Gratt. 224, 253. See opinion of BURKS, J., in *Horton v. Bond*, 28 Gratt. 815, 822, where the same principle is applied to decrees of sale. See also, *Schultz v. Hansbrough*, 33 Gratt. 567, 576. (opinion of BURKS, J.)."

In *Shurtz v. Johnson*, 28 Gratt. 661, the court said, "In a deed of trust to secure the payment of debts, the trustee is the agent of both parties, debtor and creditor, and should act impartially between them; and in making sale of the trust subject he should use all reasonable diligence to obtain the best price. And if there be any cloud hanging over the title or uncertainty as to the amounts of the debts secured, or of prior incumbrances, or any other impediment to the fair execution of the trust which cannot be otherwise removed the aid of a court of equity should be invoked by him to remove the impediment."

2. **Injunction—Dissolution.**—On a bill to enjoin a sale of land by the trustee, the answer denies all the grounds of equity stated in the bill; and there is no proof to sustain them. The court may dissolve the injunction and dismiss the bill; or it may dissolve the injunction and have the sale made and the proceeds distributed under its direction.

3. **Same—Same—Equity Jurisdiction.**—In such case, the trustee having been declared a bankrupt, it was especially proper for the court to retain the cause, and have the trust administered under its direction, and to require the trustee to give security for the faithful performance of his duties.

4. **Deed of Trust—Decree for Sale Should Follow the Deed.**—The decree for the sale of the property should be according to the terms of the deed.

ment before sale; and if he fail or refuse to resort to the court for that purpose, the parties in interest who may be injured by his default, whether debtor, secured creditor, or subsequent encumbrancer, may apply to the court for relief. *Rossett v. Fisher*, 11 Gratt. 492, and cases there cited; *Hogan v. Duke & als.*, 20 Gratt. 244." See also, *Rohrer v. Travers*, 11 W. Va. 153, where the principal case is distinguished.

§**Injunction—Dissolution.**—In *Moore v. Steelman*, 80 Va. 340, the court said: "It necessarily follows that the injunction was properly dissolved. The settled doctrine is, that where a motion to dissolve is on the bill and answer, and the answer denies all the equity of the bill, the injunction is dissolved, of course, except when from the bill and answer, special reasons may appear for continuance. 1 *Barton's Chy. Pr.* 414; *Hoffman v. Livingston*, 1 *Johns. Chy. R.* 211; *Mintun v. Seymore*, 4 *Johns. Chy. R.* 497; *Hayzlett v. McMillan*, 11 *West Va.* 464; *Deloney v. Hutcheson*, 2 *Rand.* 183; *North's Ex'r v. Perrow*, 4 *Rand.* 1; *Hogan v. Duke*, 20 Gratt. 244."

See also, *Motley v. Frank*, 87 Va. 435, 13 S. E. Rep. 26, and *Ingles v. Strans*, 91 Va. 225, 21 S. E. Rep. 490; *Thomas v. Rowe (Va.)*, 23 S. E. Rep. 159, all citing and following the principal case as authority on this point.

§**Same—Same—Equity Jurisdiction.**—For cases in which a court of equity after dissolving the injunction, retained the cause and had the trust executed under its direction, see *Robinson v. Mays*, 76 Va. 715; *Michie v. Jeffries*, 21 Gratt. 346.

In *Anderson v. Phlegar*, 93 Va. 422, 25 S. E. Rep. 107, the court said: "This brings us to the only remaining question that need be considered, and that is, whether or not it was error in the court below to dissolve the injunction and dismiss the cause, instead of retaining it with the view of supervising the administration of the trust?"

"It is true, that, whether a court on dissolving an injunction to a sale under a trust deed, should dismiss the bill, or retain it with the view of supervising the administration of the trusts, lies within the discretion of the court. *Hogan v. Duke et als.*, 20 Gratt. 244; *Robinson v. May's Trustee*, 76 Va. 708; *Muller's Adm'r v. Stone*, 84 Va. 839. But whether this discretion has been soundly exercised depends upon the facts and circumstances of the particular case. There is no suggestion in the record here that there are any other liens on the land than those mentioned in the bill and answers. Therefore there existed no good reason for an account of liens before a sale by the trustee, but there being a

5. **Same—Sale—Expenses.**—It was proper to allow compensation for the services of an auctioneer in making the sale ordered by the court, and also the expense of a former advertisement of the sale of the property by the trustee, which had been enjoined by the debtor, and the injunction dissolved.

6. **Same—Account Decead—Order for Partial Payment of Debt.**—Though the court decreed an account involving a few items to a small amount, it was not error to direct the payment of so much of the debt secured by the deed as might be safely paid, leaving enough to meet any possible amount which could be reported as due on that account to the debtor.

245 *This is an appeal from a decree dissolving an injunction to a sale under a deed of trust, and directing the sale to be made. The appellant, Hogan, who was plaintiff in the court below, in his bill, which was filed on the 9th day of September, 1868, among other things alleges that on the 22d day of October, 1865, he purchased from the appellee, Duke, a tract of land in Henrico county for the sum of four thousand dollars, of which he paid two thousand dollars cash in gold, and for the remaining two thousand dollars he executed two bonds, each for the sum of one thousand dollars, with interest from the 1st day of March, 1866, and payable respectively in one and two years from that day; and to secure the payment of said bonds as they became due, he conveyed the said land by deed of trust to Joseph J. White as trustee: that on the 1st day of March, 1867, the first bond became due, and on the 23rd of the same month he paid \$800, on the 23rd of the next month, April, \$150, and on the 23rd of the next month, May, \$150, which said three payments were in full of the said first bond, and left a balance of \$34 44 to be credited on the second bond: that he is entitled to other credits on the second bond, "as follows, to wit, eight bushels of seed oats, three barrels of Irish seed potatoes, a lot of lumber and other articles, which the said Duke promised to credit on the said second bond, but has failed to do so:" that having fully paid the said first bond, he is entitled to the possession of the same, but the said Duke refuses to deliver it up; and that the said Duke is now again, for the fourth time, attempting to sell the said land under the said deed of trust; his object in doing so, being, because at the depreciated value of the land in this State, the property can be bought in by the said Duke, or by some of his friends, at a price which will be utterly inadequate to its value, and he or they will purchase the same for about one-

conflict between the parties to the cause as to their respective rights and interests, the court should have decided the issues between them, and then decreed a sale of the property and directed the application of the proceeds. *Muller's Adm'r v. Stone*, *supra*."

§**Deed of Trust—Sale—Expenses.**—See principal case approved in *Womack v. Paxton*, 84 Va. 24, 5 S. E. Rep. 550.

third of its value. The plaintiff
246 *therefore prays that said Duke, White and others be made defendants to the bill; that said sale be enjoined, and for general relief. These are all the allegations of the bill which are deemed to be material.

The deed of trust is exhibited with the bill. After reciting that Hogan is indebted to Duke in "the sum of \$2,000, evidenced by two bonds for one thousand each, dated the same day with this deed, payable in gold coin, as follows, to wit: one bond, payable in gold, on the first day of March, 1867, one other bond, payable in gold, on the first day of March, 1868, both bonds bearing interest from the first day of March, 1866, till paid," the deed proceeds to convey the land to the trustee for the security of the said bonds. The trust is thus declared in the said deed: "That, should the said Hogan fail and make default in the payment of said bonds, or either of them, as they respectively fall due, and the interest thereon, then said Joseph J. White shall advertise the said tract of land in a newspaper, published in the city of Richmond, for not less than ten days, and sell the same, on the premises, at public auction, for so much in cash as may be necessary to satisfy the costs and expenses of sale, and to pay so much as may be then due on said bonds, or either of them, and upon a credit corresponding with the time of payment of either of said bonds not then due; and as to the residue, upon such credit as the said Hogan may prescribe, or, in default of such direction, as the said trustee may think proper; such credit payments to be properly secured by a lien on the property sold."

On the same day on which the bill was filed, to wit: the 9th of September, 1868, an injunction was awarded accordingly, by an order of a judge in vacation, and was perfected by the execution of the bond required by the order; and thus the sale, which was to have been made on that day, under the deed of trust, was arrested.

247 *In October, 1868, the defendant Duke filed a demurrer and answer to the bill. The cause assigned for demurrer is, that the bill on its face presents no case for relief, by injunction or otherwise. The respondent, in his answer, states, among other things not material to be here mentioned, that he admits the purchase of said tract of land in 1865, though it was in fact made about the last of April in that year, and not in October, as stated in the bill. "He admits that he (said Hogan) paid \$2,000 on account of said purchase money in cash, in United States currency, and not in gold, as alleged in the bill; and that he executed his two bonds, for \$1,000 each, and a deed of trust on the land to secure the same, as stated in the bill. The said bonds carried interest from the 1st day of March, 1867 (1866?), and were payable in gold, one on the 1st March, 1867, and the other on the 1st March, 1868. He admits the payment, on account of the first bond, of \$800 in currency, on the 23d March, 1867,

for which said Hogan holds the receipt of your respondent. And your respondent took from him two mules at the price of \$150 each," and "agreed to allow the said sums of \$150, the price of said mules respectively, as payments on said bonds, as of the dates specified in the said bill, and so stated in the advertisement of the said land by the trustee." "He admits that these sums will overpay the first bond and interest by a small amount, which should be credited against the interest then due on the second bond. It is not true that this respondent ever refused to deliver to said complainant the first bond; for, as before stated, he has never been able to get the said Hogan to a settlement, nor has the said Hogan ever asked him for said bond." "It is not true that the complainant is entitled to a credit upon the said second bond for the price of the 'eight bushels of seed oats, three bushels of Irish seed potatoes, a lot of lumber and other articles,' as stated in

248 *his said bill; nor is it true, that this respondent ever promised to credit the said bond therefor. This claim was asserted by the complainant, in another suit between these parties, hereinafter alluded to, and still pending in this court, and was disallowed, there being no evidence to sustain it. In fact, the complainant is indebted to respondent on other accounts than on account of said bonds, to wit: for groceries, wood, &c., to an amount equal, within a few dollars, to the amount due him for the lumber, potatoes and oats. These small accounts between them were utterly independent of the transactions for the land, and were never understood by either party to have any connection with said bonds.

"It is true that your respondent has attempted to assert his rights under said deed of trust, by causing the trustee to advertise the land on three occasions. The first advertisement was stopped at the request of said Hogan, upon the payment of the said \$800 on the first bond, though he has failed up to this time to pay the sum of about \$21, due for said advertisement, which is justly chargeable to him, and which he has agreed to pay. Upon the second advertisement, which was made during the month of May last (1868), for default of payment of the balance due on both said bonds, the said Hogan applied for and obtained an injunction. This respondent filed his answer, and upon a hearing thereof upon the bill, answer and evidence, among which was the deposition of said Hogan himself, the judge of this court, in June last, dissolved said injunction; and, though time was given him for the purpose, no appeal was taken from said decision. Your respondent here refers to the record of said cause, now remaining in this court, and to all the proceedings therein, from which it will appear that the same grounds, with reference to the state of indebtedness between the parties, were relied upon by the complainant,

249 *and that his claim, as above stated, was then disallowed by the court.

After waiting a considerable time, and

no appeal being taken from said decision, this respondent, for the purpose of getting his money, again advertised the property to be sold on the 5th day of September (1868), on which day, at the request of complainant, the sale was postponed to the 9th of September, when the bill was filed in this suit and an injunction obtained, as aforesaid, a few hours before the sale was to have been made. In this bill he relies, to a great extent, upon the same grounds which he relied upon in the former suit pending in this court, concerning which your respondent has already answered. Your respondent, now proceeding to answer the other allegations of the said bill, denies that he has attempted to sell the said land under said deed of trust, with any view of buying it himself. His real and only purpose is to get his money, due him by said Hogan on said bonds, of which he has stood, and now stands, sorely in need. The respondent then proceeds to answer other allegations of the bill, which are hereinbefore omitted because deemed immaterial, and the answer thereto is also omitted for the same reason.

Three depositions were taken and filed in the cause by the plaintiff, but none by the defendants. These depositions proved none of the allegations of the bill which can afford any ground for equitable relief. One of the witnesses testifies that he owed Hogan four dollars for rent, which sum Duke, who owed witness, promised to pay for him. But it does not appear that there was any understanding of the parties, or promise by Duke, that this amount should be credited on the bond of Hogan. Besides, it is not a matter put in issue by the pleadings in the cause: though the plaintiff will have the benefit of it, if he is
250 entitled to it, in the account *to be settled under the decree made in the cause, which will now be noticed.

The cause came on to be heard on the 7th of November, 1868, on the bill taken for confessed as to all the defendants except Duke, on his demurrer and answer, and the plaintiffs joined in the demurrer and general replication to the answer, on the exhibits and depositions, and on the motion of the defendant Duke to dissolve the injunction, and was argued by counsel. On consideration whereof, the court decreed that the injunction be dissolved, so far as the same conflicts with the subsequent provisions of the decree; that the defendant White, the trustee named in the said deed, "after having first given bond before the clerk of the court in the penalty of \$2,000, with security to be approved by said clerk, payable and conditioned according to law, shall make sale of the real estate specified in said deed, after advertisement according to its terms, for cash as to so much as may be necessary to defray the usual costs and expenses of such sale (including the legal commissions of the trustee and the usual charges of an auctioneer to make said sale, and the cost of advertising this sale and a former sale which was enjoined in this

court, and the injunction subsequently dissolved), and also a fee, not exceeding ten dollars, for preparing a deed to the purchasers of said real estate, and the cost of stamping the same, and to pay the amount claimed to be due to the said Duke on account of the bonds specified in said deed of trust, after deducting therefrom the various credits specified in the advertisement for the sale of said property which was arrested by said injunction; an extract of which advertisement is filed as an exhibit with the bill.

"As to the residue of the proceeds of sale: the same shall be made upon such terms as the said Hogan may prescribe, and, in default of such direction, as the said
251 *trustee, or other person executing this decree may think just and reasonable; all such credit payments to be properly secured by a lien on said property. Out of the cash payment, the said trustee, or other person executing this decree, shall be authorized to pay the said commissioner's and usual auctioneer's and advertising charges above-named, and the said charges for preparing and stamping the deed to the purchaser, and also to pay to the said Duke the sum of nine hundred dollars, on account of the amount claimed by him to be due from said Hogan to him on the bonds secured by said deed; it appearing manifest to the court that he is certainly entitled to receive at least that sum on account thereof. The residue of said cash payment the said trustee, or other person acting, shall deposit in one of the banks of this city, to the credit of this cause, and file a certificate of such deposit with the clerk, and shall make report of his action in the premises, returning therewith a statement of all payments made by him under authority of this decree, and the vouchers for such payments, and a statement showing the whole amount of cash received by him, and shall also return any securities taken by him for the residue of said purchase money over and above the amount paid him in cash, as above described.

"In the event that the said White shall not give the security required by this decree, and proceed to act under the same, within ten days from the date of this decree, the court" further decreed "that the sheriff of this county, who is hereby appointed a commissioner for the purpose, shall proceed to make the sale hereinabove directed, and in all respects to act in the premises in the place and stead of the said White, trustee as aforesaid, in the same manner and to the same extent as herein above directed.

"And the court" further decreed "that
252 one of the commissioners take an account of any matters of *indebtedness existing between the plaintiff, Hogan, and the defendant, Duke, which are referred to in the pleadings in this cause, independent of the said bonds, so as to ascertain whether the said Duke be indebted to the said Hogan on account of the said matters, and the amount of such indebtedness, if

any; and shall enquire whether said other matters have, by any agreement between the said parties, or otherwise, any connexion with the said bonds specified in said deed, and shall also state any account showing what may appear to be due to the said Duke on said bonds after the payment to him of the said sum of nine hundred dollars, as herein above directed; all which accounts and enquiries the said commissioner was directed to state and make report," &c.

And the court reserved, until the coming in of said report, the decision of all questions in the cause not covered by the decree.

From this decree the said Hogan applied for and obtained an appeal to this court.

Spalding and Gregory for the appellant.
Young for the appellees.

MONCURE, P., after stating the case, proceeded:

The demurrer to the bill was not expressly sustained or overruled. But it was impliedly overruled by the decree which was made in the cause, without taking any of the demurrer. I think it was properly overruled. There are allegations in the bill, which, if conceded to be true, entitle the plaintiff to relief, and the demurrer concedes them to be true, for the purpose of the question it propounds to the court, whether they can entitle the plaintiff to any relief?

These allegations are, 1st. That the plaintiff is entitled to other credit on the second bond, over and above the sum of \$34 44, overpaid on the first bond,
253 *as follows, to wit: "8 bushels of seed oats, 3 barrels of Irish seed potatoes, a lot of lumber, and other articles, which the said Duke promised to credit on the said second bond, but has failed to do so;" 2dly. That the plaintiff, having fully paid off and discharged the first bond, is entitled to the possession of the same, but the said Duke refuses to deliver it to him; and, 3dly. That the object of the said Duke, in now again, for the fourth time, attempting to sell the said land, under the said deed of trust, "is because, at the depreciated value of land in this State, the said property can be bought in by the said Duke, or by some of his friends, at a price which will be utterly inadequate to its value, and that he or they will purchase the same for about one-third of its value."

In regard to the first of these allegations, there can be no doubt but that it is improper in a trustee to make a sale under a deed of trust, executed to secure the payment of a debt, so long as it remains uncertain what amount is due on account of said debt. And if it be uncertain what is the amount of the debt due, or what is the amount of the credits properly applicable thereto, but not so applied, it is the duty of the trustee, before making the sale, to ascertain the amount to be raised by the sale, and to bring a suit in chancery to procure a settlement, by a commissioner for that purpose, if necessary. Or, if the trustee be about to make the sale, without performing that duty, the debtor may himself bring a

suit in chancery for such a settlement, and in the the meantime to enjoin the sale.

The bill does not allege a refusal or failure, on the part of the creditor, to give any other proper credit on the bonds, than the credit here claimed for seed oats, potatoes, lumber, and other articles: and, in regard to this credit, the claim asserted in the bill is very vague. There is no account of the items of

the claim filed with the bill, and none
254 of those items are set out in the *bill,

but 8 bushels of seed oats, and 3 barrels of Irish seed potatoes. The remaining subject of the claim is, "a lot of lumber and other articles." If we are to judge of the amount or value of the lumber and other articles, here referred to, from the quantity and character of the items specified, the whole claim appears to be comparatively small. The bill does not allege any attempt by the plaintiff to have a settlement of these matters with Duke, or any refusal of Duke to settle them. On the contrary, it alleges that he promised to credit them, but has failed to do so. Non constat, that he was not willing to credit them, and did not intend to credit them, when the balance due on the bonds was ready to be settled, either by the debtor or out of the proceeds of the trust sale of his property. The presumption is, that Hogan knew the amount of the credit which he claimed, and could easily ascertain the balance which he owed, and, if he wished to prevent the sale, he had only to tender the amount of that balance to Duke. But he made no such tender. And it is really difficult to perceive any just ground of complaint on this score that he has. His complaint seems to be narrowed down to this: that Duke promised to credit the amount due for the oats, potatoes, lumber and other articles on the second bond, but failed to do so. Such is the allegation of the bill, and, if it makes out any case at all for equitable relief by injunction, it barely does so. And now let us see how the answer treats this allegation.

Duke, in his answer, says: "It is not true that the complainant is entitled to a credit upon the said second bond for the price of the 'eight bushels of seed oats, three bushels of Irish seed potatoes, a lot of lumber, and other articles,' as stated in his said bill; nor is it true that this respondent ever promised to credit the said bond therefor. This claim was asserted by the complainant in another suit between

255 these parties, *hereinafter alluded to, and still pending in this court, and was disallowed, there being no evidence to sustain it. In fact, the complainant is indebted to respondent on other accounts than on account of said bonds, to wit: for groceries, wood, &c., to an amount equal, within a few dollars, to the amount due him for the lumber, potatoes and oats. These small accounts between them were utterly independent of the transactions for the land, and were never understood by either party to have any connection with said bonds."

Here, then, is a positive denial in the

answer of the only material allegations of the bill on this subject, and there is not a particle of proof in the record to sustain these allegations, or either of them.

2dly. In regard to the allegation of the bill, that Duke refused to deliver to Hogan the first bond, which has been duly discharged, Duke, in his answer, says: "It is not true that this respondent ever refused to deliver to said complainant the first bond; for, as before stated, he has never been able to get the said Hogan to a settlement, nor has said Hogan ever asked him for said bond." There is not a particle of proof in the record to sustain the allegation of the bill on this subject.

3dly and lastly. In regard to the allegation of the bill that it is the complainant's object to have the land sold at a sacrifice, that he or some of his friends may purchase it at about one-third of its value; Duke, in his answer, says, he "denies that he has attempted to sell the said land under said deed of trust with any view of buying it himself. His real and only purpose is to get his money due him by said Hogan on said bonds, of which he has stood, and now stands, sorely in need." There is no proof in the record to sustain the allegation of the bill on this subject.

In regard to the small sum of four dollars, which the evidence introduced by Hogan shows was assumed to *be paid
256 him by Duke for Bridgwater, it is outside of the pleadings in the cause, and there is no evidence to show that it was agreed by Duke to credit it on the bond of Hogan.

Such being the pleadings and the proofs in regard to the only grounds of equitable relief relied on in the bill, when the cause came on to be heard on the bill, answer, exhibits and proofs, the court might, with propriety, have wholly dissolved the injunction and dismissed the bill: and this court could not have said, on an appeal from such a decree, that it was erroneous.

Instead of doing so, however, the Circuit court only dissolved the injunction so far as it conflicted with the provisions of the decree, which the court proceeded to make for the sale of the property and disposition of the proceeds of sale; in other words, for the execution of the trust of the deed, under the superintendence and by the direction of the court.

It was perfectly competent for the court to pursue this alternative course; and it seemed to be proper in this case to do so, for the reason, if no other, that it appeared from the evidence that the trustee named in the deed was "not a responsible man, having lately taken the benefit of the bankrupt law." Certainly it was for the benefit of Hogan that the court should pursue this course, and he has no cause to complain of it unless there be something objectionable in the details of the decree. And now let us see whether such is the case or not.

The decree directs the trustee named in the deed, after having first given bond with approved security before the clerk of the

court in the penalty of two thousand dollars, payable and conditioned according to law, to make sale of the real estate specified in said deed. Thus far there can be nothing objectionable, and there is no objection to this part of the decree. It was proper that the trustee selected by
257 both parties should *execute the trust; provided he would give security, which, his having become a bankrupt, made necessary, and provided the trust was executed under the supervision of the court.

The decree then directs the sale to be made, "after advertisement according to" the terms of the deed, "for cash as to so much as may be necessary to defray the usual costs and expenses of said sale (including the legal commissions of the trustee, and the usual charges of an auctioneer to make said sale, and the cost of advertising this sale and a former sale which was enjoined in this court and the injunction subsequently dissolved), and also a fee, not exceeding ten dollars, for preparing a deed to the purchaser of said real estate, and the costs of stamping the same, and to pay the amount claimed to be due to the said Duke, on account of the bonds specified in said deed of trust, after deducting therefrom the various credits specified in the advertisement for the sale of said property which was arrested by said injunction; an extract of which advertisement is filed as an exhibit with the bill."

I can see nothing objectionable in this part of the decree. The advertisement should of course be according to the terms of the deed; and according to those terms it was proper to require so much of the purchase money to be paid in cash as might "be necessary to satisfy the costs and expenses of sale, and to pay so much as might then be due on said bonds, or either of them." This is all which this part of the decree requires. It is objected that the "costs and expenses of said sale" are to include, among other things, "the usual charges of an auctioneer to make said sale, and the cost of advertising," not only the sale directed by the decree, but "a former sale which was enjoined in this court and the injunction subsequently dissolved."

It is said that the charges of the auctioneer ought to be paid by the trustee
258 out of his own commission, *which is allowed him for selling the property and other services in executing the trust; and if he chooses to employ an auctioneer to make the sale for him, the expense thus incurred is on his own account. The compensation allowed by law to a trustee is for his usual and proper services. A trustee who makes a sale generally employs somebody to cry the sale, and a reasonable charge for that service has always been allowed as a part of the expenses of executing the trust. An auctioneer in a city has facilities for making a sale which others have not, and more is generally realized to the owner of the property by employing an auctioneer to sell it, than the amount of the usual charge for doing so. I believe

the invariable practice has been to allow the usual and reasonable charge of an auctioneer in such cases, as part of the expenses of executing the trust. The service of the auctioneer not being considered as embraced in the usual and proper services of the trustee for which his legal commission is allowed him. Of course the court will take care not to make an unreasonable allowance on account of the service of the auctioneer. The amount to be allowed is not fixed by the decree. The cost of advertising the sale under the decree is a proper charge; and so also is the cost of advertising a former sale which was enjoined and the injunction subsequently dissolved. Besides the costs and expenses of sale, which are all specially enumerated and seem to be unobjectionable, the cash payment of the proceeds of sale is required to be sufficient "to pay the amount claimed to be due to the said Duke on account of the bonds specified in said deed, after deducting therefrom the various credits specified in the advertisement for the sale of said property which was arrested by said injunction; an extract of which advertisement is filed as an exhibit with the bill." These credits thus specified were \$800 on the 23rd of March,

1867, \$150 on the 23rd of April, 1867, 259 and \$150 *on the 23rd of May, 1867, being all the credits claimed by Hogan, except the credit claimed for oats, potatoes, lumber and other articles, which credit was denied by the answer and not sustained by any evidence as aforesaid. And the amount of the two bonds subject only to these credits specified in the advertisement being the amount then due on account of the trust debt according to the pleadings and proofs in the cause, it was required by the terms of the deed of trust that that amount should be provided for in the cash payment to be made by the purchaser at the sale. There was no uncertainty as to the amount of the cash payment to be so made. It could be made certain by a simple statement from materials furnished by the decree. Still less was there any uncertainty as to the amount necessary to be paid to prevent any sale at all under the trust deed or under the decree. That amount was the balance due on the trust debt, and expenses already incurred in the part execution of the trust. The debtor Hogan had a right to pay that amount and prevent a sale at any time before it was made, and thus avoid any further expense. The decree did not expressly recognize this right, but that was unnecessary, as the right clearly existed, independently of the decree. The debtor made no tender of the debt or offer to pay it.

As to the residue of the said proceeds of sale, the decree directs that "the same shall be made upon such terms as the said Hogan may prescribe; and in default of such direction, the said trustee, or other person executing the decree, may think just and reasonable; all such credit payments to be properly secured by a lien on said property." This part of the decree is in strict conformity with the deed, and no objection is made to it.

"Out of the cash payment" the decree provides that "the said trustee, or other person executing the decree, 260 *shall be authorized to pay the said commissioner's and usual auctioneer's and advertising charges above named, and the said charges for preparing and stamping the deed to the purchaser, and also to pay to the said Duke the sum of nine hundred dollars, on account of the amount claimed by him to be due on the bonds secured by said deed, it appearing manifest to the court that he is certainly entitled to receive at least that sum on account thereof. The residue of said cash payment the said trustee, or other person acting, shall deposit in one of the banks of this city to the credit of this cause, and file a certificate of such deposit with the clerk, and shall make report," &c.

This portion of the decree is objected to, because it directs a sum of money to be paid to Duke out of the cash payment of the proceeds of sale before it is ascertained precisely what will be due to him, which can only be ascertained by the settlement in the latter part of the decree directed to be made of other matters of account between Hogan and Duke, independent of the said bonds. And the question is asked, How did the court arrive at the sum of nine hundred dollars as the proper sum to be paid to Duke out of the cash payment?

The court did not say, and did not intend to say, that \$900 was the precise balance which would be due by Hogan to Duke on account of the bonds, but only that at least as much as that amount would be due, even after deducting any balance which might be found due by Duke to Hogan on the settlement of the account directed to be settled in the latter part of the decree. This estimate of \$900 leaves two or three hundred dollars of the cash payment to meet the possible balance due to Hogan on that account. I think this was an ample provision for such a contingency. But if no provision at all had been made for it, Hogan would have had no good ground of 261 complaint on that score, *since, according to the pleadings and the proofs in the cause, he is entitled to no credit on that account. This portion of the decree, therefore, is for the benefit, and not to the prejudice of, Hogan.

The decree then provides, that in case White, the trustee, shall not give the security required by the decree, and proceed to act under the same within ten days from its date, the sheriff of the county, who is appointed a commissioner for the purpose, shall proceed to make the sale therein directed, and in all respects act in the premises in the place and stead of said White, trustee, in the same manner and to the same extent as thereinbefore directed. This portion of the decree is not objected to, and seems to be unobjectionable.

Then the court decrees "that one of the commissioners take an account of any matters of indebtedness existing between the plaintiff, Hogan, and the defendant, Duke, which are referred to in the pleadings in

this cause, independent of the said bonds, so as to ascertain whether the said Duke be indebted to the said Hogan on account of said matters, and the amount of such indebtedness, if any; and shall enquire whether said other matters have, by any agreement between the said parties or otherwise, any connexion with the said bond specified in said deed; and shall also state an account, showing what may appear to be due to the said Duke on said bonds, after the payment to him of the said sum of \$900," as therein before directed; "all which accounts and enquiries the said commissioner shall state and make report to the court," &c.

No objection is made to this portion of the decree; but it is contended by the counsel of Hogan that the accounts thereby directed should be taken before any sale of the property is made, and not after such sale. The answer to this view has already, in effect, been made, that there is nothing in the pleadings and proofs which requires a

262 settlement of these accounts; and the *portion of the decree which directs such a settlement, even though it be made after the sale, is for the benefit, and not to the prejudice of, Hogan.

The decree concludes by reserving, until the coming in of the report, all questions in the cause not covered by the decree.

Before I close my opinion in this case, I suppose I ought to notice what was said in the argument as to the said bonds being payable in gold. One of the counsel of Hogan argued that the bonds were probably not so payable; and that, for that reason, the one which has been discharged has not been surrendered, and they were not exhibited with the answer nor filed in the cause by Duke. I do not think there is any just foundation for this argument. The deed of trust speaks a plain language on this subject. It states that the two bonds are "payable in gold coin, as follows, to wit: one bond payable in gold on the 1st day of March, 1867; one other bond payable in gold on the 1st day of March, 1868." It is not pretended that there was any fraud in procuring this deed, or any mistake in its execution; nor is there any complaint made of it in the bill in this respect. On the contrary, the bill alleges that the first payment of \$2,000, for the land bought by Hogan of Duke, was made in gold; though the answer denies that the said payment was made in gold, and avers that it was made in United States currency. But the answer avers that the two bonds for the deferred payments were payable in gold: and the deed of trust executed and acknowledged by Hogan fully sustains the answer in this respect. It seems, therefore, that these bonds are payable in gold; and that payment in gold might have been exacted by the creditor. Instead of that, however, he has received in currency all the payments which have been made on account of the purchase money of the land, and expects to receive,

263 and is willing to receive in currency, the balance due him on that *account,

as his counsel announced in the argument. If the decree had expressly directed the balance to be paid in gold, I do not see how it could have been considered erroneous on that ground. But it says nothing about gold, and all other payments having been made and received in currency, the manifest intention of the creditor was to receive the balance in currency. In this view of the case, the decree is palpably for the benefit of Hogan.

At all events, I see no error in it to his prejudice, and am for affirming it.

The other judges concurred in the opinion of Moncure, P.

Decree affirmed.

264 *Southern Express Co. v. McVeigh.

January Term, 1871, Richmond.

JOYNES, J., absent, sick.

1. **Common Carrier—Breach of Implied Duty—Action on the Case.**—An action on the case lies against a party who has a public employment—as a common carrier or other bailee—for a breach of duty which the law implies from his employment or general relation.

2. **Same—Breach of Express Duty—Action on the Case.***—When there is a public employment, from which arises a common law duty, an action may be brought in tort, although the breach of duty assigned is the doing or not doing something contrary to an agreement made in the course of such employment, by the party on whom such general duty is imposed.

3. **Same—Same—Declaration.**—Though the declaration does not allege that the defendants are common carriers, yet, if the facts set out constitute them such in law, it is sufficient to sustain the action against them as common carriers.

4. **Same—Express Company—Liability.**—An express company is to be regarded as a common carrier, and its responsibilities for the safe delivery of the

***Breach of Express Duty—Action on the Case.**—In *Ferrill v. Brewis*, 25 Gratt. 767, the court said: "In determining the character of the first count in the declaration here, it is proper to bear in mind there is a class of cases (among them that of bailment) in which the foundation of the action springs out of the privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indifferently in assumpsit, or in case upon tort. *Boorman v. Brown*, 8 Adol. & Ellis 525; *Southern Express Co. v. McVeigh*, 20 Gratt. 264.

"In all these cases the contract is of course referred to to ascertain the rights of the parties and the measure of redress; but the wrongful act of the defendant is relied upon as the gravamen of the action. This is peculiarly true with regard to attorneys, surgeons, carriers and the like. The principle is, however, not confined to employments of a public character, but to all bailees, whether public or private. In cases of mere gratuitous bailment, as no consideration is paid, it has been generally considered that an action *ex delicto* is peculiarly appropriate." See also, principal case cited, as to this point, in *Spence v. Norfolk, etc., R. R. Co.*, 92 Va. 115, 22 S. E. Rep. 815.

property entrusted to it is the same as that of the carrier.

5. **Same—Action on Case—Declaration—What It Must Allege.**—Though the declaration in case does not allege the duty of the defendants as common carriers to carry the goods, and the breach of that duty, if it avers facts from which the law infers the duty, and that the defendants, not regarding their said duty, &c., and assigns the breach, that is sufficient.

6. **Same—What Necessary to Liability.**—To subject a party to the responsibility of a carrier for goods lost, it must appear that he received the goods, and that they were delivered to and received by him as a carrier.

7. **Same—What Amounts to Delivery.**—V. owner of certain goods about to arrive at the depot of a railroad in Charlotte, N. C., wishes them to be carried from thence to Richmond, Va., and an express company, by their agent at Charlotte, undertakes to remove and deposit said goods in their warehouse as soon as possible on the arrival of the goods at the depot in Charlotte, and to carry them from Charlotte to Richmond within a reasonable time, for a reward paid. The goods

265 arrive at the depot, and *the express company has notice of their arrival. This is a delivery to the express company as carriers.

8. **Express Companies—When Liable as Carriers.**—When goods are delivered to parties to be forwarded and transported, and these parties are expressmen, and receive compensation for forwarding and transporting, the goods are in their custody as carriers.

9. **"Forwarders"—Liability for Fire.**—If goods are under the control of parties as forwarders and not as common carriers, and are consumed by accidental fire in a warehouse, without any fault or negligence on their part, they are not liable; unless they had expressly agreed for compensation paid, to insure them, and had failed to do it.

In December, 1866, Wm. N. McVeigh instituted an action in the Circuit court of Richmond against the Southern Express Company. The declaration contained four counts. The first count set out that the defendants were a corporation doing business in the States of Georgia, North Carolina and Virginia. That they were common carriers, and were engaged in carrying goods and merchandise, for hire, to and from places within said States, and particularly from the town of Charlotte, in North Carolina, to the city of Richmond, in Virginia. And that, on the 25th of November, 1864, the plaintiff was desirous of forwarding and having conveyed from the said town of Charlotte, to the city of Richmond, certain goods, viz: &c., of the value of \$200,000. And that on the said 24th of November the plaintiff delivered to the defendants, they being common carriers, at a certain place in the town of Charlotte, being the place used by them in the way of their business as common carriers, for the receipt of parcels and goods to be by them carried and conveyed as such common carriers, the said goods and merchandise, to be by the defendants carried and conveyed from the town of Charlotte to the city of Richmond, to be delivered by the defend-

ants for the plaintiff, for certain reward to the defendants. Yet the said defendants, not regarding, &c., did not take proper care of *the same, but took such bad care of them that the goods were destroyed by fire at Charlotte.

The second count sets out that on the 25th of November, 1864, at the town of Charlotte, the plaintiff caused to be delivered to the defendant certain goods, viz: &c., of the value of \$200,000, to be taken care of and safely carried and conveyed by them from Charlotte to Richmond, and at Richmond to be safely delivered by the defendants for the plaintiff, within a reasonable time then next following, for certain hire and reward: and although the defendants accepted the said goods for the purpose aforesaid, and undertook the carriage, conveyance and delivery as aforesaid, within such reasonable time; and, though such reasonable time hath long since elapsed, yet the defendants, not regarding their duty, &c., but contriving, &c., did not nor would, within such reasonable time, or at any time afterwards, take care of or safely carry the said goods from Charlotte to Richmond, nor deliver the same at Richmond for the plaintiff; but had neglected and refused so to do; and by reason of the negligence and improper conduct of the defendants, the goods were not delivered to or for the plaintiff at Richmond or elsewhere, and are wholly lost to the plaintiff at the said town of Charlotte.

The third count sets out, that on the 25th of November, 1864, at the town of Charlotte, the plaintiff did present to the defendants a list in writing of certain goods then about to arrive at the depot of the Charlotte and South Carolina Railroad Company, in the town of Charlotte, to wit: &c., of the value of \$200,000, which the plaintiff was desirous to have conveyed and carried to Richmond and delivered to the plaintiff; and the defendants did then and there undertake to remove and deposit said goods in their warehouse as soon as possible on arrival of the goods at the town of Charlotte, to wit: at the said depot, and to *carry them from Charlotte to Richmond within a reasonable time, for certain hire and reward to the defendants. And the plaintiff, on the 25th of November, 1864, at Charlotte, did pay to the defendants the sum demanded by them of him as reward for freight and insurance of said goods, to wit: the sum of \$5,623 50, and the defendants then and there did give a receipt in writing for said money received for freight and insurance. And the plaintiff avers that the said goods afterwards, viz: on the 26th of November, 1864, arrived in Charlotte, viz: at the depot of the Charlotte and South Carolina Railroad Company, therein situate, and were ready for removal by the defendants, and that the defendants had due notice of the same. Yet the defendants, not regarding their duty in that behalf, but contriving, &c., did not nor would, on the arrival of the goods at Charlotte, nor at any time afterwards, remove said goods from the said depot and deposite the same in

their warehouse and carry them to Richmond, and there deliver the same to the plaintiff, but wholly neglected and refused so to do. And by means of the negligence and improper conduct of the defendants, the said goods have not been delivered to or for the plaintiff at Richmond or elsewhere, and are wholly lost to the plaintiff.

The fourth count sets out that on the 25th of November, 1864, the defendants were expressmen and forwarders of goods, engaged in the business of receiving and forwarding, for those who might offer them, for a reward, goods and merchandise, and the like, from Charlotte to Richmond, and the course and usage of their business was, when requested by their owners, to receive such things destined for Richmond of the Charlotte and South Carolina Railroad Company at their depot in Charlotte, and forward the same to Richmond, storing them in their warehouse in the town of Charlotte until they could be sent off, when

268 *there was delay in sending them off by the railroads connecting Charlotte and Richmond, in cars of the said railroad, the use of which for that purpose was allowed to the defendants by agreement between them and the said railroad companies, the defendants receiving of the shippers entire cost and charges of such transportation from Charlotte to Richmond, so that the latter had nothing to pay for the same to the said railroad companies; and also receiving, when agreed on, of the shippers, in addition to the charge of transportation, a price for insurance of the articles shipped against loss or damage arising from the dangers of railroad transportation, fire, &c. The contract for receiving, storing and carrying the goods, and the arrival of the goods at the railroad depot in Charlotte, is set out as in the third count, except that it charges that the defendants undertook to insure the goods against damage by fire, &c., for a reward; and it avers that the plaintiff had given orders to the railroad company to deliver the goods to the defendants when they might demand the same. And the conclusion of the count is the same, except that it avers that the goods were lost at Charlotte by a fire, which consumed them in the warehouse of the Charlotte and South Carolina Railroad Company.

The defendants appeared and demurred generally to the declaration and each count thereof; but the demurrer was overruled by the court. They then pleaded not guilty, and it was agreed by the parties by their counsel, that the defendants might give in evidence any matter under the plea of not guilty, that might be given in under any proper special plea if filed.

On the trial the defendants took two exceptions to rulings of the court. The first need not be noticed. The second was to the refusal of the court to give certain instructions asked for by the defendants, 269 and the *giving of others. The statement of the evidence in the bill of exceptions shewed the relevancy of the instructions asked, and those given; and it

need not be set out. The instructions asked by the defendants are:

That in order to find a verdict against the defendants as common carriers, the jury must be satisfied that the defendants received the goods, for the loss of which they are charged, and that they were delivered to and received by them as carriers, to be transported for the plaintiff.

If, from the evidence, the jury shall believe that the goods of the plaintiff were under the control of the defendants as forwarders and not as carriers, and were consumed by accidental fire in a warehouse, without fault or negligence by the defendants, then the defendants are not liable.

The plaintiff also asked for instructions, but it is not necessary to give them. The court refused to give any of the instructions as asked, and gave the following:

1. That in order to find a verdict against the defendants as common carriers, the jury must be satisfied that the defendants received the goods for the loss of which they are charged, and that they were delivered to and received by them as carriers, to be transported for the plaintiff. But if the jury believe that the defendants, through their agent at Charlotte, N. C., agreed with the plaintiff, on the arrival of the goods there, to take charge of them and to carry them to Richmond for hire, then they are liable, if in any reasonable time after the same reached Charlotte, and they had notice thereof, they failed to take charge of the said goods, and they were lost by reason thereof. If the jury believe the defendants were an express company following the business of carrying goods for hire or reward from Charlotte, N. C., and points 270 south of *it, to Richmond, Va., the goods of such as chose to employ them, they were common carriers.

2. To entitle the plaintiff to recover of the defendants as forwarders, and not as common carriers, the jury must be satisfied from the evidence that the defendants contracted to take his goods from the railroad depot and forward them to Richmond, and that compensation was received for forwarding said goods, and that the defendants negligently failed to forward the same, whereby they were lost to the plaintiff. But if the jury shall believe that the defendants, at the time they agreed to forward said goods, were expressmen, and when they agreed to forward said goods, also agreed to transport them to Richmond, and received compensation therefor, then they are liable as common carriers.

3. But if the jury believe, from the evidence, that the defendants made no agreement for the immediate transportation of the goods of the plaintiff, but agreed to forward them as soon as they conveniently could by the railroad, and before they could conveniently forward them they were consumed by an accidental fire, not attributable to the negligence of the defendants, then the defendants are not liable.

4. If, from the evidence, the jury shall believe that the goods of the plaintiff were

under the control of the defendants as forwarders, and not as common carriers, and were consumed by accidental fire in a warehouse, without any fault or negligence of the defendants, then the defendants are not liable.

The jury found a verdict for the plaintiff, and assessed his damages at four thousand three hundred and thirty dollars and six cents, with interest from the 8th of January, 1865, until paid. The defendants thereupon moved the court for a new trial; but, upon the plaintiff consenting to reduce the ver-

dict to three thousand six hundred and 271 twenty-six dollars and *ninety-two cents, the motion was overruled, and judgment was rendered for the latter amount, with interest. And the defendants applied to this court for a supersedeas to this judgment; which was awarded.

Wells and Lyons, for the appellants.

The plaintiffs in error insist that each and every of the counts, excepting the first, is a count in assumpsit, an action ex contractu, counting upon a breach of contract, implied from the undertaking, and that including in the declaration any one of the last three counts, with the first, was a misjoinder, good ground for demurrer, and made the whole pleading defective.

I. If a declaration contain different counts, some of them sounding in contract and some in tort, there is a fatal misjoinder, for which the declaration will be held bad on demurrer. *Nimocks v. Inks*, 17 Ohio R. 596; *Noble's Adm'r v. Layley*, 50 Penn. R. 281; *Stevens v. Hurlburt Bank*, 31 Conn. R. 146; *Ederlin v. Judge*, 36 Missouri R. 350. See also *Copeland v. Flowers*, 21 Alab. R. 472; *Crenshaw v. Moore*, 10 Georgia R. 384; 1 Chitty Pl. 200-1; *Creel v. Brown*, 1 Rob. R. 265. This proposition is, however, so universally conceded and elementary in its character as not to need citation of authorities. If either of the counts are in assumpsit, the judgment must be reversed.

II. The second count is in assumpsit, because it counts upon the breach of contract implied from the undertaking, and does not rely upon a breach of duty resulting from the relation.

"The real test by which to determine whether a count is in case or assumpsit is, does it count upon the defendant's undertaking or upon the obligation which results from the relation." *Wilkinson v. Moseley*, 18 Alab. R. 288. A count charged that the plaintiff delivered to the defendant property to be taken care of, which the 272 latter agreed to take care of and redeliver. The *court held that this was to be considered a count in assumpsit. *Corbett v. Packingham*, 6 Barn. and Cress. 268-274; also, 9 Dow. and Ry. 265.

The third and fourth counts of a declaration set forth promises of the defendant not connected with any common law duty arising from the relation. The last count was in trover, declaration was held bad for misjoinder. *Courtenay v. Earle*, 1 Eng.

Law and Eq. R. 333; 4 American Law Regt. 1855-6, p. 769.

A declaration contained two counts, one in trespass, "for putting filthy substances in a quart of rum, whereby it was rendered valueless," the other in case, "for putting noxious substances in a quart of rum, intending to cause the plaintiff to drink thereof," which he did, and was made sick. Held, that the causes of action were different, could not be joined, and that the misjoinder was fatal on writ of error. *Boerum v. Taylor*, 19 Conn. R. 122.

An inspection of the form of a count in assumpsit against a carrier, and one in case, will show that this count is clearly in assumpsit, and not in case. The characteristic of the count in case is, that it charges that the defendants were common carriers, that they received the goods as such, to be safely carried for reward, but, disregarding their duty as such common carriers, they did not safely deliver them. See 2 Chitty's Pl., 652. The feature which identifies the count in assumpsit is, that being a carrier he received the goods, and for a reasonable reward undertook to safely carry them. 2 Chitty's Pl., 356.

The second count does not, like the first, rely upon the duty imposed by law, and charge a violation of that duty; but it sets out the contract, and alleges nothing but a violation of it by the plaintiffs in error. The language is, "they accepted the goods, and undertook the carriage." * * *

"Yet, not regarding their duty in that behalf, did not securely carry." If a

273 *count be for nonfeasance and breach of contract, and is substantially in assumpsit, though it omit the words, "undertook and promised," yet it will be considered as framed in assumpsit, and if joined with other counts for torts, the misjoinder will invalidate the whole declaration. 1 Chitty's Pl., p. 199; 3 Barn. & A. 208; *Brill v. Neele*, 1 Chitty's R. 619.

III. The third count is in assumpsit, and must be held so for the reasons applicable to the second count, and because a count in case could not be framed upon the facts disclosed in it, for no duty imposed by law was violated. The responsibility and duty of a carrier does not begin until the goods are delivered to him, or to his proper servant, authorized to receive them for carriage. *Redfield on Carriers*, p. 80, sec. 95; 2 *Parsons on Contracts*, p. 177; *Story on Bailments*, p. 532; *Redfield on Railways*, p. 245, sec. 129; *Maybin v. South Carolina Railway*, 8 Rich. R. 246. "In order to charge a common carrier, it must be shown that the goods were delivered to him for transportation." *Trowbridge v. Chapin*, 23 Conn. R. 595; *Blanchard v. Isaacs*, 3 Barb. R. 388; *Merriam v. Hartford and N. Haven R. R. Co.*, 20 Conn. R. 354. In the case of *Tower v. Utica and Schen. R. R. Co.*, 7 Hill R. 47, an action in case was brought to recover the value of a coat stolen from the defendant's cars; it was placed upon a seat by the owner; the conductor of the train had his attention called to the coat

by another passenger. It was held that the defendant was not liable, because there was no delivery. Nelson, Judge, says: "I am of opinion that the nonsuit was properly granted; the overcoat was not delivered into the possession or custody of the defendants, which is essential to their liability as carriers." In the case of *Cronkite v. Wells*, 32 New York R. 247, where a package was delivered to the clerk of the agent of the Express Company, outside of the office of the agent, it was held that the defendant was not liable, that not being such a
274 delivery *as was necessary to create the liability. *Wells v. Wilmington R. R. Co.*, 6 Jones' Law (N. C.) 47, is peculiarly applicable to this case. Goods were deposited by the side of the road where there was no station and no agent, but the conductor of the freight train had agreed to stop and take the goods on; they were destroyed; the defendants held not liable, because there was no delivery.

"A railroad company is not liable as a common carrier for property deposited in their warehouse to await orders for transportation." *Mich. E. & N. Ind. R. R. Co. v. Shurtz*, 7 Mich. R. 515. In *South Car. R. R. Co. v. Bradford*, 10 Rich. Law (S. C.) 307, it was proven that the goods were delivered to another railroad company, terminating at the defendants' road, and consigned to them, but no proof that they came into the possession of the defendants: Held, that the action could not be maintained. In *Kimball v. Rutland and Burlington Railroad Co.*, 26 Verm. R. (3 Deane) 247, the plaintiff declared in case against the defendant as a common carrier upon a special contract. Held, that "such contract changed the relation, and that an action must be brought on the contract and not against the defendants as common carriers."

This count does not pretend that there was any delivery, actual or constructive, but that the plaintiff "exhibited a list of goods about to arrive" at the depot of the Charlotte and South Carolina railroad, and that the defendants undertook to remove and deposit said goods in their warehouse as soon as possible after their arrival, and to carry them to Richmond. Now, a carrier is bound by law to carry such goods as may be offered to him, and if he refuses, may be sued in case, because it is part of his common law duty to carry all goods brought to him for carriage; but if he makes a contract to send for goods upon their arrival at a particular place, this being no part
275 of the duty imposed *upon him by virtue of his public employment, and he violates that contract, he must be sued, as any private person would be, in assumpsit and not in case, which is precisely what has been done in this count.

An examination of the count shows not only that it ought to have been in assumpsit, but that it plainly is so upon its face. The language is, "the defendants did then and there undertake to remove, deposit and carry." Their liability is founded, claimed and stated to be upon a contract and under-

taking, and not as the result of the relationship, nor one imposed by law. It is true that this count and the alleged contract relates to the same subject matter as that referred to in the first count, but that is not enough to warrant the joinder.

In *Howe v. Cook & Maxwell*, 21 Wend. R. 29, the true rule on this subject is stated with precision and clearness. Bronson, Judge, in delivering the opinion of the court, says: "It is not enough that the counts may relate to the same subject matter; * * * that the evidence is the same to support them. The counts to stand together must be in the same form of action. * * * Although the plaintiff has two modes of framing his principal count, and the evidence to support the declaration may be the same in both, yet other counts can only be joined when they belong to the same form of action. In actions against a carrier the plaintiff cannot declare in case for the loss and add a count in assumpsit." In speaking of the declaration in that case he says: "Two counts are plainly founded upon contract. They set forth a promise and the breach of it as the cause of action, and then add a count in trover, which is a fatal misjoinder." * * * "The manner in which the breach is alleged does not determine the form of the action. In assumpsit it is not unusual to allege for breach that the defendant contriving and fraudulently intending, subtly deceived, &c., and
276 this form is allowed *in actions against bailees in cases where assumpsit is the only remedy. In declaring upon contracts it is always sufficient breach to show that the defendant did not perform his engagement; and if the plaintiff goes farther, and alleges that the defendant fraudulently and deceitfully violated his undertaking, it neither changes the form of the action nor varies the proof." "This verbiage of the count will not convert it into a count in case if it be clearly founded upon a breach of promise, as distinguished from a breach of duty, incumbent upon a bailee." Which is precisely the case here. See opinion in *Orton v. Butler*, 18 Eng. C. L. R. 361.

IV. The fourth count is, like the third, in assumpsit. It merely states promises by the defendants, and their non-performance of them. An action in form *ex delicto* could not be founded on the facts stated therein. An action on the case does not lie for the non-performance of promises. *Smith v. White*, 37 Eng. C. L. R. 353. See same case in 6 Bing. N. C. 218; 8 Dowl. P. C. 255. In this case the defendant obtained possession of the property under a contract, but tortiously disposed of it, and for that reason it was held that case was the proper remedy, for, when the carrier is sued for an injury *ex delicto*, the action should be case and not assumpsit, because it is founded on the wrong and not on the contract. *Bretherton v. Wood*, 6 Moore R. 141.

This count does not undertake to charge the defendants as common carriers, but simply as expressmen and forwarders of

goods; it states the course of their business, and alleges that the plaintiff exhibited to them a bill of goods about to arrive, and that the defendants then and there undertook to remove and deposit said goods, and to insure them against loss by fire, and that the plaintiff had given to the railroad com-

pany an order to deliver the goods to the defendant *when they might demand the same, but that the defendants would not and did not receive the goods. Can it be, for one moment, contended that an action *ex delicto* could be founded upon the breach of such an undertaking? Is it not peculiarly a liability *ex contractu*, and does not this count go upon the breach of the contract?

The rigid rules of the common law makes the carrier assume the liability of an insurer, whilst the forwarder is answerable only as a bailee for ordinary neglect. 2 Parsons on Contracts, p. 78-9.

Can it be maintained that an action in case could be sustained upon such a contract to receive and insure, when the breach alleged is not receiving? We think that this count is clearly in *assumpsit*, and the court seems, in its charge to the jury, to have so regarded and treated it. The language used is: "If the jury believe that the defendants, through their agent at Charlotte, N. C., agreed with the plaintiff, on the arrival of the goods there, to take charge of them and carry them to Richmond for hire, then they are liable, if in a reasonable time after the same reached Charlotte and they had notice thereof, they failed to take charge of the said goods."

On any other hypothesis than one which treats this count as in *assumpsit*, this portion of the charge delivered by the learned court becomes palpably and utterly erroneous, while, if we regard this count as in *assumpsit*, then the charge is in this particular entirely correct, and it is also clear, that upon this count alone, and as a count in *assumpsit*, the verdict of the jury was founded; for the proof shows that the goods were never delivered to the defendants; that they never received them as forwarders or bailees; that no common law liability had accrued; that no right of action *ex delicto* had arisen; but, if charged at all, it must

have been in an action *ex contractu*, for the non-performance *of the promise and undertaking to receive, take charge of and carry the goods.

We think that each of the counts, excepting the first, is a count in *assumpsit*, and that in the very nature of the facts stated they must have been so; but, if any one of them is in *assumpsit*, then the defect is fatal to the whole declaration. Henderson v. Stinger, 6 Gratt. 130, and cases there cited.

V. It is also respectfully submitted, that the court erred in the instruction it gave to the jury, first, in affirming the liability of the defendants upon a contract made with an agent, whether it was within the scope of his authority or not.

The principal is bound by the acts of the

agent, only when they are within the scope of his employment. Story on Agency, sec. 126, 134; 1 Parsons on Contracts, 41-2-4.

The agent of a common carrier, while he has authority to ship goods, and to sign bills of lading for goods, has no authority to enter into a special contract to receive goods and store them before their arrival, nor to create any liability beyond that which belongs to the undertaking or business of a common carrier. 1 Parsons on Contracts, p. 45; Opinion of Comstock in Mech. Bank v. N. York & N. Hav. R. R. Co., 3 Kern. R. 599; Grant v. Norway, 10 C. & B. 665. In that case the agent signed a bill of lading for goods not yet received: Held, that "he exceeded his authority, and the principal was not bound, although the act, judged of by its appearance, was strictly within his authority."

It will be remembered that in this case the question of the agent's authority was not only raised, but there was proof to show that the money was received by the agent, not on behalf of the defendants, that it was not mingled with their money, but kept in separate packages, and marked as the money of the plaintiff, and for the plaintiff's accommodation; that the transaction

was an *individual matter of the agent, and entirely beyond the scope of his agency. The instruction given was calculated to mislead. "Where an instruction is given on an abstract question, which may mislead the jury, the judgment will be reversed." Pasley v. English, 10 Gratt. 236.

Instructions given by the court are defective, if they fail to declare to the jury, in explicit terms, accurately and intelligibly, the law upon the point raised. Fell's Point Savings Inst. v. Weedon, 18 Mary. R. 320; Snively v. Fahnestock, 18 Id. 391. The question here was the authority and scope of the agency. In a case involving the authority of the agent, it was held that the court erred in not calling the attention of the jury to the distinction between a general and special agent. McDonell v. Dodge, 10 Wisc. R. 106.

Secondly. The court erred in submitting to the jury, in its charge to them, the question of the defendant's liability for a matter arising from special contract in an action *ex delicto*. The plaintiff below claimed that his suit was in case; the first count confessedly was so; the court in fact held that each of the counts was in case: this being so, the whole subject of the special contract should have been withdrawn from the consideration of the jury. The court in fact charged the jury, that if they believed that the defendants through their agents at Charlotte agreed with the plaintiff, on the arrival of the goods there, to take charge of them, and, after notice they failed to do so, then the defendants were liable.

This error is in a matter the most vital; for it is apparent, from the inspection of the record, that there was an utter failure to establish any common law liability—any

liability resulting from the business of a common carrier—any liability resulting from a misfeasance—or any for which a recovery could be had under the first count of the declaration. The real point
280 *of the controversy was, in fact, whether the defendant had made a special contract to receive the goods which had been violated by him in not receiving them, and whether, as a consequence of that violation, they rendered themselves liable for the loss of the goods by an accidental fire.

We respectfully submit that the whole subject of the violation of the contract should have been withdrawn from the jury.

John Howard and J. Alfred Jones, for the appellee. The appellants are common carriers. But there are various common carriers, with duties peculiar to each of them. The appellants are an express company; and this fact is ignored by the counsel on the other side, and they are treated as if they were a railroad company. We charge that they only undertook to do for us what it was a part of their business to do. Redfield on Carriers, § 61, p. 47, describes their business: It is to go out, gather up, and distribute. When notified of freight within convenient limits to be carried by them, they send out their wagon, and take it into their possession at that place.

We say that this is an action on the case, and that all the counts are in case.

In 3 Rob. Prac. 439, 440, he reviews the cases and deduces this broad, general principle: "The contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a tort." "Wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the plaintiff may recover either in tort or in contract." Boorman v. Brown, 43 Eng. C. L. R. 843; S. C. 11 Clark & Fin. R. 1. See Thorne v. Deas, 4 John. R. 84, where Judge Kent discusses the whole subject.

And it will be seen that where the
281 gravamen of the *complaint arises out of a breach of duty arising under a contract, a count may be case though good in assumpsit, or assumpsit though good in case. 4 Rob. Prac. 875; Church v. Munford, 11 John. R. 480. See, also, New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. U. S. R. 344, 410, 411, 412.

The second count, which it is insisted on the other side is in assumpsit, merely sets up the contract as inducement, not as the gravamen of the action. Brown's Legal Maxims, p. 158, 159; 1 Chitty's Pl. 136 marg.; Boorman v. Brown, 43 Eng. C. L. R. 843, 850; S. C. 11 Clarke & Fin. R. 1; Courtenay v. Earle, 1 Eng. L. & E. 333. The true principle underlying all the cases, is, that the liability arises from negligence. This applies to all cases, common carriers and all others. In the case of common carriers there is always a contract. There

is no liability upon them until the contract is entered into: This is shewn by the fact that assumpsit may be brought against him. And yet it is the negligence in performing the duty that is the gravamen of the action. Judin v. Samuel, 4 Bos. & Pul. R. 43.

But it has long since been established that there is a class of cases in which case will lie, though no common law duty attaches to the contract. Coggs v. Bernard, 1 Smith's Lead Cas. 82, marg. p. 304; Dickson v. Clifton, 2 Wils. R. 319; Mast v. Goodson, 3 Id. 348; Govett v. Radnidge, 3 East's R. 62, 70; Samuel v. Judin, 6 Id. 333; Mazetti v. Williams, 20 Eng. C. L. R. 412; Godefroy v. Jay, Id. 183; Burnett v. Lynch, 12 Id. 327; Smith v. White, 37 Id. 353; Stoyell v. Westcott, 2 Day's R. 418; Robinson v. Threadgill, 13 Ired. L. R. 39; The Philadelphia and Reading R. R. Co. v. Derby, 14 How. U. S. R. 468; Trice v. Cockran, 8 Gratt. 442; Harvey v. Skipwith, 16 Id. 393, 403.

These authorities shew that the declaration is good if the defendant was a private carrier. It is equally so as against the defendant as a common carrier. The
282 *description of the defendant in the first count, is to be read in connection with each count. Express companies are common carriers ex vi termini. Redfield on Railways, 15, 16 and sequel; Hooper v. Wells, Fargo & Co., 5 Amer. Law Reg. N. S. 16; Russell v. Livingston, 19 Barb. R. 346; Sherman v. Wells, 28 Barb. R. 403; Southern Express Co. v. Newby, 36 Georg. R. 635; Belger v. Dinsmore, 51 Barb. R. 69; Mercantile Mutual Ins. Co. v. Chase, 1 E. D. Smith N. Y. R. 116, 126. But it is not necessary to state that the defendant is a common carrier, or to state the custom of the realm. 1 Chitty's Pl. 221; 3 Id. 378; Pozzie v. Skipton, 35 Eng. C. L. R. 578; and this case was approved in Wyld v. Pickford, 8 Mees. & Welsb. R. 458, 459; Bretherton v. Wood, 7 Eng. C. L. R. 346.

Then is the second count a good count in case. If it is not a count in case it is because Chitty has given us a wrong form. 2 Chitty's Pl. 653 a top paging. The only difference between the count and the form is that Chitty does not allege that the carriage was done for reward, the second count does, which certainly makes no difference in the nature of the count. And Chitty says, at the special instance &c., of the defendant, which would more strongly indicate a count in assumpsit. We further refer to 3 Chitty's Pl. 375-6, marg.; and Code edi. 1860, p. 710, § 11, p. 712, § 31. The first count in Courtenay v. Earle, 1 Eng. L. & E. R. 333, is very much like this; and the same may be said of the first count in Orton v. Butler, 18 Eng. C. L. R. 361; and Corbett v. Packingham, 6 Barn. & Cress. R. 268.

Then upon the third and fourth counts. When we brought the goods to the railroad depot and gave the defendant notice of the fact, that was a delivery. If the goods had been there and the plaintiff had said to

the defendant, take the goods now, and the defendant had said I take them, that
 283 would have been a delivery. *Then what is the difference, when they came the next day and the defendant had notice of their arrival. 2 Redfield on Railroads, p. 46, 47, 48; Wells v. Wilmington and Weldon R. R. Co., 6 Jones Law R. 47; Southern Express Company v. Newby, 26 Geo. R. 635; Redfield on Carriers, § 99, 100, 101. It seems always sufficient if the goods are put in the charge of the carrier. Brien v. Bennett, 8 Car. & Payne R. 724. And this question of delivery is a question of law. Merriam v. Hartford and New Hav. R. R. Co., 20 Conn. R. 354; Story on Bail. § 533, 534.

But it is not necessary to aver or prove a delivery of the goods; the liability of the defendant was independent of the delivery. Coggs v. Bernard, 1 Smith's Lead. Cas. notes 334, top paging. In the case of an unpaid agent, possession is necessary, but it is not necessary in the case of a paid agent.

Upon the instructions, the case of Southern Express Co. v. Newby, 36 Georg. R. 635, is expressly in point. It is said that the agent of the company may not have had authority to enter into the arrangement made with the plaintiff. The agent was placed at Charlotte to manage their business at that place, and the company is liable for his acts. Pickford v. Grand Junction R. R. Co., 12 Mees. & Welsb. 766.

ANDERSON, J., delivered the opinion of the court.

This is an action on the case against an express company. There are four counts in the declaration. The first is the usual count in case against a common carrier. The other counts, the plaintiffs in error contend, are in assumpsit, and therefore improperly joined with the first count in case for tort. The question is raised by a general demurrer to the declaration, and to each count thereof, which was overruled by the Circuit court. This is the first error assigned.

The first count is properly conceded
 284 to be in case for *tort. If the other counts are not in tort, the declaration is clearly bad for misjoinder, and the demurrer well taken.

It is contended for the defendants in error, that all the counts are properly in case, and that consequently the demurrer was rightly overruled. The case has been elaborately argued, and much learning evolved upon the interesting question. I have carefully looked into nearly all the numerous cases cited, as well as others. To state and go through them all would be tedious and unnecessary. Whatever else may be drawn from them (which it is not necessary now to inquire), I think the following conclusions, which have an important bearing upon the case in hand, are clearly deducible: First, that an action on the case lies against a party who has a public employment—as, for example, a

common carrier or other bailee, for a breach of duty, which the law implies from his employment or general relation. This is not disputed. And second, that where there is a public employment, from which arises a common law duty, an action may be brought in tort, although the breach of duty assigned is the doing or not doing of something, contrary to an agreement made in the course of such employment, by the party on whom such general duty is imposed.

In the leading case of Boorman v. Brown, 43 Eng. C. L. R. 843, it was held by the Court of Exchequer Chamber, on error from Queen's Bench, that the duty resulted from express contract described in the declaration, and not simply from defendant's character of broker. On a writ of error to the House of Lords, it was objected that the ground taken in the judgment was too broad. But the House of Lords affirmed it. "You cannot (says Lord Campbell) confine the right of recovery merely to those cases where there is an employment, without any special contract. But wherever there is a

contract, and something to be done in
 285 the course of *the employment, which is the subject of that contract, if there is a breach of duty in the course of that employment, the plaintiff may either recover in tort or contract. This case has never been overruled that I am aware of. The case of Courtenay v. Earle, 1 Eng. L. & E. R. 333, decided in 1851, recognizes its authority. Maule, J., says: "The older cases may have decided that if an action be brought in breach of a stipulation made by one on whom a common law duty is cast, in modification of the duty implied by law, a count on such a breach could not be joined with a count in case. The case of Boorman v. Brown, has certainly overruled such an opinion, if any such there was." This principle seems to be well settled in England and America. Many of the cases go much further, and none I think can be found in conflict with it. I will refer to Coggs v. Bernard, Ld. Raym. R. 909; Samuel v. Judin, 6 East R. 333; Stoyel v. Westcott, 2 Days R. 418; Burnett v. Lynch, 12 Eng. C. L. R. 327; Mazetti v. Williams, 20 Eng. C. L. R. 411; Brown's Legal Maxims, p. 159; 3 Rob. Prac. 439 (new edition); Harvey v. Skipwith, 16 Gratt. 393, and Robinson v. Threadgill, 13 Ired. R. 39.

For the appellee it is claimed that all the counts proceed against the defendants as common carriers. Let us see whether the 2d, 3d and 4th counts proceed against them in that character. The 4th count, as well as the 1st, sets out the public character of the defendants, substantially, as common carriers. They are described as expressmen and forwarders, engaged in receiving goods from those who might offer them, and transporting them for reward from Charlotte, North Carolina, to Richmond, Virginia, in cars of the railroads, the use of which was allowed to them by agreement between them and the railroad companies; the defendants receiving from the shippers entire costs and charges of such transporta-

tion; so that the shippers had nothing to pay to the railroad companies for transportation. *It is true that in this description of the character and relation of the defendants, they are not expressly alleged to be common carriers. But the facts set out constitute them to be such in law. 2 Redf. on Railw. p. 16; Southern Express Co. v. Newby, 36 Georgia R. 635. An express company is to be regarded as a common carrier, and its responsibilities for the safe delivery of the property entrusted to it, is the same as that of the carrier. Belger v. Dinsmore, 51 Barb. R. 69. Numerous other cases might be cited, but more are not needed.

The second and third counts do not set out the character of the defendants as common carriers. Held, on general demurrer, not to be necessary. Pozzi v. Shipton, 8 Adol. & El. 574. But they are sued as an express company, which is prima facie a common carrier. Redf. on Carriers, p. 45, sec. 58; and they are consequently, as such, declared against in all the counts.

The question now arises, do the facts, as set out in the declaration, which upon demurrer must be taken to be true, show that the goods were delivered to the defendants, so as to charge them as carriers? The first and second counts expressly allege a delivery of the goods to the defendants. According to the third and fourth counts, an actual delivery was not made. But the goods were delivered at the place where the defendants agreed to receive them. And the defendants had due notice of their delivery at that place. Does this constitute in law a delivery to them in their public character of carriers?

If the goods were delivered for carriage, of which they had notice, and the place where they were delivered was their usual place of receiving similar articles, the company would be responsible to the end of their route. Redf. on Car., p. 80. And, though the place, where the goods were delivered, was an unusual place, the acceptance by the carrier will be sufficient

to charge *him. Redf. on Railw. p. 48; L. Ellenborough, 2 Maul. & Sel. 172; Southern Express Co. v. Newby, 39 Georgia R. 635. Is not the legal effect the same, if the place was designated before the delivery, and the plaintiff instructed to deliver them there; or the defendants contracted to receive them there, and were duly notified of the delivery? It would seem so in reason. The agreement only substitutes the place agreed on for the delivery, for the usual place of delivery. We have seen that they are in charge of the carrier, when delivered at the usual place, upon notice. And they are as much in his charge, when delivered at the place agreed on, upon notice. Can it make any difference whether the goods are delivered at the usual place, or the place agreed on, provided the carriers have notice of the delivery. We think not. When railroad companies contract to receive, or deliver goods at other places than their stations, it has been repeatedly held,

that they are undoubtedly bound by such undertakings. Redf. on Car. p. 86, sec. 104, citing Farmers' & Mech. Bank v. Chaplain Transportation Co., 23 Verm. R. 186, 209; Noyes & Co. v. Rut. & Bur. Railway Co., 27 Verm. R. 110; 1 Pars. on Cont. 661. Redfield on Railways says, p. 25, sec. 34: "Instructions given antecedently to the delivery of the goods, but in contemplation of such delivery, on part of both the owner and carrier, are of the same binding force as if given at the very time of the delivery."

But, were the goods delivered for carriage or warehousing? The main and leading object, undoubtedly was, to get the goods from Charlotte to Richmond. The defendants were public carriers between those cities. The plaintiff applied to them to carry them. The defendants agreed to carry them, and to receive them at the depot, on delivery by the railroad, and move and deposit them in their warehouse, and deliver them, in a reasonable time, safely to

*the plaintiff in Richmond; and received the reward for transporting and insurance. The depositing of the goods in their warehouse, seems to have been as means to an end; as ancillary to their undertaking to carry the goods to Richmond, and there safely deliver them to the plaintiff.

When a common carrier is also a warehouseman, questions of difficulty may often arise, in which character he received the goods. In this case it does not appear that the defendants were engaged in warehousing as a distinct employment. It only appears that they were common carriers, and had a warehouse. The establishment of warehouses by express companies or railways, may be considered as a part of their business as carriers, and for their own convenience and advantage. Redf. on Car. p. 92, sec. 109. And it is a fact of public notoriety, that express companies have their warehouses or offices, where they receive goods for transportation, and where they deposit goods which they have sent out for, and brought in, to be transported. They have them for their own convenience. I do not think, therefore, that, because express companies have a warehouse, it follows, necessarily, that they are warehousemen. But, whether the defendants in this case were warehousemen or not, they were common carriers, and they had a warehouse, where the goods were to be deposited for carriage. In such cases, is there any test, or well-defined rule, by which it can be determined, in what character the parties charged with the goods are liable?

It seems to be well settled, that the responsibility of a carrier attaches upon the delivery of the goods at his warehouse, unless there are special directions given by the owner. Redf. on Car. p. 92, citing McCarty v. New York & Erie R. R. Co., 30 Penn. R. 247. And it is his duty, not only to carry safely, but also, if no time is stipulated, in a reasonable time. 1

Smith's Leading Cases, p. 304. What

can relieve him from this obligation and liability? Nothing but the act of the owner of the goods. He may relieve him from his common law liability, by directing him to do that which is incompatible with his common law duty as carrier. As, for example, if the owner directs him to "keep back the goods," or not to forward them "until further orders," or until "he hears from his consignee," he is relieved by such instructions by the owner, from his liability as carrier; because it is impossible for him, if he obeys the instructions, which the owner has a right to give, and he is bound to obey, to discharge his duty of carrier, to forward the goods presently, or in a reasonable time. And the goods remaining in his custody, he is not liable as carrier, but only as an ordinary bailee, as long as the special instructions are operative. But when they are revoked, and the owner gives orders to forward the goods, his liability as carrier immediately attaches. This is reasonable, and I think it will be found to be the principle which underlies all the decisions which have been made upon the subject. See *Clarke & als. v. Needles*, 25 Penn. R. 338; *Blossom v. Griffin*, 3 Kern. 569; 2 Redf. on Railw. p. 49; Redf. on Carriers, p. 81, sec. 97.

In the case before us, the defendants' undertaking to carry the goods in a reasonable time to Richmond, was only what the common law duty of the carrier required. Hence, there was nothing in the instructions of the owner, or in their agreement, to interfere with their duty as carriers, and, consequently, nothing to relieve them from their liability as such. It is true the goods were not delivered to them, at their warehouse, but they were delivered at the place where they agreed to receive them, and from thence to move them to their warehouse themselves: which we have seen, is the same in effect, as the delivery at their usual place of receiving.

290 *As common carriers, then, the defendants were liable for the safe delivery of the goods to the plaintiff at Richmond, and were insurers, independently of their express agreement: and consequently the action against them is properly conceived in case.

But it is contended for the plaintiffs in error, that the second, third and fourth counts do not proceed in case, but are in assumpsit, because they do not aver a duty, or a breach thereof. It is true that they do not aver, totidem verbis, the duty of the defendants. But they aver facts, from which the law infers a duty, which is all that is necessary. *Lancaster Canal Co. v. Parnaby*, 39 Eng. C. L. R. 54. Each of them sets forth facts, from which the law infers a duty; and then, averring that the defendants not regarding their said duty, assigns the breach. The court is, therefore, of opinion, that each count in this declaration contains allegations sufficient to support it in case. And though they may be sufficient in assumpsit, as in *Church v. Munford*, 11 John. R. 480, they are never-

theless good in case; and that, therefore, the court below did right to overrule the demurrer.

The second assignment of error is, that the court erred in refusing the instructions to the jury moved by the defendants' counsel, and in the instructions which it gave, and in overruling the motion for a new trial.

It is not in the power of this court to say whether the verdict ought to have been set aside, and a new trial awarded, on the ground that it was not supported by the evidence, as the facts are not certified. But, if the court erred in refusing, or in giving instructions to the jury, that was good ground for setting aside the verdict. We will now inquire whether this objection is good.

The first instruction moved by defendants' counsel was, "That, in order to find a verdict against the defendants as common

carriers, the jury must be satisfied

291 *that the defendants received the goods, for the loss of which they are charged, and that they were delivered to, and received by them, as carriers, to be transported for the plaintiff." This instruction was given by the court verbatim. Of course they do not object to that; but to the additional instruction, given by the court, which immediately follows, and is in these words: "But, if the jury believe that the defendants, through their agent at Charlotte, North Carolina, agreed with the plaintiff, on the arrival of the goods there, to take charge of them, and to carry them to Richmond, for hire, then they are liable, if, in a reasonable time after the same reached Charlotte, and they had notice thereof, they failed to take charge of said goods, and they were lost by reason thereof. If the jury believe the defendants were an express company, following the business of carrying goods, for hire or reward, from Charlotte, North Carolina, and points south of it, to Richmond, Va., of such as chose to employ them, they were common carriers."

The court is of opinion, that the propositions of law contained in both branches of this additional instruction, are correctly stated. Nor does the instruction undertake to decide any fact in the case, or to charge the defendants with any contract, which is not proved to the satisfaction of the jury. The instruction, it seems to the court, does not assume any facts or any contract to have been proved; which would have been error; but only declares the legal consequences, if the jury should believe, from the evidence, that such a contract, or such facts, were proved. And the court is of opinion, that the law is accurately declared. Whether the peculiar facts of the case were ignored, it is not perceived how this court could undertake to decide, unless the facts had been spread upon the record. But, if it is meant by the objection, that the instructions were upon an abstract point of

292 law, having no relevancy *to the case then before the jury, we cannot concur

in that view. We think the pleadings in the cause, and the bill of exceptions, show that the points upon which the instructions were given, were involved in the issues, and, therefore, that the objection cannot be sustained. We are also of opinion, that in instructing the jury as to what would constitute the defendants common carriers, it was proper to say, from Charlotte to Richmond, without designating "the railroad depot," within the limits of the former place; for, if they were common carriers from Charlotte to Richmond, and agreed to accept the delivery of the goods at that depot, to carry to Richmond, their liabilities attach from their delivery at that place and notice.

Another objection urged by counsel for plaintiffs in error, to this instruction is, that it affirms the liability of the defendants under a contract made by the plaintiff with an agent, whether it was within the scope of his authority or not; and that the instruction was defective, in not explicitly declaring what the law was on the question as to the scope and authority of the agency, which was the point in the case.

As to the first branch of this objection, the court does not understand the instruction as affirming any contract made by the plaintiff with an agent. The instruction does not assume that there was any such contract. The case is put hypothetically. If the jury should believe, from the evidence, that the defendants, through their agent, agreed, the jury must be satisfied that the defendants agreed. If the defendants contracted through another, the instructions require that the jury must be satisfied that he was the agent of the defendants, and, consequently, that he was acting within the scope of his authority.

As to what was necessary to constitute such an agency, no instruction was given. If the counsel for the defendants regarded it as the point in the case, he
293 *might have moved an instruction upon it. This was not done; and it is not ground for reversal now, that the court did not instruct upon it. The bill of exceptions cannot be treated as a demurrer to evidence, and a point be raised which was not asserted in the motion for instructions to the jury. A party moving an instruction ought to lay his finger on the point. Baldwin, J., in *Trice v. Cockran*, 8 Gratt. 450.

With regard to the second instruction, we have had more difficulty. But upon further consideration we do not think there is any error in it to the prejudice of plaintiffs in error, of which they can complain. The first branch of it is in these words: "To entitle the plaintiff to recover of the defendants as forwarders and not as common carriers, the jury must be satisfied, from the evidence, that the defendants contracted to take his goods from the railroad depot and forward them to Richmond, and that compensation was received for forwarding said goods, and that the defend-

ants negligently failed to forward the same, whereby they were lost to the plaintiff."

If the defendants had agreed to insure the goods against fire &c., from the time of their being put into their charge at the railroad depot, until they were safely delivered to the plaintiff at Richmond, as is alleged in the 3d and 4th counts of the declaration, and as is stated in the bill of exceptions, evidence was offered tending to prove, it would seem, that the instruction is not broad enough. But as it is not prejudicial to the plaintiffs in error, and is not complained of by the defendants in error, the judgment cannot be reversed for that cause.

The second branch of this second instruction is, "But if the jury shall believe that the defendants, at the time they agreed to forward said goods, were expressmen, and when they agreed to forward said goods also agreed to transport them to Richmond,
294 and received *compensation therefor, they are liable as common carriers."

We think the proposition is true, that when goods are delivered to parties to be forwarded and transported, and those parties are expressmen, and receive compensation for forwarding and transporting, the goods are in their custody as carriers. And that is substantially the instruction given. The court does not understand this instruction as confounding the distinction between common carriers and mere forwarders, or as affirming that the liabilities of both are the same, as was ingeniously argued by counsel; but as only affirming that when the forwarder is an expressman and receives the goods not only to forward, but to transport, and receives the reward for transporting, he is liable as a common carrier: which we believe to be true. But lest the jury might infer, from the foregoing instruction, that an expressman could not receive goods as a mere forwarder, and incur only the liabilities of a warehouseman, the court gives the 3d instruction: "But if the jury believe, from the evidence, that the defendants made no agreement for the immediate transportation of the goods of the plaintiff, but agreed to forward them as soon as they conveniently could by railroad; and before they could conveniently forward them they were consumed by an accidental fire, not attributable to the negligence of the defendants, then the defendants are not liable." This instruction goes fully as far as the defendants had any right to require; and we think can only be supported upon the hypothesis that the defendants did not expressly undertake to insure the goods after they were to be in their charge, until delivered to the plaintiff in Richmond, nor receive compensation therefor, as the plaintiff alleged in the 3d and 4th counts of the declaration, and offered evidence tending to prove, as shown by the bill of exceptions. And the instruction, it seems to me, ought to have been given with such qualification. The *4th instruction is in the
295 language of the 2d instruction moved by defendants' counsel, except one word,

"common," which is put before "carriers," and does not alter the sense. This instruction is liable to the same objection which we have mentioned in regard to the 3d instruction; because if the goods were under the control of the defendants as forwarders, and not as common carriers, and were consumed by accidental fire in a warehouse, without any fault or negligence of the defendants, they would still be liable if they had expressly agreed to insure against fire &c., as is alleged. But if it was error to give those instructions, without such qualification, it is not to the prejudice of the plaintiffs in error; and the defendant in error, who only could be prejudiced by them, does not complain. We are therefore of opinion that there is no error in the judgment of the Circuit court, for which it should be reversed.

Judgment affirmed.

296

*Brown v. Speyers.

January Term, 1871, Richmond.

JOYNES, J., absent, sick.

1. **New Trial—After-Discovered Evidence—Nature of the Evidence.**—It is an established rule of the courts to grant new trials very rarely, upon the ground of after-discovered evidence; and never but under very special circumstances. The party asking for it must show he was ignorant of the existence of the evidence, and it must be such that a reasonable diligence on his part would not have secured it at the former trial; that the new evidence is not of like import with any part of that offered on the former trial. He must produce the affidavits of the witnesses, stating the facts they will testify to, or if that be impracticable, the affidavits of persons who have conversed with them, showing the facts they will state.

2. **Same—Same—Same.**—A new trial will never be granted on the ground of after-discovered evi-

***New Trial—After-Discovered Evidence.**—The rule laid down in the principal case, that the party asking a new trial on the grounds of after-discovered evidence must produce the affidavits of the witness, stating what they will testify, etc., has been followed in several West Virginia cases, citing the principal case as authority. See *Strader v. Goff*, 6 W. Va. 271, 258; *Hale v. Pack*, 10 W. Va. 155; *Varner v. Core*, 20 W. Va. 475.

Same—Same—What Four Things Must Concur.—As to the four things necessary to authorize a new trial on the ground of after-discovered evidence, several cases cite the principal case as authority. See *Whitehurst v. Com.*, 79 Va. 561; *Gillilan v. Ludington*, 6 W. Va. 145; *Smith v. McLain*, 11 W. Va. 668; *Zickefoose v. Kuykendall*, 12 W. Va. 30; *Carder v. Bank of W. Va.*, 34 W. Va. 41, 11 S. E. Rep. 717. See also, on this point, *Thompson's Case*, 8 Gratt. 641; *Wynne v. Newman*, 75 Va. 817; *Read's Case*, 22 Gratt. 924, and *foot-note*, where numerous cases, in accord with the principal case on this point, are collected.

Same—Same—Cumulative Evidence.—In *State v. Hobbs*, 37 W. Va. 824, 17 S. E. Rep. 385, the principal case is cited upon the question of cumulative evidence. See also, on this point, *foot-note* to *St. John v. Alderson*, 32 Gratt. 140.

dence, if it appears that the evidence might, with reasonable attention and diligence, have been procured before the first trial; nor when the affidavit states only that a person had told a party what he would say; nor when the evidence does not relate to new facts, but consists merely of cumulative facts or circumstances relative to the same matter controverted at the former trial.

3. **Wager Contracts—Mutuality of Risk.**—That is not a contract of wager, by the terms of which all the profit or loss is to be on one of the parties.

4. **Contract for Sale of Gold—Public Policy.**—Contracts for the sale and purchase of gold are not void as against public policy.

This was an action of assumpsit in the Circuit court of the city of Richmond, brought in December, 1868, by Albert Speyers, a gold broker of New York, against A. Vance Brown, to recover the amount of commissions due to, and losses sustained by, the plaintiff, upon purchases and sales of gold which he alleged he had made for Brown. The declaration contained only the *money counts. The only evidence introduced on the trial was the depositions of the plaintiff and the defendant, and the copies of accounts and letters filed with the depositions; and on the 16th of February, 1869, the jury found a verdict in favor of the plaintiff for \$1,043 08, with legal interest from the 1st of April, 1867, till paid; upon which the court rendered a judgment.

On the 10th of March, during the same term of the court, Brown moved the court for a new trial; but the court overruled the motion, and he excepted. On the 15th of March the exception was presented to the court. It embodied the evidence given on the trial, and also the affidavits of the defendant and of Hamilton G. Fant. The affidavit of the defendant stated that he had discovered new and material evidence, the existence of which was unknown to him before the trial, and which, by no diligence, he could possibly have discovered before said trial; and which evidence would, in his opinion, if it had been introduced on the trial, have produced a different verdict, viz: that the transactions which formed the subjects of said suit were fraudulently conducted by said Speyers, and that the sales and purchases of gold, alleged to have been made by Speyers for the defendant, were not real and bona fide sales and purchases; but, on the contrary, were collusive and fictitious; and that the same identical lots

***Wager Contract—Mutuality of Risk.**—In *Embrey v. Jemison*, 9 Sup. Ct. Rep. 779, the court said: "The plaintiff relies upon *Brown v. Speyers*, 20 Gratt. 296, as expressing a different view of this question. But we do not so understand that case. The supreme court of appeals of Virginia did not there indicate its opinion as to the validity of a contract for the purchase of 'futures,' the settlement in respect to which was to be upon the basis of paying simply the difference, according to the fluctuations in the market, between the contract price and the market price."

See monographic note on "Gaming" appended to *Neal v. Com.*, 22 Gratt. 917.

of gold, alleged to have been sold by him, were, in point of fact, sold on account of various persons at the same time; and that the same identical lots of gold were in like manner purchased on account of various persons at the same time other than the defendant; so that the defendant was charged with commissions and losses on transactions which were not really and bona fide made on account of the defendant, or for his benefit; and that the knowledge of these facts only became known to the defendant

on Wednesday, the 17th instant, two
298 *days after said trial was had; and

that the names and residences of the witnesses by whom these facts can be proved were not ascertained by him before the said trial, and could not have been ascertained by him before, in consequence of the fact that the said transactions were had in a distant city, viz: New York, where also the said witnesses reside; and that the knowledge of said facts and the names of said witnesses were learned by him by means of an interview with one of the said persons, which was brought about by an accidental circumstance that occurred after the trial; that the circumstances under which he became apprised of the above-mentioned facts were wholly accidental; and that no amount of effort or diligence, or the use of any ordinary means of enquiry within his power, would have enabled him to have ascertained the existence of the same at any time prior to the trial of the cause.

Fant, in his affidavit, says: I have read the above affidavit of A. Vance Brown, and I have reason to believe that if a new trial is granted to Mr. Brown he will be able to establish the facts mentioned by him as to the purchases and sales of gold referred to by him in said affidavit.

The defendant, in his deposition, which was read on the trial and made a part of the bill of exceptions, after stating that a letter written by him and made a part of the deposition of the plaintiff, was written from Chicago before he had received an account from the plaintiff, says that on his way back to Richmond he telegraphed twice to the plaintiff, to know why he had exceeded his instructions, and instructed him at the same time to sell what he had bought; to which telegrams he received evasive replies from the plaintiff. That soon after his return to Richmond he compared the above-mentioned telegrams with similar telegrams that had been received by another party, Mr. H. G. Fant, for whom the

plaintiff was at the same time acting
299 as broker, *and that the comparison

of the two at once impressed the defendant with the idea that a fraud had been practiced by the plaintiff, in this, that the sales and purchases reported in the said account current were not real and bona fide transactions; and that the plaintiff, who was an operator in gold on his own account, had made the transactions for himself, and had charged the losses to the defendant, and had also charged commissions for said

transactions to defendant, as if said sales and purchases had been really and in good faith made by the plaintiff as broker for the defendant.

The court, in overruling the motion for a new trial, gave, as the grounds of his judgment, that the only witnesses introduced on the trial were the plaintiff and defendant, and their testimony was in direct conflict; and the court could not, therefore, certify the facts; and because the newly-discovered evidence is cumulative, and of the same character with that offered by the defendant himself. And the court certifies that, as to the affidavit of H. G. Fant, it appeared on the trial that he has given to the defendant information in relation to the matters testified to by the defendant on the trial. And the court certified, in relation to the sales of gold in the gold room in New York; that the party offering the gold never had the gold which he professed to sell in his possession, but at the time of delivery is expected to account for its then value.

Upon the application of Brown a writ of supersedeas was awarded to the judgment.

E. Y. Cannon, for the appellant.

The first point relied upon by the appellant is, that the evidence certified upon the motion for a new trial shows that the implied contract upon which the suit was brought in the court below was grounded

on no actual consideration, but was a
300 mere wager, and, as *such, void under the provisions of law on that subject. See Code of 1860, chap. 142, sec. 2.

The second point relied upon by the appellant is, that it appears by the said evidence, as certified upon the said motion for a new trial, and in the certificate of the judge of the Circuit court, that at the time when the alleged sales and purchases of gold took place, which formed the pretended consideration of said contract, in point of fact no such sales or purchases were made, and the subject matter of said alleged sales and purchases had at that time no existence, actual or potential, and, therefore, according to a well-established principle of the law of sales, the alleged contract in relation thereto was in law void. And on this point I refer to the cases of Bryan v. Lewis, Ryan & Moody, R. 386, 21 Eng. C. L. 467; Robinson v. Macdonnell, 5 Maule & Sel. R. 228; Lunn v. Thornton, 1 Common Bench R. 379, 50 Eng. C. L.; Wood & Foster's Case, 1 Leonard R. 42.

The third point on which the appellant relies is, that the motion for a new trial, on the ground of after-discovered evidence, was improperly denied; and on this point I refer to the following cases: Simmons v. Fay, 1 New York, E. D. Smith R. 107; White v. State, 17 Ark. R. 404; Bronson v. Hickman, 10 Indi. R. 3; Nuckols' Adm'r v. Jones, 8 Gratt. 267; Hansburger v. Kinney, 13 Gratt. 511.

In reply to the brief of argument upon the part of the appellee, I submit:

First. That the point made by him, that the bill of exceptions in this case states the

evidence of the witnesses, instead of the facts proved, in support of which proposition he cites the case of *Bennett v. Hardaway*, 6 Munf. 125, and other cases of the like character, has no application whatever to the present case. The motion for a new trial in this case was not based upon the ground that the verdict was contrary to the evidence, *but upon the ground of after-discovered evidence, and upon the ground, further, that the verdict was contrary to law; and, for the purposes of this motion, it was not only competent, but proper, that all the evidence should be stated in the bill of exceptions, in order that the appellate court may determine the relevancy of the affidavits offered in support of the motion, and, also, whether upon the whole case made by the evidence, the verdict was contrary to law or not. And the case of *Nuckols' Adm'r v. Jones*, 8 Gratt. 267, which is cited by the counsel for the appellee in support of his position, I rely upon, also, to show that the frame of the bill of exceptions in this case is right, and that an omission to state the whole evidence would have been error. And it will be seen that the judge who signed the certificate in this case expressly declined to certify the facts proved, because of the conflict in the testimony.

In regard to the second point made by the counsel for the appellee, that the newly-discovered testimony was cumulative, and that the affidavits offered in support of the motion were insufficient in not coming from the newly-discovered witnesses themselves, in support of which propositions the counsel cites 2nd *Tucker's Com.* pages 306, '7 and '8, the case of *Callaghan v. Kippers*, 7 Leigh 608, and various other cases, I have to say that not one of said cases or authorities referred to, supports the propositions contended for by the counsel for the appellee.

In the first place, the testimony was not cumulative in any sense, as is shown by the certificate of the judge himself who presided at the trial. The certificate shows that the only witnesses examined on the trial were the plaintiff and defendant, and that their testimony was in conflict. The newly-discovered testimony, as shown by the affidavits, went to fortify and confirm the evidence given by the defendant; and where the scales of evidence are equally

302 balanced by the opposing *oaths of the parties to the cause, new testimony of disinterested persons, confirmatory of the statements made by either of said parties, is not cumulative, and it would be absurd to call it so.

The case of *Nuckols' Adm'r v. Jones* goes further to support the propositions of the appellee on this point, than any other he has cited; but by reference to that case it will be seen that the affidavit upon which the motion for a new trial was grounded, merely stated that the party moving for the new trial had been informed that certain witnesses would give important testimony, without stating the nature of the testimony,

so as to enable the court to see whether such new testimony would have the probable effect of producing an opposite verdict upon the new trial. And further, it appears that in that case the motion was rejected because the case had been depending for a length of time, and the newly-discovered witnesses lived in the county, and within a few miles of the party making the application for the new trial; whereas in the case at bar the cause was tried at the first term after it had matured, and the newly-discovered witnesses resided several hundred miles from the place of trial. In regard to the third point made by the counsel for the appellee, that a constructive delivery of chattels is sufficient to pass the right of property, and that an actual delivery in fact is not necessary, and the cases of *Pleasants v. Pendleton*, 6 Rand. 473; *Chapman v. Campbell*, 13 Gratt. 105; and *Brockenbrough's Ex'ors v. Spindle's Adm'rs*, 17 Gratt. 21, cited in support of said proposition, I submit that the principle laid down in said cases has nothing to do with the case at bar. As I have already argued, there was no delivery in this case, either actual or constructive. The pretended subject matter of the sale had no existence, either actual or potential. The transaction in question was a mere gambling transaction; a mere wager that gold would

303 be worth a given sum on *the market, on a given day in the future. The party offering to sell said gold did not have it in his possession, nor ever expected to have it in his possession. He neither delivered it nor expected to deliver it, nor was capable of delivering it; and when the counsel for the appellee says, in his brief, that these statements are "unsupported in evidence and without foundation in fact," he must have overlooked the certificate made by the judge who tried this cause; in the bill of exceptions the court certifies that, "in relation to the sales of gold in the gold room in New York, the party offering to sell gold never had the gold which he professed to sell in his possession, but at the time of delivery is expected to account for its then value."

Rose, for the appellee.

1. The bill of exceptions in this case states the evidence of the witnesses instead of the facts proved. The Appellate court, therefore, according to its well-settled practice, cannot revise the judgment of the court below, unless, by rejecting all the evidence of the exceptor and giving to that of the adverse party full force and credit, the decision still appears to be wrong. The application of such a test here must put an end to the case, and, in the language of Judge Roane in *Bennett v. Hardaway*, "repel it from the consideration of the court." *Bennett v. Hardaway*, 6 Munf. 125; *Carrington v. Bennett*, 1 Leigh 374; *Ewing v. Ewing*, 2 Leigh 337; *Callaghan v. Kippers*, 7 Leigh 608; *Pasley v. English & als.*, 5 Gratt. 141; *Nuckols' adm'r v. Jones*, 8 Gratt. 267; *Farish & Co. v. Reigle*,

11 Gratt. 667; Carrington v. Goddin, 13 Gratt. 587; Bull's Case, 14 Gratt. 613.

2. The newly-discovered testimony was cumulative, or of the same character as that before offered by the defendant himself on the trial, and did not relate to any new fact, and was therefore inadmissible. The

affidavits also were insufficient in not coming from *the newly-discovered witnesses themselves. 2 Tuck. Comm. 306-7-8; Callaghan v. Kippers, 7 Leigh 608; Nuckols' adm'r v. Jones, 8 Gratt. 267; Hansbarger's adm'r v. Kinney, 13 Gratt. 511; 1 Gr. & Wat. on New Trials 462 to 472, and 486 to 492; 3 ib. 1057 to 1063, 1065 to 1072, and cases cited.

3. An established usage constitutes the common understanding of parties, and ought to be resorted to as the interpreter of the contract.

In contracts for the sale of chattels, a constructive delivery is sufficient to pass the right of property; an actual delivery in fact or law is not necessary. The contract of sale being complete, the purchaser is bound though there was not and could not be a delivery, and though the vendor may not have the chattel, but may have to go into the market and buy the same. Pleasants v. Pendleton, 6 Rand. 473; Chapman v. Campbell, 13 Gratt. 105; Brockenbrough's ex'ors v. Spindle's adm'rs, 17 Gratt. 21; 1 Par. on Con. (5th edi.) 513, note m. and cit.; Hibblewhite v. McMorine, 5 Mees. & Welsb. R. 462.

4. The statements of the appellant in his brief, that "the implied contract upon which the suit was brought in the court below was grounded on no actual consideration, but was a mere wager," and that no sales or purchases of gold were, in point of fact, made, and "the subject matter of said alleged sales and purchases had no existence, actual or potential," are statements unsupported by evidence, and without foundation in fact.

STAPLES, J., delivered the opinion of the court.

The defendant in error, a gold broker in the city of New York, was employed, in the year 1867, by plaintiff in error, residing in the city of Richmond, to buy and sell gold on commission. The speculation proved unfortunate, resulting in a loss to the latter of about *four thousand dollars. At the close of the transactions between the parties, the defendant in error claimed a considerable balance to be due him, for the recovery of which a suit was instituted in the Circuit court of the city of Richmond, and at the February term, 1869, a verdict and judgment were rendered in his favor.

The plaintiff in error then moved the court to set aside the verdict and grant him a new trial, upon the ground of after-discovered evidence; and he offered his own affidavit and that of Hamilton G. Fant, in support of this motion. The facts set forth in defendant's affidavit were, substantially, that the purchases and sales of gold with

which plaintiff in error was charged, were fictitious and fraudulent; that the identical lots of gold alleged to have been bought and sold for plaintiff in error, were purchased and sold on account of various other persons, at the very same time; so that plaintiff in error was charged with commissions and losses on transactions which were not really for his benefit; and the knowledge of these facts only became known to him two days after the trial; that the names and residences of the witnesses by whom the facts could be proved, could not be ascertained by him before the trial, because the transactions took place in a distant city, where the witnesses resided, and that the knowledge of these facts, and the names of the witnesses, were learned by him by means of an accidental interview with one of said persons after said trial.

The witnesses alluded to in this statement were not produced, nor were their affidavits read, nor even their names given. It is stated, however, that the names of the witnesses and the facts relied on, were learned in an interview between plaintiff in error and one of said persons. Who that person is and why his affidavit was not taken and filed, we are not informed. The affidavit of Hamilton G. Fant is in the record; and he states *that he had read the affidavit of plaintiff in error, and that he had reason to believe that if a new trial was granted plaintiff in error, he would be able to establish the facts relied upon in regard to the purchases and sales of gold. What these reasons are does not appear. Whether founded on a knowledge of the facts or a mere inference from facts, we are left to conjecture. If this affiant had conversed with the witnesses in New York, it is a little remarkable he was not requested so to state. If he was one of the persons who had personal knowledge of the fraudulent conduct of the defendant in error, it is still more remarkable he did not state the facts. The cautious language employed by him would indicate that he was stating opinions rather than facts. Whatever he may have intended, no value or importance can be attached to an affidavit couched in such language.

On the trial of the cause, the plaintiff in error was himself examined as a witness. It appears from his testimony that as early as March, 1867, his suspicions of the defendant in error were awakened by certain evasive telegrams received from the latter; that these suspicions were strengthened by comparing these telegrams with others received from the same source by the witness Fant, from which it appeared that defendant in error was then professing to buy and sell at the very same time, the identical amounts of gold for said Fant, he was pretending to buy and sell for plaintiff in error. It is evident, from this statement, and from the affidavit of plaintiff in error, as also the certificate of the judge who presided at the trial, that the said Fant was one of the persons by whom plaintiff expected to establish the facts contained in his affidavit,

and urged as a ground for new trial. It appears that the trial did not take place until February, 1869; two years after the interview with Fant and the comparison between the telegrams; and yet Fant was not
 307 *examined as a witness, nor is any reason given for the failure to do so; and the plaintiff in error gravely asks for a new trial to afford him an opportunity of examining a witness whose testimony was known to him two years before the former trial.

During all this time it does not appear that the plaintiff in error exercised the slightest diligence, or made any preparation for his defence, or effort to find or procure the attendance of witnesses, notwithstanding his attention had been directed to the very facts now made the basis of an application for a new trial. But his negligence, after the trial, was equally glaring and palpable; and subjects him to the suspicion of attempting to obtain a new trial upon improper grounds.

The verdict was rendered on the 16th February, 1869. The affidavits of plaintiff in error and H. G. Fant were made two days thereafter. The motion for a new trial was, however, not submitted until the 10th of March; nor was the bill of exceptions signed until the 15th of the month. During this period the plaintiff had ample opportunity to go to New York and take the affidavits of the witnesses whose names and residences he had ascertained on the 18th February; and thus shew to the court that he had discovered new and important evidence unknown before, which, upon a new trial, would establish, beyond controversy, the fraudulent conduct of his agent. Instead of pursuing this plain and obvious course, he appears to have been content to trust his case to the court upon the unsatisfactory affidavits previously taken; or perhaps he was conscious of his inability to establish the facts upon which he founded his claim to the interposition of the court in his behalf.

To grant a new trial, under the circumstances here disclosed, is to violate well-settled principles of law; to offer premiums to negligent or fraudulent suitors to omit the exercise of proper diligence in
 308 preparing *for the trial of cases. It is an established rule of the courts to grant new trials very rarely upon the ground of after-discovered evidence, and never but under very special circumstances. The party must show he was ignorant of the existence of the evidence, and it must be such as reasonable diligence on his part could not have secured at the former trial; that the new evidence is not of like import with any part of that offered on the former trial. He must produce the affidavits of the witnesses, stating the facts they will testify, or, if that be impracticable, the affidavits of persons who have conversed with them, showing the facts they will state. On the other hand, a new trial will never be granted if it appear that the evidence might, with reasonable attention and dili-

gence, have been procured before the first trial: nor where the affidavit states only that a person had told the party what he would say: nor where the evidence does not relate to new facts, but consists merely of cumulative facts or circumstances relative to the same matter controverted at the former trial. *Smith v. Brush*, 8 Johns. R. 84; *Shumway v. Fowler*, 4 Johns. R. 425; *Nuckols v. Jones' adm'or*, 8 Gratt. 278; *Callaghan v. Kippers*, 7 Leigh 608; 13 Gratt. 511.

It is objected, however, that the contract, which is the foundation of this action, is a mere wager, and void, as such, under the provisions of the Virginia statutes. I cannot perceive the force of this objection. By the very terms of the arrangement, the defendant in error, in buying and selling the gold, could sustain no loss, nor realize any profit from the transaction beyond his commissions, to which he was entitled in any event. Whatever might happen, no damage or benefit could accrue to him from the adventure. If any profit resulted from the speculation, it belonged to the plaintiff in error. If any loss accrued, he was to bear it. And I have yet
 309 to see a case in which it has been held that *a contract is a wager, by the terms of which the loss and profit were all on one side.

Another point relied upon in the argument is, that no sales and purchases of gold were in fact made; and the subject matter of such pretended purchases and sales had, at the time, no existence, actual or potential; and therefore, according to a well established principle of the law of sales, the contract in relation thereto was void in law. In support of this position several cases were cited, in which it has been held, that if goods are sold, to be delivered at a future day, and the vendor neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and buy the goods he has contracted to deliver, he cannot maintain an action on such contract. Whether this principle be sound or not, it is unnecessary now to decide. It certainly has been repudiated by great judges, and is not regarded as law, according to the current of modern authorities. See 2 *Parsons on Contracts*, 543; *Hibblewhite v. McMorine*, 5 Exch. R. 462. This principle, however, can only apply to actions by the vendor against the vendee to recover damages for non-performance of the contract. It can have no application to a case in which an agency is established, and the agent is authorized to go into the market, purchase the goods, and sell them for the benefit of his principal. In such case, if the agent conforms to his instructions, and a loss is sustained from the transaction, it would seem to be too clear for argument, that the principal is bound to indemnify the agent for any loss he may sustain. As the agent is not permitted to reap any of the profits of his agency, he is entitled to be compen-

sated for all expenditures and damages arising in the course of his employment.

In regard to the assertion, that no such purchases and *sales of gold were in fact made, the defendant in error states that all the transactions mentioned in his account of gold bought and sold for the defendant were actual, bona fide transactions, with other parties; and there is no evidence in the record contradicting this statement.

The last and only remaining point to be noticed, made by the counsel for the plaintiff in error, is that contracts for the sale of gold are illegal, because they are supposed to contravene considerations of public policy.

The Congress of the United States has exclusive control of all questions appertaining to the currency. It has not deemed it advisable to adopt any legislation prohibiting the purchase and sale of gold. On the contrary, the act of June, 1864, as amended by that of 1865, imposes a tax upon any sales or contracts for the sale of gold and other bullion and coin; and the act of March, 1863, provides that all contracts for the purchase or sale of gold or silver coin or bullion, if to be performed after a period exceeding three days, shall be in writing or printed, and signed by the parties or their agents. It would be a singular exercise of judicial power for the court to declare illegal, sales from which the government not only derives a revenue, but has actually defined the terms upon which those sales shall be made under certain circumstances.

Independent of such considerations, the courts are very averse to holding contracts illegal upon grounds of public policy, unless the question is free from all doubt. In *Hilton v. Eckersly*, 6 Ellis. & Black. R. 47, the judges differed in opinion as to what public policy really was in the case then before them. Lord Campbell said he entered upon such considerations with much reluctance and great apprehension.

Bert, Ch. J., said he was not much disposed to yield to arguments of public policy: that the judges had *gone much further than they were warranted in going, on such questions: that they had taken on themselves, sometimes, to decide doubtful questions of policy; and they were always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which enter into the judgment of those who decide on questions of public policy. Judge Story has said that the courts have never really defined it. That it varies with the habits and fashions of the day, with the growth of commerce and the usages of trade. In the *License Tax Cases*, 5 Wall. U. S. R. 462, Chief Justice Chase said: "This court can know nothing of public policy, except from the constitution and laws, and the course of administration and decision."

Whether purchases and sales of gold un-

duly affect the currency, and, if so, to what extent; whether the tendency of such transactions is to depress or stimulate values, are questions of political economy that address themselves chiefly to the legislative department. Their solution depends upon the laws and usages of trade and commerce, the course of legislation, the confidence of the people in the circulating medium, and the good faith and stability of the government, the state and condition of the country. There is nothing in this record, this court has no data, no facts before it, which enable it to declare that the business of buying and selling gold injuriously affects the currency, the trade or the morals of the country. We may indulge in speculative opinions upon the subject; but it would be going very far to pronounce such transactions illegal, upon some vague and undefined notion that their tendency is to violate public policy. The cases cited, and others that might be referred to, justify no such conclusion.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

312

*Home Ins. Co. v. Cohen.

January Term, 1871, Richmond.

Absent JOYNS, J., sick, and STAPLES, J.

1. **Insurance Policy—Conditions—Reasonable Compliance Sufficient.***—In an action on a policy of insurance against fire, all that can be required of the plaintiff is a reasonable and substantial compliance with the conditions of the policy.

2. **Same—Same.**—One of the conditions of the policy is, among other things, that the insured shall forthwith give notice of his loss, and as soon as possible deliver in a particular account of such loss, signed with his own hand, and verified by his oath or affirmation; and also, if required, shall produce their books of accounts, &c., and exhibit the same for examination by any person named by the company; and until such proofs are furnished the loss shall not be deemed payable. The account having been furnished, first under the oath of an agent, and when so objected to, under the oath of the principal, and the company having been called upon to state what other proofs they required, and not stating what, **HELD:**

1. **Same—Same—Waiver.**†—The company will be held to have waived any demand for further preliminary proof.

2. **Same—Same—Same.**—The books and papers being to be produced if required, and the company not having named a person to examine them, it must be considered as a waiver of any demand for them.

***Insurance—Conditions—Reasonable Compliance Sufficient.**—The proposition laid down in the first head-note, that a reasonable and substantial compliance with the terms of the insurance company is all that can be required, has been expressly sustained in *Georgia Home Insurance Company v. Goode*, 96 Va. 755, 30 S. E. Rep. 366, and *Bryan v. Peabody Insurance Company*, 8 W. Va. 610.

†**Same—Same—Waiver.**—In *Geo., etc., Co. v. Kinnier*,

In October, 1867, M. Cohen instituted an action of assumpsit in the Circuit court of the city of Richmond, against the Home Insurance Company, of New Haven, Connecticut, to recover the value of certain goods which had been insured by the Company, and had been destroyed by fire. The action was founded upon a policy of insurance issued through their agents in Richmond, by which the Home Insurance Company insured Cohen against loss by fire to the amount of three thousand dollars,

on his stock of dry goods, &c., contained *in the wooden building No. 1715, occupied by him on Main street, in the city of Richmond. The policy seems to be in the usual form issued by the Company. The only provision of the policy which it seems necessary to state, is the following: "And all persons insured by this Company and sustaining loss or damage by fire, are forthwith to give notice thereof to the Company; and as soon after as possible, to deliver in a particular account of such loss or damage, signed with their own hands and verified by their oath or affirmation; they shall also declare on oath whether any and what other insurance has been made on the same property; what was the whole value of the subject insured;" "when and how the fire originated, so far as they know or believe; and also, if required, shall produce their books of account and other proper vouchers, and shall also produce certified copies of all bills and invoices, the originals of which have been lost, and exhibit the same for examination by any person named by the Company, and be examined under oath touching all questions relating to the claim; and until such proofs are furnished and loss shall not be deemed payable."

Upon the trial of the cause, after all the evidence had been introduced, the defendant moved the court to give two instructions to the jury; to which the plaintiff objected, and asked the court to give four instructions; to which the defendant objected. But the court gave both sets of instructions; and to this opinion of the court the plaintiff excepted, so far as it gave the instructions asked for by the defendant, and the defendant excepted as to the instructions asked by the plaintiff. The bill of exceptions sets out all the evidence; and the instructions, and the material part of the evidence, are given in the opinion of the court, delivered by Judge Christian.

There was a verdict and judgment in favor of the plaintiff for twenty-five hundred dollars, with interest *thereon from the 17th day of August, 1867,

28 Gratt. 112, the principal case is cited and approved in regard to the doctrine of waiver in insurance cases. See also, the principal case cited in *Rockingham, etc., Co. v. Sheets*, 26 Gratt. 866.

See *foot-note* to *Geo., etc., Co. v. Kinnler*, 28 Gratt. 88, for a collection of cases on this subject.

See, generally, monographic *note* on "Fire and Marine Insurance" appended to *Mut., etc., Soc. v. Holt*, 20 Gratt. 612.

till paid; and thereupon the Home Insurance Company applied to this court for a supersedeas to the judgment, which was awarded.

Crump, for the appellant, insisted,

1st. That the plaintiff having averred, in his declaration, that he had performed the conditions required of him by the policy, which were conditions precedent to his right of recovery, he could not maintain his action by proof of the defendant's waiver of these conditions. And to maintain this proposition he referred to 2 Wend. R. 64, 403; 7 Barb. R. 171; 8 John. R. 392; 9 Id. 115; 15 Id. 204; 4 Cow. R. 566; 8 Mass. R. 388; 3 T. R. 90; *Oakley v. Morton*, 1 Kern. R. 25; 5 Rob. Prac. 252. And if it was impossible to perform the condition that is no excuse. 2 Pars. Cont. 528. And he insisted that if the plaintiff relied on a waiver of performance of the conditions by the defendant, he should have so alleged it in his declaration, and should have set out the facts which constituted the waiver. 1 Chitty's Pl. 354-358; 20 Eng. L. & E. R. 541.

2d. That the evidence did not authorize the giving the second instruction asked for by the plaintiff.

3d. That the second instruction was further erroneous, because it presented only a partial view of the evidence, and left to the jury an enquiry only as to certain facts picked here and there from the proofs, upon which, as a conclusion of law, the supposed waiver was based. And he insisted that the question of waiver was a question of fact, and the jury should not have been instructed that certain facts, if found, constituted a waiver.

4th. That the instructions given for the defendant and plaintiff were contradictory, and calculated to mislead the jury, and therefore erroneous. *Ragland v. Butler*, 18 Gratt. 323; *Rosenbaum v. Weeden & al.*, Id. *785; *Ward v. Churn*, Id. 801; *Peshine v. Shepperson*, 17 Id. 472; *McDowell's ex'or v. Crawford*, 11 Id. 377; *Balt. & Ohio R. R. Co. v. Polly, Woods & Co.*, 14 Id. 447.

Lyons, for the appellee, insisted that the Circuit court did not decide that the plaintiff was released by a waiver from all preliminary proof; but simply that when proof of substantial performance had been given, and no demand had been made for further preliminary proof by the defendant, or any objection had been made to the sufficiency of the proof offered, then they must be regarded as having waived their right, if they had it, to demand a more particular specification of loss. And he referred to the language of the condition, which says, "if required," the insured shall produce their books, &c., and exhibit the same for examination by any person named by the company. Thus shewing that this was only to be done if required, and for a particular purpose. And he insisted, 1st, when what are called preliminary proofs are offered by the insured, and are not objected to by the underwriter, all objections are waived,

and cannot be relied upon at the trial. And for this he referred to *Turley v. North Amer. Fire Ins. Co.*, 25 Wend. R. 374; *O'Neil v. Buffalo Fire Ins. Co.*, 3 Comst. R. 122; *McMasters & als. v. Westchester County Ins. Co.*, 25 Wend. R. 379; *Bodle v. Chenango County Mutual Ins. Co.*, 2 Comst. R. 53; *Westlake v. St. Lawrence County Mutual Ins. Co.*, 14 Barb. R. 206; *Bumstead v. Dividend Mutual Ins. Co.*, 2 Kern. R. 81; *Fireman's Ins. Co. v. Crandall*, 33 Alab. R. 9; *Francis v. Somerville Mutual Ins. Co.*, 1 Dutcher's R. 78; *Underhill v. Agawam Mutual Fire Ins. Co.*, 6 Cush. R. 440; *Peoria Marine & Fire Ins. Co. v. Lewis*, 18 Illin. R. 553; *Baltimore Fire Ins. Co. v. Loney & al.*, 20 Mary. R. 20; *Franklin Fire Ins. Co. v. Updegraff*, 43 Penn. R. 350; *Bersche v. Globe Mutual Ins. Co.*, 31 Missouri R. 546; *Rathbone v. City Fire Ins. Co.*, 31 Conn. R. 194; *Peacock v. New York Life Ins. Co.*, 1 Bosw. N. Y. 338; 316 **Ayres v. Hartford Fire Ins. Co.*, 17 Iowa R. 176; *Brown v. King's County Fire Ins. Co.*, 31 How. Prac. R. N. Y. 508.

2d. That a substantial compliance with the policy by the assured was sufficient. *Sexton v. Montgomery Co.*, 9 Barb. R. 191.

3d. That when the books and accounts of the insured are lost, the general statement of the loss is sufficient. *Mechanics' Fire Ins. Co. v. Nichols & al.*, 1 Harrison's N. J. R. 410; *Wightman v. Western Marine & Fire Ins. Co.*, 8 Rob. La. R. 442; *Franklin Ins. Co. v. Culver*, 6 Ind. R. 137.

CHRISTIAN, J., delivered the opinion of the court.

This case is before us upon a writ of error to a judgment of the Circuit court of the city of Richmond. The suit was instituted on a policy of insurance issued by the appellants on the 16th November, 1866, by which the appellees were insured to the amount of \$3,000 against loss by fire. The building containing the goods insured was destroyed by accidental fire on the 31st March, 1867, which totally consumed a large portion of the goods, together with all the books and papers of the insured.

The only question we are called upon to determine, is whether it was error in the court below to give to the jury the instructions moved by the plaintiff's counsel.

It seems that both the plaintiff and defendant moved the court for instructions; and both sets of instructions were given in the form in which they were respectively presented. The court first gave the following instructions, which were moved by the defendant's counsel:

1st. That it was the duty of the plaintiff, within a reasonable time, to give to the defendant notice of his loss and damage; and as soon thereafter as possible to 317 *deliver to the defendant a particular account of such loss or damage, signed with his own hand, and verified by his oath or affirmation; and also to declare on oath whether any and what other insurance had been made on the same property, what was the whole value of the subject insured, what

was his interest therein, in what general manner (as to trade, manufactory, merchandise or otherwise) the building containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of said building, and when and how the fire originated, as far as the plaintiff knew or believed; and unless the jury is satisfied from the evidence that the plaintiff has complied substantially with these requirements of the policy, they must find for the defendant.

2d. That it was the duty of the plaintiff, when required by the defendants, to produce to the defendants certified copies of all bills and invoices, the originals of which have been lost, and exhibit the same for examination; and unless the jury shall be satisfied from the evidence that the plaintiff has complied, as fully as it was in his power to do, with the provision of the policy, he is not entitled to recover in this action."

To these instructions the plaintiff objected; but they were given by the court; and then the plaintiff moved the court to give the following:

1st. "If, from the evidence, the jury shall believe that the plaintiff has fairly and reasonably complied with the terms of the policy of insurance, he is entitled to recover of the defendants a sum sufficient to cover the loss which he actually sustained by the fire; provided it does not exceed the sum of \$3,000, the amount expressed in the policy of insurance."

"2. If the jury shall believe that the plaintiff was insured in the company of the defendants by policy No. 136 (see policy copied on pages 21 to 29, inclusive, of the record), and that afterwards, on the 318 night of *the 31st March, 1867, the stock of the plaintiff was destroyed by accidental fire, and without any evil practice or fraud on the part of the plaintiff; and that on the day of April, 1867, the plaintiff furnished a statement of his loss, verified by the oath of his agent P. M. Colinsky; and that the defendants refused to receive the same, upon the ground that the policy required the statement of loss to be signed by the hand of the plaintiff, and verified by his affidavit, and so informed the plaintiff, his agent or attorney at law; and that afterwards the plaintiff, by his attorney at law, required the said company to point out what proof they required of the plaintiff, and to specify any defect in the proof of loss furnished, and that thereupon the defendants required the affidavit of loss to be made by the plaintiff himself; and the plaintiff afterwards, in a reasonable time, furnished the proof of loss contained in paper marked (A) (entered on page 40-41 of the record), and the defendants received the same without objecting thereto, or specifying any objection; and that said defendants at that time, and after such proof of loss was given, did not require a more particular specification of the loss; then their right under their policy if any, to demand a more particular specification of

the loss was waived by their neglecting to demand it."

"3. The court instructs the jury that it is the duty of the defendants to prove evil practice or fraud on the part of the plaintiff, if they rely upon the same as a defence.

"4. If the jury shall believe, from the evidence, that in making his claim against the defendant, the plaintiff committed, wilfully, any fraud or false swearing, for the purpose of enabling him to recover of the defendant more than he was justly entitled to under his policy, upon the facts as they really occurred, then he is not entitled to recover."

319 *As to the first instruction asked for by the plaintiff, we are of opinion that there is no error. It was substantially the same which had already been given to the jury in the first instruction propounded by the defendant's counsel; the only difference being that the latter sets out specifically the several conditions of the policy, and then says that "unless the jury shall believe, from the evidence, that the plaintiff has substantially complied with these requirements of the policy, they must find for the defendants;" while the former, without setting out the terms of the policy, declares that the jury must be satisfied that the plaintiff has fairly and reasonably complied with the terms of the policy.

These two instructions, so far from being inconsistent, are substantially and in effect the same, and intend to assert, and do in effect assert, this proposition of law: That compliance with the requirements of the policy (which is the contract of the parties) is necessary; but that a literal compliance is not necessary, where a substantial compliance has been shown. This proposition is not contested by the defendant, but is affirmed by them in the first instruction given by the court at their instance. It is certainly true, that all that can be required in such a case is (as in any other contract) a reasonable and substantial compliance with the conditions of the policy. *Angel on Insurance*, § 229; *Turley v. North Amer. Fire Ins. Co.*, 25 Wend. R. 374; 2 Philips on Ins. § 1865; 2d Kern. R. 81.

As to the second instruction asked for by the plaintiff, it is earnestly insisted by the learned counsel for the defendant, that the court below was in error: 1st, because the facts upon which it was hypothecated were not proved, but assumed by the court; and, 2d, because the court undertook to decide a question of fact, while it referred a question of law to the jury.

It is evident that this construction points to that portion of the evidence which
320 is set forth in the record, *in the shape of a correspondence between the attorney for the plaintiff and the agent of the defendant.

The fire occurred on the 31st March, 1867. On the 9th day of April, 1867, preliminary proofs, as they are called, were furnished to the defendant, in the shape of a notice signed by P. M. Colinsky, agent and attorney in fact of Meyer Cohen, and verified

by him, together with a certificate of a justice of the peace of the city of Richmond.

The notice and certificate are as follows:

"To the Home Insurance Co., New Haven, Conn.:

"I hereby give you notice, as heretofore your agent has been notified, that on the night of the 31st March last, between the hours of two and three o'clock, my store, in the wooden building No. 1715, on the south side of Main street, between 17th and 18th streets, in the city of Richmond, was fired accidentally or otherwise, by means wholly unknown to me, and in which I had no manner of participation, directly or indirectly, and my stock of dry goods, insured by you to the amount of \$3,000, by policy No. 136, and by the Washington Fire Insurance Co., of Baltimore, to the amount of \$2,000, was entirely consumed in part, and in part so much burnt as to be of no value whatever. The stock was composed of a general variety of dry goods suitable for this market, and was worth, at the time of the fire, in cash value, at least seven thousand five hundred dollars. A more minute description or account I cannot give, because my books and papers were consumed by the fire. And I demand of you three thousand dollars, the amount insured by you.

"Signed Meyer Cohen, by P. M. Colinsky, agent and attorney in fact."

The certificate of the justice, sent with the above notice, was in these words:

321 *"I, Augustus Bodeker, a justice of the peace for the city of Richmond, do hereby certify, that I am well acquainted with the character and standing of M. Cohen and P. M. Colinsky, his agent and attorney in fact, in this community, and reside not far from the store lately occupied by him on Main street; that I have enquired into the circumstances attending the late fire in his store, and believe that he has by misfortune, and without fraud or evil practice on his part, sustained loss to the amount claimed by him.

Given under my hand this 9th day of April, 1867.

Signed,

A. Bodeker, J. P."

These preliminary proofs were submitted to the agents of the Home Insurance Co. by the counsel for Cohen, accompanied by a letter, explaining that Cohen was, at the time of the fire, and still was, detained in New York by illness; and that, therefore, his application was of necessity verified by his agent and attorney in fact, Mr. Colinsky. To this letter the agents of the Home Insurance Company reply, that they are instructed to refuse to receive any papers furnished by the reputed agent of Cohen, or to acknowledge any liability under the same; and that the company demand proofs in due form, with copies of bills of goods purchased or other authentic evidence of the amount of goods on hand.

A long correspondence follows, in which the attorney of Cohen insists that he has furnished all the preliminary proofs required

by the policy, and that it is impossible to furnish copies of bills of goods purchased, or any more minute specification, because of the fact that all the books and papers of Cohen had been destroyed by the same fire which consumed his goods. On the other hand, the agents of the defendants, in their letter, insist that the proofs must be furnished by Cohen himself.

322 *After many letters had passed between the agents of the company and the attorney for Cohen, there was furnished to the agent a notice, verbatim et liberatim, as the former notice, signed and verified by Cohen instead of Colinsky as agent and attorney in fact. It cannot fail to be remembered, that after the first letter from the agents, demanding copies of bills of goods purchased, and the reply of Cohen's attorney that this was impossible from the fact that all his books and papers had been destroyed, the agents of the company, though pressed to point out (in the absence of the books and papers) what additional proof was required, failed to indicate the character of the evidence they required, but simply insisted that the proofs must be submitted by Cohen himself.

There is a letter in the record which was given in evidence to the jury, but not alluded to by the counsel in the argument, which furnishes a key to this correspondence, otherwise vague and indefinite. It is a letter written by Cohen to the agents of the Home Insurance Company in Richmond, he then being in New York, dated April 3rd, 1867, in which he informs the agents at Richmond that he had revoked the power of attorney he had given Colinsky, as his agent, to manage his business at Richmond. This letter was, no doubt, received by Alfried & Son, the agents of the Home Insurance Company, before the application was received from Colinsky, the agent of Cohen, which bears date April 7th, 1867. This accounts for the agents of the Home Insurance Company protesting, from the beginning of the correspondence with the attorney of Cohen, that he would not receive the papers furnished by the reputed agent of Cohen; and insisting to the end, that he must have the preliminary proof, furnished by Cohen himself. The prominent idea in the mind of the agents who conducted this correspondence, as shown by the letter referred to, was, that

323 inasmuch* as Cohen had revoked the agency of Colinsky, and had informed them of this revocation, they were not at liberty to receive the preliminary proof from an agent whose powers had already been revoked, but must require them from the principal. It is true, in their first letter to the attorney for Cohen, they not only say that they will not receive the papers furnished by the reputed agent, but demand "proofs in due form, with copies of bills of goods purchased, or other authentic evidence of the amount of goods on hand." But, as before remarked, it is a pregnant fact which cannot escape observation, that after the attorney for Cohen, in the correspondence referred to, had explained that

it was impossible to furnish these copies, because all the books and papers of Cohen had been consumed by the same fire which destroyed the goods insured, the agents never pointed out (though pressed to do so) any additional proof, which would be satisfactory; but afterwards simply insisted that the proofs must be furnished by Cohen, and not by Colinsky, the agent. It was to this state of facts, disclosed by this correspondence, that the 2d instruction asked by the plaintiff, pointed. The whole correspondence was before the jury as evidence. It was for them to consider and weigh it, along with the other facts of the case.

We think the plain meaning and scope of the 2nd instruction was simply this: That after having furnished the preliminary proofs in the shape of the specification of loss verified by the oath of the plaintiff and the certificate of the justice, if, when called upon by the plaintiff to state whether any farther proof was required, the defendants failed to make any requirement for farther proof, or to make any objection to the sufficiency of the proof, then they must be regarded as having waived their right to demand a more particular specification of their loss.

We think when this instruction is 324 taken in connection *with those which preceded it, it contains no error. Its correctness will be more clearly vindicated when we consider the terms and conditions of the policy upon which this action is founded. We find this provision pointing out what is to be done by the insured before the policy "shall be deemed payable;" and this refers to what is known, in the language of insurance policies, as "preliminary proofs." "All persons insured by this Company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the Company, and as soon after as possible, to deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation; they shall also declare on oath whether any and what other insurance has been made on the same property; what was the whole value of the subject insured, &c., &c. * * And also, if required, shall produce their books of account and other proper vouchers, and shall also produce certified copies of all bills and invoices, the originals of which have been lost, and exhibit the same for examination by any person named by the Company; and be examined on oath touching all questions relating to the claim; and until such proofs are furnished the loss shall not be deemed payable." Now, the evidence, upon which the instructions were based, clearly shows that, after the first letter rejecting the papers furnished by the reputed agent, as he is designated, and demanding "proofs in due form, with copies of bills of goods purchased," &c., they not only fail to indicate what additional proofs are required, but they never, as it was their duty to do by the express terms of their policy, indicate any person by whom the examination of such proofs was to be made. It was not sufficient that they should require

of the assured, copies of invoices, bills, &c., but they were bound to indicate some person before whom they should be exhibited.

Having failed to do that, and having
325 simply insisted *that the proofs should be furnished by Cohen himself, and Cohen having furnished the account and verification of the loss, in accordance with the terms of the policy, the defendants must be held to have "waived their right to demand a more particular specification of the loss." And there was no error in the court so instructing the jury, if they believed the supposed state of facts.

Good faith and fair dealing is of the very essence of the contract of insurance; and where the company puts its refusal to pay upon the ground of a defect in the preliminary proofs, they ought to point out what the defect is—what is necessary to be supplied so as to give the insured the opportunity to supply what is required. Failure to do this, or their silence when called upon, will be held to be a waiver of such defect in the preliminary proofs. *Angel on Insurance*, § 245; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. R. 385; *Burnstead v. The Dividend Mutual Ins. Co.*, 2 Kern. R. 81; *Turley v. North Amer. Fire Ins. Co.*, 25 Wend. R. 374; *Id.* 379. And so as in the case before us, where the Company has the right, by the express terms of the policy, to call for the production of copies of bills, invoices, &c., where the originals have been lost, before a person to be named by them, and they fail to name such person, the Company will be held to have waived their right to require their production as a part of their preliminary proof.

We are therefore of opinion that there was no error in the court saying that a given state of facts, set forth in the instructions, if found by the jury to be true, constituted a waiver. It is for the jury to find the facts, but what state of facts constitutes a waiver is a question of law for the court.

Another objection to the second instruction given at the instance of the plaintiff, urged by the counsel for the appellant, is,

that it submits to the jury a question
326 *of law. The language of the instruction being "then their right, under their policy, if any, to demand," &c., it is insisted that the court left it to the jury to determine the question whether they had any right, under their policy, to demand a more particular specification of loss. We do not think this language is obnoxious to the criticism of the learned counsel. Fairly interpreted, it means the same thing as if the court had said: "then the right, under their policy, admitting they had such right, to demand," &c. This, we think, is its plain meaning, and that the jury must have so understood it.

As to the third and fourth instructions, we think they are substantially correct, and we are of opinion, upon the whole case, that the judgment of the Circuit court of the city of Richmond should be affirmed.

Judgment affirmed.

327 *Saunders, &c., v. White & als.

January Term, 1871, Richmond.

JOYNS, J., absent, sick.

Liquidation of Banks—Statute.*—The principles decided in the cases of *Exchange Bank of Virginia for Camp, trustee, &c. v. Knox, &c.*, and *Farmers' Bank of Virginia for Goddin, &c. v. Anderson & Co.*, 19 Gratt. 789, re-affirmed.

In May, 1867, David J. Saunders and Samuel C. Tardy, trustees of the Bank of Virginia, instituted an action of debt, in the court of Hustings of the city of Portsmouth, against Wm. White as maker, and John R. White and Arthur Emerson as endorsers, of a negotiable note, dated the 5th of February, 1862, and payable eighty-eight days after date, for thirteen hundred and fifty dollars, and \$2 65, charges of protest, which was discounted by the Bank of Virginia at Portsmouth. The plaintiffs claimed, as trustees of the Bank in a deed made the 8th day of February, 1867, in pursuance of the act of the 12th of February, 1866, requiring the banks to go into liquidation.

The defendants pleaded "nil debet," and also a plea of set off; in which they say that, as to \$1,633 of the debt in the declaration mentioned, the plaintiffs, as trustees under the deed of the bank, are indebted to them in the sum of \$1,633, upon certain bank notes issued by the said bank, and payable to bearer, and acquired by the defendants since the said deed of assignment was executed, and since notice thereof to the defendants, and now held by them, &c. The plaintiffs objected to the filing of this plea; but the court overruled the objection; and they excepted.

328 *Upon the trial, after the evidence had been introduced, and it was admitted that the note sued on was delivered to the plaintiffs after the deed of the bank was executed, that the Bank of Virginia was insolvent, and that its notes, offered as set off, were at the time of the trial at a current value of thirty-five cents in the dollar, and were acquired by the defendants since the institution of this suit, the plaintiffs moved the court to instruct the jury—to disallow the said offset on the aforesaid notes of the bank. But the court refused to give the instruction: and the plaintiffs excepted.

The jury found a verdict, in which they allowed the plaintiffs the amount of their debt, principal and interest, \$1,859 05, and allowed the defendants the amount of the notes of the bank—\$1,633—as a set off, and ascertained the balance due to the plaintiffs to be \$226 05. And for this sum the court rendered a judgment for the plaintiffs, with interest from the time of trial. From this judgment Saunders and Tardy obtained a supersedeas.

Tazewell Taylor, for the appellants, sub-

*See *Bank of Va. v. Knox*, 19 Gratt. 789; monographic note on "Banks & Banking" appended to *Bank v. Marshall*, 25 Gratt. 378.

mitted the case. There was no counsel for the appellees.

CHRISTIAN, J., read the judgment of the court.

This day came the plaintiffs by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion that the questions involved in this case, having been definitely settled by this court, in its decision rendered at the last term, in the cases of "Exchange Bank of Virginia v. Knox, &c.," and "Farmers' Bank of Virginia v. Anderson, &c.," and reported in 19 Gratt. 739; and the court, referring to its opinion in said causes, for the reasons for its action in this case, doth adjudge and order, that the judgment of the said Hustings court for 329 the city of Portsmouth *be reversed and annulled, and that the plaintiffs in error recover against the defendants in error their costs in said Hustings court. And this court, proceeding to enter such judgment as the said Hustings court ought to have rendered, doth adjudge and order, that the plaintiffs in error recover, against the defendants in error, the sum of one thousand three hundred and fifty dollars, together with two dollars and sixty-five cents, charges of protest, and interest from the 7th day of May, 1862, and their costs expended in the prosecution of their writ of supersedeas here.

Which is ordered to be forthwith certified to the said Hustings court of the city of Portsmouth.

Judgment reversed.

330 *Miller & Franklin v. The City of Lynchburg.

March Term, 1871, Richmond.

JOYNES, J., Absent.*

1. **Statute—Temporary.**—The act of March 20, 1862, to provide a currency of notes of less than five dollars, was intended to be temporary in its operation.
2. **Municipal Corporations—Issuance of Notes.**—The city of L. on the 8th of May, 1862, passed an ordinance for the issue of \$120,000 of small notes, and directed its treasurer to exchange them for coin or currency, which should be held or invested for the redemption of the notes. From May 8, to October, \$72,418 was received in currency in exchange for the notes, of which \$68,000 was invested in Confederate bonds, and the balance was held in hand. The notes were directed to express, and did express, on their face—received in payment for city taxes and all other city dues. The city

*He decided the cause in the District court of appeals.

See the principal case cited in Omohundro v. Omohundro, 21 Gratt. 634; Meredith v. Salmon, 21 Gratt. 772; Wrightman v. Bowyer, 24 Gratt. 435; Dinwiddie Co. v. Stuart, 28 Gratt. 551, 579; Richmond v. Crenshaw, 76 Va. 940.

did not levy a tax for the redemption of the note.
HELD:

1. **Same—Same—Confederate Currency.**—The notes were issued and received with reference to Confederate currency as a standard of value.
2. **Same—Same—Limitation of Redemption.**—By the act, the notes were required to be redeemed within the period prescribed by the act.
3. **Same—Same—Same—Statute—Effect.**—The city of L. having provided for the issue of her notes, under the act of March 20, the act of May 15, extending the time of redemption, does not apply to the notes issued by that city.
4. **Same—Same—Redemption—Unnecessary to Levy a Tax.**—The city of L. having provided ample funds for the redemption of her notes, she was not required to levy a tax for their redemption.
5. **Same—Same—Effect of Non-Presentation for Redemption within the Prescribed Period.**—Some of these notes not having been presented for redemption within the time prescribed by the act of March 20, the holders of them are not entitled, after the war, to set them off against taxes due from them to the city; and the fund which *had been provided and held ready for their payment, having perished, without fault of the city, the city of L. is not under any obligation in law or equity, to redeem them.

On the 29th of March, 1862, the General Assembly of Virginia passed an act "To provide a currency of notes of less denomination than five dollars," by which all the cities and towns of the State having a population of over two thousand, were authorized to issue notes as currency, of a less denomination than five dollars, to an amount double the amount of State taxes assessed on property, real and personal, within such city or town, for one year; and the banks were authorized to receive and pay out the same. The fifth section of this act provides that, for redeeming the notes issued by the counties, cities and towns of the Commonwealth, under the provisions of this act, the courts of such counties, cities and towns are required, at their annual levy, to levy, upon the subjects of taxation mentioned in the 5th section of ch. 53 of the Code, an amount sufficient to redeem thirty-three and one-third of the amount of such notes in circulation at the time of such levy in 1862 and 1863; and in 1864 shall levy on the same subjects an amount sufficient to redeem all such notes as may be then in circulation; such redemption to be made in such funds as are receivable in payment of dues to the Commonwealth.

By an act passed on the 15th of May, 1862, this fifth section was amended, by providing that the levy in 1863 should be sufficient to redeem sixteen and two-thirds per cent. of the amount of the notes in circulation at the time; and so of each successive year until the entire amount issued is redeemed; provided that the redemption of the entire issue shall not be postponed for a longer time than six years from the levy courts of 1863. Such redemption to be made in such funds as are receivable in payment of dues to the Commonwealth.

332 *On the 8th of May, 1862, prior to the passage of the last act, the council of the city of Lynchburg passed an ordinance for the issue of notes under the denomination of one dollar, to the amount of \$120,000; and the notes were to be in tenor and effect following:

Received in payment of city taxes, and all other city dues. Issued by authority of an act of the General Assembly of the State of Virginia.

Lynchburg, April 1st, 1862.

The city of Lynchburg will pay the bearer, in current funds, when demanded in sums of one or more dollars

No.

President.

The notes were directed to be delivered, as completed, to the treasurer of the city, who was directed to keep an account of all the notes received, and also all redeemed by him, so as to shew at all times the amount and denomination in circulation. The notes were to be issued by the treasurer, and only by him, in exchange for coin or current bankable funds; and the amount so received was to be entered in his books to the credit of "small note account," as a fund appropriated, and to be so held or invested, and to be held exclusively for the redemption of the notes so issued. And for all notes issued under this ordinance, the faith of the city of Lynchburg was thereby inviolably pledged to redeem, in current bankable funds, when presented in sums of one or more dollars, agreeably to the provisions and requirements of the act of the General Assembly of the State of Virginia, authorizing the issue of small notes passed the 29th of March, 1862.

The ordinance further provided, that any of the notes so redeemed might be re-
333 issued: and further, that *the treasurer should report at their regular meeting in December next, and annually thereafter, the amount of each denomination of notes issued by him, and also the amount redeemed on the 15th of the same month, and the amount of the funds held for the redemption of such notes as may be in circulation on that day.

Between the 6th of May and the 1st of October, 1862, there was delivered to the treasurer, \$72,418 60 of the notes authorized by the aforesaid ordinance; and the whole amount was paid out to everybody who applied for them between these dates; and the currency of that date, which was Confederate currency, was received for the same, and duly deposited in bank to the credit of the "small note account," to the full amount of \$72,418 60. And within the above dates \$67,000 of the amount was invested in Confederate States bonds, for the redemption of the notes so issued; and the balance remained in bank until it was deposited in the Citizens' Savings Bank of Lynchburg in 1864, where it still remains. The \$67,000 invested fund was increased to \$68,100, by changing some of the convertible bonds into others of another class; but that fund in Confederate States bonds is still in the hands of the treasurer, for the

redemption of the small notes. The small notes were delivered to all applicants for the same amount in Confederate notes.

In 1867, Miller & Franklin, brokers in the city of Lynchburg, were assessed upon their business with a city tax of \$1,125; and, when called upon for payment by the collector, they refused to pay the same in the currency of the United States, and tendered to him in payment of and as an offset to said tax, the small notes of the city, issued as aforesaid, to an amount equal to the tax. These the collector refused to receive, and levied upon their office furniture and iron safes. And Miller & Franklin thereupon applied to the judge of the Circuit
334 court of the city of Lynchburg *for an injunction to restrain the officer from selling the property under the levy; which was granted.

The bill sets out the issue of the notes as hereinbefore stated, the tax upon the plaintiffs, and that, at the time the tax was assessed, and when it was levied, they were the bona fide holders, for value, of a large amount of these small notes, which, upon their face, were made receivable for city taxes and all other city dues: That they had offered to pay the tax by these notes, which had been refused; and their property had been levied upon by the collector. The prayer of the bill was for an injunction, and that they may be permitted to pay the tax by these notes.

The city of Lynchburg demurred to the bill, and also answered; and insisted, among other grounds, that the power of taxation, whether State or municipal, was purely legislative, and whilst acting within their constitutional authority, no court could prescribe to the legislative body what they shall or shall not receive in payment of taxes; nor could they be compelled to allow offsets or discounts to their tax bills. It was insisted further that the notes were issued to aid the rebellion, and were therefore forbidden to be paid by the laws of the United States, and the present constitution of Virginia.

On the 1st of July, 1868, the cause came on to be heard, when the court dissolved the injunction, and dismissed the bill. Miller & Franklin, thereupon, applied for and obtained an appeal to the District Court of Appeals at Lynchburg; where the decree of the Circuit court was affirmed. And they then applied for and obtained an appeal to the Supreme Court of Appeals.

The case was argued by Kirkpatrick and Kean, for the appellants, and by Wm. Daniel and H. C. Cabell, for the appellee.

335 *ANDERSON, J. On the 8th of May, 1862, the common council of the city of Lynchburg, by authority of the act of assembly of 29th of March, 1862, passed an ordinance "that notes under the denomination of one dollar, be issued as a currency." They were to be issued only by the treasurer, and were not to exceed \$120,000.

In 1867, the plaintiffs, who were bankers

and brokers in the city of Lynchburg, were in possession of a large amount of these notes, at the time they were assessed with a license tax of \$1,125 by the said city. They offered to pay the tax with these notes at the scaled value of Confederate treasury notes in relation to gold, as of their date, which they allege is \$1,687 50 of the face of the notes. They tendered that amount to the city collector, in payment of their said tax, which he refused to receive. And they being unwilling to pay in United States currency, he levied upon their property, the sale of which was enjoined by the Circuit court, upon the application of the plaintiffs by bill in chancery. The injunction was afterwards dissolved and the bill dismissed by the Circuit court, and an appeal taken by the plaintiffs to the District court, which affirmed the decree of the Circuit court. And from that decree of affirmation, the plaintiffs have appealed to this court.

The case is one of great importance, not so much for the amount involved in this suit, though that is considerable, as for the principle to be decided, in which the cities, and many of the towns, of this Commonwealth, may be very largely interested. It demands, therefore, our most careful consideration.

The plaintiffs contend that they have a right to pay the tax with those notes, by virtue of the act of assembly authorizing the issue; by the ordinance under which they were issued, and by the face of the notes. The act of assembly of 29th March, 1862, authorizing *their issue, expressly provides, "that the notes issued as aforesaid shall be receivable in payment of all dues to the corporation issuing them." And the city ordinance directs, that the notes issued shall be inscribed on their face, "received in payment of city taxes or all other city dues." And it is presumed that all the notes were issued with that inscription on their face.

This language imports an obligation on the part of the city to receive these notes in payment of "city taxes and all other city dues." But it imposes no higher obligation than is imposed by the 5th section of the ordinance, which is in these words: "All notes issued under this ordinance, the faith of the city of Lynchburg is hereby inviolably pledged to redeem, in current bankable funds, when presented in sums of one or more dollars." I think it is clear, if the city was under an obligation to receive those notes in payment of taxes in 1867, when they were presented, it was bound to redeem them in funds which were then current and bankable. The question of obligation, in both cases, depends upon this, whether it was a promise to pay in such funds as were current and bankable at the time the notes were issued, or in such funds as were current and bankable after the war, when demand of payment was made.

The contract must be construed in reference to the provisions of the act of assembly, by authority of which the notes were

issued. It must be presumed that it was the intention of the city, in issuing those notes, to comply with the terms of the law; and of the other parties in receiving them, to have received them with the understanding that they had been issued and would be redeemed in accordance with its manifest intention and object. Accordingly the plaintiffs, in their bill, very properly, do not rest their claim entirely upon the face of the notes and the ordinances of the city council, but also upon the act of assembly, *without the authority of which they could have had no validity.

If then, when the city council ordered those notes to be issued, it was understood that they were to be issued only for a temporary purpose; that they were not to constitute a permanent currency of the country, but were intended merely to supplement the Confederate currency, and were to be redeemed and withdrawn from circulation at an early day; if this was understood to be the policy and purpose of the act of assembly, and that those issues were to constitute a small note currency merely to meet an exigency occasioned by the war, which had withdrawn specie from circulation, until some other remedy could be devised; and that in furtherance of said policy, the Legislature had required that provision should be made annually for the redemption of 33⅓ per cent. of the issue, so that the whole might be redeemed in the course of three years, then the pledge given by the city council must be understood to have been given with a reference to that implied understanding, that the notes were to be presented for payment in accordance with the policy and requirement of the law. Suppose that the act of assembly, having provided that the city should provide for the redemption of those issues in one, two and three years, had expressly required that the holders should present them for redemption in that period (the language, though more explicit, would not more certainly disclose the purpose and policy of the Legislature), would not the pledge to receive them in payment of city taxes, or to redeem them when presented &c., in current bankable funds, be construed to have been given with the understanding that they would be presented within the time limited, and would be redeemed with such funds as were then current and bankable?

But the case is stronger, in view of what was in fact *the action of the city under this act of assembly. The city did not avail itself of all the time allowed by the act for the redemption of those issues. The act does not inhibit the city from making provision for an earlier redemption than the time specified. The intention of the Legislature evidently was, that the issues authorized should be redeemed at an early day, and the utmost time allowed to make provision for their redemption, was the period specified. But the city council, as we think they had a right to do, determined to do more, and made provision

for their redemption *pari passu* with their issue, by requiring that the very funds received for them should be specially set apart, held and invested for their redemption. And this was done in strict conformity to the requirement of the ordinance.

It is true that a subsequent act was passed on the 15th of May, extending the time for the redemption of those notes to four, five and six years. Upon a fair construction, I think that provision is applicable to issues made under the 3d section. But it only extends the privilege of the cities, towns and counties, which they might avail themselves of or not as they chose. The city of Lynchburg did not avail herself of that privilege. She had not, as we have seen, availed herself of the full time allowed by the first act. Her ordinance had been passed and notes issued under it, and direction given for the provision which should be made for their redemption, before the amendatory act was passed. And she made no change in her action thereafter. So that it is manifest the city of Lynchburg did not avail herself of any privilege proffered by the act of assembly of 15th of May. And her ordinance having been passed, and her whole scheme for issuing and redeeming the notes in question having been adopted prior to that act, and not afterwards

339 *changed, cannot be regarded as having been adopted with reference to it, nor can her undertaking be construed by its provisions.

Now, was it the intention of the Legislature, by the act of March 29th, 1862, or indeed by the subsequent acts amendatory thereof, that the issues authorized to be made should be redeemed in funds which were current and bankable at the time of their issue, or in any other than Confederate currency? A provision that they were to be received in payment of city taxes after the war, and redeemable in such currency as was then current and bankable, it is perfectly manifest, would have defeated the very object of the law; which was to provide a currency. With such a provision, they would have been immediately withdrawn from the channels of circulation, and held as an investment, and not circulated as currency.

It was not the design of the Legislature to provide a better currency than the Confederate. It was to supplement it with a fractional currency for the accommodation of the public, as a substitute for Confederate currency, the government of the Confederacy not having authorized the issue of notes under the denomination of one dollar. These notes were undoubtedly expected to be exchanged for Confederate notes of a larger denomination than one dollar; and being no better than Confederate notes, were expected to be redeemed with them—the small notes for the large ones. When exchanged, the note-holder would have the small notes, and the city the large ones. If the Confederacy was overthrown, the large notes would go down with it, and the small notes must incur the same fate. So

that it was not a matter of much importance, whether the small notes were returned to the city, and the large notes to the note-holder, before the fall or not; the consequence to both would be the same. The act

of the Legislature was evidently designed for the accommodation *of the people. If, in carrying it out, the city invested the notes in Confederate bonds, it was because those bonds were readily convertible into Confederate notes; so that she might be ever ready to redeem her notes when presented for payment. And if by such an investment she made a profit, it was perfectly legitimate, and merely incidental, and not at all in conflict with the design and policy of the law to accommodate the public. Upon the whole, therefore, I think it was not contemplated by the Legislature, in the acts authorizing these issues, that they should be redeemed in any other than Confederate currency. Certainly there is nothing in the acts to inhibit the cities from providing that they should be redeemed in such currency.

And the city of Lynchburg virtually did so provide. This is shown by the 4th section of the ordinance; and by the acts of the proper city authority, in its execution. By this section the council provided that the whole fund received in exchange for these notes should be entered on the treasurer's books, to the credit of "small note account," "as a fund appropriated, and to be so held or invested, and held exclusively for the redemption of the notes so issued." The treasurer was authorized to receive, in exchange for them, "bankable funds;" and he tells us that he received entirely Confederate money for them (which was bankable, and the currency of that date), which was daily deposited in bank to the credit of "small note account," to the full amount of \$72,418 60 (the whole amount of issues under the ordinance); that \$67,000 of the amount were invested, between the 6th of May, 1862, and the 8th of October following, in Confederate States bonds, for the redemption of those notes, and the balance remained in bank until it was deposited in the Citizens' Savings Bank of Lynchburg, in 1864, where it still remains. The invested fund was increased to \$68,100, by

changing some of the convertible

341 bonds into others of another *class.

But that fund in Confederate States bonds is now in the hands of the treasurer, for the redemption of the small notes." That these bonds were readily convertible into Confederate treasury notes is a fact of history. From the foregoing, I think the ordinance of the council, and the acts of the city authorities, do most conclusively show that the city did intend, when issuing these notes, that they were to be redeemed in Confederate currency. And this intention not being in conflict, but in accord, with the language and spirit of the act of Assembly under authority of which they were issued, I think it is a fair presumption that they were received by the parties to whom they were issued with the under-

standing that they would be redeemed in that currency; or would be received in payment of city taxes, which were recoverable in the same currency.

Upon the whole, I conclude that, according to the true understanding and agreement of the parties, this contract was to be fulfilled, on the part of the city of Lynchburg, in Confederate States treasury notes, and was made with a reference to such notes as a standard of value.

This was what the city undertook, and the parties to whom the notes were issued must be presumed to have accepted them with that understanding. And we have seen that the city made ample provision to redeem the notes in Confederate currency. It cannot be doubted that if the holders had presented these notes, in accordance with the obvious purpose of the act of Assembly, they would have been promptly redeemed. Before the notes on deposit in bank were exhausted, they could, and doubtless would, have been replenished as fast as they were needed, by converting the bonds, which were readily convertible, into currency. It seems to me that the city, when she had made provision for the redemption of these

342 notes whenever presented, had *complied with the contract on her part. What more could she have done? It was no part of her contract to look up those notes to redeem them. She was only bound to redeem them when presented and demanded. And the holder could not maintain an action on them until demand made and refusal, unless he could show that the city had closed doors and refused to redeem. Her contract being to redeem in Confederate currency when presented and demanded, the holder having failed to demand payment until the currency which the city had provided for their redemption, without fault on her part, had become worthless, cannot now demand payment in United States currency. Nor can he take advantage of his own laches in not demanding payment before Confederate currency became worthless, now to demand what was the value of the notes in that currency, at a time when it had any value.

An attempt was made in argument to liken this case to that of *Boulware v. Newton*, 18 Gratt. 708. I do not perceive the analogy. The peculiar feature of that case is, that the obligee expressly reserved the right to designate the time when payment should be made, and negatived the right of the obligor to pay at any other time; and by the terms of the contract, payment was to be made in such funds as were current at the time of payment. The court held that it was a contract of hazard, and that one of the hazards was the contingency as to the result of the war, whether it would be adverse or favorable. It is difficult to perceive how a contract could be framed which more effectually secured to the obligee the right to postpone payment until after the termination of the war, and then to receive it in such funds as were then current, whether Confederate or United States, according to the result of the war. And it was because

the evidence that such was the intention of the parties to the contract, was so clear and conclusive that the court felt impelled, 343 in that case, *to a conclusion which bore so heavily and harshly upon the obligor. I should be indisposed to extend the principle of *Boulware v. Newton* in its application to other cases, and would not apply it unless required so to do by clear and conclusive evidence, in order to give effect to the intention of the contracting parties. In this case there is no such evidence of intention, but much to show the contrary.

Upon the whole, I am of opinion that the decree of the District court should be affirmed.

The other judges concurred in the opinion of Anderson, J.

Decree affirmed.

344 *Southside R. R. Co. v. Daniel.

March Term, 1871, Richmond.

JOYNES, J., absent.*

1. *Special Replication—Want of Rejoinder—Objection in the Appellate Court.*†—In an action on the case for damages to plaintiff's land, there is the plea

*He had been counsel in the cause.

†*Special Replication—Want of Rejoinder.*—The principal case is cited by many subsequent ones as authority for the proposition that, though no rejoinder (or further pleading) is filed when the replication (or other pleading) alleges new matter, yet, if the record states that the jury was sworn to try, or rendered a verdict on, the issue joined, and the cause is tried on its merits, such a technical irregularity will be treated as a misjoinder of issue and will be cured by the statute of Jeofails; and will not be looked on as a nonjoinder which the statute does not cure. See *Dickinson v. Dickinson*, 25 Gratt. 325; *Bartley v. McKinney*, 28 Gratt. 757; *Simmons v. Trumbo*, 9 W. Va. 363; *Huffman v. Alderson*, 9 W. Va. 634; *B. & O. R. R. Co. v. Bitner*, 15 W. Va. 460; *Henry v. Ohio R. R. Co.*, 40 W. Va. 239, 21 S. E. Rep. 865; *Curry v. Mannington*, 23 W. Va. 19; *Chancey v. Smith*, 25 W. Va. 408. See also, *Bart. L. Pr.* (2d Ed.) 474, 479, 481, 482, 750, 1352; 4 *Min. Inst.* (3d Ed.) 722, 743, 942, 1074.

In *Dickinson v. Dickinson*, 25 Gratt. 325, the court said: "Another objection made by the plaintiff is to the failure of the defendants to put in a rejoinder to plaintiff's replications to pleas Nos. 2 and 3 respectively. The record states that the plaintiff replied specially to pleas Nos. 2 and 3, and generally to plea No. 1 and 'issue was joined thereon.' Upon the authority of *Southside R. R. Co. v. Daniel*, 20 Gratt. 344, and cases there cited, this is sufficient to show that the issue was in fact joined and duly tried by a jury."

In *Simmons v. Trumbo*, 9 W. Va. 363, the court said: "The defendant's assignment of error, that there was no replication to the plea of the statute of limitations, nor any issue upon this plea, are not well taken as grounds for reversing the judgment. The entry on the record, quoted above, shows that, by this entry, the plea of payment, and of the statute of limitations, are treated as together constituting

of not guilty, on which issue is joined, and there is a special plea, to which there is a special replication concluding to the country. To this there is no rejoinder, and the record does not say that issue was joined upon it; but the parties go to trial, and the subjects of the special plea and replication are contested before the jury, which renders a verdict for the plaintiff. No objection having been taken to the want of joinder of issue in the court below, it seems that the objection cannot be taken in the Appellate court.

2. Same—Same—When Cured by Statute of Jeofails.†
—In such a case if the subject of the replication is such that the defendant cannot rejoin special

one plea, on which the record says issue was joined. If these pleas had properly, each of them, concluded to the country, this entry would be held as equivalent to an issue on each of the pleas. *Gallego v. Moore*, 4 Munf. 60. But the plea of the statute of limitations, and payment, should have concluded with a verification, and issue could not have been joined upon them by adding a similiter, but only after a replication; and this joinder of issue was, therefore, improper. But we think it must be regarded as a misjoinder of issue, which, after verdict, is covered by the statute of jeofails.

"It is true that, at one time, it was held, in Virginia, that such an error was not cured by the statute of jeofails (see *Stevens v. Thornton's Adm'r*, 1 Wash. [155] 194, and *Wilkinson's Adm'r v. Bennett*, 3 Munf. 314); but the contrary was subsequently held in *Moore v. Mauro*, 4 Rand. 488; and this decision apparently met the approbation of the court in the case of *Southside Railroad Co. v. Daniel*, 20 Gratt. 300. I think, therefore, this was a misjoinder of issue, cured by Code of Va. Ch. 181, Sec. —; Code of W. Va. 1868, Ch. 134, Sec. 8."

And in *Huffman v. Alderson*, 9 W. Va. 634, the court said: "The Virginia cases formerly held, that when there was a special replication containing new matter, there can be no issue thereon without a rejoinder, and that this objection is not obviated by the statement in the record, that the jury were sworn to try the issue, or rendered a verdict on the issues joined; but it was held otherwise in a more recent case of *Moore v. Mauro*, 4 Rand. 488, and this decision was approved in *Southside Railroad Co. v. Daniel*, 20 Gratt. 300. In that case, as in this, the record shows no issue made upon the special plea; one had been made upon the general issue, and the jury was sworn to try the issue, but, in their verdict, they state that they find for the plaintiffs on the issues joined. The court held that this was a misjoining of issues, cured by the statute of jeofails. Our case resembles this in most respects. * * * In the case now before us, this failure to make up the issues has not even been assigned as an error in this court, nor has any allusion to it been made by counsel in their argument. It would seem to have entirely escaped attention that issues had not been properly made up. To reverse the case now for such an error, would be to sacrifice justice to a mere technicality, in no way affecting the merits. Basing our action on the two Virginia cases referred to, I think we should regard this as a misjoinder of issue, cured, after verdict, by the statute of jeofails."

See the principal case distinguished in *Griffe v. McCoy*, 8 W. Va. 208.

†Same—Same—When Cured by the Statute of Jeofails.—See principal case approved in *Douglass v. Central Land Co.*, 12 W. Va. 512.

matter without a departure from the defence set up in his plea, but must take issue upon the replication, the nonjoinder of issue will be cured by the statute.

3. Estoppel by Record—Judgment.§—Two actions on the case are brought in the same court at the same time, by the same plaintiff against the same defendant. The same act of defendant is charged as the cause of the damage in each case; but the damage in one case is charged to be to the plaintiff's land, and in the other to the crops grown and growing upon it. The case as to the crops is the first tried, and the evidence is as to the crops, and there is a verdict and judgment for the defendant. This verdict and judgment cannot be set up as an estoppel to the plaintiffs in the other action for damages to the land.

4. Condemnation Proceedings—Assessment of Damages—Subsequent Injury.—A railroad company has the land of R. condemned for its road, and the commissioners assess the damages, and their report is confirmed, and the company pay the amount of the damages assessed to R. R. sells the land to D. D. may maintain an action against the company for injury to his land done since the purchase, which could not be foreseen and estimated for by the commissioners.

5. Same—Same—Same.||—In such cases the assessment of damages is only a bar to an action for such injuries as could properly have been included in such assessment. *The commissioners are bound to presume the company will construct its works in a proper manner, and they have no right to award damages upon the supposition that the company will negligently and improperly perform its work. A failure to do so by the company will, therefore, impose a liability to any one who may sustain any loss or injury by reason of such negligence.

In February, 1857, George W. Daniel instituted an action on the case in the Circuit court of Prince Edward county, against the Southside Railroad Co., for damages done to the plaintiff's land. In his declaration, he charged, that he was the owner of a tract of land of eight hundred and fifteen acres, bordering upon the Appomattox river; through a portion of which land two water courses flow, known as Big and Little Buffalo, and uniting in the plaintiff's flat lands; and Big Buffalo, known as Buffalo river after the junction of the two streams, falls into the Appomattox river, on the lands of the plaintiff; about five hundred acres of which lands are Appomattox and Buffalo low lands. Buffalo river, after it receives Little Buffalo, flows through a narrow pass or flat, about two hundred feet in width, formed by a rock or bluff on

§Estoppel by Record—Judgment.—See principal case cited in *Allebaugh v. Coakley*, 75 Va. 637. See also, monographic note on "Estoppel" appended to *Bower v. McCormick*, 23 Gratt. 310.

||Condemnation Proceedings—Assessment of Damages—Subsequent Injury.—See the proposition laid down in the fifth head-note approved in *A. & D. R. R. Co. v. Peake*, 87 Va. 136, 12 S. E. Rep. 348; *Norfolk, etc., R. Co. v. Carter*, 91 Va. 504, 22 S. E. Rep. 517; *Watts v. Norfolk, etc., R. R. Co.*, 39 W. Va. 201, 19 S. E. Rep. 523.

the west bank of Buffalo river and the hill lands on the east, leaving, naturally, that space for the escape of the flood waters of Buffalo river; and, in addition to which space, there was a sink or low place in the midst of the plaintiff's low lands west of Buffalo river, over which pass of about two hundred feet at Buffalo river, and the sink or low place the flood waters of Buffalo were accustomed to flow and escape without obstruction. And he charges that the defendant made an embankment and other structures running on, to and across the Buffalo river, at the said pass of about two hundred feet, without leaving sufficient arches or water ways to allow the waters of the Buffalo river to escape over the said pass and the sink in the midst of the plaintiff's low lands, as they had been
 346 . accustomed, *whereby the said sink or low place on the plaintiff's lands was wholly obstructed, and whereby, in the month of August, in the year 1856, the flood water was accumulated and penned back upon the low lands of the plaintiff, above and south of the said embankments and other structures, until they broke and washed down a portion of said embankment at Buffalo river at the said pass, permanently obstructing the said pass, to the sobbing and rendering permanently unfit for cultivation, a large portion of the plaintiff's low lands south of said embankment and other structures, of great value, viz: to the value of \$9,500, and whereby the lands north of and below said embankments were greatly washed, abraded and injured; to the damage of the plaintiff \$10,000.

At the March term of the court for 1858, the defendant appeared and pleaded "not guilty;" on which issue was joined. The defendant also pleaded specially—That the defendant was a company incorporated by the General Assembly of Virginia, for a work of internal improvement: that before the embankment and other structures mentioned in the declaration were constructed, commissioners, appointed by the County court of Prince Edward, ascertained and reported to the County court, that \$1,362 was a just compensation to the tenant of the freehold of the lands in the declaration mentioned, for the portion of the lands proposed to be taken by the defendant for its purposes, and for the damage to the residue of the said lands beyond the peculiar benefits to be derived in respect of such residue, for works to be constructed by the defendant. That the defendant paid the amount of \$1,362 to the tenant of the freehold; and that the County court of Prince Edward confirmed the report and ordered it to be recorded; and that afterwards the defendant constructed the said embankment and
 347 other structures in *the declaration mentioned; and this the defendant is ready to verify.

To this second plea the plaintiff replied, that the embankment and other structures were so improperly and negligently constructed by the defendant, that by reason thereof the lands of the plaintiff had been

greatly damaged; and that the said damages were not estimated or ascertained by the commissioners in their assessment and report in the plea mentioned, and this he prays may be enquired of by the country.

There was no issue made up upon the special plea; the entry on the order book, after stating the issue on the plea of not guilty, is: and the defendants filed their special plea in writing, to which the plaintiff filed his replication in writing; and it is ordered that this suit be continued until the next term.

The cause came on to be tried at the August term, 1859, of the court, when the jury found a verdict for the plaintiff, and assessed his damages at one thousand dollars.

The record says the jury were sworn to try the issue joined; and the verdict is upon the issues. The defendant thereupon moved the court for a new trial; but the court overruled the motion, and rendered a judgment upon the verdict; and the defendant excepted.

The judge certifies a great many facts; but upon other important points he certifies that the evidence was so conflicting that he could not certify the fact in relation to them. It appears that at the time damages were assessed by the commissioners, the land was in the possession of the executor of Judith Randolph, and it was shortly afterwards sold to the plaintiff. In the conclusion of the bill of exceptions, he says: "On many points arising during the protracted trial of this case, a number of witnesses were examined, whose testimony was so conflicting that it is with great difficulty that the court can certify any
 348 facts as distinctly *and clearly proved, except such as were contained in papers exhibited." And "that the jury were sent to view the lands of the plaintiff, and the works of the defendant thereon, and the court cannot tell what effect such view had upon their minds, except so far as the result of said view may appear in the verdict rendered by them."

Among the papers introduced in evidence by the defendant, and set out in the bill of exception, is the copy of the record of another suit brought by the same plaintiff against the same defendant. This was an action on the case, brought at the same time in the same court, for injury to the plaintiff's crops. The declaration sets out the description of the plaintiff's land, and the obstructions of the defendant, and also the causes of the damage sustained, in the same terms as are employed to set them out in the principal case; and refers to the same flood of August, 1856, as the cause of the damage complained of; but charges that the flood waters became accumulated and penned back upon the lands of the plaintiff above and south of said embankment and other structures, to the utter destruction and loss of the crops of the plaintiff then and there grown and growing upon that part of the plaintiff's low lands, and on the low lands north of said embankment and

other structures, of great value, viz: and then sets out the different kinds of crops, with their value, to the damage of the plaintiff of ten thousand dollars.

The special pleas and the replication are the same in both cases; and there is no issue on the replication; but the entry on the order books is the same.

In August, 1858, the cause was tried, when the jury found that the defendants are not guilty in the manner and form as the plaintiff against the said company hath complained. And thereupon the plaintiff moved the court for a new trial; which motion was overruled; and a judgment rendered for the defendant: And the

349 *plaintiff excepted. The facts certified in the bill of exception, show that the enquiry in this cause was as to the injury to the crops growing on the land, whilst in the principal case they indicate that the enquiry was as to the injury to the land.

Upon the application of the Southside Railroad Co., a supersedeas to the judgment was awarded.

J. Alfred Jones, for the appellant.

The first point made in the petition is sound, viz: that the verdict and judgment in the former action were a bar to the recovery in the present action. Although there was, on some points, conflict of evidence, and the facts in respect thereto are not certified, there was none on the point that the land referred to, and the works complained of, are the same in each action. This is not disputed.

The issue was the same in each action, and the verdict and judgment in the former, which were for the defendant, were conclusive in the latter.

The answer made to this, in the argument of the appellee, that the jury might have found the appellee was not damaged by the appellant's works, because there was evidence tending to show that the freshet, which was so extraordinary, would have destroyed the crops, even had those works not been erected, is not sufficient.

It proceeds upon a misconception of the finding of the jury. That finding is not that there were no damages to the crops from those works. The finding is, that "the defendants are not guilty, in manner and form, as the plaintiff against said company hath complained."

This verdict settled not merely the question of damages. It went deeper: It settled the question of wrongful act. It was a response to the plea of not guilty, which "operates as a denial of the breach of duty,

or wrongful act, alleged to have been committed by the defendant." *Stephens on Pleading, marg. 160, top 158,

350 edi. 1837. If the act done had been wrongful, the verdict must have been guilty. And its being "not guilty" is decisive and conclusive upon the question that there was no wrongful act. And, indeed, if there was a wrongful act, there must have been some damages found.

"Some damages are always recoverable for violation of a right, although the action be in tort." 3 Rob. Prac., new edi. 618-621. It was long ago held, that "every injury imports damage in the nature of it," by Lord Holt, in *Ashby v. White*, quoted by Robinson, ubi supra. And though, says that author, "there may have been a want of consistency in the language of the judges" (page 619), "now the doctrine is established in the United States and in England, that actual perceptible damage is not indispensable as the foundation of an action. If there has been the violation of a right, and no other damage is established, the party injured is entitled to a verdict for nominal damages." Page 620. "The general principle," said Coleridge, J., "applies, that although no appreciable damage may be sustained in the particular instance by the wrongful act, yet, as the repetition of such an act might be made the foundation of claiming a right to do the act hereafter, a damage in law has been already sustained, in respect of which an action is maintainable." Page 621. And in Pennsylvania it was held (in 1828) that the law implies damage from flooding the ground of another, though it be in the least possible degree, and without actual prejudice; and in such case the plaintiff recovers nominal damages, although special damage was alleged and not proved." Page 620.

If, then, the jury were not satisfied that the special damage (to the crops) alleged was caused by the appellant's works; if they were not satisfied there was any "actual prejudice" therefrom, yet, if the evidence 351 *showed that the appellee's ground was flooded in the least possible degree by the wrongful act of the appellants, they were bound to find a verdict of guilty, instead of not guilty, and to give some damages. Nevertheless, the jury found the defendants not guilty. Their verdict, then, in that case, is an explicit and unequivocal finding that it was not a wrongful act in the appellants to erect and continue the works complained of in this action, and (there having been judgment on it) is conclusive in the present case. *Preston v. Harvey*, 2 Hen. & Mun. 55; 1 Greenl. Evi. S. 531.

The declaration, in the former case, not only alleged special damage, but also general damages. Robinson (see 3d vol. Prac., new edi., page 624) says, that after stating the cause of action, "the declaration usually alleges the matter therein set forth to be to the damage of the plaintiff some specified sum. Under this common allegation there may be shown what are termed general damages; that is, damages which necessarily result from the act complained of, for," &c.

Such was the form of the declaration in the first case. It stated, as cause of action, that the defendants made an embankment and other structures across Buffalo river, without leaving sufficient waterway to allow the flood waters to flow, as they had been accustomed, and then alleged damage there-

from. And there was in it not only an allegation of special damage to the crops, but general damage was alleged, to wit: to the specified sum of \$10,000.

Under this, as we have just seen, there might have been shown "what are termed general damages; that is, damages which necessarily result from the act complained of;" and as damages necessarily result from unlawfully flooding another's ground (for "the law implies damage from flooding the ground of another, though it be in the least possible degree, and without actual prejudice"), they would have been shown

352 if it *had been shown that the flooding was unlawful; and, in such case, the plaintiff would have recovered nominal damages, although special damages was alleged and not proved." 3 Rob. p. 620. Chitty utters the same voice (1 Plead. 440 m.), that "damages are general or special. General damages are such as the law implies, or presumes to have accrued, from the wrong complained of. Special damages are such as really took place, and are not implied by law, and are either superadded to general damages, arising from an act injurious in itself, or," &c.

Speaking of this principle, Sedgwick, on the measure of damages, says "in the common case of trespass to lands, the main object usually being to determine the right, this principle becomes very important." In many of these cases, it might seem, at first sight, that the maxim *injuria sine damno* applied, and that the law would refuse redress. But, as has been clearly said by the supreme court of Connecticut, in an action for flooding lands, "an act which occasions no other damage than putting at hazard those rights, which, if the act was acquiesced in, would be lost by lapse of time, is a sufficient ground of action," Pages 47-48, and notes.

It is submitted, the court should have instructed the jury that the verdict and judgment in the former case were conclusive that, in erecting and continuing the works complained of by the appellees, the appellants did no wrong to them (*Preston v. Harvey*, 2 Hen. & Mun. 55); for "a judgment of a proper court being the sentence or conclusion of the law, upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the courts and juries ever afterwards, so long as it shall remain in force and unreversed." 353 **Marsh v. Pier*, 4 Rawle R. 273, 288-9; and see 1 Greenl. Ev., § 531, and notes.

Whether pleaded or given in evidence, the verdict and judgment were conclusive. It is so in most of the States. 2 Smith's Lead. Cases 820, top, Libr. edi. 683 m. And notwithstanding the obiter dictum in *Cleaton v. Chambliss*, 6 Rand. 86, of one of the judges, that is the rule in Virginia. See *Shelton v. Barbour*, 2 Wash. 64, and opinions of Tucker,

Judge, and Roane, Judge, in *Preston v. Harvey*, 2 Hen. & Mun. 63-4, 67-8.

Not only are the verdict and judgment in the former case an absolute bar to the suit in this case, but the facts show there is no ground of action. And if substantial grounds were wanting to set aside this verdict, there is a fatal defect in this; that there was no issue made upon the second plea.

The replication to it set up new affirmative matter, to wit, that the works were negligently constructed, and the damages not estimated with reference to such negligent construction. But while averring new matter, it concluded to the country. This was error. See 5 Rob. Prac., new edi., 174-5, and cases cited.

The clerk did not enter the similiter—that clerk (now an octogenarian, the last survivor of the old school of Virginia clerks), understood his business. He had no right to cut off the defendant from pleading, because the plaintiff concluded his replication erroneously, and he knew it. If the replication had concluded with a verification, as it should have done, there could have been no joinder of issue without a rejoinder; 1 Rob. Old Prac. 218; and the improper conclusion does not result in an issue, when a proper conclusion would not. Issue, therefore, was not joined on this replication. And this error is not cured by the provision of the Code, ch. 181, § 3. That applies only where the similiter is proper to be entered; where it is matter of form.

It has not the effect to dispense with 354 pleadings necessary *to an issue. It cures misjoining of issue, but does not dispense with an issue.

The objection, "is not to the informality of the replication in concluding to the country while it affirmed new matter."

It is not an objection to the replication at all. Nor is it an objection that the similiter was not added; it goes beyond.

It is that the replication, notwithstanding its conclusion to the country, was nevertheless a replication, on which the clerk could not enter the similiter. For it did not end the pleading; did not bring the parties to issue. It remained for the defendant to rejoin to the new matter averred in the replication, which the clerk could not shut him out from doing, because of the erroneous conclusion thereof; that it is to the substance of the plea, and not its conclusion the clerk must look in deciding whether or not to add the similiter, and when he decided here not to enter the similiter he decided not against his "obvious duty," but plainly right. It is only when the plaintiff takes issue on the defendant's pleading, or traverses the same, that the plaintiff may proceed as if there were a similiter. § 27, ch. 171, Code 1860, page 712.

Here the plaintiff did not take issue, traverse or demur, and could not therefore proceed as if there were a similiter.

In this state of the pleadings, how can it be said "the case was regularly tried on its merits by a jury." Juries are sworn to try

issues, and on this important plea, going to the very foundation of the action, there was no issue made up.

And, in fact, the jury were not sworn to try any supposed issue springing out of this plea. They were sworn to try "the issue joined," not the issues—but the one, the only issue, to wit, the general issue joined on the plea of not guilty. And
355 it is submitted, it is no answer that "the omission was overlooked or disregarded, or immaterial."

There is a mode of making up issues on pleas received in court. See it in 1 Rob. Old Prac. 222. Parties are not allowed to disregard it. They must come to issue before they go to trial. They cannot waive this cardinal rule of Virginia jurisprudence. And if the court which tried the case fails, for whatever reason, to see that it is done, it will be fatal in the Court of appeals. The cases are numerous to that effect; cases in which the exception was taken, as it is objected is done here for the first time, in the Court of Appeals; for, if the defect has been noticed in the lower court, it would have been corrected.

Verdict does not cure the error. See the cases collected by Mr. Robinson, in the Old Practice, page 220-1. See what he extracts from the case of Totty's ex'or v. Donald & Co., 4 Munf. 430, in which nonassumpsit and a special plea were pleaded. "Upon the first plea issue was joined, and to the second the plaintiffs filed a special replication, to which there was neither demurrer nor rejoinder. The record stated that the jury were sworn to try the issues joined (not, as in this case, the issue). Upon both pleas there was a verdict for the plaintiffs, and judgment rendered accordingly. The Court of Appeals was of opinion that "there being no rejoinder, the special replication to the second plea was no issue on that plea;" and for this cause reversed the judgment, set aside the verdict, and remanded the cause for further proceedings." 1 Rob. Prac. 221.

Bouldin, Marshall & Bouldin, for the appellee.

1. The technical exception to the state of the pleadings, taken in this court for the first time by the learned counsel for the appellee, involving, as it does, matter of form merely, does not appeal very
356 forcibly *to the favorable consideration of the court, and is untenable.

However irregular and informal it may be to conclude a plea to the country, when it should properly conclude with a verification, such irregularity is now regarded as a matter of form only, and is no longer, as formerly, the subject of a general demurrer. 5 Rob. Prac. p. 182, § 8, and cases there cited. Not being the subject of general demurrer, and special demurrers being abolished, and no objection having been taken in the court below to the form of the pleading, nor any motion made to correct its conclusion, all objection on that score must be considered as waived; and it was the

obvious duty of the clerk, under the Virginia statute, to add the similiter. Had that been done, it will not be pretended at this day, that the judgment would be reversed after verdict on account of the informal conclusion of the plea. But it was not done; yet the omission was overlooked, or disregarded as immaterial, and the case was regularly tried on its merits by a jury, who rendered a verdict, which was approved by the court.

After verdict and judgment thus rendered, no exception will be allowed for want of the similiter. Code 1860, ch. 181, § 3, p. 742-3.

2. The record adduced in evidence could not be relied on as an estoppel, either in pleading, or as evidence. In Apsden & others v. Nixon & others, 4 How. U. S. R. 467, the Supreme court, following the well known rule adopted in the Dutchess of Kingston's Case, held, that "a judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, to be conclusive, must have made—

"1. By a court of competent jurisdiction upon the same subject matter.

"2. Between the same parties.

"3. For the same purpose."

357 *The rule thus laid down was reaffirmed by the same court in the case in 24 How. U. S. R. 333, Washington, Alexandria & Georgetown Steam Packet Co. v. Sickles, &c.; and in United States v. Lane, 8 Wall. U. S. R. 185, it was held that "a record of a judgment on the same subject matter cannot be set up as an estoppel, when neither the record is set forth, nor the finding shews on what ground the court put its decision, whether for want of proof, insufficient allegations, or on the merits of the case."

Now, the record offered as evidence in this case, whilst it shews a contest between the same parties, was not "upon the same subject matter," nor "for the same purpose" sought to be obtained by the existing suit.

This suit alleges a permanent injury to real estate: to land.

That alleged an injury to personalty: to crops, severed to a great extent, and stored on the land.

In this suit we are asking damages for permanent injury to our land.

In that we asked compensation for crops destroyed.

It is respectfully submitted, that both the subject matter and purpose of the two suits are wholly dissimilar; and so thought both court below and jury.

It will be observed, that there was no allegation in either suit, that the erection of the embankment across the low grounds of the appellee was an illegal or wrongful act. The actions were trespass, but were both in case for consequential damages; and the jury might well find, as—with the approval of the court—they did find, that the consequences alleged in the declaration did result in the one case from the unskillful erection of the embankment; whilst the

destruction of the crops charged in the other case, was not a consequence, in any degree, of the embankment; but that the latter were washed away and destroyed by the natural and unavoidable effect of a very great and unusual flood, sufficient of
 358 itself to produce the result *(as was in fact the case); and yet, by the unskillful erection and subsequent breaking and washing away of the appellant's embankment, and a change in the channel of the stream, caused thereby, the jury might also find that the appellee's land was covered with sand, slobbered, abraded, and greatly injured. So far from these cases being the same, it is respectfully submitted, that when strictly analyzed, it will be difficult to find the slightest similitude.

It is not perceived how, under the well known rules of law applicable to estoppels, such a record as that offered in evidence can be relied on as an estoppel in such a case as this.

Not being conclusive as an estoppel, it is merely a fact in the cause; and the other important facts not being fully certified, the judgment of the court below cannot be reviewed here.

3. In reply to the suggestion, that the land owner has been already paid for the flooding of his land, by the original condemnation and assessment of damages, we think it enough to say, that it is apparent, not only from the special replication, but on the face of the declaration, that the appellee's claim was to recover for damage to his property, not only not foreseen and estimated by the commissioners, but which, from the very nature of the case, could not have been foreseen and estimated; being the unexpected result of a breach of the embankment, caused by unskillful construction.

We need not cite authority to shew that such unforeseen injury is not covered by the original assessment of damages.

STAPLES, J. This is an action of trespass on the case for damage to the plaintiff's land. The declaration charges the defendant with erecting an embankment and other structures across the lands of the plaintiff, without leaving sufficient
 359 arches or waterway to allow *the flood waters of Buffalo run to escape as they had been accustomed; and in consequence thereof the flood waters of said run became accumulated in great quantity upon the low lands of the plaintiff, injuring the same, and rendering them permanently unfit for cultivation.

The defendant pleaded not guilty; upon which issue was joined. He also filed a special plea alleging, in substance, that the commissioners, duly appointed, had awarded the tenant of the freehold, under whom plaintiff claimed, the sum of \$1,362, as a just compensation for the land taken by the company, and for the damage to the residue of the tract; that the sum so awarded had been duly paid by the defendant to said tenant of the freehold, and the report of the

commissioners confirmed by the proper court.

To this plea the plaintiff put in a special replication, averring that the damages to the lands of the plaintiff, set forth in the declaration, resulted from a negligent and improper construction of the defendant's works, and were not assessed or ascertained by said commissioners; concluding to the country.

To this replication there was no rejoinder. The record states that the jury "returned into court, and upon their oaths rendered a verdict 'upon the issues joined' for the plaintiff."

It is now insisted that, though a misjoining of issue is cured by the statute of jeofails, yet that act will not sustain a verdict where no issue has been in fact joined; and in this case the special replication, containing new matter, there can be no issue thereon without a rejoinder; and this objection is not obviated by the statement in the record that the jury were sworn to try or rendered their verdict upon the issues joined. It must be admitted the cases cited by appellant's counsel strongly sustain this view. The case of *Moore v. Mauro*, 4 Rand.

488, is, however, a later decision than
 360 either of *those cited, and maintains a contrary doctrine. There the defendant pleaded that the action was founded on an account of goods, wares and merchandise; and that the cause of action did not accrue within one year. The plaintiff replied that the plaintiff and defendant were merchants, and goods were sold and delivered by plaintiff as a merchant, and so purchased and received by the defendant; concluding with a verification.

There was no rejoinder to this replication, but the record stated "that issue was thereupon joined."

It was objected that there was no issue; but the court held this was a misjoining of issue which was cured by the statute of jeofails. It does not appear from the report of the case, that the previous decisions were cited, or in any manner alluded to, either in the argument or the opinion of the court. This is the more remarkable, as the cases are in direct conflict, unless, as has been suggested, the statement in the record in *Moore v. Mauro*, "that issue was joined on the replication," distinguished that case from *Wilkinson's Adm'r's v. Bennett*, 3 Munf. 314; where the record states "the jury were sworn upon the issue joined." This is certainly a very narrow and unsatisfactory ground upon which to adjudicate the rights of parties. Besides, in *Stevens v. Thornton's Adm'r*, 1 Wash. 194, an entry upon the record after the replication filed, "that issue was thereupon joined," was held to be insufficient when it appeared there was no issue.

The decision in *Moore v. Mauro*, would seem to be more in harmony with the spirit of the modern cases, and the disposition manifested by the courts to disregard mere technical objections, unless there be omitted something so essential to the action or de-

fence that judgment according to law, and the very right of the cause, cannot be given; more especially where the parties, as in this case, have gone to trial upon the merits, submitting the cause to the jury as
361 though the issues *had been more formally joined. The certificate of the judge presiding at the trial, shews that the subject matter of the plea and replication was fully investigated, was the point to which the evidence of both plaintiff and defendant was principally directed, and must have been passed upon by the jury.

No objection for the nonjoinder of issue was made, either before or after the rendition of the verdict. The cause was tried in August, 1859; a motion made by the defendant for a new trial and overruled; and a writ of error and supersedeas from this court obtained in that year. During all this time this objection has never been made; and now, after the lapse of nearly twelve years, we are asked by the defendant to reverse the judgment for a defect in the pleadings directly attributable to its own negligence. The effect of sustaining such an objection now would be the sacrifice of the justice of a cause upon a mere technicality in no way affecting the merits, and to hold out to parties inducements to omit some purely formal proceeding easily overlooked in the hurry and confusion of a trial, with a view to a reversal of an unfavorable verdict.

Under these circumstances, I think this court, in this case, should follow the rule announced in *Moore v. Mauro*, if there was no other ground upon which its decision might be based. But the question here may be settled without reference to the precise point involved in the previous decisions.

It is a rule of pleading, that whenever the replication contains new matter it should conclude with a verification, to afford the opposite party an opportunity of answering it. In such case there will not be an issue until the defendant adds the rejoinder. But when the replication properly concludes to the country, the making up the issue by adding the similiter, is mere matter of form. This may be done by the
362 clerk; but *the failure to do so is not ground of error. The rule just stated is subject to this qualification, that although the replication may contain new matter, yet if the defendant cannot take any new or other issue in his rejoinder without a departure from his plea, the replication may, notwithstanding the new matter, conclude to the country. 1 Saunders R. 103 a.; *Carthrae v. Clarke*, 5 Leigh 268.

The defendant pleaded that compensation had been made the tenant of the freehold for the land taken, and for the damage to the residue of the tract. The plaintiff replied that in consequence of the negligent construction of the work, the damages sued for were not assessed nor foreseen by the commissioners.

Suppose the defendant had rejoined, what new issue could he have taken, or what new matter averred, without a departure from

his plea? He could only have rejoined that the work was properly constructed, and the damages were foreseen and assessed by the commissioners. And thus the parties would have been formally and technically at issue on the precise ground with respect to their pleadings, they in fact occupied on the trial.

The same defect occurred in the pleadings in the first case tried, in which there was a verdict against the plaintiff, and upon which the defendant is now relying as an estoppel.

It is not improbable that the counsel, in both cases, for plaintiff and defendant, considered the replication as substantially a denial of the plea, upon which the issue might at once be tendered, and to which the defendant could make no answer, other than that contained in the plea.

If these views be correct, an issue was properly tendered by the replication, and the failure of the defendant to join therein is cured by the statute.

The second question to be considered is, whether the *verdict in the
363 first case tried presents a bar to a recovery in this suit. There can, of course, be no doubt that a verdict in one suit will be conclusive in every other between the same parties, where the cause of action is the same; upon the ground that what has once been judicially determined shall not again be made the subject of controversy. But it has been settled by numerous cases, that to make such verdict available as an estoppel, or conclusive as evidence, it must appear not only that the same matter was in controversy, but that it was actually decided; and that where the verdict of the jury may have been founded upon one of two points, it will not operate as an estoppel as to either. 2 Smith's Leading Cases 374. Although the testimony may have been sufficient to establish a particular fact, and that fact may have been involved in one of the issues to be tried, yet if it be doubtful whether the verdict was based upon such fact, it will not operate as an estoppel.

In *Long v. Baugas*, 2 Ired. R. 290, it was decided that a verdict, in an action of detinue against the plaintiff, on the plea of non detinet, is not sufficient evidence in another suit to show that the plaintiff had no title to the property demanded. Judge Ruffin said the verdict might have proceeded on various grounds, suggested by him; that the plaintiff had no title, or that the defendants did not jointly detain the property. It was impossible to tell on what ground the jury went, possibly upon either or all the grounds together. And if evidence were allowable, to show the grounds upon which the verdict was rendered, it was clear the evidence did not show that the verdict was given, necessarily, on the very fact that the plaintiff had no title.

According to the New York decisions, parol proof may be given to show the grounds upon which the verdict was rendered in the first action, where the record

does not disclose them. But it is
 364 there held, also, it *will not be sufficient to show that the testimony established a particular fact; it must clearly appear that the verdict was based upon that fact. *Jackson ex dem. v. Wood*, 3 Wend. R. 27; *Lawrence v. Hunt*, 10 Wend. R. 80. In *McDowell v. Langdon & als.*, 3 Gray's R. 513, it was decided that a verdict for the defendant in an action at law for obstructing the flow of water to the plaintiff's mill, on a plea of not guilty, and a specification of defence denying both plaintiff's right and any injury thereof, are not a bar to another suit for the same matter, unless it appear either by the verdict or extrinsic evidence, that the defendant prevailed because the jury found that the plaintiffs had not the right which they claimed. *Metcalf, J.*, said it was doubtful whether the defendants succeeded in the first action, on the ground that they had the right they claimed in their specification, or on the ground that they had done no acts in violation of the plaintiffs' rights. And the parol evidence admitted showed only that the plaintiffs at the trial claimed an ancient right to a prior use of the water; and that evidence was introduced on both sides in regard to the rights of both parties. The plaintiffs may have failed in their action because they failed to satisfy the jury that the defendants had violated their rights, even though the plaintiffs had all the rights which they claimed. See also *Lore v. Truman*, 10 Ohio State R. 45.

In the case of *The Wash., Alex. and Geo. Steam Packet Co. v. Sickels and Cook*, 24 How. U. S. R. 333, the Supreme Court of the United States decided that the record of a former suit between the parties, in which the declaration consisted of a special count and the common money counts, and where there was a general verdict on the entire declaration, cannot be given in evidence as an estoppel in a second suit founded on the special count, for the verdict may have been rendered
 365 *on the common counts. Also, 2 *Smith Lead. Cas.* 794, and cases there cited.

Let us see if these principles are not decisive of the question under consideration. The two actions were instituted against the defendant on the same day. The declarations in both cases were filed at the same time, and the same issues made up in both cases at the same term. The writ in the one case is for damage to the plaintiffs' crops, in the other for damage to his land. The declarations follow the writs with great precision and care in each case. In that for the destruction of the crops, the declaration contains no allegation whatever of any injury to the land. That case was first tried, and the certificate of the judge, of the facts proved, shows that the attention of neither party was directed to the question of damage to the lands, nor was there a scintilla of evidence before the jury on that subject. The reason is obvious; at that time the other suit between

the same parties, for the recovery of such damages, was pending in the same court, and must have been understood and tacitly agreed, as not a proper subject of investigation in the case then being tried. It may be that testimony was offered to show that defendant's works were improperly constructed, but the record does not show the fact. The main purpose of the defence was to show that the flood which swept away plaintiff's crops was the heaviest known in that section for twenty-five years, and that the crops of the plaintiff would have been utterly destroyed though the embankment had never been made. The judge certifies it was proved on the trial that at the time of the injury the plaintiff's lands were not covered with water to a greater extent than they had frequently been before defendant's works were constructed; and if these works had never been constructed at all, all the plaintiff's crops would have been utterly destroyed. Surely the defendant
 366 could not be required to pay the plaintiff *for the loss of his crops, if it were clear they would have been destroyed with or without the embankment, although the jury might believe, from the evidence, the work was defectively constructed. No one reading this record can fail to perceive that the verdict was given on this ground, and upon no other. If, however, upon the pleading and the evidence, it is merely doubtful upon what ground the jury rendered their verdict in the first action, such verdict will not operate as an estoppel, according to the authority of adjudicated cases.

It has been argued, and with much ingenuity and ability, that the averment of specific damage to the crops was not the gist of the first action, but only a consequence of the right of action; that flooding the ground of another is actionable in itself; that in such case the law will imply damage which need not be specially stated; that the plaintiff, though he might fail as to the crops, had the right in the first action to recover for injury to the land, and that the plea of not guilty put in issue both the act complained of, and all its consequences.

And so in detinue, the plea of non detinet puts in issue the title of the plaintiff, as well as the act of detention. But in such case the verdict does not operate as an estoppel, unless the ground upon which it was rendered appear from the record or by extrinsic evidence.

In *Thorpe v. Cooper*, 15 Eng. C. L. R. 387, it was said that, although a declaration contains counts under which the plaintiff's whole demand might be recovered, yet, if no attempt be made to give evidence of some of the claims, they may be recovered in another action. This proposition is sustained by numerous authorities. *Hadley v. Green*, 2 Tyrwhitt's R. 390; *Seddon v. Tutop*, 6 T. R. 607; *Wheeler v. Van Houten*, 12 Johns. R. 311; and *Irwin v. Knox*, 10 Johns. R. 313. It is equally well settled that, whenever a question arises as to the identity of the matter litigated in the

367 first suit, parol *evidence may be received of what transpired on the first trial, with a view to ascertain what was the matter decided upon by the jury.

The rule is thus laid down in 1 Starkie Evi. p. 263. A recovery in one action cannot be pleaded in bar of a second, where in trial of the first action no evidence was given in support of the claim on which the second is founded. Where issue is taken on the fact whether the second action is brought for the same cause as the first, evidence is admissible of what passed at the first trial. See, also, *Whittemore v. Whittemore*, 2 New Hamp. R. 26; 2 Phillipps on Evidence, new ed. 18.

It may be argued, however, that this rule only applies where the causes of action are distinct and severable, and the plaintiff is at liberty to enforce them in one or several suits.

The rule undoubtedly is, that where a wrong or a contract is entire, and might be the subject of a single suit, the law will not permit it to be divided and made the subject of several suits. In such case, if there is a judgment for or against the plaintiff for part, the residue will be as absolutely extinguished as if the whole demand had been embraced in the first suit. The difficulty is not in the rule, but in discriminating between causes of action that are entire, and such as are separate and distinct.

Where the act is unlawful in itself, a right of action accrues immediately, and is held to include all subsequent damage flowing from it. In such cases there can be but one recovery between the parties, as the injury is not the cause of action.

Where, however, the act is lawful in itself, but negligently and improperly performed, the gist of the action is the damage, without which there can be no recovery. And I can see no good reason in such case why the plaintiff may not institute separate suits for distinct injuries, occurring
368 at different times, to different *parcels of property, though resulting from one and the same act of negligence.

The case of *Young v. Munby*, 4 Maule & Selw. R. 184, substantially affirms this principle. The plaintiff declared against the defendant, the executor of the former rector of the rectory of Gilling, for the failure of such rector to repair the chancel and pew of the church, as it was his duty to do. The defendant's plea was, that the plaintiff had impleaded the defendant in a former action for want of reparation of the rectory house, out-houses and cottages belonging to the rectory, and recovered a verdict; and that the same state of ruin and decay of the chancel and pew existed before and at the time of the commencement of the former action, and might have been included in the former suit.

It was argued by Tindal, that the plaintiff is not at liberty to subdivide one entire cause of action, and to bring so many separate suits as there may be consequences resulting from it; but that he is bound to

include all the consequences under one action, and to recover damages for them once for all. Lord Ellenborough said there was no doubt in the case. If the defendant could make out that an injury caused by dilapidations was one entire identical injury, forming precisely the same cause of action for any part of it, then he would be right that the plaintiff could have but one action for it. But there was no good reason why this should be considered as one entire cause of action, compounded of the several injuries sustained in the several parts. They are different and independent injuries in respect of the different parts, the injury from the dilapidation of the house is one thing, and for the dilapidation of the chancel is another; the causes are distinct; the latter might not be consummate when the first was.

In this case, conceding for a moment that the plaintiff *had the right
369 to recover in the first suit for flooding his lands, still it is apparent he neither enforced nor attempted to enforce that claim. There was no allegation in the declaration of such damage, nor evidence offered on the trial bearing upon that question. Had he attempted it, it is not improbable the evidence would have been objected to on the ground of the pendency of another action for damage to the land.

In the first suit, the gravamen of complaint was, that by reason of defective arches and waterways, the plaintiff's crops were destroyed by the flood of August, 1856.

In the present case, the evidence bearing upon the question of the damage to the land, and the causes to which it was attributable, was very conflicting; so much so, that the presiding judge refused to certify the facts. We must, therefore, look to the declaration to ascertain the grounds of the action, and as there was a verdict for the plaintiff, it is to be presumed he sustained these grounds at least to the satisfaction of the jury. The averment is, that, owing to insufficient arches or waterways constructed by the defendant, the waters of Buffalo run became accumulated upon the low lands of the plaintiff in the month of August, 1856, and at various other times since, a portion of the embankment washed down and was thrown into the stream, obstructing the channel, and causing a reflux of the waters upon the adjoining lands of the plaintiff, sobbing and permanently injuring the same. It is apparent from this statement that the causes of action are different for distinct injuries, occurring at different times. The plaintiff's right of action for the destruction of the crops was complete upon the happening of that event. Whether he could then have maintained a suit for the damage to the freehold, is very questionable. The extraordinary freshet which destroyed the crops, would also have
370 flooded the lands, although the *defendant's works had never been constructed. The exemption from liability was as complete in the one case as the other. The permanent injury to the free-

hold, of which complaint only is made in this action, was sustained afterwards, was gradual in its character, and was the result of successive overflowings or accumulations of water upon plaintiff's land, and which could have been in a measure prevented by removing the obstructions and the construction of suitable arches and waterways. For the first injury, the loss of the crops, the plaintiff might have sued immediately. For the second, the damage to the freehold, he had the right to bring a new action whenever the damage was sustained. Indeed, upon well settled principles, each overflowing of the plaintiff's land was a continuation of the injury, for which there might have been successive actions. The fact that the plaintiff delayed his suit for the first injury until the occurrence of the damage in the second, it seems to me, imposes upon him no obligation to include both causes in the same action.

Before concluding this opinion, it is proper to notice a question which has been raised as to the right of the plaintiff to maintain this action. At the time of the assessment of damages by the commissioners the land was held by the personal representative of Mrs. Judith Randolph, and to him the money was paid. A short time thereafter the land was sold under a decree of court and was purchased by the plaintiff. Whether the works of the company were then completed does not distinctly appear. If they were not, the purchaser could not know that these works would be constructed in a negligent and imperfect manner. If they were so completed, it has been suggested the purchaser must be apprized of the defective execution of the work, and as his vendor received compensation for the land, and for damages to the residue
371 of the tract, he must *take the land cum onere; and further if the works of the defendant were so defectively constructed, a cause of action at once accrued to Mrs. Randolph's representative, but did not pass to the purchaser, and the plaintiff has, therefore, no right to maintain this action.

The principle of law is well settled, that wherever any act injures another's right, and would be evidence in future in favor of the wrong doer, an action may be maintained for the invasion of the right without proof of any specific damage. The reason is said to be that the repetition of the act may, in the progress of time, impair or defeat the right, and were the owner required to wait for some appreciable injury before bringing his suit, he might lose the right without a remedy to preserve it. But this principle can have no application to a case like the present. No right of the land owner was infringed by the construction of the company's works. Upon the payment of the damages assessed by the commissioners, the title to the land taken for the railway immediately vested in the company in fee simple, and thereafter the relation sustained by the land owner and company to each other was simply that of vendor and

purchaser. Being the owner of the land thus acquired, the company had complete dominion of the soil, and might place thereon such structures as it deemed proper in the prosecution of its work. For the exercise of this undoubted right it could not be accountable to any one unless for actual damage sustained thereby, however defective the work might be. The rule is thus laid down in a leading case: "The right which a man has is to enjoy his own land in the state and condition in which nature has placed it, and also to use it in such manner as he thinks fit, subject always to this, that if this mode of using it does damage to his neighbor, he must make compensation." The ground of complaint in such case, is not the doing an unlawful act, but the doing an act, lawful in
372 itself, *in such a careless and negligent manner that consequential damage is caused to the contiguous land owner.

If this view be correct, the estate of Mrs. Randolph had no cause of action by reason of the defective construction of the company's works, as thereby no right of said estate was invaded, and no damage to the land occurred until after it had passed into the possession, and became the property of the plaintiff.

The company's works may have been defectively constructed, but did it not necessarily follow that any injury to the landowner would result from such construction. Whether it would or not would depend upon the violence or frequency of storms, the action of the weather, and other agencies, whose influences could neither be estimated nor foreseen. The damages in such cases would be purely speculative, and the result would be, that in many instances the company would be required to pay for injuries that would never occur, and in others escape the payment of damages which might be sustained long after the verdict was rendered.

If a right of action accrues so soon as the work is defectively done, this injustice would follow. If the land-owner fails to sue within five years thereafter, his action is barred, though his property should be rendered utterly valueless within the five years by a reflux of the water thereon occasioned by such defect.

In *Bonomi v. Backhouse*, 96 Eng. C. L. R. 622, the plaintiff was the owner of the reversion of an ancient house, and brought his action, alleging that the defendant negligently and without leaving proper support, worked the mines under the contiguous land. No actual damage had occurred until within six years, and it was claimed the action was barred. The court of Exchequer, reversing the Queen's Bench, held that no cause of action accrued for the mere excavation by the defendant on his own land, so long as it caused no damage
373 *to the plaintiff's. The judge said, if the cause of action arose when the act was done, without regard to the injury, the jury would have to decide upon the speculative question whether any damage is likely

to arise; and it might well be, that in many cases the jury would give large sums of money for apprehended damage, which, in point of fact, might never occur, and in other cases, upon the evidence of mineral surveyors and engineers, find that no damage was likely to occur when the most serious injury might afterwards happen; and in such case no new action could be brought for any subsequent damage occurring, because if the original act was unlawful, all the damage consequent upon that unlawful act is satisfied by the first recovery. The authority of this case has been repeatedly recognized, and is generally regarded as sound law.

The injustice of a contrary rule is made manifest by a single illustration. A railway company having constructed a defective culvert or other structure, ascertains that the land of the adjoining proprietor will be flooded and injured, and immediately remedies the defect by a proper culvert, so that no damage to the land can ever occur. It seems to me that fact would be a conclusive answer to an action brought for the defective construction of the work in the first instance. The defendant might well say that the plaintiff had not only sustained no damage, but beyond all dispute never would sustain any damage. But if the cause of action arises by reason of the defect alone, the right having once vested could not be extinguished.

These considerations serve to show that, to maintain an action against a railway company for the erection of defective structures upon its land, the plaintiff must aver and prove some special damage, and upon proof of that he is entitled to recover whenever his title may have been acquired.

The case of *Lawrence v. The Great Northern Railway Co.*, 4 Eng. Law and Eq. R. 265, is an authority directly in point. There the declaration averred that the defendants erected an embankment across certain low lands, without leaving sufficient arches for the flood waters of the river Dun to escape, by means of which said waters became accumulated on plaintiff's lands.

The defence was that before the plaintiff, who was a mere tenant for years, became possessed of the land, the defendant had paid to the owner, under whom plaintiff claimed, the amount awarded such owner, as a compensation for the land purchased and for all damage done or likely to be done to the remaining lands; and that before plaintiff became possessed of the close the defendants constructed their arches and embankments in the mode and according to the specifications mentioned in the award. The plaintiff's right to maintain the action was not denied. The only question considered was whether the compensation received by the owner embraced all possible and contingent damage arising from the construction of the work, although neither foreseen nor even guessed at by the arbitrator. The court held that the company might, by ex-

cuting their arches with proper caution, have avoided the injury which the plaintiffs sustained, and the want of such caution was sufficient to maintain the action.

In *Pittsburg, Fort Wayne, and Chicago Railway v. Gilliland*, 56 Penn. St. R. 445, the same questions were presented and discussed as in the previous case.

This was also an action against a railway company for damages to the plaintiff's premises, a tenant for years, arising from the construction of an insufficient culvert, by means of which plaintiff's lands were overflowed in time of heavy floods. It was insisted that the plaintiff's remedy, if any he had, must be held to be included in the special remedy given for the appropriation of the land, under which the damages had been duly assessed, and paid to the 375 tenant of the freehold *long anterior to the lease under which plaintiff claimed. But the court held that no estimate of damages could be founded upon an expectation that the company will omit its duty, or on the supposition that it will so negligently and unskillfully construct its work as to produce injury; or whether it will fail at all is unknown and can furnish no guide to govern the estimate. If the culvert was so unskillfully and negligently constructed as to be insufficient to resist the high water of the stream, the company building it would be liable to any party injured thereby. *Hentz v. Long Island R. R. Co.*, 13 Barb. R. 646, is to the same effect. 11 Cush. R. 221.

All the authorities agree that the assessment of damages under the statutes applying to that subject, is only a bar to an action for such injuries as could properly have been included in such assessment. The commissioners have the right and are bound to presume the company will construct its works in a proper manner, and they have no right to award damages upon the supposition that the company will negligently and improperly perform its work. A failure to construct its works in a proper and skillful manner will therefore impose a liability for damages to any one who may sustain any loss or injury by reason of such negligence; it being well settled that such damages are not to be considered as included in the estimate of the commissioners. In this case, whether the works of the company were or were not properly constructed was a question exclusively for the jury. Upon this point the evidence was so conflicting, the judge of the Circuit court refused to certify the facts. Upon well-settled principles, where the evidence is contradictory and a new trial is refused by the court which presided at the trial, its decision is not the subject of a writ of error or examination in an Appellate court.

376 *The judgment of the Circuit court must therefore be affirmed.

The other judges concurred in the opinion of Staples, J.

Judgment affirmed.

377

*Kraker v. Shields.

March Term, 1871, Richmond.

JOYNES, J., absent.

1. Sale of Land—Notes—Standard of Value—Confederate Currency—Present Currency.*—In November, 1862 S. sells to K. a house and lot in Richmond, for \$14,500, of which \$4,500 is paid in cash, and notes with interest for the balance are given, payable in one, two, three and four years, with a deed of trust to secure them. The cash payment, and first and second notes, are paid in Confederate money, the third is paid four months before it fell due by a compromise, S. taking for it \$2,000 in U. S. currency. Bill to enjoin the sale of the house and lot for the payment of the fourth note, alleges that it was given with reference to Confederate currency as the standard of value, and prays that S. might be required to receive payment according to the value of that money at the time of the contract. S. denies this was the contract, and says he was to be paid in the currency of the time the note fell due, and asks the court to adjudicate the question. **HELD:**

1. Same—Same—Same—Order of Reference.†—The court may refer the case to a commissioner, to enquire whether the contract was made with reference to Confederate money as a standard of value, or whether the notes were to be paid in the currency of the time they fell due.

2. Same—Same—Same—Issue Out of Chancery—Improper.‡—It is not a case in which the court should have directed an issue. And this especially as there was no conflict of testimony when the case was referred to a commissioner.

3. Cases in Which an Order of Reference Proper.—In what cases court may refer a case to a commissioner, see the opinion of MONCURE, P.

4. Sale of Land—Notes—Interest.§—The interest being included in the note, if there is a decree for the payment of the note, it is proper to decree interest on the whole amount.

5. Same—Same—Decree.—The court being of opinion that the note should be paid in the currency of the time it fell due, may decree in favor of S. against K. for the amount.

378 *6. It was irregular, after decreeing in favor of S., to dismiss the bill; and the appellate

***Standard of Value—Confederate Currency—Present Currency.**—Several subsequent decisions refer to the rules laid down in the principal case as settling the principles by which to determine whether a bond, note, etc., is payable in the currency prevailing at the time when the contract was made, or is payable in the currency of the time when the note fell due. See *Morgan v. Otey*, 21 Gratt. 625; *Teel v. Yancey*, 23 Gratt. 702; *Puryear v. Cabell*, 24 Gratt. 268; *Dyerle v. Stair*, 28 Gratt. 802. See principal case distinguished in *Meredith v. Salmon*, 21 Gratt. 773; *Hilb v. Peyton*, 22 Gratt. 566.

†Order of Reference.—See the principal case cited in *Robinson v. Allen*, 85 Va. 737, 8 S. E. Rep. 835. See also, monographic note on "Commissioners in Chancery" appended to *Whitehead v. Whitehead*, 23 Gratt. 376.

‡Issue Out of Chancery.—See monographic note on "Issue Out of Chancery" appended to *Lavell v. Gold*, 25 Gratt. 173.

§Interest—Usury.—As to usurious contracts, see the principal case cited and approved in *Græme v.*

court will correct the decree in this respect, and affirm it, with costs.

7. The decree should reserve liberty to S. to apply to the court, by motion or petition in the cause for a sale of the house and lot under the trust, if the personal decree against K. failed to produce the money: This, too, the appellate court will correct, and affirm the decree.

On the 21st day of November, 1862, James H. Shields sold to Meyer Kraker a house and lot in the city of Richmond, for the sum of \$14,500; of which the sum of \$4,500 was paid down, and for the balance, \$10,000, four negotiable notes were given, at twelve, twenty-four, thirty-six, and forty-eight months after date, each for the sum of \$2,500, with interest added from the date to the maturity of the note: the first being for \$2,650, due 21st November, 1863; the second being for \$2,800, due 21st November, 1864; the third being for \$2,950, due 21st November, 1865; and the fourth being for \$3,100, due 21st November, 1866.

On the day of sale the property was conveyed to the purchaser who thereupon conveyed it to a trustee to secure the deferred instalments of the purchase money. Nothing is said in the notes or the deeds about the currency in which payment of the money was to be made, but the money is described generally as so many dollars. The cash payment was made in Confederate notes. The first deferred instalment, due 21st November, 1863, and the second, due 21st November, 1864, were paid at maturity, in Confederate notes. The third, due 21st November, 1865, was settled more than four months before it became due, by a compromise effected through the agency of Mr. Wellington Goddin, employed by Kraker for that purpose. By that compromise the sum of \$2,000 in legal currency was paid and received in discharge of the note of \$2,950.

When the fourth and last deferred instalment became due, *which was on the 21st of November, 1866, Shields demanded payment in legal currency, but Kraker refused to pay in such currency, and insisted that the amount of the note should be scaled, according to the provisions of the act of the General Assembly passed March 3, 1866, Session Acts 1865-'66, p. 184, chap. 71; the said Kraker contending that the contract was, according to the true under-

Adams, 23 Gratt. 235, and *Græme v. Cullen*, 23 Gratt. 309; *Reger v. O'Neal*, 33 W. Va. 166, 10 S. E. Rep. 377.

In 1 Va. Law Reg. 230, Prof. Lille, citing these last cases above laid down and the principal case as his authority, says: "Where property is sold *bona fide*, and not as a shift to cover a loan, the deferred payments, by agreement at the time of sale, may be made to bear any rate of interest that the parties may agree upon, without infringing the statute against usury. What is called 'interest' is as much a part of the purchase price as the principal sum, and, though it exceed the legal rate, the transaction is not usurious."

See monographic note on "Interest" appended to *Fred v. Dixon*, 27 Gratt. 541; monographic note on "Usury" appended to *Coffman & Bruffy v. Miller*, 26 Gratt. 698.

standing and agreement of the parties, to be fulfilled or performed in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value.

The parties being thus at issue as to their relative rights and obligations in regard to the last note, James M. Taylor, the trustee named in the deed of trust, proceeded, at the request of Shields, to execute the trusts of the deed, by causing the property thereby conveyed to be advertised for sale on the 8th day of April, 1867.

On the 28th day of March, 1867, Kraker filed his bill in chancery against Shields and Taylor, in which he said that he was "ready and willing to pay off the said last note at the rate of one dollar in legal tender notes for three of Confederate treasury notes; that the contract for the purchase of said real estate, according to the true understanding and agreement of the parties, was to be performed in Confederate States treasury notes, and was entered into with reference to such notes as a standard of value; and your orator is advised that, by the law of the land, he is not required to pay at a greater rate than that above mentioned." He charged that, notwithstanding the premises, the said Taylor, trustee in the said deed of trust, had "advertised the said property to be sold at public auction on the 8th day of April next, as will appear by the printed advertisement bearing date March 27th, 1867," and exhibited with the bill. He said he was advised that if he had no

other ground upon which to injoin the
380 *sale, "he might do so upon the sole ground that the advertisement does not conform to the requirements of the deed of trust, in this, that the deed requires that the property shall be advertised for twenty days before sale, and the said Taylor has only given twelve days' notice at most;" and therefore, to the end that full and complete justice might be done in the premises, he prayed that the said sale might be enjoined, that the said Shields might be compelled to receive payment of the said last note as above proposed by the complainant, and that the latter might have general relief.

An injunction was accordingly awarded.

On the 6th day of May, 1867, the defendants filed their answers.

The defendant Shields denied "that the contract for the purchase of said real estate, according to the true understanding and agreement of the parties, was to be performed in Confederate States treasury notes, and was entered into with reference to such notes as a standard of value." On the contrary, he charged "that the true understanding and agreement of the parties was, expressly, that the said notes, for the deferred instalments of purchase money, were to be paid in the money current at the time the said notes respectively matured." He said that he, "in good faith and in accordance with the said last-mentioned understanding and agreement, did receive Confederate States treasury notes in payment

of all the notes that matured while that money was current in Richmond, although the same had become greatly depreciated, as compared with the value of that money when the said sale was made." He charged and claimed, "that according to the true understanding and agreement of the parties, at the time of said contract and sale, the said note for \$3,100, now due and unpaid as aforesaid, was to have been, and ought to be, paid in full, in the legal-tender notes now current, and ought not to be
381 scaled at all." *He charged further,

"that, in consequence of the agreement and understanding as to the currency in which payment was to have been made, and the fact that they extended through a period of four years from the date of said sale, and the parties could not anticipate the character of money in which the payments would be made, there was not the difference between the actual value of said property in coin and its value in Confederate money that was usually made in the sales of real estate in the fall of 1862." He admitted "that the said deed of trust does require that the property therein mentioned shall be advertised for twenty days, and that the said Taylor, as trustee, only gave about twelve days' notice, as alleged in said bill." He said he was informed, and believed that the said sale "was so advertised through inadvertence and mistake of the said trustee." But, admitting this, he prayed the court "to adjudicate and settle the questions in controversy between the complainant" and himself, "independent of and additional to that involved in the advertisement of the sale above mentioned," as he was advised "that said questions are, all of them, the proper subjects of equitable jurisdiction and relief, in such a case as this."

The defendant Taylor, in his answer, showed that "it was through inadvertence and mistake that only about twelve days' notice of the sale was given in the advertisement, instead of twenty days, as required by the deed of trust."

On or about the 28th of November, 1868, three depositions were taken and filed in the cause; that of Wellington Goddin, in behalf of the plaintiff; and those of James W. Shields, one of the defendants, and D. J. McCormick, in behalf of the defendants.

1. Wellington Goddin proved that from November 1st, 1862, to April, 1865, Confederate treasury notes were the only currency in circulation in Richmond,

382 *and all other parts of the State under the control of the Confederate government. During that period, he was extensively engaged in the sale of real estate in the said city, and nearly if not all the sales made by him were made with reference to funds current in the several banks then in existence in the city; and as these banks received and paid out nothing but Confederate treasury notes, that was the kind of currency he expected to receive for all payments made to him during the period aforesaid: as far as his experience went, in the

absence of any special contract to the contrary, the purchase money was to be paid in such funds as the several banks in Richmond were in the habit of receiving on deposit at the time of the maturity of the obligation, or at the time of the payment of the debt. Being asked by the counsel for the plaintiff, "when sales of real estate were made during the period mentioned, unless it was expressly understood otherwise between buyer and seller, were or were not the deferred payments universally understood to be payable in Confederate treasury notes?" he answered: "No, sir; according to my experience during that period, if the terms of sale required cash, Confederate treasury notes would have been received in payment, because such funds were current in all the banks of the city at that time; if the terms of sale were partly cash and partly on credit, the credit payments were to be discharged in such funds as the said banks were in the habit of receiving at the time of the maturity of such payments." Being asked, on cross-examination, "What was the currency or circulation receivable in the banks of Richmond in November, 1865, and November, 1866?" he answered, "By the fall of the Confederacy, in April, 1865, all the State banks then in Virginia were destroyed; in a few months thereafter a few national banks were established in the city; and in

November, 1865, and November, 1866,
383 Federal currency, sometimes *called greenbacks, constituted the only currency in this city." The witness then gave an account of the compromise he had effected, as agent of the plaintiff, with the defendant Shields, of the third deferred instalment due on the 21st of November, 1865; after which he stated that he was well acquainted with the value of the house and lot in question in November, 1862, and also in November, 1865 and 1866. According to his best judgment, the specie value of the property before the war was about \$10,000, and he thought it was worth in specie, in November, '62, what it was worth prior to the war. In the summer of 1865, and thereafter till the close of the year, real estate in the city sold at higher prices than had been obtained for many years before. In his opinion, this property would have sold, in November, 1865, for between \$15,000 and \$16,000. Real estate continued to sell high till the spring of 1866, when it began to recede, and has continued since to decline. In his opinion, in November, 1866, the property would have brought, in "greenbacks," from \$10,000 to \$12,000. Such was the depressed condition of real estate in the city at the time of giving his deposition, that the property would not then sell for more than \$7,000 or \$7,500.

2. D. J. McCormick proved that he has resided in Richmond since March, 1862. A week or a few days before Kraker purchased the lot of Shields, Kraker and witness went to the workshop where Shields was working, to see about the property. Witness gave the following account of that visit

and interview: "We talked a great deal on the way going there, and at the workshop. I do not recollect that there were any terms asked for concerning the property, but I remember telling Mr. Kraker, at the shop, to buy the property, if possible, for cash. If not, to make as short notes as possible—short time as possible; telling him, at the same time, that the war would be over
384 in perhaps *less than two years, and Mr. Shields, after the war, would have as much interest in the property as it would then be worth. I told him that I thought Mr. Shields was a very smart man, and that if he would sell all his property in that way he would do well, as he would have a large income during the war, and his property, perhaps, be of full value after the war, with these notes resting upon him." Witness proved that Kraker offered to pay Shields cash for the property, but Shields refused, saying he would not sell for cash.

3. James W. Shields deposed, among other things, as follows: "Mr. Kraker came to me, and desired to purchase the middle tenement of the Mansion House, owned by me, on Main street, and desired to know on what terms I would sell it. I told him, as well as I recollect, that I would take \$14,500: I think, \$4,500 cash, the balance in one, two, three and four years, secured by deed of trust, with four negotiable notes, bearing even date therewith, and with interest from the date, negotiable and payable in bank, in whatever was current at the time the notes became due. He then demurred from that, and desired to purchase for cash. I declined to sell on any other terms than the terms stated. He said that he would give me a decisive answer the next day. He called and concluded to purchase the property on those conditions, and I sold it to him on those conditions; and, since the making of the contract, I have received the depreciated currency for the notes as they became due, consisting of two notes in full, and the third note, a part of it was received by way of compromise in "greenbacks." He desired to give me his individual note, with personal security, for the fourth note, payable in greenbacks, if I would release the deed of trust. The contract for the house was made about the 18th of November, 1862, and executed about the 21st of November, 1862."

"I had an offer from Mr. Litchenstein of \$14,000 cash. This was *some
385 few months before I sold to Kraker, and refused it. I would not sell for cash. I had, also, an offer from Mr. Jacobs to purchase for cash; but, as I peremptorily told him I would not sell for cash, no particular amount was named." Being asked, "Why would you not sell for cash?" witness answered, "Because money was depreciating every day, and I expected that, in a year or so at most, I would get a better currency." Being asked, "Did you assign any reason to Mr. Kraker for declining to take cash, and, if so, what reason?" witness answered, "I think I told Mr. Kraker, am pretty certain of it, it is a long

time since, that I wouldn't sell for cash, because I thought that in a year or two the currency would be better. If he chose to take it at that risk, he could do so. I wasn't anxious to sell the property." After stating that he had received the cash payment, and first two deferred instalments, falling due in November 1863 and 1864, in Confederate currency, and the third instalment, falling due in November 1865, in part in greenbacks by a compromise, he was asked, "How did this compromise or settlement occur between you," to which he answered, "I was pressed for money at that time, and went to him a little while before this third note was due. I offered to knock off \$150 from the face of that note, if he would cash it and pay me the balance. He told me he would give me an answer that evening. He went to Mr. Wellington Goddin, and employed him to manage the matter for him. Mr. Goddin said that any settlement he would make, Mr. Kraker would abide by. The money was paid in the presence of Mr. Goddin, by his award and settlement between us." Being enquired of, as to the grounds of the compromise, he answered, it was "according to the value, as well as I recollect, of the property." Being asked whether either of the houses adjoining on

either side of the tenement in question was sold in *1865, he answered,

"There was one about three doors below. I think Straus's house was sold in 1865 or '6, a much inferior house, for \$17,000, at public auction."

In this state of the cause, it came on to be heard on the 8th day of February, 1869, on the bill and exhibits, the answers and general replications thereto, and the depositions of the witnesses aforesaid, when the court decreed "that this cause be referred to one of the commissioners of this court, to ascertain and report, whether the contract for the purchase of the real estate in the bill and proceedings mentioned, according to the true understanding and agreement of the parties thereto, was to be performed in Confederate States treasury notes, and was entered into with reference to such notes as a standard of value; or whether the notes given by the complainant, as alleged in the bill and proceedings, for the deferred instalments of the purchase money of said real estate, were to be paid, according to the true understanding and agreement of the parties, in whatever money was current at the time the said deferred instalments, respectively matured, and became due and payable. And the said commissioner is also required to ascertain and report which, if any, of said deferred instalments of purchase money are now in arrear and unpaid, and the amount thereof, as appears by the face of the papers; and what money was current at the time the same became due and payable. And the said commissioner is directed to make his report on the matters above referred to, with all convenient speed, together with anything deemed pertinent by himself or specially required by any of the parties."

On the 18th of February, 1869, commissioner Pleasants made a report under the aforesaid decree; and reported, 1st. That the notes given by the complainant, as alleged in the bill and proceedings, for the deferred instalments of the purchase money of the said real estate, *were to be paid, according to the true understanding and agreement of the parties, in whatever money was current at the time the said deferred instalments, respectively matured, and became due and payable; 2dly. That the fourth or last of said deferred instalments, amounting, as appears by the face of the papers, to \$3,100, with interest thereon from the 24th day of November, 1866, until paid, is now in arrear and unpaid; and, 3dly. That at the time the said deferred instalment, which is still in arrear and unpaid, became due and payable, federal currency, sometimes called greenbacks, constituted the only currency in the city of Richmond.

To this report two exceptions were taken by the plaintiff's counsel.

On the 25th of February, 1869, the cause came on again to be heard upon the papers formerly read, and upon the report of commissioner Pleasants and the exceptions thereto, on consideration whereof the court recommitted the said report to the said commissioner on the exceptions thereto, and directed him to report to the court the reasons upon which the conclusions in his said report are founded. And the said commissioner was further directed to take any additional evidence that might be offered by either party, and to report to the court his proceedings under the said order, with any matter deemed pertinent by himself or required to be reported by either of the parties.

On the 5th of March, 1869, commissioner Pleasants made his report under the last mentioned order, and there were returned with his report two depositions taken before him, both of them in behalf of the plaintiff; to wit, the deposition of the plaintiff himself, Meyer Kraker, and that of his brother Julius Kraker. M. Kraker deposed that there was no understanding between himself and Shields, except what was in the contract, about the kind of money in which the payments *were to be made. The property, at the time he bought it, was worth about five thousand or five thousand five hundred dollars in gold. It was in very bad condition at that time, and when he took possession of it, about half a year thereafter; the repairs have cost him about \$2,000 in good money. He did not offer to pay Shields for the property in cash in Confederate money. Mr. McCormick advised witness to pay cash for the property, telling him that it would be a great thing for him to do so. But witness had not the money to pay for the property in cash, and so told Mr. McCormick.

Julius Kraker deposed that he was well acquainted with the property, and presumed that its value in gold at the time of the said purchase, was between five and six thou-

sand dollars. There were also two papers returned with said report marked "Y" and "X," the former being an extract from the books of the auditor's office in Richmond, showing that the said property was assessed on those books for 1860 at \$8,992; and the latter being an extract from the deed conveying the said property to Shields, dated 20th February, 1854, showing the consideration of the deed to be \$7,800. The commissioner reported his reasons at length for his former report, and that upon the new evidence taken, there did not appear to be any ground for changing it. He therefore readopted his former report, and made it a part of his last report.

To this last report the plaintiff's counsel again excepted.

On the 9th of March, 1869, the cause came on again to be heard, when the court overruled the complainant's said exceptions to the said reports respectively, and decreed that the said reports be confirmed, and that the defendant Shields recover against the plaintiff Meyer Kraker the sum of \$3,100,

with legal interest thereon from the 21st day of November, 1866, until *paid, and his costs by him about his defence in that behalf expended; and the court further decreed that the injunction be dissolved and the bill dismissed.

On the 12th of March, 1869, "it appearing to the satisfaction of the court that the several deferred instalments of purchase money in the bill and proceedings mentioned were, according to the true intent and meaning of the parties, to be discharged in the money current at the times of the maturity of said instalments respectively, and that all of said instalments have been paid except the last, which is the subject of litigation in this cause; that said last instalment matured on the 21st day of November, 1866, on which last named day the money known as United States legal tender notes, and the notes issued by the several national banks of the United States, constituted the money current at that time, and which were of equal value, the court ordered that the said decree of the 9th of March, 1869, in favor of the defendant Shields against the plaintiff Meyer Kraker, should be so amended and modified as that the same may be discharged in such lawful money of the United States.

From the said decree the plaintiff applied for an appeal to this court, which was allowed.

Hallyburton and Lyons, for the appellant.

Henry A. Wise and Fitzhugh, for the appellee.

MONCURE, P., after stating the case, proceeded:

There are five assignments of error in this case, which are as follows: 1st. "The case was one not proper for a reference to a commissioner." 2d. "The court should have ordered an issue to be tried before a jury." 3d. "It was error to render a decree in favor of the defendant against the plain-

tiff." 4th. "The decree is erroneous, in being for interest upon the whole sum called for by the note, a part of it being interest, *and therefore not bearing it, such interest being compound."

And, 5th. "The decree, upon the testimony, should have been in favor of the plaintiff, if any was rendered without a jury."

I will consider these assignments of error in their order. But, before I do so, it seems to be proper, by way of explanation, to say something in regard to Minnie N. Kraker, wife of Meyer Kraker, and a co-plaintiff in the suit and co-appellant in the appeal. A great deal is said about her in the record; and in the earlier period of the litigation her interest in the subject seemed to be a matter of some importance. Her husband caused the property to be conveyed to her, and the notes and deed of trust to be executed in her name; the vendor, Shields, believing that the property was conveyed to her husband, and that the notes and deed of trust were executed by him and in his name. Shields complained that a fraud was practiced upon him in this respect; but Kraker denied that any such fraud was intended. But however that may be, it seems to be conceded by the parties, and properly so, that her rights, if she have any, and whatever they may be, are in subordination to those of Shields, to whom her husband and the property are liable for the purchase money, just as if the property had been conveyed to him in his own name, and as if he, in his own name, had executed the notes and deed of trust. Her name, therefore, need not be noticed, either in the statement of the case or in this opinion, though possibly I may have occasion to refer to it again before I conclude. I will now proceed to consider the assignments of error; and,

1st. That "the case was one not proper for a reference to a commissioner."

The Code, chapter 175, § 2, provides for the appointment of commissioners in chancery, but does not prescribe their particular duties, except as to taking accounts.

*It declares that "each court may, from time to time, appoint commissioners in chancery, or for stating accounts, who shall be removable at its pleasure; there shall not be more than three such commissioners in office at the same time, for the same court." § 4 declares that "every commissioner shall examine and report upon such accounts and matters as may be referred to him by any court."

The act to establish Circuit Superior courts, passed April 16th, 1831, provided that the said courts "shall have power to appoint commissioners in chancery, not exceeding two for each court, for taking and reporting such accounts or other matters as such courts shall commit to them to be examined, stated and reported." Sup. to R. Co. 1819, p. 164, § 76. The duties of a commissioner in chancery in this State are considered to be, generally, the same with those of a master in chancery in England, whose

duties are set forth in the books of chancery practice in that country; as, for instance, in 2 Daniel's Chancery Pl. and Pr., sec. 7, pp. 1345-1503. That writer, in pointing out the course to be pursued in the Master's office, upon the particular reference before him, says: "The objects, however, for which references to a Master may be made, are so numerous and various, that it would be impossible, in a treatise of this nature, specifically to detail the course of proceeding which should be adopted in each;" and he therefore confines his attention to the most usual subjects of reference, by analogy to which the proper steps to be pursued in other cases may be inferred. "References to the Master upon decrees or decretal orders," he says, "are either—1. To make enquiries; 2. To take accounts and make computations; or, 3. To perform some special ministerial acts directed by the court. Inquiries by the Master are directed either to persons or to facts, though sometimes they are directed to matters of law; but it

392 is, in general, in those cases only where the law comes *in as a matter of fact, as in the case of an enquiry into the law of a foreign country, that the Master is ever directed to enquire into the law; the habit of the court not being to refer abstract questions of law to the opinion of the Masters. Sometimes, however, questions of law are so mixed up with the fact to be ascertained, that it is not possible to decide upon the one, without giving an opinion as to the others. In such case, the Master is bound to give his opinion upon the law, as well as upon the matter of fact referred to him; as, in the case of a reference to a Master to enquire whether a good title can be made to land, &c. The most usual cases in which inquiries as to persons are directed to be made by a Master, are those in which it is necessary to ascertain the heir at law or next of kin of a deceased person. The same sort of enquiry is also frequently directed for the purpose of ascertaining the individuals forming a particular class," &c. "A similar inquiry is also necessary where it is referred to the Master to take an account of the debts due by a particular individual, such account involving, necessarily, an inquiry who the creditors are, as well as into the amount of their claims." Id. p. 1399-1400. See also 1 Smith's Ch. Pr., pp. 10 and 11, and 2 Id. p. 96; 1 Barbour's Ch. Pr. 468.

The question when it is proper, or may be useful, to resort to the aid of a commissioner, is one which addresses itself to the sound discretion of the court, and as to which a large latitude of discretion must be allowed to the court; though of course the court ought to exercise such discretion soundly, to prevent unnecessary expense or delay; which seem to be the chief, if not the only evils, of an improper reference. The court is responsible for the correct decision of the cause, and cannot shift such responsibility from its own shoulders to those of a commissioner. But it can avail itself of the assistance of a commissioner

393 to prepare the cause and place it in the best possible state to enable *the court to decide it correctly. The most invaluable assistance may be afforded to the court by the agency of an intelligent, skillful, and experienced commissioner. He has often an advantage, which the court has not, in seeing and hearing the witnesses give their testimony, and being thus better able to judge of its weight. And where he acts only on the proofs already in the cause, as he often does, he may afford important aid to the court by deducing the material facts of the case from a large mass of testimony, and enabling counsel, by means of exceptions to his report, to make up and present to the court the only issues requiring its decision in the cause.

According to the foregoing principles, I do not think the Circuit court erred in referring the cause to one of its commissioners, "to ascertain and report whether the contract for the purchase of the real estate in the bill and proceedings mentioned, according to the true understanding and agreement of the parties thereto, was to be performed in Confederate States treasury notes, and was entered into with reference to such notes as a standard of value; or whether the notes given by the complainant, as alleged in the bill and proceedings, for the deferred instalments of the purchase money of said real estate was to be paid, according to the true understanding and agreement of the parties, in whatever money was current at the time the said deferred instalments, respectively matured, and became due and payable;" nor in the other directions given to the commissioner, by the decree of the 8th of February, 1869. If there were any such error, it was certainly not to the prejudice of the appellant.

2d. That "the court should have ordered an issue to be tried before a jury."

I do not think that the case was a proper one for an issue. There was no conflict of testimony in the case when it was referred to a commissioner. The only

394 *testimony then taken, was that of Goddin, for the plaintiff, and that of Shields and McCormick, for the defendant. And, even after the depositions of the two Krakers, Meyer and Julius, were taken by the commissioner, there was not such a conflict in the testimony as to make an issue necessary or proper. Even where there is a conflict of evidence, it does not necessarily follow that there must be an issue; but the court may decide the cause without one, if its conscience is satisfied. 2 Rob. Pr. old ed. 354, and cases cited. In the case of a bill, contesting the validity of a will, a court of equity is bound to have the issue which is made up tried by a jury. But, in other cases, the court will determine, according to its discretion, whether it does or does not want the assistance of a jury. Id. p. 352. Of course the court must exercise its discretion soundly. The court may often, at its election, direct an issue, or refer a question to a commissioner. There are some questions which seem more properly

to belong to a jury, if indeed they do not belong exclusively to a jury, in case the conscience of the court is not satisfied; such, for example, are questions involving fraud, or the genuineness of a deed. *Id.* On the other hand, there are questions which seem more properly to belong to a commissioner, although they may be made the subjects of an issue: as, for instance, a question as to rents and profits of land in controversy in a suit in equity. *Id.* 362; *Green, J., in Newman v. Chapman*, 2 Rand. 93, 106.

3d. That "it was error to render a decree in favor of the defendant against the plaintiff."

It is a general rule that no person but a plaintiff can entitle himself to a decree; but it is admitted that there are exceptions to this rule. In a bill in equity for an account, both parties are deemed actors, when the cause is before the court upon its merits; and, if a balance is ultimately

395 found in favor of the defendant, *he is entitled to a decree for such balance against the plaintiff. 1 Story's Eq. § 522. A plaintiff, by applying to a court of equity for an account, subjects himself to a decree for any balance which may be found due from him to the defendant. 2 Rob.Pr. old ed. p. 405. This is not the only exception to the rule; but any case, falling within the same principle, is for the same reason an exception to it. This case falls within the same principle. The plaintiff might have filed his bill solely upon the ground that less than twenty days notice of the sale, as required by the deed, had been given by the trustee; and upon the admission in the answer of the fact of such defective notice, a sale under that notice would have been perpetually enjoined. Indeed, if that had been the only ground of the plaintiff's complaint, he might have obtained relief without coming into court for it. The defective notice was no doubt given by inadvertence merely, as the defendants alleged; and the error would, therefore, have been corrected on request. But the plaintiff had other grounds of complaint, which would have carried him into a court of equity to stop a sale under the deed of trust, if there had been no ground of objection to the notice. He charges in his bill, "that all the notes mentioned in the said deed of trust, except the last, have been fully paid off by your orator, and he is now ready and willing to pay off the said last note at the rate of one dollar in legal tender notes for three of Confederate treasury notes; the contract for the purchase of the said real estate, according to the true understanding and agreement of the parties, was to be performed in Confederate States treasury notes, and was entered into with reference to such notes as a standard of value; and your orator is advised that, by the law of the land, he is not required to pay at a greater rate than that above mentioned." And he prays, among

396 other things, that the court would compel the said *Shields to accept the sum in legal tender notes, as above proposed, and grant such other and further

relief as the case might require. On the other hand, the defendant Shields, in his answer, "denies that the contract, for the purchase of said real estate, according to the true understanding and agreement of the parties, was to be performed in Confederate States treasury notes, and was entered into with reference to such notes as a standard of value. On the contrary," he "charges that the true understanding and agreement of the parties was, expressly, that the said notes for the deferred instalments of purchase money were to be paid in the money current at the time the said notes respectively matured." And he prays the court "to adjudicate and settle the questions in controversy between" the parties, "as he is advised that the said questions are all of them the proper subjects of equitable jurisdiction and relief in such a case as this." To this answer the plaintiff replied generally; and the parties, being thus at issue upon these questions, proceeded to take evidence to sustain their respective views, and the case progressed to a final decree, which turned out to be in favor of the defendant. He is entitled to the benefit of it, as he would have been bound by it, if it had turned out to be against him. Both parties invoked the decision of the court upon their controversy, which was a proper subject of equitable jurisdiction, properly brought before the court, and both ought to abide the result. "The court," it is said, "had no authority to render any decree, except to perpetuate the injunction, or dissolve it and dismiss the bill. The record now exhibits," it is further said, "the singular case of a bill dismissed, with costs, which put the case out of court, and yet a moneyed decree in favor of the defendant, with no bill or petition to sustain it."

The true relative position of the parties to the suit *was reversed by the manner in which the controversy arose. The defendant was the creditor, and was in substance the plaintiff; while the nominal plaintiff was the debtor, and was in substance the defendant in the suit. The court, having adjudicated the controversy and determined that the plaintiff owed to the defendant a certain sum of money and interest, properly rendered a personal decree therefor, notwithstanding the real estate for which the money was due was also liable for its payment. If any other reason were required to vindicate the propriety of such a decree, it might be found in fact that the plaintiff caused the property to be conveyed to his wife, who may therefore be entitled to it unless the sale of it be necessary to satisfy the defendant's demand, in case the personal decree rendered therefor should prove ineffectual in whole or in part. If it could be said in this case, as was said in *Mettert's adm'or v. Hagan*, 18 Gratt. 231, that according to the strict rules of pleading, a cross bill was necessary, it might at least as well be said here as there, that the answer "may, for that purpose, be treated as a cross bill, so as to enable the

court to do complete justice in this cause." The dismissal of the bill was irregular. But that irregularity can easily be cured by amending the decree.

I do not think there is anything in the case of *Medley v. Pannill's adm'or*, 1 Rob. R. 63, cited and relied on by the learned counsel of the appellants, to show that it was error to render a decree in favor of the defendant against the plaintiff in this case, which is at all in conflict with what I have said on the subject. The decision in that case was founded on peculiar circumstances which are set forth in the opinion of Judge Allen therein, and do not exist in this case.

4th. That "the decree is erroneous, in being for interest upon the whole sum called for by the note, a *part of it being interest, and therefore not bearing it, such interest being compound."

There was no agreement to pay compound interest. The interest on the deferred instalments for the time they had to run was added to the principal, and notes taken for the aggregate amounts respectively. Default having been made in the payment of the last note, the whole amount of it properly bears interest from the day it became payable. There is nothing usurious or illegal in this. In fact, the interest included in the notes is a part of the purchase money of the land, and in effect principal.

5th. That "the decree, upon the testimony, should have been in favor of the plaintiff, if any was rendered without a jury."

The bill alleges that "the contract for the purchase of the said real estate, according to the true understanding and agreement of the parties, was to be performed in Confederate States treasury notes, and was entered into with reference to such notes as a standard of value." The answer denies this allegation in the very words in which it is made; and charges, on the contrary, "that the true understanding and agreement of the parties was, expressly, that the said notes for the deferred instalments of purchase money were to be paid in the money current at the time the said notes respectively matured." If the case had stood alone upon bill and answer when the decree for a reference was made, there could have been no doubt of the defendant's right to a decree, according to his version of the contract. How was that right affected by the evidence which was then in the cause? But three witnesses had been examined; one of them, Wellington Goddin, for the plaintiff, and the other two, McCormick, and Shields himself, for the defendant. Goddin knew

nothing about the contract, and testified *chiefly as to a compromise of the third note before it became due; which has no material bearing upon the case. But being asked by the plaintiff "When sales of real estate were made during the period mentioned," which was from November 1, 1862, to April, 1865, "unless it was expressly understood otherwise between the buyer and seller, were or were

not the deferred payments universally understood to be payable in Confederate treasury notes?" He answered, "No, sir; according to my experience, during that period, if the terms of sale required cash, Confederate treasury notes would have been received in payment, because such funds were current in all the banks of this city at that time. If the terms of sale were partly cash and partly on credit, the credit payments were to be discharged in such funds as the said banks were in the habit of receiving at the time of the maturity of such payments." This evidence certainly supports the view taken in the answer. As to the two witnesses examined for the defendant, McCormick testified that he urged the plaintiff to buy the property, if possible, for cash; if not, on as short credit as possible; and that the plaintiff accordingly offered to pay cash, but Shields refused to sell the property for cash. The reason of the witness for giving this advice is plainly apparent, and must have been known to the plaintiff. Witness says he told "him, at the same time, that the war would be over in perhaps less than two years, and Mr. Shields, after the war, would have as much interest in the property as it would then be worth." The defendant, Shields, testified to the facts stated in his answer. He said that some few months before he sold the property to the plaintiff, Mr. Latchenstein offered him \$14,000 cash for it, but he would not sell for cash. He had also an offer from Mr. Jacobs to purchase for cash, but peremptorily told him he would not sell for cash. His reason for not selling for cash was, because money was *depreciating every day, and he expected that in a year or so, at most, he would get a better currency. He said that the plaintiff offered to purchase from him for cash, and was very anxious for him to take it; but he refused, for the reason before mentioned. Being asked, "Did you assign any reason to Mr. Kraker for declining to take cash, and if so, what reason?" his answer was: "I think I told Mr. Kraker—am pretty certain of it—it is a long time since—that I wouldn't sell for cash, because I thought that in a year or two the currency would be better. If he chose to take it at that risk he could do so. I wasn't anxious to sell the property." This testimony in behalf of the defendant also strongly sustains his answer; and the Circuit court, in that state of the case, would have been well warranted in rendering a decree against the plaintiff for the amount of the last note and interest, payable in the currency which existed at the time of its maturity. But, instead of that, the court referred the case to a commissioner; which could only have been done for the benefit, if not at the instance, of the plaintiff. Certainly, that decree was not to the prejudice of the plaintiff; though I do not mean to say that, under the circumstances of the case, it was not a proper decree.

The commissioner made a report sustaining the defendant's claim; to which report

the plaintiff excepted, and the report and exceptions were recommitted to the commissioner with directions to report the reasons for his conclusions, and to take any additional evidence that might be offered by either party. The commissioner made another report under that order, giving his reasons, re-affirming his former conclusions, and returning with his report two depositions taken before him in behalf of the plaintiff, to wit, the depositions of the plaintiff himself, Meyer Kraker, and of his brother Julius. These depositions do not materially vary the case. The plain-

401 tiff testified that there was *no understanding about the kind of money in which the payments were to be made, except what was in the contract. And that when he was negotiating with Mr. Shields for the purchase of the property he did not offer to pay him in cash for it in Confederate money; though he admitted that Mr. McCormick advised him if possible, to buy the property for cash, and told him it would be a great thing for him to pay for it in cash. We have seen that both McCormick and Shields testified that the plaintiff did offer to pay cash for the property. But, however that may be, I think the decree which has been rendered against him is plainly right. The sale was made in November, 1862, at a time when Confederate money had already depreciated to two and a half for one, compared with gold, and was rapidly depreciating in value. The property was sold for \$14,500, of which the sum of \$4,500 was paid in cash in Confederate notes, and for the balance, \$10,000, with interest from the date, negotiable notes were given, payable at one, two, three and four years after date. It was evident, from these long credits, that Shields expected that before they would all mature there would be a better currency, and intended that the notes should be payable in the money current at the time they respectively matured. And it is certain the plaintiff knew that such was the expectation and intention of Shields. For the plaintiff admits that McCormick advised him to buy the property, if possible, for cash, and told him it would be a great thing for him to pay for it in cash. How could it be so except that by paying cash for the property he would avoid the risk of loss from an improvement in the currency before the notes, or some of them, would mature? Probably no man in the South, in November, 1862, expected the war to last four years longer. Most persons expected it to end in a much shorter time, perhaps in one or two years, and all, no doubt, be-

402 lieved *that however the war might terminate it would be followed by a better currency. The parties, in their contract, therefore, speculated upon the duration of the war and change of the currency. It turned out that the war lasted until April, 1865; longer, no doubt, than either party expected; and that Confederate money continued to be the currency of the country until the end of the war, although it rapidly depre-

ciated in value all the time. Besides the cash payment of \$4,500, which was made in Confederate money, the first two deferred instalments matured during the war, and were also paid in Confederate money, then, and especially when the second note became due on the 21st of November, 1864, reduced to a very low ebb. The last two notes, the third and fourth, matured after the war, in November, 1865 and 1866. The third was compromised and settled more than four months before it became due, by the payment of \$2,000 dollars in greenbacks, though the nominal amount of the note was \$2,950. The fourth now only remains due, and is the subject of controversy in this suit. I think the plaintiff is bound to pay the amount of it, with interest from the time of its maturity, in the money which was current at that time, according to the decree of the Circuit court. It was argued that if an improvement of currency was contemplated by the parties, it was of Confederate currency, and that it could not have been expected or intended that payment should be made in Federal currency. No doubt these parties believed, as did most people in the Confederate States, that the war would terminate favorably to them, and, therefore, that any improvement which might take place in the currency would probably be of Confederate currency. But they also knew that the war might terminate otherwise; and, however it might terminate, it must have been intended by the parties, as is certainly right and proper, that the vendor should be paid 403 *for his property by the vendee who enjoys it. The terms of the contract, the justice of the case and the presumed intention of the parties alike, apply to currency existing at the time of the maturity of the notes, whether it was Confederate or Federal. On this subject see what is said by this court in *Boulware v. Newton*, 18 Gratt. 708.

Upon the whole, I think there is no error in the decree of the Circuit court to the prejudice of the appellant. But I think there are two defects in the decree which ought to be corrected, and which may be corrected by an amendment. In the first place, the bill ought not to have been dismissed, and so much of the decree as dismisses it ought to be set aside. In the second place, the decree ought to be so amended as to reserve liberty to the defendant Shields, in case the decree rendered in his favor against the plaintiff personally should prove ineffectual in whole or in part, to apply to the court, by petition or motion in this cause, for further relief by a sale of the property for the satisfaction of the said decree, or so much thereof as may remain unpaid. I am therefore for affirming the decree, when so amended, with damages and costs.

The other judges concurred in the opinion of Moncure, P.

Decree amended and affirmed.

404 *Commonwealth v. Chalkley.

March Term, 1871, Richmond.

Liability of Present State Government for Contracts of Richmond Government.*—N. was elected storekeeper of the penitentiary prior to 1861, for a term commencing on the 1st of January, 1861, and to continue for two years. In the last of the year 1861, and the first of the year 1862, he, as such storekeeper, purchased of C. leather and findings, to be manufactured by the convicts in the penitentiary—both N. and C. recognizing the authority of the Richmond government. C. not having been able to obtain payment of his debt from the Richmond authorities, he, in December, 1866, instituted proceedings to recover the amount due him from the present government of Virginia. **HOLD:** He has no claim, either in law or equity, upon the present government, for its payment.

This was an appeal by O. H. Chalkley from the refusal of the auditor of public accounts to pay a claim presented by Chalkley against the State for leather and findings, furnished by him to the penitentiary, from November 4th, 1861, to February 25th, 1862, amounting to \$6,750 08. There was no doubt that the articles were furnished to the penitentiary by Chalkley. At the time, Robert M. Nimmo was the storekeeper of the penitentiary, under an election by the General Assembly, his term having commenced on the 1st of January, 1861, and continuing for two years; but he did not take the oath prescribed by the Wheeling government. It was his duty to purchase the articles used in manufacture at the institution, upon the order of the board of directors; and though the record does not shew that he purchased these goods, or that the directors either ordered the purchases, or approved them afterwards, yet there was no reason to doubt either fact.

405 *Nimmo having gotten into pecuniary difficulties, the amount due upon the account, though applied for by Chalkley during the war, was not paid; and in the session of 1864-65, he petitioned the General Assembly for its payment, and a bill was reported to the House of Delegates for the purpose, but, owing to the press of more important matters, was not acted on.

The auditor, in his answer to the petition, relies upon the provision of the constitution, article 4, § 27, which declares that the General Assembly "shall not provide for the payment of any debt or obligation created, in the name of the State of Virginia, by the usurped and pretended authorities at Richmond:" And he insisted that Nimmo, not having taken the oath prescribed by the Wheeling government, his office of storekeeper of the penitentiary was vacated, and he had, therefore, no authority to purchase the articles.

Upon the hearing, the parties dispensed with a jury, and submitted the case to the court; and the court rendered a judgment

*See foot-note to De Rothschilds v. The Auditor, 22 Gratt. 41.

for the sum of \$5,496 65, the value in gold of Confederate money at the time of the sales. The Attorney-General thereupon excepted to the opinion of the court; and applied to a judge of this court for a super-seedeas, which was awarded.

The Attorney-General, for the Commonwealth.

J. Alfred Jones, for the appellee.

JONES, J. To entitle the defendant in error to recover in this case, it was incumbent on him to establish that his claim rests upon a "legal ground;" in other words, that it could be sustained upon principles of law or equity. Code, ch. 45, § 12, ch. 46, §§ 1-3. The question before us is, therefore, a legal one purely; beyond that view of the case we cannot go. We have nothing to do with any consideration of justice, policy or good faith, which might appeal to the Legislature, *if any such consideration exists, except so far as they may bear on the legal question.

The claim in this case is for the price of leather and findings furnished to the penitentiary from November, 1861, to February, 1862, for the purpose of carrying on its manufactories. It is not disputed that they were proper and necessary supplies. During that period the State of Virginia was one of the States associated under the name of the Confederate States.

The government of Virginia, at Richmond, had the possession and control of the penitentiary, supplied it with materials, sold and appropriated the proceeds of the goods manufactured there. Robert M. Nimmo was then acting as the general agent and storekeeper of the penitentiary, having been elected before the secession of the State, for a term of two years from January, 1, 1861; and having continued to hold the office and perform its duties after secession as before. It is the duty of the general agent, "on the requisition of the board" of directors, to purchase all materials and other things required for work done in the penitentiary. Code, ch. 213, § 55. It does not appear in this case, by any express proof, that there was any requisition of the board for the purchase of the articles which are the subject of this claim, nor that there was any general requisition that would cover such purchases, nor that the purchase of them was subsequently ratified by the board. It does not even appear, by any express proof, that they were purchased by the general agent. The answer of the auditor, however, does not deny that they were purchased by Nimmo, acting as general agent, and on the requisition of the board. And I think it may be fairly inferred, from all the evidence, that the purchases were made by Nimmo, as general agent, and that they were made on a requisition of the board given beforehand, or were ratified afterwards; which would have the same effect as a previous requisition.

407 *The question is, whether the purchases, so made, impose a legal claim

upon the Commonwealth, which can be sustained by the court.

It must be conceded, that Chalkley, when he sold these goods, looked to the Richmond State government, and to that alone, for payment. He must be presumed to have known of the existence of that government; that it was exercising supreme and exclusive control in this part of the State; that it had exclusive management and control of the penitentiary, furnished its supplies and appropriated its work; and that Nimmo, however and whenever he was appointed general agent, was then acting as such under the authority, direction and control of that government; in short, that he was acting as an officer of that government. It may fairly be inferred, that Chalkley recognized that government as a lawful government, because it appears that he was, what the witness calls, "a good Southern man." He, no doubt, believed that that government would survive the efforts to overthrow it. Why, then, should he not be willing to sell goods to it upon its credit alone? That he sold the goods on the credit of that government alone, further appears from the fact that he was willing to accept Confederate money in payment in 1865, when it had depreciated to not more than one-twentieth, or perhaps one-fortieth, of its value, at the time he was entitled to receive it, under his contract. That he reposed confidence in the credit of that government, or in its ability to bind the State by its contract, is shown by the fact that he continued to sell to it as before, notwithstanding the non-payment of the present claim, and from the other fact that he sold to the penitentiary cheaper than to other manufacturers, because he "considered the State (meaning, of course, as it might be bound by the Richmond government) safer than individual credit."

We must now enquire what that
408 government was, *and what was its legal relation to the people of the State—to the State itself.

I shall not go into a discussion of the right of a State to secede from the Union in 1860 and 1861, or of the effects resulting from its exercise, or attempted exercise. It was understood, in the States which seceded, to be nothing more than a withdrawal from all connection with the other States, under the constitution; not the creation of a new State; the original State retaining its integrity and identity. In Virginia, the officers of government continued; there were no new elections in consequence of secession. In June, 1861, the "restored government," as it was called, was established at Wheeling, and claimed jurisdiction, as did the Richmond government, over the whole territory of the State. After the establishment of the restored government, each of these conflicting governments became unable to render its jurisdiction practical and effectual, as to a large part of the territory of the State. The actual jurisdiction became practically

divided between them—the Richmond government exercising exclusive jurisdiction over about two-thirds of the State, and the restored government exercising jurisdiction over the other third.

I need not follow up the history of these conflicting governments, or discuss their respective claims, upon principles of public and constitutional law, to be considered the true and lawful government of the State. It has been held by the Supreme court, that when there are two governments in a State, each claiming to be the lawful government, the question which of them is really the lawful one, is not a judicial question, but a political one, to be determined by the political authorities of the United States. *Luther v. Borden*, 7 How. U. S. R. 1.

Now, whatever opinion we, or any other citizen, may entertain upon the respective
claims of these two governments,
409 *upon principles of law, of reason or justice, all must agree that the opinion of the authorities of the United States has been unmistakably expressed. The conqueror, as might have been expected, has resolved the question in favor of his ally in the conflict, and against his enemy. This question was fully discussed by Chief Justice Chase in *Cæsar Griffin's case*, 8 Am. Law Register, N. S., 358; and he accordingly held that the restored government was the lawful government of Virginia.

The present constitution of the State recognizes the restored as having been the lawful government, and denounces the authorities which carried on a government at Richmond during the war as "usurped and pretended authorities." This constitution was adopted by the people at the polls. Whether the people adopted it willingly and because they approved it, or only adopted it as the best alternative within their reach, is a matter of no consequence—the constitution is equally obligatory in either case. Sitting here under the authority of that constitution, and exercising only the jurisdiction it confers upon us, directly or indirectly, we are not at liberty to disregard its provisions, or the principles on which it evidently rests. Whatever we might have thought about it, as an original question, if it was our province to decide it as such, we are not at liberty now, in the circumstances in which we are placed, to hold judicially, in opposition to the constitution, that to have been the lawful government which the constitution has declared to have been unlawful. The most that would be conceded by the Federal authorities, and the most that can be maintained upon the principles of the present constitution, is, that the Richmond government was a *de facto* government. That is all that the Supreme court has conceded to the governments of seceded States, which had complete and

exclusive control of the whole territory,
410 *with no other government asserting a conflicting claim. *Texas v. White*, 7 Wall. U. S. R. 700; *Thorington v. Smith*, 8 Ib. 1.

The constitution of the States provides

that "no appropriation shall ever be made for the payment of any debt or obligation created in the name of the State of Virginia, by the usurped and pretended authorities assembled at Richmond during the late war." This provision makes no reference to the character or consideration of the debt, further than to describe it as a debt "created in the name of the State of Virginia, by the authorities at Richmond." The evident meaning is, that every such debt or obligation is void on principle, independent of this provision, and that the Legislature shall never treat any such debt or obligation as valid, by providing for its payment. And the convention seems to have treated such debts and obligations as invalid, because they considered the Richmond government as having no lawful authority to bind the State by any contract. This provision of the constitution, though in terms a restraint upon the Legislature only, is virtually a restraint upon the courts likewise.

It was contended at the bar, that notwithstanding the general and comprehensive terms of this provision, it could not have been designed to prohibit the payment of such a debt as that claimed in this case. The support of the penitentiary, it was said, was imposed upon the State by laws passed long before secession, and never repealed; and the restraint and punishment of offenders were necessary to the protection of society. And reference was made at the bar, and in the opinion of the Circuit court, to a report made by the majority of the committee for courts of justice, in the house of delegates of 1865-'6, in reference to the right of the Legislature, under the constitutional provision above quoted, to provide for the payment of claims for

411 bread and other necessary supplies for the inmates of the *penitentiary during the war, and for which the claimants alleged that, after the exercise of due diligence, they had been unable to obtain payment from the Richmond authorities. I do not propose to express any opinion upon the soundness of the views presented in that report, or in the counter report of the minority; for the question then before the Legislature was not the same as that now before this court. The Legislature, if not restrained by the constitution, might choose to recognize an obligation founded on considerations of justice, policy, or good faith, when it might not think there was any obligation in point of law. This court, before it can sustain a claim rejected by the debtor, must find a ground of legal obligation. The majority of the committee held that the claims under its consideration, being founded on long-established laws, never repealed by the restored government, and essential to the preservation of civil society; being what they called debts of the people; not debts of the government; not arising originally out of the action of the "usurped" authorities, and not burdens thrown upon the people of the State in con-

sequence of secession, over and above what they must have borne had there been no secession; but being such only as they must have borne under any circumstances, could not properly be regarded as debts or obligations "created by the usurped authorities." Upon that ground, among others, the majority of the committee expressed the opinion that the payment of these claims was not inhibited. But these views, if we should hold them to be sound, will not help us, unless we can hold that there is some ground of legal obligation upon the State.

Chalkley cannot sustain his claim upon the ground of his contract with the Richmond authorities, *proprio vigore*, for we must hold that they had no right to make a contract that could, as such, impose 412 a legal obligation *on the State. It is insisted, however, 1st, that there was no contract with the Richmond authorities, so called, but that the contract was made with Nimmo, an officer appointed by the lawful government, before secession, and never removed by the restored government; and 2d, that Chalkley does not seek to recover on the basis of the express contract, if it should be held that it was made with the Richmond authorities, but upon an implied obligation, arising out of the duty of the State to maintain the penitentiary. Let us consider those grounds.

1. While it is true that Nimmo was appointed by the lawful government before secession, and while the counsel is probably right in saying that he was not removed from his office by force of any ordinance or statute of the restored government, I cannot hold that he is to be regarded as acting under the authority of the restored government, or as possessing any authority from that government, while he was daily acting in the service of the Richmond government, and recognizing its authority. The Richmond government was hostile to the restored government. The two positions were, therefore, incompatible. When Nimmo recognized the authority of the Richmond government and continued in its service, he must be regarded as repudiating and turning his back upon the restored government. When he thus repudiated and turned his back upon the restored government he abdicated his office under that government, if he was ever entitled to hold it under that government, and virtually resigned it. The suggestion that an officer of the Richmond government was, at the same time, an officer of the restored government, would have shocked the common understanding of that day; and any officer who would have asserted such a pretension would, without doubt, have been thrust from his office, with the least possible ceremony.

413 *2. Chalkley must avail himself of the alleged obligation of the restored government to provide for the penitentiary, if at all, either on the principles applicable to the action of *assumpsit* upon what the laws call an implied contract, or on the equitable doctrine of substitution. The

case was put by the Circuit court on both grounds. And first as to the principles of assumpsit.

I have already said that Chalkley made an express contract with the Richmond government, upon whose credit alone he relied, at that time, for the payment of his debt. The precise question to be now considered is, whether the law will imply another contract on the part of the restored government, or on the State represented by it, for the payment of this debt.

If this debt to Chalkley can be considered as a debt "created" by the Richmond government, within the meaning of the constitution, it might be contended, with great force, that the provision of the constitution referred to imposes a restraint upon the court as well as upon the Legislature, and that it would be an evasion of the constitution thus indirectly to give substantial effect to an invalid and reprobated contract. But I do not propose to consider these questions.

A conclusive reason why the law will not imply an assumpsit to pay Chalkley's debt, by the State, or by the restored government, is, that the sales upon which his claim is based were made to the Richmond government, exclusively upon the credit of that government. The principles applicable to this case, putting it in the strongest light for Chalkley, may be illustrated by reference to the case of husband and wife. When a wife is living with her husband, he is bound to provide her with necessaries, and a person who provides them for her may sue him for the price. So, if a husband turns his wife out of his house, and refuses to provide for her, a person who supplies her with necessaries may

414 *sue the husband for the price, upon an assumpsit implied from his obligation to provide for her. But if, in either case, the goods are not furnished upon the credit of the husband, but upon the credit of another person, the husband cannot be held liable. This is so when the goods are sold upon the credit of the wife only, and although she is living with her husband, and so he is undoubtedly bound to provide for her. The person who supplies the articles, may, if he chooses, rely upon the credit of the husband and the duty which the law casts upon him to provide for his wife, or, if he chooses, he may rely upon the agreement and the credit of some other person, whom he prefers to trust, even though that person be a married woman. When he has fairly, and with a knowledge of the facts, chosen his debtor, the law will not allow him to change his contract. He cannot "repudiate his choice and choose again." *Metcalf v. Shaw*, 3 Camp. R. 22; *Bentley v. Griffin*, 5 Taunt. R. 356, (1 Eng. C. L. R. 131); *Stammers v. Macomb*, 2 Wend. R. 454. So if, at the time of a sale, the seller knows that the person with whom he is dealing is an agent, and that he is acting within the scope of his authority so as to bind his principal, and notwithstanding this knowledge, he chooses to make the

agent his debtor, and looks to him alone for payment, he cannot, after the failure of the agent, turn round and charge the principal; having made his election when he had the power to choose between the one and the other. *Addison v. Gandapegin*, 4 Taunt. R. 574; *Paterson v. Gandapegin*, 15 East. R. 62; *Paige v. Stone*, 10 Metc. R. 160.

Now, as much as could be claimed in behalf of Chalkley, would be, that the obligation of the State, represented by the restored government, to provide for the support of the penitentiary, should be placed upon as high ground as the obligation of a husband to support his wife; and that a person furnishing supplies *for the penitentiary should have the same rights as a person furnishing supplies for a wife. If that were conceded, it would not help Chalkley, because he did not furnish the articles sold by him upon the credit of the State, or of her lawful representative, the restored government; but upon the credit of certain parties in Richmond, who did not lawfully represent the State, and could not pledge her credit.

If Chalkley had found the penitentiary abandoned or neglected, and the necessary wants of the prisoners unprovided for; and had, in that state of things, supplied them with food, clothing and other necessaries, relying upon the restored government alone to reimburse him, he would have had a claim of the strongest character upon the justice and the gratitude of the present government. Perhaps his claim might have been sustained by the court in that case; but as to that I give no opinion. But that is not the case. Chalkley supplied neither food, clothing, fuel, or any other article of necessity for the prisoners. He supplied leather and findings to the Richmond government, upon its credit, to be used in carrying on its workshops in the penitentiary. It does not appear from anything in the cause, that the proceeds of the goods manufactured from these materials, or any part of such proceeds, went to the use of the penitentiary in any way, much less to the use of the prisoners, by supplying them with necessaries. They may have been part of the funds which were soon after sunk in the hands of Nimmo.

It was argued, however, that the business of manufacturing in the penitentiary is part of the discipline of the prison, employed to promote the good behavior, the contentment, and the health of the prisoners. Does it follow that Chalkley, who supplied materials for carrying on one of the workshops, ought to be regarded as furnishing necessaries for the prisoners, in like manner *as one who furnished bread? I think not. It may be true, and doubtless it is, that it is of great advantage to the prisoners, and to the discipline of the prison, that they should be kept at work; but those advantages are incidental. The primary purpose in carrying on the workshops is to make money. The great object is to make the

penitentiary support itself, and, if possible, yield a surplus to go into the general treasury. In some of the States these institutions yield large profits, over and above expenses. The Richmond government was in deadly hostility to the restored government, in the pending war, and had, with its adherents and allies, excluded the restored government from the greater part of the territory over which it claimed jurisdiction, and from the control of the public institutions within those limits. All this, we are bound to presume, was well known to Chalkley. It would seem to be too clear for argument, that, under such circumstances, the State, or the restored government, was under no obligation to pay for supplies furnished by Chalkley to the Richmond government to be worked up into goods for its benefit; to enable that government to carry on a profitable business, and thereby to augment its resources and lessen the burden of taxation. Where there is no obligation, no duty, the law will not imply an assumpsit.

As to the claim to rest this case upon the ground of substitution, I need say but little. The claim is, that Chalkley is entitled to be substituted to the rights of the prisoners, to be provided for by the State, as represented by the restored government. Certainly the Richmond authorities had no claim against the State to which he could claim to be substituted; and no such claim has been asserted. Whatever right of substitution to the prisoners a man might have who supplied their necessary wants, the claim could not be extended to articles

not, in themselves, necessities for 417 the prisoners, *without proof that they or their proceeds were actually applied to the procurement of such necessities. As I have said heretofore, there is no proof that the articles furnished by Chalkley, or any part of them, or their proceeds, went to the procurement of necessities for the prisoners, or even that the proceeds of them went to the use of the penitentiary at all. Besides, as I have already shown, the articles furnished by Chalkley were only materials to be worked up into goods, to be sold for the benefit of the Richmond government. Under the "circumstances then existing, there was no obligation, legal or equitable, upon the restored government to pay for things furnished to the Richmond government, to enable it to make money. It would be inequitable, in the last degree, to impose such an obligation. And a court of equity will not lend its aid to enforce payment, by its extraordinary remedies, of claims that are not sustained by justice and good conscience.

Moreover, it was incumbent on Chalkley, before he could claim relief upon the principles of equity, to show that he had used due diligence in his efforts to collect his debt from the Richmond government. And in considering the measure of diligence which he ought to have used, it must be borne in mind that the Richmond government was a revolutionary government, not

recognized as lawful, and whose very existence was involved in the war then pending. He seems to have been diligent in importuning the officers of the penitentiary for payment up to the end of 1862. He does not appear to have done anything in 1863 or 1864. The next thing he seems to have done was on the 27th day of January, 1865, when he obtained a certified copy of his account from the books of the penitentiary, and a certificate from the superintendent of his refusal to pay the claim, and of the ground of his refusal. These were obtained, no doubt, with a view to the applica- 418 tion *to the Legislature, spoken of by Judge Sheffey. Why was no legal proceeding taken in all this time? Why was no application made to the Legislature at the session of 1862-'3, or at that of 1863-'4? Why was it postponed until 1865, when, as the Legislature no doubt well knew, the Confederate cause had come to extremities well nigh desperate—utterly desperate, as the event soon proved—and when the minds of members were so engrossed by the perils of the situation that no wonder they could give but little attention to claims? My opinion is, that Chalkley has not shown that he used due diligence to collect his claim from the Richmond government.

Upon the whole, I am of opinion that the claim of Chalkley cannot be sustained upon any ground of law or equity. The decree must, therefore, be reversed and the petition dismissed.

ANDERSON, J. I very reluctantly, and with considerable doubt, concur in the judgment, upon the ground of the inhibition of the constitution. But am not prepared to concur in all the positions and the reasoning of the opinion of J. Joynes.

The other judges concurred in the opinion of Joynes, J.

Judgment reversed.

419 *Johnson & als. v. Drummond, &c.

Crockett & als. v. Thomas, &c.

March Term, 1871, Richmond.

1. Statute—"Duty on Oysters"—Unconstitutional.—The 7th section of the act of March 8, 1866, entitled an act imposing a duty on oysters, imposes a tonnage duty, and is, therefore, in violation of the constitution of the United States, article 1, § 10.
2. Same—Joint Suit to Test the Validity of.*—A statute requires the captain or other officer of a vessel engaged in the oyster trade to take out a license. A number of such captains or officers may unite in one bill to enjoin the sale of their vessels, and test the constitutionality of the act.

These cases were heard together, and the material facts as well as the question involved in both are the same.

*See principal case cited in Richmond v. Crenshaw, 76 Va. 940; Blanton v. Southern, etc., Co., 77 Va. 337; Williams v. County Ct., 26 W. Va. 518, 520.

In the one case it is a bill by Johnson and a number of others, citizens of Accomac county, engaged in carrying oysters from the waters of Virginia in their vessels, setting out that their vessels had been seized by Drummond, an inspector appointed under the act of March 3, 1866, entitled an act imposing a tax on oysters, for their failure to pay the tax prescribed by § 7 of that act, and that he was about to sell the same, and asking for an injunction to restrain the sale; and Drummond and Wm. F. Taylor, auditor of accounts of the State, were made parties defendants.

The other case is that of Crockett and a number of others, whose vessels had been seized for the same cause by Thomas, another inspector, setting out substantially the same facts, and asking the same relief; the grounds of relief relied on in both cases being that the said seventh section of 420 the act imposing a tax on oysters, was in contravention of the 10th section of the 1st article of the constitution of the United States.

The causes were sent from the Circuit court of Accomac to the Circuit court of Richmond; and when they came on to be heard, the injunctions which had been awarded were dissolved, and the bills dismissed. And the plaintiffs applied to this court for appeals, which were allowed.

John Wise, for the appellants.

The Attorney General, for the Commonwealth.

JOYNES, J. The seventh section of the act passed March 3, 1866, entitled "An act imposing a tax on oysters" (Sess. Acts 1865-6, p. 75), contains the following provision: "Every captain or officer of a vessel which shall be employed in carrying oysters taken in the waters of Virginia, shall obtain from an inspector a license, for which he shall pay to said inspector a tax of three dollars per ton for every ton said vessel may measure, according to the custom-house enrollment or license; and it shall be the duty of every such captain or officer to have said license framed, and so set or placed upon the quarter-deck or binnacle of his vessel, as to be exposed to the full view of every person who may board said vessel; which license shall authorize such vessel to carry away oysters for one year."

The twelfth section of the act authorizes the inspector to attach the vessel and appurtenances of any captain or officer failing or refusing to obtain the license and pay the tax provided for in the seventh section; and invests him with all the powers and duties of a sheriff for the collection of other taxes.

Sundry vessels owned by the plaintiffs were attached and seized by the defendant Drummond, an inspector, and were advertised for sale, for the non-payment of the license tax imposed by the seventh 421 section; and the bill in this case was filed to enjoin the sale. The only ground alleged for the injunction is, that the provision quoted from the seventh sec-

tion of the statute is in violation of that part of section 10, article I, of the constitution of the United States, which declares that "No State shall, without the consent of Congress, lay any duty of tonnage." The injunction was awarded; but, at the final hearing, it was dissolved, and the bill dismissed.

Under the articles of confederation, the power to regulate commerce, and to lay imposts and duties, belonged to the States respectively, subject only to the restriction contained in the third section of the sixth article, that no State should lay any duties or imposts which might interfere with any stipulations in treaties entered into by the United States. Some of the States, from their geographical situation, were thus placed at the mercy of those through which their imports and exports had to pass. This independent right of the several States was often exercised, in an undue degree, under the influence of local interests and jealousies, and led to the adoption of conflicting, and even hostile and oppressive regulations. The pressure of this condition of things led, at an early period after the close of the war, to great complaint, and movements were made in Congress, and on the part of individual States, for the purpose of establishing uniformity in the commercial regulations of the several States, as "necessary to their common interest, and their permanent harmony," and was the main cause which led to the adoption of the present constitution. The evils then felt would not have been effectually cured, however, by conferring upon Congress power to regulate commerce, even if the grant of that power was exclusive of a like power in the several States. The power to regulate commerce does not carry with it the power of taxation for revenue.

The power to regulate commerce 422 does not give to Congress the power to tax it. Congress derives that power from the express grant of power "to lay and collect taxes, duties, imposts and excises." Nor does the grant to Congress of the power to regulate commerce, even if construed to be exclusive of like power in the States, prohibit the States from making it the subject of taxation within their own jurisdiction. The inability of the States to levy such taxation, results altogether from the restrictions contained in section 10, article I, of the constitution. *Gibbons v. Ogden*, 9 Wheat. U. S. R. 1; *Passenger Cases*, 7 How. U. S. R. 283; see *Taney, C. J.*, pp. 479, 480; *Federalist*, No. 32.

One of the familiar modes of imposing a tax on commerce, is by laying duties on imports and exports. If this power had been left to the several States, without restraint, they could, by means of it, have brought about substantially the same evil which was so much complained of under the confederation. It was, therefore, made the subject of special prohibition by the several clauses of section 10, article I, of the constitution.

Another familiar mode of taxing commerce is by a tax upon the vessel, the vehicle of commerce, known as a tonnage tax, or a "duty of tonnage," as it is called in the constitution. A grievous burden might be laid upon any trade, by a tax upon the vehicle in which the trade is carried on, as by regulations applicable to the trade itself, or by taxes upon the articles which are the subjects of the trade. And, accordingly, this power is restricted by the third clause of section 10 of the same article; which provides that "no State shall, without the consent of Congress, lay any duty of tonnage." This prohibition is general—"any duty of tonnage"—and is not confined to any kind or kinds of commerce, or to any class of vessels.

In *Gibbons v. Ogden*, Marshall, C. 423 J., said: "A duty *of tonnage is as much a tax as a duty on imports or exports; and the same reason which induced the prohibition of those taxes, extends to this also." And in *Steamship Company v. Portwardens*, 6 Wall. U. S. R. 31, Chase, C. J., said, delivering the opinion of the whole court: "The general prohibition upon the States against laying duties on imports or exports, would have been ineffectual, if it had not been extended to duties on the ships which are the vehicles of commerce. This extension was doubtless intended by the prohibition of any duty of tonnage."

A duty of tonnage, in the most obvious sense of the word, imports a tax or duty proportioned to the tonnage or size of the vessel. This description of tax has usually been imposed in that form, both in England and in this country, and from the form, it doubtless received its appellation. But, in the case cited from 6 Wallace 31, the Supreme court held that "it was not only a pro rata tax that was prohibited, but any duty on the ship, whether a fixed sum upon the whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty." Accordingly, in that case, the court held an act to be unconstitutional which laid a uniform tax of five dollars upon all vessels arriving at the port of New Orleans, without regard to size. And it seems, from what was said in that case, that the fact that the tax does not go to the State, but to wardens of the port, whose duty it is, when called upon, to render service to vessels in the port, and purports, by the terms of the law, to be designed to provide compensation for the wardens, will not exempt it from condemnation as a duty of tonnage, if it would be so regarded, in the absence of such an appropriation of the money. And in that case the tax was held to be a regulation of commerce, and also a duty of tonnage, and forbidden on both grounds.

It is immaterial what form of expression is used in *describing the tax, 424 or the object or the subject of it, if, upon looking at its real character and effect, it is found to come within the meaning of a duty of tonnage. The question is one of

substance and not of form or name. 12 Wheat. U. S. R. 445; 12 How. U. S. R. 314; 24 How. U. S. R. 169. Thus, the tax, instead of being called a tax on the vessel, may be called a tax upon the master or upon the cargo; it may purport to be a tax upon some privilege to be enjoyed by the vessel, as the privilege of coming into a certain port, or of riding at a particular anchorage, or of being served, as she may have occasion, by the wardens of a port, or the privilege of engaging in a particular trade—as the trade in wood, in corn, or in oysters—yet, if really and substantially it is a duty of tonnage, it is equally within the prohibition as if the tax had been called by its right name. Nor will it alter the case if the tax is employed by the State as a necessary means, or as the best means, of enforcing some law which is within its constitutional authority. A tonnage tax is a means prohibited to the States, without the consent of congress; and cannot, without such consent, be employed for one purpose any more than another.

A duty of tonnage may be local in its application, as in the cases in 6 Wallace 31, and 3 Strobbert Law R. 594. It may apply only to vessels of a particular class, or of not less than a particular size, or to vessels of a particular construction. So it may apply only to vessels engaged in a particular trade, or the vessels which are liable to it may be ascertained by any rule of discrimination which the State may choose to adopt. To the extent of the vessels to which it applies, the tax is liable to the same constitutional objections as if it embraced all vessels whatever, without exception.

The mere fact that a tax is graduated in amount by the tonnage of a vessel, is not enough, of itself, to determine that it is duty of tonnage. As we have seen, 425 *there may be a duty of tonnage which is not at a certain rate for tax, And so a tax otherwise lawful may be measured by a certain rate per ton of a vessel, and not be a duty of tonnage. In *Lott, tax collector, v. Mobile Trade Co.*, 43 Alab. R. 578, a tax upon vessels owned in the State, or property merely which a State has an acknowledged right to impose (6 Hamm. R. 522; 3 Gill's R. 14; 9 Alab. R. 234), was held to be valid, though the amount to be paid by each vessel was proportioned to her tonnage. And so the fact that the tax is nominally upon a license to engage in the oyster trade, does not determine that it is not a tax upon the vessel as a vehicle or instrument of commerce—a duty of tonnage. The license is issued to furnish the taxpayer with evidence that he has paid the tax, which is exacted in advance. If the same tax, collected in any other way, would be a tax on the vessel as a vehicle of commerce, the interposition of the license cannot change its character.

The State, being the owner of the native oysters in her waters, has a right to turn them to account for purposes of revenue by means of taxation; and it is insisted that

she is authorized to employ such means for the collection of the tax as may seem to be most efficient. But this cannot be admitted. The State cannot employ any means, however valuable or necessary it may be, which is prohibited to it by the supreme law, the constitution of the United States. Among such forbidden means, without the consent of congress, is a duty of tonnage. It is said, however, that the tax we are considering, is, in effect, a tax on the oysters, and not a tax on the vessel as a vehicle of conveyance. I cannot admit this proposition. The tax is not exacted from the owner of the oysters, and is not in proportion to the quantity or value of the oysters. It is a tax exacted from the master of a vessel,

who may or may not own either the
426 vessel or the *oysters, in consideration of a privilege to be granted to the vessel to engage in the carrying of oysters. The tax is applicable to all vessels wherever owned, and is not applicable to any vessel which does not carry oysters, and is not, therefore, a tax upon the vessel as property. The license for which the tax is paid is not a license to the master personally to engage in the oyster trade, for then he might substitute another vessel. The words of the statute are, that the license shall "authorize the vessel to carry away oysters for one year." The license, therefore, is to the vessel herself; if she is lost or destroyed the next day, the license is gone. She must obtain the license and pay the tax, because she carries oysters; or more properly, because she has a capacity to carry oysters, under the privilege conferred by the license, and the license is in proportion to her capacity. She is not licensed and taxed as a vehicle of commerce generally, such as a vessel engaged in general trade, as cargoes offer; but she is licensed and taxed as the vehicle of a particular trade; upon her capacity to render service in a particular trade, to wit, the trade in oysters. If the statute had provided that no vessel should carry on any trade in the waters of Virginia, without payment of a tax in proportion to her capacity, for the privilege, it could hardly be doubted, I apprehend, that the tax would have been a duty of tonnage. The power to impose such a tax would enable a state to harass commerce in the most vexatious and oppressive manner. It would enable the State, in a great measure, to defeat the wise and beneficent purposes of the constitution, in vesting congress with the power to regulate commerce, and in denying to the States, without the consent of congress, the power to lay "any duty of tonnage." What difference can it make, in principle, that the law, being the same, in all other respects, applies only to the particular trade
in oysters? It seems to me, therefore,

427 that *the tax I am considering comes within the definition of a duty of tonnage. The case is a much stronger one than that cited from 6 Wallace, or that cited from 3 Strobhart.

It may be that such a tax as this may be

the best means, or an indispensable means, of securing the tax on oysters. If so, the state is fortunately not absolutely debarred from the use of it. It may apply to congress for its consent, and if a proper case can be made out, it is to be presumed that congress would not withhold its consent.

In *Lott v. Mobile Trade Co.*, before cited, the Supreme court of Alabama intimated an opinion, that the prohibition against a State laying "any duty of tonnage," did not apply to vessels engaged exclusively in the purely internal commerce of the State. The case, however, was decided on the ground that the tax in question was not a tonnage tax, but a tax on property. It is not important, in this case, to consider whether this opinion is a sound one. The tax now under consideration is not confined by the statute to vessels engaged exclusively in internal commerce. It is a tax upon all vessels engaged in carrying oysters caught in the waters of Virginia. These vessels belong in Hunting creek, in the county of Accomac; and the bill alleges that they are engaged in carrying oysters from said creek "to various ports." They cannot reach any port of Virginia without crossing the Chesapeake bay. Such commerce cannot be called purely internal commerce. Congress cannot regulate purely internal commerce of a State, but it regulates all commerce on the Chesapeake and its navigable tributaries. There is no reason to infer that these vessels traded exclusively to Virginia ports; but there is strong reason to infer the contrary. The number of vessels in this State engaged in purely internal commerce exclusively, is very small. Hunting creek is nearer to
428 some of the ports of Maryland *than to any port of Virginia. One of them, which is a very large center of the oyster trade (Crisfield), and the terminus of a railroad leading to Philadelphia, is not more than some fifty miles off, and on the same side of the bay. Baltimore, the largest port on the tributaries of the Chesapeake, and the great centre of the oyster trade, is within a few hours' run. And it may be mentioned, as a matter of common knowledge, that such small craft, while they usually trade with the largest port within convenient reach, because they are sure to find a ready market, which is all-important in case of a perishable cargo like oysters, often trade to one port or another, in or out of the State, as the winds favor or the markets at the moment invite.

It was also contended in the argument, that the tax in question is a violation of that clause of the constitution which gives to Congress the power to regulate commerce. That point, however, was not fully argued on either side, and it need not be decided, as the case is disposed of on another ground. Besides, the case does not seem to be properly presented to raise that question.

It was objected by the Attorney-General, that the appellants, being the owners of several vessels, by distinct and independent titles, and not having a common interest in

all the vessels, could not properly unite in the same bill to enjoin the sale of all the vessels. There is nothing in this objection. It is fully answered by *Bull, &c. v. Read*, 13 Gratt. 78.

I am, therefore, of opinion that the decree of the Circuit court should be reversed, and the injunction made perpetual: and that the appellee Drummond should pay the costs in both courts.

CHRISTIAN and STAPLES, Js., concurred in the opinion of Joynes, J.

429 *MONCURE, P. The question in these cases is, whether the seventh section of the act passed March 3, 1866, entitled "An act imposing a tax on oysters" (Acts of Assembly, 1865-'6, p. 74, ch. 5), is contrary to the constitution of the United States.

The only provisions of that constitution to which the said section can be said to be opposed, are the three following, which declare:

First. That congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Article I., section VIII., clause 3.

Second. That "no State shall, without the consent of congress, lay any imposts or duties on imports or exports, except," &c. Same article, section X., clause 2; and,

Third. "No State shall, without the consent of congress, lay any duty of tonnage," &c. Same article and section, clause 3.

In regard to the first and second of these provisions, little need be said. The power to regulate commerce is given to congress, but it is not expressly denied to the States. Of course an exercise of the power by congress prevents any inconsistent exercise of such a power by the States. But an exercise of power by a State which may be perfectly consistent with the acts of congress, if any, on the subject, is constitutional, though it may, in its nature or effect, be a regulation of commerce between the States; especially if it does not discriminate against citizens of other States. If, therefore, the seventh section of the act of March 3, 1866, were a regulation of commerce, it would not be unconstitutional on that ground, because it is not inconsistent with any act of congress on the subject, and makes no such discrimination. But it is not a regulation of commerce. It is no regulation of any-

430 thing. It merely requires a license to be obtained by every captain *or officer of a vessel employed in carrying oysters taken in the waters of Virginia, without reference to the place, in or out of the State, to which they may be carried. It has no reference to commerce, either with foreign nations or among the several States; which is the only commerce over which congress has any control. All will admit that the State has exclusive control over commerce confined to her own limits. That oysters carried under such a license may possibly be carried to another State, cannot make the law a regulation of com-

merce, much less make it unconstitutional.

Then, in regard to the provision prohibiting a State, without the consent of congress, from laying any imposts or duties on imports or exports. Even if the law expressly imposed a duty on oysters carried from the waters of this State to any other State of the Union, it would not, on that ground, be unconstitutional; the Supreme court of the United States having recently decided, in effect, that this provision of the constitution applies only to foreign commerce, and not to interstate commerce. *Woodruff v. Parham*, 8 Wall. U. S. R. 123. But the law in question does not impose such a duty. It merely requires a license to be obtained for carrying oysters taken in the waters of the State, without reference to the place to which they may be carried. It places all other States and their citizens on the same footing, in this respect, with the State of Virginia and her citizens. If the law were void as to citizens of other States and valid only as to our own, it would discriminate against our own citizens; and that, too, in regard to a subject which is so peculiarly her own that she may lawfully exclude the citizens of all other States from any participation in it.

The only remaining and important question, therefore, is, whether the law under consideration lays a duty on tonnage, in the meaning of the constitution?

431 *I think it does not. A duty on tonnage, in this connection, is a tax on a vessel. A vessel is the only vehicle of commerce on the high seas. A tax on a vessel, as such, is, in effect, a tax on commerce. And as the regulation of commerce on the high seas belongs to congress, the constitution therefore prohibits a State, without the consent of congress, from laying any duty of tonnage; that is, from laying any tax on a vessel as such. But, by the act in question, the tax is not laid on the vessel, but on the oysters, or the business of carrying them. The oysters in the waters of the State belong to her. She can do what she pleases with them, and entirely exclude, if she chooses, the citizens of other States from participating in them. While they remain public property, of course, she has no occasion to tax them. Being altogether hers, she cannot tax her own property. Taxation is a means of appropriating to public use so much of private property as is needed for the purpose. But so soon as this public property becomes private, it then becomes a subject of taxation. It can become private only in the mode and on the terms prescribed by law. The mode and terms prescribed by law in regard to those who wish to engage in the business of carrying oysters, are, that they shall obtain a license, by paying for it in proportion to the capacity of the vessel which they wish to employ in the business. This is a mere means of ascertaining the amount of the tax which the State chooses to lay, she having a right to lay a tax of any amount on the subject. No owner of a vessel is subjected to the tax except by his own act.

He is not compelled to engage in the oyster carrying business in the State. He is permitted to engage in it on certain terms, if he chooses. He may be excluded altogether from it, if the State chooses; and of course he may be excluded from it sub modo, or except on certain prescribed terms and conditions.

432 *Of course, I am speaking of oysters which belong to the public at the time they are caught, and which, I believe, are the principal subject of the carrying business. That the vehicle in which the business is conducted is a vessel which is an ordinary vehicle of commerce, makes no difference. If oysters were caught on land they might be carried in a wagon, and the capacity of the wagon might be made the measure of the tax on the license for conducting the business. If such were the case, there would be no ground for objection to the tax as unconstitutional. But oysters are taken only in water, at a distance from land, and the business of carrying them can only be conducted in vessels. The only, or the most convenient, mode of taxing them, therefore, is to tax the business of carrying them, according to the capacity of the vessel engaged in the business. A tax collector cannot know when and where the oysters are to be taken, and cannot be present to take note of the quantity and collect the tax. By requiring the owners of all vessels engaged in the business to pay for such privilege in proportion to the capacity of the vessels, all difficulty is obviated, and such owners may carry all the oysters their vessels can carry, during the period for which such license is obtained. I do not think there is anything in all this which is at all in conflict with the letter or spirit of any provision of the constitution of the United States; while I think the mode of taxation may be eminently useful as a means of deriving revenue from a most valuable subject belonging to the State.

In these cases, all the appellants who complain of the tax are citizens of the State. They are protected by the most stringent laws from the competition of non-residents. They enjoy a monopoly of the business; and they object to the payment of the tax imposed by the State which secures to them such monopoly. The law, they say, is unconstitutional, because

433 the State *cannot tax the business of carrying oysters from this State to another State; while they admit that the State can exclude non-residents from catching oysters in the waters thereof, or permitting their vessels to be used in that business, and thus secure the monopoly of it to themselves.

If the State has a right to license the business of carrying oysters within her limits, and grants a license to carry them, without specification as to place, it should be construed as a license to carry them within the State, and not as a license to carry them out of the State, if that be unconstitutional. The fact is, the State only

licenses the business of "carrying oysters taken in the waters of Virginia." The carrying of them to this point or that point, within or without the State, is not the business licensed, the consideration for which the tax is paid. The business is, the carrying. And the moment the vessel, being laden with her cargo, sets out on her journey, the consideration of the license, quo ad hoc, is received. It matters not to the State where the vessel goes. If her owner, who undoubtedly has a right to go to any part of the State, finds it to his interest, and chooses, to go to a port without the State, he surely has no good cause of complaint against the State on that account. But there is, in fact, nothing in these cases to show that the oysters were carried, or intended to be carried, out of the State; though I consider that fact as wholly immaterial.

I am of opinion that there is no error in the decrees of the Circuit court, and that they ought to be affirmed.

Anderson, J., concurred with Moncure, P.

Decree reversed.

434 *Bernard v. Maury & Co.

March Term, 1871. Richmond.

CHRISTIAN, J., absent.*

Brokers—Investments—Case at Bar.—N, living in the country, employs M, a broker in Richmond, to invest his moneys in Missouri bonds. In November, 1862, M invests at \$112 50, and February, 1863, he invests at \$125. In March, N sends a claim upon the Confederate government to M for collection, and tells of other funds which will be paid in to M in May, and directs him to invest in Missouri bonds. M collects the claim, and invests it at \$160, and so writes to N. The 23d of May the funds spoken of by N are received by M, and then Missouri bonds have advanced seventy or eighty per cent. above the last investment, and are difficult to be gotten. On the 29th of June M writes to N, acknowledging the receipt of this fund, stating that Missouri bonds were then at 230 to 235, and asks whether he shall invest at the advanced price when to be had. M receives no answer to his inquiry, and therefore does not invest the money in his hands: the Missouri bonds continuing to advance in price. **HOLD:** M was justified in waiting for further instructions, and is not liable to N for the loss.

This was an action on the case, instituted in April, 1864, in the Circuit court of the city of Richmond, and afterwards removed to the Circuit court of the county of Henrico, by A. N. Bernard against Robert H. Maury & Co., brokers, for failing to invest the funds of the plaintiff in their hands in Georgia, Alabama or Missouri bonds. The plaintiff lived in Fredericksburg until some time in 1863, when he removed to his farm in the county of Westmoreland. As

435 early *as November, 1862, the defend-

*He decided the case in the court below.

ants appear to have acted as his brokers, and in that and the months of December, January and February, they purchased Missouri bonds for him at \$112 and \$112 50; and in May they purchased another of these bonds for him at \$160.

In March, 1863, the plaintiff wrote to the defendants, authorizing them to collect a claim against the quartermaster's department of the Confederate government, and instructing them to invest the proceeds, and all other funds which should be deposited with them to his credit, in Missouri bonds. He also wrote to his sister, who then was staying at Ashland, near Richmond, requesting her to see the defendants, and instruct them to invest all his funds as speedily as practicable in Missouri bonds. And she went to Richmond, and saw one of the defendants, and read to him the letter. But she could not state at what time of the year that was. In May, the defendants wrote to the plaintiff, stating the investment of the money received from the quartermaster's department in a Missouri bond at \$160. On 29th of June, they wrote again to him, acknowledging the deposit with them for the plaintiff of \$9,129; stating that Missouri bonds had advanced greatly in price, and were then at 230 and 235; and asking whether or not they should invest when the bonds could be had at the advanced price; and saying that no Georgia or Alabama bonds had then been on the market. On the 23d of August, they again write to the plaintiff, stating the contents of their previous letters; and saying that no Missouri bonds were to be had; and they would then bring 356 to 375, and probably more; and again requesting him to advise them what they should do with the balance due him.

It further appeared that, between the time when the bond was purchased at 160, and the receipt by the defendants
436 *of the sum of \$9,129, Missouri bonds had advanced seventy or eighty per cent.; they were very scarce, and not to be found in the open market or on the street, and that intervals from thirty to fifty days occurred when these bonds were not to be had at all.

It also appears that communication was difficult between Richmond and Westmoreland, and no reply was made by the plaintiff to the letters of the defendants asking for instructions.

The parties dispensed with a jury, and submitted the whole matter both of law and fact to the court; and the court, after hearing the evidence, gave judgment for the defendants. And thereupon the plaintiff excepted; and applied to this court for a supersedeas; which was awarded.

Little, for the appellant.

Page & Maury, for the appellees.

ANDERSON, J., delivered the opinion of the court.

This was an action brought by the plaintiff in error against the defendants in error, to recover damages for the

neglect and failure of the defendants to invest the plaintiff's funds, in their hands during the late war between the States, in Georgia, Alabama and Missouri bonds, as the plaintiff alleges he instructed them to do.

The record shows that the defendants received a letter from the plaintiff, dated March 15th, 1863, inclosing a draft on the Confederate States for the sum of \$1,858, which he requested the defendants to invest in a bond of the State of Missouri, and saying that, on or about the 1st of May following, there would be placed in their banking-house, to the credit of the plaintiff, some eight or nine thousand dollars in Confederate currency; which he requested them also to invest in Missouri bonds.

437 *The defendants, it seems, had been the plaintiff's regular bankers and brokers, at least since November, 1862, and, under instructions from him, had invested his funds in Missouri bonds, in November, 1862, at a cost of \$112 50; in December following at a little lower rate, \$112; in January, 1863, at \$115; and in February, at \$125, the latter being the highest price paid for them prior to the date of plaintiff's letter of March 15th, 1863. The fund mentioned in that letter to come into the hands of the defendants about the 1st of May, to be invested for the plaintiff, was not received until the 23d of that month, when Missouri bonds had gone up from \$125, their market value at the time the letter of instruction was written, to \$230 or \$235. This appears from the letter of defendants, addressed to the plaintiff, dated 29th of June, 1863, in which they ask for further instructions, informing the plaintiff that, in consequence of this great advance in the price of Missouri bonds, and there not being and never having been any Georgia or Alabama bonds offered in market, they had not invested. And the question now is, was it their duty, under the circumstances, to carry out the instructions of March 15th, as to the purchase of Missouri bonds, or to await further instructions? The instructions given by the plaintiff through his sister, though communicated to the defendants at a later date than the letter of March 15th, were probably given under the same state of facts in the mind of the plaintiff that existed at the date of the letter, and cannot change the relations between the parties. Nor is it satisfactorily shown by the record that Missouri bonds could at that time have been obtained, if the defendants had then been instructed to purchase them at the extraordinary price at which they had been sold. But, whether this be so or not, the court is of opinion that it was a case for continued instruction. And

438 *that the defendants, who, it seems, were acting in good faith, nothing to the contrary being even imputed to them, and who were acting in fact against their own interest, for what they believed to be for the benefit of their principal, were justified in asking for and awaiting further instructions.

With regard to instructions, there are two qualifications which are naturally and necessarily implied in every case of mercantile agency. And the same is applicable to an agency of this sort. The one is that they are applicable only to the ordinary course of things. And the agent will be justified in cases of unforeseen emergency, in deviating from them. Story on Agency, sec. 193. We think there had been such an extraordinary advance in the price of Missouri bonds since the instruction was given, which, if it did not constitute such an emergency, as at least to justify the defendants to call for further instructions, and to await an answer. They wrote time and again to the plaintiff, informing him of the change of circumstances, and asking for further instructions. If he did not receive their letters, it was not their fault. And it seems to the court that it would be too strict to hold them liable for the loss. The judgment of the Circuit court must therefore be affirmed.

Judgment affirmed.

439 *Gimmi v. Cullen.

March Term, 1871, Richmond.

MONCURE, P., absent.

i. **Sale of Negotiable Notes—Usury.***—G makes his note which is endorsed, and makes a deed of trust on land to secure it, and puts it in the hands of L, a broker and banker, to sell; and L advances to him nearly as much as it is expected will be the net proceeds of the note. On the next day, L offers the note to C at one and a quarter per cent. per month discount. C says he has no money, but L, who has on deposit notes of C coming soon to maturity, proposes to advance the money for him; and C agrees to take the note, if, after examining the title to the property, he is satisfied. L thereupon advances to G the whole of the net proceeds of the note. C examines the title and is satisfied, and in sixteen days afterwards he pays L the money he had advanced for him, and interest upon it for the sixteen days. C has no knowledge of the character of the note, or for whose benefit it is sold. This is not usury.

2. **Bill of Exceptions—Certification of Evidence—Rule as to Review by the Appellate Court.**†—In a bill of exceptions to the refusal of the court to grant a

***Sale of Negotiable Notes—Usury.**—See the principal case sustained in *Moseley v. Brown*, 76 Va. 421, and distinguished in *Bailey v. Hill*, 77 Va. 497.

†**Bill of Exceptions—Certification of Evidence.**—See second headnote sustained in *Morgan v. Fleming*, 24 W. Va. 186, 196. But in *Moses v. Old Dominion, etc., Co.*, 82 Va. 29, LACY, J., in a dissenting opinion said: "In the case of *Gimmi v. Cullen*, 20 Gratt. 439, the cases are examined and compared, and it was held that 'if all the evidence is the evidence introduced by the exceptor, the appellate court will not review the judgment; but if all the evidence is introduced by the party who recovers a judgment, the appellate court will review.' But in a case where the evidence was all introduced by the party who obtained the verdict, and yet he was made the exceptor, by the action of the court in setting aside the verdict, if

new trial, the evidence, and not the facts proved, is stated. If all the evidence was introduced by the exceptor, the Appellate court will not review the judgment; but if all the evidence is introduced by the party who recovers the judgment, the Appellate court will review the judgment, and, if taking it all as true, the verdict and judgment is erroneous, will reverse it.

In May, 1867, Louis Gimmi applied to the judge of the Circuit court of the city of Richmond for an injunction to restrain Patrick Cullen and others from proceeding to sell certain real estate in the city of Richmond and county of Henrico, under a deed of trust executed by Gimmi and wife to secure a negotiable note for \$7,000, made by Gimmi and endorsed by 440 *S. Swartz, and held by Cullen. The bill charged that the note was usurious, having been discounted at sixteen per cent. per year; and without asking for a discovery from the defendants, prayed the court to direct an issue to be tried at its bar, whether or no the transaction was usurious.

Cullen answered the bill, denying that he had knowledge of any usury in the note: he purchased it of Lancaster & Co., brokers, without knowing for what purpose it was made, or to whom it belonged.

An issue having been directed, on the first trial the jury was hung, and no verdict was rendered. On the second trial, after the evidence had been introduced, the defendant moved the court to instruct the jury as follows:

If the jury shall be satisfied, from the

the exceptor's evidence is rejected, who passes upon the weight or credibility of the evidence? See the opinion in that case. This statement of the rule is not sustained by the authorities cited. In this case the sole question before this court was the measure of damages. As to this question there was no conflict of testimony. I do not see how the court can refuse to review the case upon the ground that the evidence was certified as to a question not in dispute. The question of the measure of damages in a case like this is a question of law. That the damages were too small was not subject of review before the statute to be found in the Code of 1819, c. 128, sec. 96, p. 510. *Jackson v. Boast*, 2 Va. Cases 49, decided in 1819; *Rixey v. Ward*, 8 Rand. 52."

See also, *Cluverius' Case*, 81 Va. 867 *et seq.*, where the decision of the principal case is discussed by LACY, J., in a concurring opinion, who says in part, at p. 868, "*Gimmi v. Cullen* is in conflict with *Goodman v. The Railroad*, cited above (81 Va. 576). In *Gimmi v. Cullen*, it is said, 'The rule, therefore, is, that where all the evidence is introduced by one party, and the verdict is in his favor, the *other party* may have a refusal to grant a new trial reviewed, upon a bill of exceptions certifying the evidence only. In such a case, the evidence certified will be considered as true by the appellate court, unless impeached in some way. But, when the verdict is against the party who introduced the evidence, he cannot have the refusal of the court to grant a new trial reviewed upon a certificate of the evidence merely; he must have a certificate of the facts proved. From the evidence certified in the former case, and from the

evidence, that the note on which this suit is brought was drawn and endorsed by the maker and endorser to raise money on a sale of it, and was placed by them in the hands of Lancaster & Co., brokers, to be sold by them for that purpose; and Lancaster & Co. sold it to the defendant at a discount of more than legal interest, but neither endorsed the note nor made themselves in any way responsible for its payment, nor at any time owned it, or any part of it; and that the defendant purchased it without notice of the purpose for which it was made, or of its character, more than the note and endorsement import, the jury must find for the defendant.

The plaintiff thereupon moved the court to instruct the jury as follows:

1. If, from the evidence, the jury shall believe that the plaintiff applied to Lancaster & Co. for a loan of money, and at the suggestion of Lancaster & Co. made the note in the house of Lancaster & Co., which was then and there, with the knowledge of Lancaster & Co., endorsed by Swartz for the accommodation of Gimmi, and delivered to Lancaster & Co., who thereupon
441 *paid him for the said note the sum of \$5,894 17 out of their own money, and the deed of trust to secure it was prepared in their office; and at the time Lancaster & Co. had no authority to purchase the note for Cullen, and no money of Cullen in their hands, then the transaction is usurious; and the subsequent sale of the note by Lancaster & Co. to Cullen did not purge it of that taint; and the jury must find for the plaintiff.

The court gave the instruction asked for by the defendant, and refused to give that

facts certified in the latter, the *appellate court will draw such inference as a jury might reasonably draw.* This distinction does not exist I think."

Same—Same—Reversal of Judgment—Old Rule in Virginia.—Several cases cite principal case as authority for the old rule in Virginia, *i. e.*, when the evidence is certified, the appellate court would not reverse the decision of the lower court unless on rejecting all the parol evidence of the exceptor and giving full faith and credit to the evidence of the adverse party, the judgment should still appear to be wrong. See *Dean's Case*, 32 Gratt. 916, and *foot-note*; *Daingerfield v. Thompson*, 33 Gratt. 141, and *foot-note*; *Payne v. Grant*, 81 Va. 169; *Hanriot v. Sherwood*, 82 Va. 3; *Muse v. Stern*, 82 Va. 37; *Bank v. Waddill*, 81 Gratt. 475, and *foot-note*. See Va. Code 1887, § 3484 for the abolition of this rule. See also, *foot-note* to *Read's Case*, 22 Gratt. 924, for a collection of cases on this point.

Same—Certification of Facts.—In *Richmond, etc., R. R. Co. v. Morris*, 31 Gratt. 208, the court said: "The certificate in this record purports to be the facts, and we think that is its true character. What each witness stated is certified as facts 'proved' by that witness, and there seems to be no essential conflict in the statements. The statements of some are fuller than those of others, but they do not appear to be in conflict with each other. This is in effect to certify that the *evidence is true*, and substantially the facts proved by the evidence. *Gimmi v. Cullen*, 20 Gratt. 439, 455." Whereas in *Procter v. Spratley*, 78

asked for by the plaintiff. And the court then gave the following instruction:

2. But if the jury shall believe that the note so made and endorsed was purchased by Lancaster & Co. with a knowledge of its character, at a greater rate of discount than six per centum per annum, then the transaction is usurious, and they must find for the plaintiff.

And on the motion of the plaintiff, instructed the jury as follows:

3. And if the jury are satisfied, from the evidence, that Lancaster & Co., without any authority from Cullen to purchase the note for him, paid for the note with their own money and received it from the maker, they thereby became the purchasers of the note.

The plaintiff excepted to the opinion of the court giving the instruction asked for by the defendant, and refusing to give the first instruction asked for by the plaintiff.

The bill of exception sets out the substance of all the evidence given on the trial; for which see the next bill.

The jury found a verdict that the note was not usurious. And thereupon the plaintiff moved the court to set aside the verdict as contrary to the law and the evidence. But the court overruled the motion,

and the plaintiff excepted. The bill
442 of exception states *that upon the motion of the plaintiff the court certifies the following as the evidence, there being no testimony offered by the defendant. R. A. Lancaster, a member of the firm of Lancaster & Co., deposed as follows: and then proceeds to give his evidence in detail. In substance it is as follows: The note in question was sold by me to Cullen

Va. 264, the court said: "Bill of exceptions No. 2 purports to certify *the facts proven*; but upon many points, and, indeed, the most material points, it certifies the testimony; and upon the question whether this was a sale by sample or not, the court expressly refuses to certify what facts were proven, but certifies that the evidence was conflicting, and refers the appellate court for information to the evidence certified in bill of exceptions No. 1. On these points bill of exceptions No. 2 is a certificate of *evidence* and not of *facts proven*. In addition to the authorities above quoted, see also, *Danville Bank v. Waddill's Adm'r*, 31 Gratt. 475; *Gimmi v. Cullen*, 20 Gratt. 451-2; and opinion of court in *Read's Case*, 22 Gratt. 928."

Same—Verdict Contrary to the Weight of Evidence—When New Trial Granted.—In *Cluverius v. Com.*, 81 Va. 816, the court said: "A new trial, asked on the ground that the verdict is contrary to evidence, ought to be granted only in a case of plain deviation from right and justice; and this court will set aside a verdict, on such a motion, *only* in a case where the jury have plainly decided against the evidence, or without evidence. *Dean's Case*, 32 Gratt., citing *Read's Case*, 22 Gratt., and cases there cited; *Gimmi v. Cullen*, 20 Gratt., and cases there cited; *Blosser v. Harshbarger*, 21 Gratt., and cases there cited." See also, *foot-note* to *Read's Case* for a collection of cases on this subject. See also, on the above points, *monographic note* on "Bills of Exception" appended to *Stoneman v. Com.*, 25 Gratt. 887.

on the 1st of May. Gimmi and Swartz were in the room at our banking house when the note was executed. Gimmi told me he wanted to raise money in several previous conversations. Swartz said Gimmi owed him money, and had property. I told him I could raise the money. Gimmi's note was larger than the note due to Swartz; that, Swartz said, was for \$2,000 in gold, for which he had a deed of trust. The note was drawn in our office in the presence of Gimmi and Swartz at my suggestion. It was difficult, at the time, to make negotiations for money. The rate of discount on the note was one and a quarter per cent. per month, then very moderate. Our commissions were to come off the amount. To secure the note Gimmi executed a deed of trust on real estate. (The deed is set out. This deed is dated April 30th, 1866. On that day there was placed to the credit of Gimmi, on Gimmi's pass book, \$5,894 17; and on the 1st of May, there was entered on their ledger to his credit \$5,926 67; and Gimmi checked for the money as he needed it.) Thinks Dr. Cullen was not in the city when the note was executed. Did not tell him anything about the origin of the paper, or the purpose for which it was made; because if I had done so he would not have purchased it. We never inform a purchaser of the origin of the paper we offer for sale. He did not know the origin of the transaction or the character of the note, or to whom it belonged. I explained to him the security on which it rested. Dr. Cullen kept an account at our house, but never authorized me to buy paper for him. I never bought
443 any *paper for him without first submitting it to him. At this time Dr. Cullen had no money on deposit with us, but he had bills receivable deposited with us for collection, which were paid, and by which we were reimbursed the money which we advanced to Gimmi. When the transaction was closed he gave us his check for the amount of the sale of the note and sixteen days interest. When I first offered the note to Dr. Cullen, on the 1st of May, he objected to taking it, saying that he had no money, and his account with us was in fact overdrawn. I told him that would make no difference, that it was a good note, and we would advance the money for him; and he agreed to do so, subject to the right, on his part, to look into the title to the property which had been conveyed to secure the note, and to decline the purchase if he was not satisfied with it. He did look into the title, was satisfied with it, took the note, and on the 16th of May we closed the transaction, charging him with the amount which had been advanced to Gimmi and sixteen days interest upon it.

The money advanced to Gimmi, as I have before stated, was our own money, but it was advanced for Dr. Cullen, as I have before stated, to enable him to purchase the note, not to purchase it for myself or for my house, and I never considered myself as the owner of it, or any part of it, at any time, and never intended to make myself

responsible for its payment. Yet, if Dr. Cullen had found that my representation of the security was not correct, and had refused to take the note, as he had a right to do, I should have been obliged to look to Gimmi for the repayment of the money I had advanced to him, as I have before stated. That is one of the risks of my business.

The defendant Cullen was examined as a witness on a former trial, and not being introduced on this trial, the plaintiff introduced several jurors who served upon the former trial, who testified that, upon
444 the *former trial, when Cullen was examined on his own behalf, he deposed that he did not purchase the said note until after he had examined the title to the property, and the property itself, and then paid for it by his check on Lancaster & Co.

On the 11th of March, 1869, the cause came on to be heard, upon the verdict of the jury and the motion by the plaintiff, for a new trial of the issue, when the court overruled the motion, dissolved the injunction, and dismissed the bill. And Gimmi thereupon applied to this court for an appeal, which was allowed.

Lyons, for the appellant, insisted—

1. That the evidence shewed that Lancaster took the note from Gimmi, and paid him the money for it; and that the sale by Lancaster to Cullen was subsequent to this payment by Lancaster to Gimmi. And as the purchase was admitted to be at more than legal interest, it was clearly usurious. And the note being usurious in its inception, it is null and void in the hands of every subsequent holder. The first instruction asked for by the plaintiff should, therefore, have been given. *Wilkie v. Roosevelt*, 3 John. Cas. 206; *Jones v. Hake*, 2 Id. 60; *Bennet v. Smith*, 15 John. R. 355; *Whitworth v. Adams*, 5 Rand. 333.

2d. If the parties whose names are on a note made to raise money, and discounted at a higher rate than legal interest, could not sue upon it if it had not been discounted, it is usurious and void. *Powell v. Waters*, 17 John. R. 176; 8 Cow. R. 669. And a bill or note drawn for the purpose of being discounted at usurious interest, and endorsed for the accommodation of the maker, is void. *Munn v. The Commission Co.*, 15 John. R. 44; *Bennet v. Smith*, 15 Id. 355.

3d. A note has no legal inception until its delivery, as evidence of an existing debt; and if negotiated at a usurious discount by the maker, it is void in the
445 *hands of the purchaser. *Marvin v. McCullum*, 20 John. R. 288; *Seymour v. Strong*, 1 Hill N. Y. R. 563; *Asly v. Rapeleye*, Id. 9; *Clark v. Loomis*, 5 Duer R. 469; *Clark v. Scisson*, 4 Id. 408; *Williams v. Storm*, 2 Id. 52; 1 Saund. R. 60; *Catlin v. Gunter*, 1 Kern. R. 368. And one who acts as agent in procuring a usurious loan upon a note, cannot recover upon it as endorser. *Reed v. Smith*, 9 Cow. R. 647.

4. A note made to raise money, and sold at a higher rate of interest than is lawful,

if none of the parties to it could sue upon it, as between themselves, it is void in the hands of a party who had purchased it at less than the legal rate of interest. *Knights v. Putnam*, 3 Pick. R. 184; *Cockey v. Forest*, 1 Gill & John. R. 482; *Ruffin v. Armstrong*, 2 Hawks. R. 411; 2 *Parsons on Bills and Notes*, 426, 427 and notes V. W. & X.; *Edwards on Bills and Notes*, 352. So, if a note is purchased with knowledge, from an agent of the maker, at a usurious discount, it is void; and, a fortiori, if it is purchased by his own agent. *Taylor v. Bruce*, Gilmer 42; *Whitworth v. Adams*, 5 Rand. 333. And where a usurious loan is made, and promissory notes are pledged as security, no action can be maintained by the lender against the borrower. *Bell & Harvey v. Lent*, 24 Wend. R. 230.

J. Alfred Jones and R. T. Daniel, for the appellee.

First. It was right to give the instruction asked by the defendant, Cullen.

It is in Virginia well-settled law, and has been since *Whitworth v. Adams*, 5 Rand. 333, and *Taylor v. Bruce*, Gilmer 42, that a note, made for sale, and placed in the hands of an agent to be sold, may be by him sold at a discount exceeding legal interest, when the agent does not make himself responsible for it, and the buyer does not know the note was made for sale.

446 *Law's ex'rs v. *Sutherland & als.*, 5 Gratt. 357; *Brummel & Co. v. Enders, Sutton & Co.*, 18 Gratt. 873.

Second. The court, in effect, gave the instructions asked by the plaintiff, Gimmi, who has therefore no right to complain on that score.

Cullen was the party entitled to complain, for there was no evidence that the note was purchased by Lancaster, but evidence exactly to the contrary; and the instruction was calculated to mislead. And so was the instruction that "if Lancaster & Co. paid for the note with their own money, and received it from the maker, they thereby became the purchasers of it."

The proof is, that they did not pay for it with their own money; that they acted as Gimmi's agents in selling the note, and that he paid them for it a commission of \$70.

The proof is, that they advanced the money, and that Cullen bought the note, and paid interest on the advance. If they fix the date of the purchase on the 1st of May, and Cullen on the 16th, it is because he did not regard it consummated until he examined into the security, and he did not complete the examination till the 16th. It was inchoate on the 1st, and when he found the security good, on examination, the purchase related back to that day. Accordingly, he paid interest for the 16 days.

In accounting for the price to Gimmi, they took the risk of Cullen's accepting the security. They were convinced it was good, and there was no risk, and they found their account in the commission they got from Gimmi on the transaction.

It is said Lancaster & Co. had no authority to purchase for Cullen. It was not necessary for them to have authority from Cullen to purchase for him. He was acting for himself, and agreed conditionally, on the 1st of May, to buy. Though he 447 had no money, their *advancing on his account, subject to his refusal of the security, and therefore of the obligation to return the advance, was not paying their own money.

To commit usury, parties must intend to do the acts constituting it. Lancaster & Co. did not intend to pay their own money to get the title to the note in themselves, nor did Gimmi intend they should get it.

They and he intended a brokerage on the part of Lancaster; and if Cullen had rejected the security, the note would have resulted to Gimmi, and Lancaster been left to sell it to some one else, who thought better than Cullen did of the security, and thus reimburse himself for the money he had accounted for to Gimmi.

Third. The motion for the new trial was properly refused. Not only was there not the conclusive evidence required to establish usury; *Brockenbrough v. Spindle*, 17 Gratt. 21, 33; there was not enough to beget a well-grounded suspicion of it. S. C. 45. But the court cannot review the ruling, for the facts are not certified.

JOYNES, J. The court did not err in giving the instruction moved by the defendant. It was in accordance with the doctrine of a majority of the whole court, in *Whitworth v. Adams*, 5 Rand. 333; following *Taylor v. Bruce*, Gilmer 42; and recognized as the settled law of the State, in *Brummel & Co. v. Enders, Sutton & Co.*, 18 Gratt. 873.

The instruction moved by the plaintiff was predicated upon the supposition that Lancaster & Co. did not sell the note to the defendant as the agents of the maker and endorser, or either of them, as supposed in the instruction moved by the defendant; but that they had themselves become the purchasers of it, and afterwards, while they held it as their own property, sold it to the defendant. This instruction did not 448 submit to *the jury the general question whether the note had been purchased by Lancaster & Co., and sold by them, as their own property, to the defendant. It set forth various supposed facts, and implied, without saying so, that if these supposed facts were true, Lancaster & Co. had purchased the note, and sold it to the defendant as their own property; which would have made a case of usury. The court, upon refusing to give this instruction, gave another, of its own motion, which, without any recital of special circumstances, submitted to the jury, in general terms, the question, whether the note was purchased by Lancaster & Co.; and instructed them that, if it was, it was a case of usury. The court evidently designed to embody, in this instruction, the same proposition as that embodied in the prayer of the plaintiff. It doubtless thought that

the form in which the latter was expressed was calculated to confuse the jury. If the instruction thus given fell short, in its scope and effect, of the instruction moved by the plaintiff, the difference was fully made up by the instruction subsequently given on the motion of the plaintiff. The plaintiff, therefore, has no right to complain; he obtained from the court substantially the same instruction he asked for, and in a simpler and more intelligible form. The instruction moved by the plaintiff was liable, however, to a more serious objection. It did not present to the mind of the jury the distinct question, whether Lancaster & Co. had become the purchasers and owners of the note, upon their own account. A lawyer would readily understand, upon reading the instruction, that that was the question involved; but a plain man, without legal knowledge, would hardly discover it without explanation. Moreover, it assumes that Lancaster & Co., at the time the note was delivered to them by Gimmi, "paid him for the said note the sum of \$5,894 17, out of their own money," having then no money of Cullen in their hands, and no authority *from him to purchase a note for him, and says that, if that was so, the transaction was usurious. This could not be true unless the \$5,894 17 was paid as the price of the note; unless the transaction was a sale of the note by Gimmi, and a purchase of it by Lancaster & Co. If it was paid for the note, in the sense of an advance of money upon it, in the expectation of making a sale of it, the note being still the property of Gimmi, then the proposition of the instruction would not be true. And in this view, the fact that the money was paid out of Lancaster & Co.'s own funds was wholly unimportant. And that fact was unimportant in any view, unless it was paid, on their own account, on a purchase of the note for their own benefit. They might advance it for Dr. Cullen, as a loan to enable him to make the purchase, as Lancaster says was the fact. The fact is, that while only \$5,894 17 was put to the credit of Gimmi on the books of Lancaster & Co. on the 30th April, 1866, the day the note was delivered by him to them, the sum was increased, on the 1st day of May, 1866, the day on which the sale was made to Cullen, conditionally, to \$5,926 67, on the nett proceeds of the note. The instruction withholds any consideration of this fact from the jury, and makes the transaction turn upon the payment of the \$5,894 17, upon the delivery of the note. Without pursuing this subject any further, I think that this instruction was calculated to confuse and mislead the jury, and ought, for that reason, to have been refused. It would have been no error to refuse it, without substituting any other in its place.

The bill of exceptions in relation to the instructions given and refused discloses, therefore, no error.

In considering the bill of exceptions to the refusal of the court to award a new trial

of the issue, the question arises, whether it is to be regarded as containing a certificate of the evidence given on the trial, or a certificate *of the facts proved on the trial, in the opinion of the Circuit court. The counsel for the plaintiff contended, that notwithstanding it does not, in terms, profess to certify the facts proved, yet as the evidence stated was all introduced by the plaintiff, and there was no intimation that any part of it was not credible, it should all be taken to be true; so that the certificate should be regarded as substantially a certificate of the facts. The language of the bill of exceptions, however, indicates that the intention of the court was to certify the evidence, and not the facts. It says, "the court certifies the following as the evidence in the cause." "Robert A. Lancaster [the only witness as to the transaction in controversy,] deposed as follows." It says that the other witnesses also introduced by the plaintiff "testified," &c.

Since the distinction between a certificate of evidence and a certificate of facts proved, has been so fully established and so well understood, it can hardly be supposed that the judge or the counsel, both of long experience and eminent learning and ability, would employ such language, when the intention was to have a certificate of the facts proved. The use of such words in the bill will not be decisive of the character of the certificate, if it appears from the use of other words, or from the general scope of the certificate, that the object of the court was to certify the facts and not the evidence merely. Jackson's adm'x v. Henderson, 3 Leigh 212. But in this case there is no statement, as in Carrington v. Bennett, for instance, that "these were all the facts proved," nor any other expression to impair the force of the other words, and throw doubt upon the character of the certificate. And we shall see from the cases which will be cited, that the facts that the evidence was all introduced by one side, and that it was not contradicted, are not sufficient to determine *that the certificate was designed as a certificate of facts.

Regarding the certificate as intended to be a certificate of the evidence given on the trial of the issue, the next question is, was it well taken to authorize this court to review the judgment overruling the motion for a new trial in the present case.

In Bennett v. Hardaway, 6 Munf. 125, a motion had been made for a new trial, on the ground that the verdict was contrary to the evidence, and the motion being overruled, a bill of exceptions was taken, which certified all the evidence given to the jury, instead of the facts which appeared to the court of trial to be established by the evidence. This court held that the bill of exceptions was not well taken, and that it could not reverse a judgment refusing a new trial, except upon a certificate of the facts proved. The ground of the decision was, that some of the witnesses may have been discredited in the court below, and

that this court might form its opinion upon testimony which was there discredited. Judge Roane, delivering the opinion of the court, said: "It does not follow that a judge believes every witness who gives evidence before him, as he may well hesitate to do from the manner of testifying and other extraneous circumstances; nor can he do it where they conflict with one another. It is evident, therefore, that in this case the opinion of this court might be founded upon the testimony of witnesses who were discredited both by the jury and the court below. This court only sees the evidence on the record, and on paper the credit of every witness is the same, who is not positively impeached." This case has never been overruled or questioned.

Subsequent cases, however, have established a modification of the doctrine of *Bennett v. Hardaway*, but entirely consistent with it in principle, which has long been the settled rule of this court.

452 This rule is, that *a bill of exceptions to the refusal to grant a new trial, may be dealt with by rejecting all the evidence on the part of the exceptor, and considering the case upon the evidence of the other party alone. In the application of this rule, the evidence of the party who prevailed below, is to be taken as true. If, testing the case upon this rule, the judgment cannot be sustained, it will be set aside. *Ewing v. Ewing*, 2 Leigh 337; *Green v. Ashby*, 6 Leigh 135; *Rohr v. Davis*, 9 Leigh 30; *Vaiden's Case*, 12 Gratt. 717; *Butts' Case*, 14 Gratt. 613; and many other cases. It is obvious that this rule does not encounter the difficulty which led to the decision in *Bennett v. Hardaway*. No question of the credit of the witnesses can arise. The exceptor gives up his own evidence, bringing it to the same thing as if he had not introduced a witness: and he admits the truth of the evidence adduced by the other side. So, in every case where a new trial is asked from an appellate court, upon a certificate of the evidence only, the party who asks it must give up his own evidence, if any, and admit the truth of his adversary's evidence, if any. Otherwise, he must encounter the difficulty upon which the decision in *Bennett v. Hardaway* proceeded.

The same principles apply, though all the evidence was adduced by one side. *Carrington v. Bennett*, 1 Leigh 340, and *Green v. Ashby*, 6 Leigh 135, were cases of that sort. In the former case, *Bennett*, as assignee, brought an action on a bond against *Carrington*, to which the defence was that the bond was given for money won at unlawful gaming. The plaintiff proved the bond and the assignment, and this was his only evidence. The defendant introduced a witness to sustain his defence, and the jury found for the plaintiff. A motion was made for a new trial and overruled. There was a question in this court, whether the

453 bill of exceptions should be construed as *a certificate of the evidence only, or as a certificate of the facts proved.

Judge Carr regarded it as a certificate of evidence only; Judges Green and Coalter considered it as a certificate of facts. Judge Carr held, that this court could not review the judgment upon this certificate, upon the ground that the court and jury might have discredited *Carrington's* witness. He said: "But how do we know that the court and jury believed this witness? They may have discredited his whole tale. They saw and heard him, and there may have been that in his manner (though wholly hidden from us) which proved to them that he was wholly unworthy of credit." * * * "And if, upon the strength of what this witness swore, we reverse the judgment and set aside the verdict, may not our opinion (in the words of Judge Roane) be founded upon testimony discredited by the jury and court below?"

It will be observed that, in the view of the bill of exceptions taken by Judge Carr, *Carrington v. Bennett* was precisely like the case before us. All the evidence upon the issue had been introduced by the exceptor, and there was no intimation in the record as to whether the court did or did not give credit to it. There was no inconsistency in the evidence; the exceptor was asking the court, as in the present case, to assume that the evidence of his witness was entitled to credit: being the only evidence in the cause and not impeached; and to hold that the court and jury had drawn the wrong conclusion from it.

Green v. Ashby was a converse case. The bill of exceptions to the refusal of the court to grant a new trial, certified the evidence given to the jury, the whole of which was introduced by the plaintiff, in whose favor the verdict was rendered. The court held that the bill of exceptions was well taken, and being of opinion that, giving full credit and weight to the evidence of the plaintiff, the judgment was erroneous, 454 it was reversed, *and a venire de novo awarded. President Tucker, after adverting to the general rules in reference to bills of exceptions or motions for new trial, said: "From this view, we may deduce the rule that no bill of exceptions is properly taken, which submits to this court conflicting evidence, upon the credit of which we must decide, before we can pronounce upon the judgment of the inferior court. And, for a like reason, though the evidence be all on one side; yet, if that which is introduced, is adduced by the excepting party, the bill of exceptions is not properly framed, if it recites the evidence which was given, instead of setting forth the facts: for, peradventure, the court and jury may have discredited the witnesses; and, if so, this court could not interfere. This was the case in *Carrington v. Bennett*, in the opinion of one of the judges. There was no conflicting evidence upon the real matter of litigation between the parties. All the evidence to that point was on the side of the exceptor; and as the court and jury both decided against him, the court could not, upon its own principles, have

overruled their opinion upon the weight of the evidence, unless the facts as proved were duly stated. In this the whole court very obviously concurred; though the majority were of opinion, that the question of the truth of the evidence was not submitted; but that the facts were properly certified." Judge Cabell thought the bill of exceptions well taken, because there was no conflict in the evidence, which was all on one side, and "against the party tendering the exception." From this it is plainly to be inferred that he concurred in the opinion with Carr, J., and Tucker, P., as to a case in which all the evidence was introduced by the excepting party.

The rule, therefore, is, that where all the evidence is introduced by one party, and the verdict is in his favor, the other party may have a refusal to grant a new trial reviewed, upon a bill of exceptions
455 certifying the evidence *only. In such a case, the evidence certified will be considered as true by the appellate court, unless impeached in some way. But, when the verdict is against the party who introduced the evidence, he cannot have the refusal of the court to grant a new trial reviewed upon a certificate of the evidence merely: he must have a certificate of the facts proved, or a certificate that the evidence was considered true by the court of trial; which would amount to a certificate that the facts stated in the evidence were really facts proved. From the evidence certified in the former case, and from the facts certified in the latter, the appellate court will draw such inference as a jury might reasonably draw.

The bill of exceptions to the refusal of the court to grant a new trial was, therefore, not well taken, and we cannot review the action of the Circuit court on that point. It is hardly necessary to say, that in the objection made to the bill of exceptions, I do not intimate any personal distrust of the truth of Mr. Lancaster's testimony, nor any belief that it was discredited by the jury or the court below. But the law is no respecter of persons, and its rules apply to all men alike.

The result would not have been different, however, if the facts proved had been certified, or if the evidence had been certified to be true. The fair result of the evidence certified, assuming that the witness was entitled to credit, is, that Gimmi delivered the note to Lancaster & Co., on the 30th day of April, to be sold by them as his agents and for his benefit; they knowing that the note was without consideration, and made to raise money; that Lancaster & Co. received the note as Gimmi's agents, and thereupon, on the same day, paid him the sum of \$5,894 17, as an advance on the note, in anticipation of a sale of it to be made by them for him, as his agents; that, on the 1st day of May, they, as agents for

Gimmi, made a conditional sale of
456 *the note to Dr. Cullen, at a discount of one and a quarter per cent. a month; the condition being that Cullen

should have a right to look into the title to the property which had been conveyed to secure the payment of the note, and to decline the purchase if not satisfied with it; that on the same day (May 1st), Lancaster & Co. increased the sum paid to Gimmi to \$5,926 67, that being the net proceeds of the note; that Lancaster & Co. paid for the note with their own money, because, when they offered it to Cullen, on the 1st day of May, he told them that he had no money, and objected to taking it on that ground; that they, knowing that Cullen had notes coming to maturity at an early day, told him they would advance the money for him, and did so accordingly; that Cullen looked into the title, was satisfied with it, took the note, and on the 16th day of May the transaction was closed by Cullen paying to Lancaster & Co. the \$5,926 67 paid by them to Gimmi on the 1st day of May, as the net proceeds of the note, and also sixteen days' interest on that sum; that Lancaster & Co. had no authority to buy paper for Cullen; that Lancaster & Co. were never the owners of the note; and that Cullen did not know, either on the 1st day of May, or on the 16th, for whom the note was sold, what was the origin or the consideration of it, or the purpose for which it was made: In all this it is evident that there was no usury, according to the law, as settled in Virginia by the case of Whitworth v. Adams.

I am of opinion, therefore, to affirm the decree.

Decree affirmed.

457 *Bank of the Old Dominion v. McVeigh.

March Term, 1871. Richmond.

1. **Debt Due Mother Bank—Payment to Branch Bank—Invalid.***—M, a debtor to the bank of D, which is within the Federal lines. In July, 1864, pays his debt to D into a branch of the bank of D, which branch is within the Confederate lines; the payment being made in Confederate currency. **Held:** The payment is not valid and the bank of D may recover the amount from M.
2. **Same—Same—Statute—Not Binding on Mother Bank.**—The act of the General Assembly sitting at Richmond, passed March 8d, 1864, authorizing such payments, is not obligatory upon a mother bank within the Federal lines.

***Debt Due the Mother Bank—Payment to Branch Bank.**—See principal case cited and approved in *McVeigh v. Bank of Old Dominion*, 26 Gratt. 794. In *Smith v. Lawson*, 18 W. Va. 241, the court said: "It is true, that in the case of the Bank of the Old Dominion v. McVeigh, 20 Gratt. 457 and 26 Gratt. 785, it was decided that the branch bank of the Old Dominion at Pearisburg, Giles county, Virginia, within the Confederate lines, had no authority to receive payment of a note, which the mother bank, the Bank of the Old Dominion at Alexandria, within the Federal lines, had discounted; but the reverse is not true.

"These decisions are based on the ground that a branch bank is an agency of the mother bank, authorized to receive payment of notes discounted by such branch bank only. But they do not affect

3. ~~Same—Same—Same—Unconstitutional.~~†—The act is unconstitutional in its application to debts contracted before its passage.

This was an action of assumpsit in the Circuit court of Loudoun county, brought in August, 1866, by the Bank of the Old Dominion against Townshend McVeigh. The object of the suit was to recover the amount of three negotiable notes executed by McVeigh and discounted by the bank. Two of these notes were for three hundred dollars each; the first dated the 22d of April, 1861, at ninety days payable at the Bank of the Old Dominion, Alexandria; the second was dated the 3d of May, 1861, and payable at ninety days at the same place; and the third was for eighteen hundred and seventy-six dollars and seventy-five cents, dated June 4th, 1861, and payable in like time at the same bank. The only question in the cause was, whether a payment of the amount of these notes into the branch Bank of the Old Dominion, at Pearisburg, Giles county, in July, 1864, in Confederate currency, was a valid payment.

458 *The Bank of the Old Dominion was chartered by an act of the General Assembly passed in 1851, and was located in the city of Alexandria. By this act the right to modify or alter the charter was reserved. In 1856 another act was passed authorizing the establishment of a branch of this bank at Pearisburg, in Giles county; which was done. On the 24th of May, 1861, the Federal forces took possession of Alexandria, and held it until the end of the war. The residence of the defendant and the branch of the bank at Pearisburg were within the Confederate lines up to and including 1864. In 1862 the banking house of the bank in Alexandria was seized and occupied, and so continued to be until the end of the war, by the United States forces. There was a bare quorum of the directors of the bank in Alexandria, until October, 1863, when one of them died, and there was no quorum of said board after that time until the close of the war. Meetings of the board in Alexandria were occasionally held at long intervals until May, 1863, but not for regular or new business.

the question, whether a mother bank, if it thinks proper, may not receive payment of its debtor for any debt due it, no matter where it was contracted; and it does seem to me clear, that the payment to the mother bank of a debt due to it, though it may have arisen from discounting a note by a branch bank, is a discharge of a debt. Surely the principal, to whom a debt is due, may receive payment of it, though such debt arose out of a contract with an agent, and though that agent might have been authorized to receive payment of it."

†Statute—Unconstitutional.—See principal case cited in the Homestead Cases, 22 Gratt. 288; Roberts v. Cocke, 28 Gratt. 217; Yeaton v. Bank of Old Dominion, 21 Gratt. 603; Antoni v. Wright, 22 Gratt. 876, (where ANDERSON, J., explains his dissent from the decision of the court in the principal case).

See the principal case distinguished in Prince William School Board v. Stuart & Palmer, 80 Va. 71.

On the 3d of March, 1864, the General Assembly, held at Richmond, passed an act authorizing any person or body politic or corporate, who was indebted to any branch banks of this State, and unable, because of the presence of the public enemy, to discharge said indebtedness at the office of said branch bank, to deposit the amount of his indebtedness in the mother bank, if within the Confederate lines; and the mother bank was authorized to receive, at its discretion, said amount, and give a receipt to the party paying the same; and such payment should be held as a discharge, to the extent thereof, of said indebtedness; provided, &c. And provided, further, that the provisions of this act shall be applicable in case of any mother bank within the enemy's lines; in which case, such payment may be made to any branch thereof within our lines, 459 in like *manner and with like effect and limitations as are above provided.

On the 18th of July, 1864, the defendant made payment of the amount of the notes sued on to the branch bank of the plaintiffs, in Pearisburg, Giles county, in Confederate currency.

When the evidence had been introduced, the plaintiff moved the court to instruct the jury as follows:

1st. That if they find, from the evidence, that the domicil of the plaintiff was in the city of Alexandria at the date and maturity of the notes in suit in this case, and has never been removed therefrom up to the institution of this suit; and that, at the time of the passage of the act of the General Assembly, sitting in Richmond on the 3d of March, 1864, and from that date continuously up to the end of the war, the said domicil was within the lines of the Federal armies, and without the lines of the Confederate armies, then that act is not obligatory upon the plaintiff, and they are not bound by the alleged payment of the debts in suit, made by deposit of Confederate States funds in their branch at Pearisburg, without the knowledge or consent of the plaintiffs.

2d. By the terms and legal effect of the notes in the plaintiff's declaration mentioned, the same was payable at the Bank of the Old Dominion, in Alexandria, at maturity of the same, respectively; and if the jury find that no payment was made as said notes severally matured, unless they further find that such payment was afterwards made or tendered to the plaintiffs, or to some one authorized by them to receive payment, they should find for the plaintiffs, so far as the defence may rest upon payment of the debt.

The court refused to give the instructions, for reasons stated in a written opinion which was read to the jury, and in which it was held that the act aforesaid was constitutional, and the Bank of the Old

460 Dominion *was bound thereby. To the refusal of the court to give the instructions, and the ruling of the court in the opinion expressed, the plaintiffs excepted; and a verdict and judgment having

been rendered for the defendant, the plaintiffs obtained a supersedeas to the District Court of Appeals at Fredericksburg; where the judgment was affirmed. And they then applied to this court for a supersedeas, which was awarded.

Matthew Harrison, and Conrad, for the appellants.

Bradley T. Johnson, and Brent & Wattles, for the appellee.

CHRISTIAN, J. This case is before us upon a writ of error to a judgment of the District court of the fourth judicial district of Virginia, affirming a judgment of the Circuit court of Loudoun county.

It was an action of assumpsit, instituted by the bank of the Old Dominion, located at Alexandria, against McVeigh, the defendant in error, for the amount of three notes, negotiable and payable at, and negotiated by the Bank of the Old Dominion at Alexandria. The first note was dated the 22d day of April, 1861, and was drawn for the sum of three hundred dollars. The second, drawn for the same amount, was dated the 3d day of May, 1861. The third note was drawn for the sum of one thousand eight hundred and seventy-six dollars and seventy-five cents, and was dated on the 4th day of June, 1861. Each of these notes was payable at ninety days, and they were not paid at maturity.

The defendant pleaded "non assumpsit;" and this was the only plea tendered. Issue was joined on this plea, and the sole defence set up under it was, that on the eighteenth day of July, 1864, the defendant in error paid into the branch Bank of the Old Dominion, at Pearisburg, the

amount of said notes in Confederate
461 *States treasury notes. The authority relied upon by the defendant in error, for making this payment at the branch bank instead of the parent bank, and in a depreciated currency, is an act of the General Assembly, sitting at Richmond, passed March 3d, 1864. The motion to exclude proof of this act from the jury, and the instructions asked for by the plaintiff in error, both raise the question, whether the defendant in error is discharged from his obligation to pay these notes, which, by the terms of his contract, are due to, and payable at, the Bank of the Old Dominion at Alexandria, by payment of Confederate treasury notes to the branch bank at Pearisburg. Or, in other words, whether it was competent for the Legislature, by the act of March 3d, 1864, to confer upon the defendant in error authority to pay in such mode, and in such currency, at the branch bank, a debt due in gold at the parent bank. This is the sole question presented by the record for adjudication here.

The act referred to is in these words: "Be it enacted by the General Assembly, that it shall be lawful for any person, body politic or corporate, who may be indebted to any of the branch banks of this State,

and unable, because of the presence of the public enemy, to discharge said indebtedness at the office of said branch bank, to deposit in the mother bank thereof, if within the lines of the Confederate armies, the amount represented to be due said branch bank, and the said mother bank is hereby authorized to receive, at its discretion, said amount, and give a receipt to the party paying the same; and such payment shall be held as a discharge, to the extent thereof, of said indebtedness: provided, &c.: * *

And provided, further, that the provisions of this act shall be applicable in case of any mother bank within the enemy's lines;

in which case such payment may be
462 made to any branch thereof *within our lines, in like manner and with like effect and limitations as are above provided."

It cannot be maintained, as argued by the counsel for defendant in error, that this act is a mere change of the charter of the Bank of the Old Dominion, made under the reserved power of the Legislature to alter and amend the charters of banking institutions. It neither proposed nor professed to change the charter of this bank, or of any other bank. There is nothing in the title, or in the body of the act, to disclose any such design. If such were its purpose and scope, it could only affect contracts thereafter made, and could in no wise change or alter contracts already entered into, so as to affect the rights of parties already acquired under them.

The act in question does more than simply to authorize a debtor to the mother bank to pay his debt at one of its branches. It is doubtful whether it would be competent for the Legislature even to do that, as to debts already contracted payable at the mother bank. It goes, however, far beyond this, and according to the theory of the defendant in error, and the construction given to it in the court below, it authorizes payment of a debt due to and payable at the mother bank, to an agent, not of its own appointment, but appointed by the Legislature, and in a currency, not in gold or its equivalent, as the contract requires, but in that which amounts in value to less than one-twentieth part of the debt, and this, too, without the knowledge or consent of the plaintiff. This must be the scope and effect of the act to sustain the defence relied upon. It is admitted that the payment was made by the defendant in Confederate treasury notes in 1864, when at a great depreciation. It will not avail him now to uphold the validity of that act, upon the ground that it does not, in terms, authorize payment in Confederate money. If it did not,

then the payment in Confederate
463 funds *was not a compliance with the act, and the debt was not discharged. If it did, then the act attempted to make Confederate money a legal tender, and was, for that reason, unconstitutional and void.

But it is said that the act in question only authorized the branch bank to receive, at its discretion, the indebtedness of creditors,

to the parent bank; and it was for the branch bank to determine what kind of currency it would accept in payment; and that having accepted Confederate money, it was a good payment in discharge of that indebtedness. But such an argument is based upon the assumption that the branch bank was the legally authorized agent of the parent bank, with authority to collect its debts in a depreciated currency. Where and how was such an agency created, or such authority conferred? Outside of the act in question, there is no law or usage which constitutes any branch bank an agent to collect debts due to the mother bank, except when sent to such bank for collection. For all purposes of banking and trading, the mother and branch banks are distinct and independent. The one is in no sense the agent of the other. The bank charters and the provisions of the Code regulating their operations, as well as the universal usage of the banks, shew this. It must, therefore, be conceded that if the deposit of Confederate treasury notes in the branch bank at Pearisburg operated as a payment, discharge or satisfaction of the debt due from McVeigh, it was not by virtue of any authority, express or implied, or by the agreement or consent of the plaintiff, but only by the compulsory force of the act of March 3d, 1864, above referred to.

It becomes necessary, then, to consider the effect and validity of that act, and to enquire whether it was consistent with those constitutional limitations and prohibitions which impose a wise and beneficent restraint upon the legislative power?

464 *This act, in effect, first creates an agent, for the creditor, without its knowledge or consent, and then authorizes that agent, thus created, to receive, at the agent's discretion, against the consent of the principal, whatever currency the agent may choose to receive in payment of debts due to the principal; and in terms declares, that such payment shall be in satisfaction of the debt. So that under this statute, if a debtor of the mother bank, situated as this bank was, made a deposit in a branch bank, which that bank chose to receive, of worthless paper money, it must be held to be in satisfaction of the debt due to the mother bank, although that debt was payable in gold, and although the deposit of the worthless paper is made in the branch bank, without the knowledge or consent of the mother bank. And this is precisely the case made by the record. McVeigh's contract was to pay in legal currency to the Bank of the Old Dominion, at Alexandria. Under this act, according to the construction of the court below, he was permitted to pay, in discharge of his obligation, a currency depreciated to the extent of at least twenty to one, not at the place where, or to the creditor to whom he contracted to pay, but at a different place, and to an agent not authorized to receive it by his creditors.

I am considering the act in question, now, according to the construction that has

been put upon it by the court below, and upon which alone the defendant is entitled to a judgment in his favor. If this be the true construction of the act, then it is difficult to conceive how any law could be framed which more plainly and palpably violates that provision of the constitution of the United States which declares that no State shall pass "any law impairing the obligation of a contract."

What is the obligation of a contract, in the sense in which it is used in the constitution? It may be defined to be whatever the law of the State, where the
465 *contract is made, binds a party to perform, under the terms of his contract, express and implied. "The obligation of a contract" (in the language of Judge Baldwin, in *McCracken v. Hayward*, 2 How. U. S. R. 612), "consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them, as the measure of the obligation to perform them by the one party and the right acquired by the other. There can be no standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning. When it becomes consummated, the law defines the duty and the right; compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or impair the right, it necessarily bears on the obligation of the contract, in favor of the one party, to the injury of the other; hence, any law which in its operation amounts to a denial, or obstruction, of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution."

In *Green v. Biddle*, 8 Wheat. R. 1, Mr. Justice Washington, delivering the opinion of the court, says: "Any deviation (from the terms of the contract) by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation." In *Bronson v. Kinzie*, 1 How. U. S. R. 311, one of the judges uses this language: "A State Legislature cannot impair the contract by changing the time and manner of its
466 performance. By the contract, *the parties have fixed their rights and obligations, and these are guarded by the constitution." See also *Sturges v. Crowningshield*, 4 Wheat. R. 122; *Fletcher v. Peck*, 9 Cranch. R. 87; *Woodruff v. Trapnall*, 10 How. U. S. R. 190; 1 Wall. U. S. R. 206; *Taylor v. Stearns*, 18 Gratt. 244.

Let us apply these familiar and well-settled principles to the case at bar. The defendant in error had given his promissory note to pay certain sums of money, on or

before a certain day, to the plaintiffs, at the Bank of the Old Dominion at Alexandria. His contract was to pay in legal currency, in gold and silver or its equivalent; and to pay the same to the plaintiffs at their banking house in Alexandria. Now, any law which changes the terms of this contract, or releases a part of its obligation, must, in the literal sense of the word, impair it. The Legislature, by the act in question, not only changed the terms of the contract, by authorizing payment to an agent of its own creation, and at a different place, but in effect released the defendant from nineteen-twentieths of the amount of his obligation. It would seem that the very statement of the proposition is sufficient to show that such an act of the Legislature must be at once condemned as unconstitutional and void. But it is gravely argued that the authority of the Legislature to pass the act in question is found in the fifty-third section of chapter 58 of Code of 1860, by which the Legislature reserved to itself "the right to repeal, alter or modify, the charter of any bank at its pleasure." It is undoubtedly true that it is in the power of the Legislature, under its reserved rights, to alter or amend the charters of banking institutions, or to take them away altogether. But it does not follow that in doing this it may interfere with and abrogate contracts lawfully made under such charters, or disturb rights already legally vested under them in the course of its legitimate business.

467 *The Legislature did reserve the right to modify and amend the charter of the Bank of the Old Dominion; but it did not and could not reserve the right to alter contracts made under the old charter. All contracts made in pursuance of its charter are to be construed with reference to the charter in force at the time they were made. The charter may be changed, but the contracts made under that charter cannot be altered by the Legislature.

In *Fletcher v. Peck*, 6 Cranch's R. 87, Ch. J. Marshall, delivering the opinion of the court, says: "The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be contravened. But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power." See also *Woodruff v. Trapnall*, 10 How. U. S. R. 190. In a very recent case, *Chicago v. Sheldon*, 9 Wall. U. S. R. 50, 55, the court says: "A contract having been entered into between the parties, valid at the time by the laws of the State, it is not competent even for its legislature to pass an act impairing its obligations."

But the act in question does not profess to be, and is not in fact, an act to "alter or modify" the charter of the Bank of the Old Dominion, or of any other bank. It is,

according to its title, "an act authorizing banks or branch banks, in certain cases, to receive payment of debts payable at branch or mother banks within the enemy's lines." It was passed March 3rd, 1864. It is true the act does not, in terms, authorize such payment in Confederate money; but it is notorious, and is a part of the current public history of the times, that the only 468 currency of the country, within *the lines of the Confederate armies, was Confederate treasury notes, and it is equally a part of the current public history that such currency was greatly depreciated at that time. In point of fact (as the record discloses), the amount paid by the defendant in error, and received by the branch bank at Pearisburg, was paid and received in Confederate money. And the act in question was relied upon by the defendant's counsel, and by the court below, as authority for receiving such currency.

As before stated, this act either authorized the payment in Confederate currency, or it authorized the payment in legal currency. If the authority was to pay in legal currency, then the defendant in error has not complied with the requirements of the act; and if the act (as construed by the court below) authorized the payment of the debt in Confederate currency, which was contracted to be paid in gold or its equivalent, then it is clearly unconstitutional and void, because it is an attempt to make a worthless currency a legal tender. In either or any view of the case, the debt has not been discharged, but is still due and unpaid.

Upon the authority of a case recently decided in this court (*Alley et al. v. Rogers*, 19 Gratt. 366), the payment to the Bank at Pearisburg was a void payment, and the notes of the defendant in error are still due and unpaid, the payment to said branch bank being without the consent of the plaintiff, and without the authority of law. I am therefore of opinion that the judgments of the District court and of the Circuit court of Loudoun must both be reversed.

ANDERSON, J. The Bank of the Old Dominion was incorporated by an act of the Legislature of Virginia, passed March 29th, 1851, subject to the right of the Legislature "to repeal, alter or modify the charter, at its pleasure." The defendant in error, who is also defendant 469 *in the court below, in 1861, made three notes, payable at 90 days, at the Bank of the Old Dominion, in Alexandria, dated respectively April 22d, May 3d, and June 4th, upon which this suit was brought in the Circuit court of Loudoun. In support of the issue on his part, the defendant relied upon the payment of the notes to the branch of the Bank of the Old Dominion, at Pearisburg, under the act of Assembly, of March 3d, 1864. There was a verdict and judgment for the defendant. The whole case turns upon the validity of that act of Assembly, which we will now consider.

It provides that any person "who may be indebted to any of the branch banks of this

State, and unable, because of the presence of the public enemy, to discharge said indebtedness at the office of said branch bank, to deposit in the mother bank thereof, if within the lines of the Confederate armies, the amount represented to be due said branch bank; and the said mother bank is authorized to receive, at its discretion, said amount, and give a receipt to the party paying the same; and said payment shall be held as a discharge, to the extent thereof of said indebtedness: provided, that such payment shall operate as a discharge in no case in which such debt has been bona fide transferred, for value, to any loyal citizen of any one of the Confederate States, at any time prior to the date of such payment: and provided further, that the provisions of this act shall be applicable, in the case of any mother bank within the enemy's lines; in which case such payment may be made to any branch thereof within our lines, in like manner and with like effect and limitations as are above provided."

It is contended by some of the plaintiff's counsel, that the latter clause, upon which the defendant relies, is a proviso; and that a proviso cannot enlarge the operation of an act. This clause is very inartificially drawn; but, I think, is not in fact a
470 proviso. The *words, "and provided further," should be read, and it is provided further; equivalent to, "it is further enacted." The word provided is used in the same sense that it evidently imports as the last word in the sentence.

I am also of opinion, that it was plainly the intention of the Legislature, if the mother bank was within the enemy's lines, to make lawful a payment to the branch bank within the Confederate lines, by any person who was indebted to the mother bank: provided, the debt had not been bona fide transferred, for value, to a loyal citizen of any one of the Confederate States, before payment; and to authorize the branch bank to receive payment, at its discretion, and to give a receipt to the party paying the same. I do not think that it can be fairly construed, as giving the discretion to receive it to the mother bank; as construed by the plaintiff's counsel. It would have been as impracticable to have appealed to the discretion of the mother bank, as to have made payment to it, in the case supposed by the act, and for which alone it is intended to provide, when payment could not be made, "because of the presence of the public enemy." Such a construction would render this clause of the act wholly nugatory. It was evidently, it seems to me, the intention of the Legislature to authorize payment of debts contracted with the mother bank, when cut off by the public enemy, just as had been provided for payment of indebtedness to the branch bank, when placed in like circumstances. It was obviously the policy and purpose of the Legislature, by this enactment, to enable the citizens of the Commonwealth to pay their indebtedness to the banks of the Commonwealth, and the banks to receive pay-

ment, as far as practicable, just as would have been done if there had been no interference of the enemy. Hence, it is provided, that if the debt had been transferred to a loyal citizen of any one
471 *of the Confederate States before payment, it should not be made to the bank. Because, in such case, payment could be made to the holder of the note.

It seems to me, that the policy and purpose of the Legislature, under the circumstances, was wise and just. It is shown by the record in this case, that on the 24th of May, 1861, the Federal army took possession of the city of Alexandria, and held it until the close of the war. That, in October, 1862, the bankinghouse of the plaintiff was seized and occupied, and so continued to be, by the military of the United States, until the close of the war. That meetings of a bare quorum of the board had been held in Alexandria, after May 1861, until May 1863, sometimes at long intervals—in one case of ten months—but not for regular, or new business, and that, after May 1863, no meeting of said board was held until September 1865; and that, by the death of a member of the board, there never was a quorum in Alexandria from October, 1863, until after the close of the war. Thus is the non-payment of these notes at maturity, or afterwards at Alexandria, accounted for. It was not because of the unwillingness or inability of the debtor to pay nor because of the unwillingness of the bank to receive payment, but because of the presence of the enemy in force, which prevented it. We have no reason to believe that these debts would not have been paid at maturity had there been no interference of the enemy to prevent it.

When the act of Assembly of March 3d, 1864, was passed, there was no board of directors of the Bank of the Old Dominion at Alexandria. It had become extinct, or its existence was suspended. But the corporation still existed. It never for one moment ceased to exist, and it existed alone in Virginia, and could exist no where else beyond the limits of her jurisdiction and sovereignty. And its corporators
472 must be presumed *to be citizens of Virginia. We have here presented the anomaly of a body corporate without a head, if the board at Alexandria was its head: and without a representative or agent, unless the branch bank at Pearisburg was its representative and agent. This branch of the Bank of the Old Dominion was established by the act of March 15th, 1856, which provides that it shall be under the direction of seven directors, to be appointed, and to have the same powers, and to be subject to the charter provided by law, in respect to the Bank of the Old Dominion, and to such other laws as may now be, or hereafter, passed in respect to said bank. And the general law provides, that any process or notice against a bank, if the case be against a bank of circulation, and be in a county or corporation, wherein the bank has a branch, service on the pres-

ident or cashier of such branch bank shall be sufficient. (Code of 1860, ch. 170, sec. 7, p. 707.) This is in a case where the proceeding is against the corporation: thus recognizing the branch bank as the representative of the corporation. We have seen that the branch bank of the Bank of the Old Dominion was under the direction of seven directors, who were to be appointed as the directors of the mother bank were appointed, and were to have the same powers, and to be subject to the charter of the Bank of the Old Dominion, and to such other laws as were then in force, or as might thereafter be enacted in respect to said bank: and this act of 1864 was one of them. The directors were all stockholders in the Bank of the Old Dominion, and had a like interest with the directors at Alexandria, in all the debts due the bank, whether contracted with the directors at Alexandria or at Pearisburg.

The act of March 3d, 1864, authorized this branch bank, so constituted, and the only representative of this corporation then existing, at its discretion, to receive

473 *payment of the debts contracted with the Alexandria board. They were the debts due the same corporation, of which the branch bank was the agency; the only agent and representative of the bank within the jurisdiction of the State, where alone the corporation itself had or could have any existence.

It seems to me, therefore, under these circumstances it was eminently proper for the Legislature, if it had the power, to authorize payment to be made to this branch bank of debts contracted with the board in Alexandria, if the branch bank was willing, as the only representative and agent of the corporation, to receive it; thus to place the debtor and creditor in the same relative situation to each other, that they would have occupied if there had been no interference of the public enemy. The debtors were ready and anxious to pay, and the agency of the bank with whom the debts were contracted, we may well presume, would also have been entirely willing to have received payment, if they could have acted, in the same currency which was receivable and payable in all the other banks of the Commonwealth. The debtor, by paying, or the creditor by receiving, was guilty of no infraction of the laws of the State, or of the Confederate States, or of the United States. For the creditor was not an alien enemy, and could not be as a Virginia corporation. And there was, consequently, no suspension of the debt by the war. And there is no good reason why the presence of the enemy in force, incapacitating one agency of the corporation to receive payment, or rendering it impracticable for the debtor to make payment to that agency, should cause the suspension of the debt if there was another agency to whom it could be paid, who was willing to receive it.

But it is argued, that there was no justice in allowing this debtor, who had contracted his debts in good money, to discharge them in a depreciated currency.

474 *Where was the justice in not allowing the debtor to pay his debts at maturity, according to his contract, when the money was not depreciated, and require him to hold it up until it had become greatly depreciated, and then refuse to receive it? Or where is the justice in receiving it and holding it until it became worthless, and then to throw the whole loss on him, and require him to pay it over again, with an accumulation of interest, when money is worth four or five times as much as it was at the time the debt was contracted, estimating its value by the rate of interest it will command.

That the plaintiff has been a loser by the settlement which has been made of this transaction, all will admit. And it is one of the evils of the war, in which all have had to share, however unequally. There are few who have not suffered. Many have been reduced from affluence to indigence. Many who were surrounded with all the comforts of life in their own happy homes are now homeless and houseless. These evils, which are the result of a disastrous war, are irremediable. And worse than vain and fruitless would it be for the courts to undertake to remove them. We cannot disturb and overturn adjustments which they themselves have made. If the war had resulted in our favor, our condition would have been very different; and the loss of this plaintiff would probably have been inconsiderable.

To have a right view of the case, we must transfer ourselves to the situation of these parties at the time the transaction occurred, surrounded by the circumstances which surrounded them. Then the country was hopeful. Those who had gloomy apprehensions were regarded as croakers. And the directors of a bank might have calculated that it would be better to receive payment of a debt in a then depreciated currency, and employ the money in banking, than

475 to have *the debt suspended, and run the risk of losing it altogether. That if the war resulted in our favor the Confederacy would be the richest and most prosperous country on earth; and the debt of the war, in which the whole population were interested, would be paid, and the faith of the Confederacy redeemed. I need only say that the prospective view of the situation then, was very different from the retrospective now.

The matter was adjusted then, and if by competent parties, it is most reasonable that it should stand, as is expressly required by act of March 3d, 1866. The argument grounded upon the inadequacy of the payment in Confederate money, is as applicable to the payments made to all the other banks of the Commonwealth, if the branch bank at Pearisburg was legally authorized to receive payment. And it is a fact, which may be judicially known, that they received payment of their debts in Confederate money down to the close of the war. If, therefore, the payment made in this instance to the branch bank at Pearisburg

was invalid, upon the ground of the depreciation of the Confederate currency, with which payment was made, then are all the payments received by the banks of this Commonwealth, in Confederate currency, after it became as much depreciated, invalid and void, and the liabilities to the banks are not thereby discharged. This is so if the act of March 3d, 1864, is valid, and the payments are annulled upon the ground of their inadequacy.

But it is argued that said act is invalid, because it impairs the obligation of contracts, within the prohibitory clause of the constitution of the United States. It seems now to be a well-established principle, by repeated decisions, that where the Legislature, in the act of incorporation, or by the general law, reserves the power "to repeal, alter or modify, the charter at its pleasure," as is the case here, such express reservation is regarded as a constituent part of the contract, and every subsequent change made in the charter, by act of the Legislature is regarded as made with the consent of the corporation, and does not come within the prohibitory clause of the constitution.

In the case of the Northern Railroad Co. v. Miller, 10 Barb. R. 260, the court says, referring to the principle decided in Dartmouth College v. Woodward, that "it is only applicable to charters where a right to repeal them has not been reserved in the original grant." "It was competent for the State, having the power to grant or to withhold the charter, to annex such condition to the grant, or to make such reservation, as it pleased. The directors, trustees, or other managing agents, by whatever names they are called, by accepting the charter became bound by the condition or reservation, and every individual who subscribes to the stock of the company thereby makes himself a party to the contract, subject to the conditions and reservations of the charter. In effect he stipulates, at the time he subscribes, that the Legislature may alter or repeal the law, and thus change the obligation of his subscription, or defeat it altogether. It cannot, therefore, be said that the amendatory act, which is complained of in this case, was an alteration of the defendant's contract without his assent." Again: "Whatever modification is thus effected in the obligation created by his subscription is made by his own agreement, entered into at the moment he became a party to the contract, and is as binding on him as if it had been accomplished by his own solicitation and procurement."

In the case of the Schenectady and Saratoga Plank Road Co. v. Thatcher, 1 Kern. R. 102, 114, Johnson, J., says: "The persons who contract to take shares in a company, under such an act, contract subject to the same reservation of power. The courts are bound to read their agreement with the legislative condition. They agree to take and pay for the shares for which
477 *they subscribe, subject to the power of the Legislature to alter or repeal

the charter of the company, and it does not lie in their mouth to complain that the power has been exercised." And again: "The corporate property is subject to that power by reason of the assent to its exercise."

In McLaren v. Pennington, 1 Paige R. 102, the Chancellor says: "It is not pretended that there is anything in the constitution of New Jersey or of the United States, which prohibits the reservation of such a power in a legislative grant. On the contrary, the insolvent laws of the States have been sustained, on the principle that a general law of the State where the contract was made, and which was in force at the making of such contract, is to be taken as a part of the contract."

In the case of the City of Roxbury v. The Boston and Providence Railroad Corporation, 6 Cush. R. 424, C. J. Shaw, delivering the opinion of the court, says: "If this act adds anything, or makes more explicit the duty imposed by the act of incorporation, it affects the remedy only, and perhaps would be within the competency of the Legislature, without any reservation of the power of amendment; but if otherwise, it was fully warranted by the reservation by the statute of 1830, ch. 81."

In the case of the State, Jersey City, and Bergen R. R. Co. v. Mayor, &c., of Jersey City, 31 N. Jersey L. R. 579, the charter provides the annual taxation which the company shall be subject to pay, and provides "that no other tax or impost shall be levied or assessed," and the company in this case sets it up as a contract against the right of the Legislature to impose additional taxes. But the C. Justice, delivering the opinion of the court, says: "These statutory provisions form, in my opinion, a contract neither in letter nor in spirit.

They are to be read in connection with
478 that other provision in this *charter, which reserves to the Legislature the right to alter, modify or repeal it."

The same principle was directly involved, and decided by this court, in the recent case of Anderson v. The Commonwealth, 18 Gratt. 295. In that case, the act incorporating the National Express and Transportation Company was passed December 12th, 1865, and was an amendment and re-enactment of the act passed in 1861. It omitted the clause in the original act which attached a personal liability to the stockholders. Under this charter, the stock was subscribed, the company was immediately organized, and it seems were doing business by the 1st of January, 1866. By the legal effect of the charter, the stockholders were not liable personally for the debts and liabilities of the company; which was doubtless an influential consideration with those who subscribed for stock.

Some six weeks after the stock was subscribed, and the company commenced business, to wit: on the 15th of February, 1866, the general assessment law was passed, which spreads over thirty odd pages, and contains ninety-seven sections; and in the

93d section there was inserted a clause, which makes the stockholders of said company personally liable, jointly and severally, for the taxes to be assessed upon the company, and for heavy penalties, should they be incurred by the company. There is nothing in the title to indicate that it contained any modification of the said charter.

In 1867, the said Anderson was served with notice, by the auditor of public accounts, that on the 12th of February, 1867, he would move the Circuit court of the city of Richmond for a judgment against him for \$516 72, being one per cent. of the gross receipts of the National E. and T. Co. for doing business in this State from the 1st of January, 1866, to the 1st of September *of the same year, due from the company for taxes on their business, and for which the defendant was alleged to be liable as a stockholder in the company.

In that case the act, as we have seen, which imposed the personal liability on the stockholders, contrary to their rights under the charter, did not profess to alter or amend the charter, or to be enacted in reference to it; a point to which so much importance is attached in this case. But the change was made in a way least likely to give notice to the stockholders; and the letter of the plaintiff in error in that case, which was relied upon by the court as furnishing the only evidence in the record that he was a stockholder, shows as clearly, at least, that he was not aware of this change in the law, affecting his liability, when the notice was served upon him, twelve months after the law was passed. Yet in that case, the point so relied upon in this was raised and strongly urged. On p. 300, J. Joynes, who delivered the opinion in that case, in which the other judges concurred, says: "In the case in 26 Maine, the objection was taken, as it was in this case, that the reserved power of amendment must be exercised by a special act for that purpose; and that the liability of the stockholders could not be altered by a general law; but it did not prevail." And this objection was overruled.

If it were an original question, and not a res judicata, I should not be willing to go as far as the court did in that case. It does appear to be reasonable, that when the Legislature exercises its reserved power to modify or amend a charter, there ought to be some reference to the subject, and in the title to the act to show that the subject of alteration was in the mind of the Legislature, and that it was knowingly and intentionally modifying the charter, and that the stockholders have presumptive notice by the act, of the modification of their charter. So far as the decision in 480 that case is in *conflict with this principle, I would concur with my brethren in the opinion that it is erroneous.

But in this case, the subject matter of the act of Assembly was the bank charters of

the Commonwealth, and the professed object was to confer powers on the branches, which it may be implied were not, in the opinion of the Legislature, conferred by their charters. The title of the act, and the body of it, show unmistakably that it was the intention of the Legislature to modify the charters, both as to the powers of the mother banks in relation to the branches, and of the branches in relation to the parent bank. In this case it is evident that the subject of the bank charters was in the mind of the Legislature, and it was its intention that the banks and their branches should have the powers therein expressed, whether its act should be regarded as a legislative construction or modification of their charters. I am of opinion, therefore, that both on principle and authority, there is no ground for the objection in this case that the act of assembly is general, or does not profess to modify the charter of the bank.

But to return to the main question, whether this act of assembly of 1864, was a violation of contract, &c., J. Joynes says, in the case cited, p. 299, "It was further contended, that the imposition of such a personal liability on the stockholders, when the legal effect of the charter was to exempt them from any personal liability for debts of the company, was a violation of the contract between the stockholders and the State. By the last clause of the charter it was made subject to modification or repeal, at the pleasure of the General Assembly. The stockholders, by accepting the charter, assented to that reservation as a constituent part of their contract." And this opinion, we have seen, is supported by the highest authority, and may be regarded as a well established principle.

But it is contended, that where the 481 company, in the *exercise of its chartered privileges, has entered into contracts, and acquired rights by its lawful acts, as the law then stood, no subsequent alteration of the charter by act of the Legislature, can avoid the contracts or divest the rights so acquired; and several authorities were cited in support of this principle. In the case referred to, supra, the stockholder was held liable for the tax of one per cent. upon the receipts, &c., of the company, before as well as after the act of February 15. But I do not controvert the principle contended for. Unquestionably if the company had acquired property or choses in action, or had conveyed property to others, as authorized by the law as it was in force at the time, those acts could not be avoided or invalidated by a subsequent repeal or alteration of the charter. But suppose the Legislature should change the name of the company, which it undoubtedly has a right to do, such change could not divest the company of its right to the chose in action, or to enforce its collection. Yet it could not sue in its old name, which has now no existence. But it could sue for it and collect it in its new name. Hyatt v. McMahon, 25 Barb. R. 457. The obligation

of the contract would continue, but the mode of enforcing it would be changed.

It is a well established principle of constitutional law, that a State may pass a law materially altering the remedy of one of the parties to a contract, although it cannot pass a law impairing the obligation thereof. *Bank of Columbia v. Okeley*, 4 Wheat. R. 235. In this case the obligation is to pay the debts to the corporation. That is in substance and effect the obligation of the contract. The debts belonged to the corporation, not to the president and directors at Alexandria. They, as stockholders, had an interest in them; and so had the president and directors of the branch at Pearisburg. But it was a debt due to this artificial person, who had an existence and personality in contemplation of law.

This ideal person had a corporate name, and could only sue or be sued in that name, unless otherwise authorized by law. Who would say that a law authorizing it to sue in another name, was not applicable to the remedy, but impaired the obligation of the contract.

We have seen that the Legislature may change the name of the corporation, and that, in such case, it must sue in its new name on contracts made in its old name. It has been held that a statute of the State of Alabama, providing that promissory notes given to the cashier of a bank *en nomine*, may be sued and collected in the name of the bank, is a law which affects the remedy only, and, although passed after the note was executed, does not impair the obligation of the contract. *Crawford & al. v. Branch Bank of Alabama at Mobile*, 7 How. U. S. R. 279. It seems to me, therefore, that an act of the Legislature, authorizing this corporation to sue for and collect these debts, in the name of the branch bank at Pearisburg, would apply only to the remedy, and could not impair the obligation of the contract. Authority to sue implies authority to receive, and to give acquittances and receipts in discharge of the debt.

Upon the whole, I am of opinion that the Legislature had the power to change the corporate name of the Bank of the Old Dominion, or to authorize it to sue and collect the debts due the corporation, contracted with the president and directors of the Old Dominion, at Alexandria, by the branch bank at Pearisburg; that such law does not impair the obligation of the contract, and is not in conflict with any provision of the constitution of the United States, or of the Confederate States, or of the State of Virginia; that the said branch bank was thereby invested with the same power to receive the debts, and to accept satisfaction in the currency which was receivable and payable by all the other banks of the Commonwealth, and which was in fact the only currency in circulation; and that the acceptance of such payment was as binding upon the corporation as if it had been done by the president and directors of the bank at Alexandria; and

under the act of 3d of March, 1866, cannot now be disturbed or set aside. It is not so much a question of agency as of legislative power, reserved in the charter, with the assent of the company and its stockholders.

The views which have been presented with diffidence in this opinion, are not confined to the points raised by the instructions moved in the Circuit court, but embrace the whole law of the case, as involved upon its merits, so far as shown by the record. In view of what has been said, without going into critical examination of the political questions raised by the instructions moved by the plaintiff, I am of opinion that there is no error in the judgment of the Circuit court refusing to give them, or in the instruction which was given; and that the judgment should be affirmed.

MONCURE, P., and STAPLES, J., concurred in the opinion of Christian, J.

JOYNES, J., concurred in reversing the judgments.

Judgments reversed.

484 *The Board of Supervisors of Culpeper v. Gorrell & als.

March Term, 1871, Richmond.

1. **Board of Supervisors—Authority to Condemn Land.***—The board of supervisors of a county have authority to provide land for building a courthouse, clerk's office and jail, either by purchase or by proceeding to have it condemned in the mode prescribed in the statute. Code, ch. 56, s. 6-16, p. 824-826.
2. **Same—Authority to Sell County Land.**—The board of supervisors of a county have authority to sell the lands belonging to the county, on which the courthouse and other public buildings once stood.
3. **Same—Authority to Choose Site for Public Buildings.**—It is for the board of supervisors to determine what land they will procure for the public buildings of their county; and, whether their discretion is wisely or unwisely exercised in the selection, cannot be enquired into in the proceeding instituted to condemn the land.
4. **Condemnation Proceedings—Statute Construed.†**—In the act authorizing the condemnation of land for public purposes, Code, ch. 56, the tenant of the freehold referred to in s. 7, is the tenant in possession appearing as the visible owner.

***Board of Supervisors—Authority to Condemn Land.**—In *Supervisors v. Cox*, 98 Va. 272, the court says: "This statute (Virginia Code 1887, § 1074, substantially the same, for present purpose, as Virginia Code 1880, ch. 56, § 6), has been construed by this court to authorize the application by the board of supervisors of a county to the proper tribunal for the condemnation of land, which it may have selected for the location of the courthouse, clerk's office, and jail of the county. *Supervisors of Culpeper v. Gorrell*, 20 Gratt. 484."

†**Condemnation Proceedings—Statute Construed.**—The proposition laid down in the fourth headnote, that the tenant of a freehold referred to in the act authorizing the condemnation of land for public

5. **Same—By Board of Supervisors—Objections to Commissioners' Report.**—The board of supervisors proceeding to have certain land condemned for the purpose of building thereon a courthouse, clerk's office and jail, and the persons whose land is proposed to be condemned, not objecting to the report of the commissioners, other citizens of the county have no right to make themselves parties in the proceeding, and object to the confirmation of the report.

8. **Same—Same—Same—Jurisdiction of Circuit Court.**—In such a case the Circuit court of the county has no jurisdiction, on the application of these citizens, to award a writ of error and supersedeas to the judgment of the County court refusing to admit such citizens as parties, and confirming the report of the commissioners.

9. **Judgments—Who May Appeal.**—To entitle any person to appeal from a judgment, he must be a party in the cause, and must be aggrieved by the judgment.

10. **Writ of Prohibition—To Restrain Inferior Court.**—The Circuit court having no jurisdiction, on the application of persons not parties to the proceedings, to revise the judgment of the

485 *County court, the writ of prohibition is a proper proceeding to restrain him from proceeding in the case.

11. **Same—Declaration Must Be Filed—Exception.**—Though it is a general rule that a writ of prohibition will not be awarded without requiring the plaintiff (if the defendant insists upon it) to file a declaration; yet, when the application for the writ is to the Supreme Appellate court, it may be dispensed with, if the court is satisfied that the merits of the case is presented fully on the petition and answer.

purposes, to whom notice must be given, is the tenant in possession appearing as the visible owner, was expressly sustained in *Hope v. N. & W. R. Co.*, 79 Va. 288; *Keystone Bridge Co. v. Summers*, 18 W. Va. 491. See also, *Pitzer v. William*, 2 Rob. 241, 254.

‡**Judgments—Who May Appeal.**—In *McKinney v. Kirk*, 9 W. Va. 80, the court says: "I understand it to be a well-established rule, as a general, if not a universal, thing, that the party asking the reversal of a decree or judgment must show that he is prejudiced thereby. Supervisors of Culpeper County v. Gorrell, 20 Gratt. 519-20."

In *Renick v. Ludington*, 20 W. Va. 537, the court said: "It is true, that this court had no jurisdiction to grant them an appeal, they not being parties to the cause as heard and decided by the court below, even though the record showed, that they had an interest in the subject-matter of controversy. See *Gorrell v. Board of Supervisors*, 20 Gratt. 484."

See also, on this point, the principal case cited and approved in *Ailstock v. Pace*, 77 Va. 391; *Ex parte Lester*, 77 Va. 677; *Williamson v. Hays*, 25 W. Va. 609, 616.

In the last-named case (*Williamson v. Hays*, 25 W. Va. 609), the first headnote reads: "To entitle any person to obtain a writ of error or appeal from a judgment, he must be both a party to the case and be aggrieved by the judgment."

See also, *Wingfield v. Crenshaw*, 8 H. & M. 245; *Dunlop v. Com.*, 2 Call 234; *Sayre v. Grymes*, 1 H. & M. 404.

§**Writ of Prohibition.**—The principle laid down in the principal case as to a writ of prohibition was cited and approved in *Burch v. Hardwicke*, 23 Gratt. 57, 58,

The board of supervisors of the county of Culpeper having selected two acres of land in the town of Culpeper, belonging to Eliza T. C. Jameson and others, for the purpose of building thereon a courthouse, clerk's office and jail for the county, applied to the County court of that county for the appointment of commissioners to value the land. The commissioners were appointed, and they returned their report to the county court in December, 1870. At the January term of the court, upon the motion of the supervisors to confirm the report of the commissioners, Joseph B. Gorrell, and seven other persons, claiming to be citizens of the county, owners of real estate and taxpayers therein, but not claiming to have any interest in the land proposed to be condemned, moved the court to allow them to be made parties to the proceeding, and to file exceptions to the report; which they exhibited. On this motion, the judge of the County court—J. W. Bell—delivered the following opinion:

The board of supervisors of Culpeper county having determined upon a site on which to locate the courthouse, clerk's office and jail, and desiring to condemn that site or parcel of land and purchase the same, applied to this court to appoint five disinterested freeholders of the county, for the purpose of ascertaining a just compensation for such land. Notice of such application was given, and service thereof acknowledged by the owners and occupants of the land; and upon its appearing that such notice had been given, and no 486 one *appearing to oppose it, the court appointed the commissioners suggested by the board, and, in the order of appointing them, designated the day for them to meet. It appears they took the oath prescribed by the statute in such cases provided, met upon the land on the day designated, viewed the same, and ascer-

50; *Hogan v. Guilgon*, 20 Gratt. 713, and note by the judge giving a list of cases in prohibition, among which is placed the principal case. *Gresham v. Ewell*, 84 Va. 785, 6 S. E. Rep. 134; *Gresham v. Ewell*, 85 Va. 7, 6 S. E. Rep. 700; *Swinburn v. Smith*, 15 W. Va. 499; *County Court v. Boreman*, 34 W. Va. 303, 12 S. E. Rep. 492; *County Court v. Boreman*, 34 W. Va. 92, 11 S. E. Rep. 750.

In *County Court v. Armstrong*, 34 W. Va. 331, 12 S. E. Rep. 490, the court said: "In deciding the case of *County Court v. Boreman*, we were greatly influenced by the case of *Supervisors v. Gorrell*, 20 Gratt. 484, which holds that when the supervisors were proceeding to condemn land for a courthouse, and the land owners did not object, other citizens and taxpayers could not make themselves parties in the proceeding, and the circuit court could not on their motion award a writ of error and supersedeas to the action of the county court refusing to admit them as parties, and was without jurisdiction to revise the action of the county court, and awarded a prohibition to inhibit the circuit court from going on with the writ of error."

See also, *foot-note* to *Ex parte Ellyson*, 20 Gratt. 10; *foot-note* to *French v. Noel*, 22 Gratt. 454; *foot-note* to *Hogan v. Guilgon*, 20 Gratt. 705.

tained what would be a just compensation for it, and made their report accordingly. No person appeared on the ground to contest it.

At a subsequent term of the court, the report and the proceedings are presented to the court, and a confirmation of the same is asked for by the board. An attorney at the bar arises in his place, opposes the motion, and gives notice to the board of supervisors, through its chairman, that in the name of certain citizens, tax-payers and real estate owners of the county, and in their behalf, he will contest the confirmation of the report, and ask the court to allow them to file their exceptions, and show cause against it.

It was suggested by the court to the attorney for the tax-payers, that his exceptions should be reduced to writing, so that the objections to the whole proceedings on the part of the board of supervisors could be more readily seen and understood. They were reduced to writing, and on the next morning brought into court. In the meantime, however, by an understanding between the counsel for the board and counsel for the tax-payers, the exceptions themselves were not to be discussed by the bar, or considered by the court, until the single preliminary question should be disposed of, viz: "Have these persons, as tax-payers, citizens and real estate owners, and in that character alone, a right to be heard here, to show cause against the confirmation of the report of the said commissioners?" This is the single, isolated proposition for this court now to determine. It is one of unqualified novelty with us, growing out of the revolutionized constitution
487 *of government under which we now live, and which we are bound to observe and execute. It is *res integra* here.

Owing to the newness and difficulties of this question, I had hoped to receive the notes and authorities promised at the bar, but regret to say have not, to this moment, although solicited by me, gotten the first note or suggestion, or authority, from a single lawyer except Mr. Lewis, who furnished me with a short note and authority, to which I shall hereafter allude—Mr. Gibson referring me to the same. There is certainly a great dearth of authority upon this question, or any one similar to it, elementary or in the decision of the courts—at least after the most industrious researches in all the libraries at this place and in Warrenton (some of them quite large), I have not been able to discover a single case wherein this distinct question is raised, save one. In 16 Pickering's Report (Massachusetts), the point is raised at the bar, and disposed of by Judge Shaw in two words—"Sed quære." It must, therefore, be determined, as best I may, upon reasoning and analogy.

It will be observed that these "citizens, tax-payers and real estate owners," do not come in by petition, setting forth and manifesting an individual interest which the court would be bound to take notice of,

and defend and protect, and ask to be made parties on the record, as plaintiffs or defendants; but merely asks in the character of "citizens, tax-payers and real estate owners," to show cause against the confirmation of the report of the commissioners. They do not show or set forth any other interest than what the descriptive character they have assumed would indicate, viz: "citizens, tax-payers and real estate owners," an interest which it must be admitted, is of the most general, uncertain and indefinite kind. They do not even set forth that they, or any one of them,
488 is a creditor of the land *owners, or that they are lien holders, or have the remotest pecuniary interest in the land proposed to be condemned, even if that fact could avail them at all. They certainly do not pretend that they are tenants of the freehold, or owners or proprietors of the land, or that they are interested as residuary legatees and devisees under William Major's will. If it appeared that they or either of these exceptants was a "tenant of the freehold," or his "guardian or committee," and that legal notice has not been served on him, then the proceedings, to that extent, would be defective. The court would refuse to confirm the report, cause notice to be served on the proper party, and bring him properly before the court. He would then be a party in interest, and have a right to be heard and show cause against the report.

The 10th section of the law under which this proceeding is had, reads as follows: "The commissioners, after viewing the land and hearing such proper evidence as either party may offer, shall ascertain what will be a just compensation for said land," &c. To whom do these words "either party" refer?—to the people of the county in a body, individually and collectively?—to any citizen, tax-payer and land owner of the county?—to any uninterested person? I cannot think so; but, manifestly, to a "party" having an interest as "tenant of the freehold," his guardian or committee; or to "those entitled to the land," in the language of the statute itself, on the one part, and the company, or county, or town council, on the other part.

The 11th section reads as follows: "The said report and certificate of the Justice shall be forthwith returned to the court of the county or corporation, and unless good cause be shown against the report, the same shall be confirmed and recorded."

The 12th section reads as follows: "If, however, good cause be shown against
489 the report, the court may, *without further notice, as often as to it seems proper, appoint other commissioners, and the matter may be proceeded in as before."

The 14th section says: "If the sum ascertained by the report which is confirmed, be not more than the sum ascertained by the first report, the party applying for the appointment of other commissioners shall pay the costs occasioned by such application."

Now, taking these four sections together,

and construing the words "unless good cause be shown against the report," and the word "party" as used therein, I cannot resist the conviction that the intention of the law was to confine all exceptions to, and all contests respecting the assessment of the land sought to be condemned, to individuals to whom such notice must be given by law; viz: to the tenant of the freehold, his guardian or committee, or those entitled to the land; and the applicant, that is to say the company, county or town, in this case, to the board of supervisors, the corporate body representing the county. What strengthens me in the propriety and reasonableness of this construction is, that in the 11th "section it is provided that the sum ascertained to be a just compensation" may be paid to the "persons entitled thereto, or into court;" and again, in the 16th section, "to enable the court to dispose properly of any money so paid into court, it may appoint a commissioner to ascertain what persons are entitled thereto, and in what proportion," and require "all interested to appear before the commissioner, that their respective claims may be passed upon." The word "person," throughout the statute, wherever used, is, in my judgment, used not in apposition to, but in contradistinction to, the word "party"—"all interested,"—that is, all persons interested, not in the land, but in the condemnation money for the land, which is always done when

490 land is taken *without the owner's consent by an incorporated company, county or town.

The term "party" or "parties" is understood to include all persons who are directly interested in the subject matter in issue, who have a right to make defence, to control the proceedings or to appeal from the judgment. Persons not having these rights are regarded as strangers to the cause. 20 Howell's St. Trials 538; 1 Greenleaf's Evidence 523.

This is my construction of these statutes, arrived at with much diffidence I confess. It applies as well to the case at the bar as to any case wherein private property was taken for public uses by an incorporated company, county or town. Many cases have arisen under it in Virginia, which have gone through the judicial ordeal from the lowest to the highest courts of the State; and in no one case can I find where one or a dozen or more of the public have ever presumed to ask to appear and contest the report of the commissioners in such cases.

It was suggested at the bar by one of the counsel for the citizens and tax-payers, that an amicus curiae would have a right to ask to be heard in open court, except to the report, and show cause against its confirmation by the court. Although not favored with any authority to support this proposition, I am with one which meets it very fully and establishes the negative. In a case that went from the District court to the Court of Appeals there was an inquisition of escheat for the want of heirs. The

inquisition found that Jackson was seized of the premises, and died without a will, or disposing of his property, and that no person had ever claimed the land as lineal or collateral heir. Dunlop, as amicus curiae, moved the court to quash the inquisition; this the court refused. Dunlop filed a bill of exception, stating the inquisition and motion to quash it, and appealed from the judgment of the District

491 *court to the Court of Appeals—Randolph for Dunlop—Nicholas, attorney general, for the Commonwealth. The case was argued by both counsel, and Lyons, judge, delivered the opinion of the court. He dismissed the appeal "because it had been improperly granted: that the amicus curiae could not move to quash an inquisition, when it did not appear that he had any interest himself, or represented any one who had."

In this case the court would not presume an interest in the amicus curiae. That Dunlop was a "citizen," there was no question; that he was a "tax-payer," they were bound to presume; that he was a real estate owner does not appear; but it does appear that he made his motion because of the interest he felt to prevent its being set aside at a future day, and purchasers from being injured; so that the case at bar is covered entirely by the case of Dunlop v. The Commonwealth, 2 Call 284. His (Dunlop's) interest was to prevent any defect in the proceedings, and to protect the interests of the Commonwealth, as well as those of the purchasers. The alleged interests of the exceptants in the case at the bar, is to protect the interests of the county and the citizens thereof.

It is laid down in the case of Thomas v. The Tawvale Railway and Dock Company, 13 Beav. a vol., which I have not been able, however, to find, but referred to in Brightly's U. S. Digest, that "a plaintiff cannot sue as one of the public," to restrain a company from closing their railway.

In the People v. Cutting, 3 John. R. 1, it was decided that "a mere stranger," that is, a man without a fixed and definite interest, "cannot interpose a traverse vs. the people;" but in the same case the court said that a possessory right was sufficient for that purpose. In these two cases two propositions are decided. 1st. That an indifferent, uninterested man—"one of the public"

—a "mere stranger"—cannot inter-

492 pose himself *between parties litigant, for the reason that he has no interest. The 2d, the converse proposition that a right in the subject was sufficient for the purpose. These exceptants here set up no right, claim no interest, present or prospective, either for themselves or in behalf of any one else. They do not allege an interest in the matter themselves; nor, in the language of Dunlop v. The Commonwealth, do they make a suggestion on behalf of any person who is "before the court and concerned in interest."

Again, in Wilson v. Supervisors of Albany City, 12 John. R. 414, a motion was

made to lay out a road to suit the applicant's convenience. It was opposed on the ground that the commissioners had the discretion to lay it out as they saw fit; and that a mandamus would not lie; the applicant having no legal or precise right." See also *Hull v. Supervisors of Oneida County*, 19 John. R. 259.

In *John Giles' case*, 2 Strange 881, a mandamus was moved for to certain justices, to grant him (John Giles) a license to keep an ale house. It was opposed on the ground that it was discretionary in the justices; and the court refused it, saying, "there never was an instance of such a mandamus."

In *The People v. Champion & others*, 16 John. R. 61, "any person conceiving himself aggrieved by a decision of the court of Highways, may appeal to the judges of the court of Common Pleas. But the right of appeal by "any person," will be found to be given by statute.

In our own State, "any inhabitant" of the county, on ten days' notice to any merchant who has obtained a certificate to get an ordinary license, may move the court which granted it to revoke the same. But this is by virtue of express statute also. See ch. 38, sec. 37, title 12, Code of Virginia.

By an act of Assembly, passed in 493 1870, fifteen voters "were authorized to make their complaint of "an undue election, or false return," two of whom shall take and subscribe an oath to the truth of the same, and the court shall proceed upon the merits, and determine the same; and the complaint shall not be regarded by the court if not filed within ten days after said election. See Sess. Acts 1870, p. 95.

Again, by an act passed July, 1870, providing for the reassessment of the lands of the Commonwealth, page 339, any person feeling himself aggrieved in the assessment of his land, may apply to the court to have the assessment corrected; and this, on affidavit sworn to by the person or his agent that the assessment is excessive. Other cases might be cited, but it is deemed unnecessary. Enough has been shown in the way of legislation to show, most persuasively at least, that it never was the intention of the legislature, in cases like these or like the one at the bar, to allow any person, any one of the public, either as *amicus curiae*, or as *amicus populi*, on a fancied interest, or in cherished hostility, either to facilitate or obstruct the execution of the laws; and to that extent to interfere with the administration of the government through its agents or otherwise. Can it be supposed that it was ever contemplated by the Legislature that any man, of his own accord, prompted it might be by feelings of the most captious sort, should have it in his power, by raising frivolous and capricious objections in proceedings of this kind, to arrest and delay a great and useful enterprise! If it had been, we think, from what has already been shown, that it would have provided for it, and not left it to inference or argu-

ment, or to the whims and caprices of the citizen, and delays and uncertainties of the courts.

It was asked by one of the attorneys for the exceptants, if the board of supervisors could erect a bowling alley at the expense of the country? While it must

494 *be confessed that, as a corporate body, they are clothed with very large and extensive powers respecting the care of the county property, and the management of the business and concerns of the county, yet, it is one thing to have exclusive, and another and a very different thing to have absolute powers; and hence, I answer, no! That would be plainly a gross perversion of their powers, for which they would be liable on their bonds in damages.

It was also urged, with earnestness, ingenuity and ability, by counsel for the exceptants, that there might be collusion between the board and the owners of the land, or those interested in the condemnation money, and in that way (I presume they meant to say) the assessment might be inordinate and excessive. The ready reply to this most improbable presumption is, that that collusion could be of no practical avail whatever, unless it were participated in by the five commissioners, chosen for their intelligence, disinterestedness and character, and who would be as much interested to keep down the assessment as any other tax-payer and real estate owner in the county. But this would be a violent presumption of fraud, contrary to all the rules of evidence in law and equity.

In considering this question, I have tried to steer clear of the merits of the exceptions, save so far as they were connected with it inseparably. In coming to the conclusion I have, I have done so with diffidence and distrust. If I had consulted my own inclinations, it would have been to admit these complainants, and hear them upon the merits of these exceptions. But I had a duty to perform, and upon the best consideration I have been able to give to it, as one of legal right and legal powers, I am brought to the conclusion, that if they have, as citizens, tax-payers and real estate owners," any right to be heard upon this subject, it is not in this court, in this 495 shape and form, but in another *forum. I therefore overrule the motion to file the exceptions.

To the opinion of the court overruling their motion and confirming the report, Gorrell and his associates filed a bill of exceptions; and applied to the judge of the Circuit court for a supersedeas to the order of the County court; which was awarded.

The supervisors thereupon applied to this court for a writ of prohibition to the judge of the Circuit court, Gorrell and the other parties, to forbid them to proceed upon said supersedeas. A full statement of the case is made in the opinion of the court.

The case was argued by Gibson, for the petitioners, and by James Green, for the respondents.

MONCURE, P., delivered the opinion of the court.

This is a case of novelty, not only on account of the nature of the proceeding, but of the questions which it involves. It is a case of prohibition, brought in this court as a court of original jurisdiction. By the constitution, article VI, § 2, this court is invested with "appellate jurisdiction only, except in cases of habeas corpus, mandamus and prohibition." And this provision of the constitution in regard to mandamus and prohibition, is carried into effect by chapter 160, § 4 of the Code, as amended by the act approved June 23, 1870, Acts of Assembly, 1869-70, page 219, chap. 171, which declares that "the said Supreme court, besides having jurisdiction of all such matters as are now pending therein, shall have jurisdiction to issue writs of mandamus and prohibition to the Circuit and Corporation courts, and to the Hustings court and the Chancery court of the city of Richmond, and in all other cases in which it may be necessary to prevent a failure of justice, in which a mandamus may issue, according to the common law.

496 The practice and *proceedings upon such writs shall be governed and regulated in all cases by the principles and practice now prevailing in respect to writs of mandamus and prohibition, respectively."

This is the second case of prohibition that has ever been brought in this court, as a court of original jurisdiction; the first being that of Ellyson ex parte, brought and decided within the last year. Supra p. 10. There have been several cases before this court as an appellate court. The first of which was Mayo, mayor, &c. v. James, 12 Gratt. 17; since which are the cases of Warwick, &c. v. Mayo, 15 Id. 528; and West v. Ferguson, 16 Id. 270. There were several cases before the General court during its existence. Miller v. Marshall, 1 Va. Cas. 158; Hutson v. Lowry, 2 Id. 42; and Jackson v. Maxwell, Id. 636. The questions upon the merits involved in this case, relate to the nature and extent of the powers and duties of boards of supervisors of the counties, under the constitution and laws of the State. In order that all the questions arising in the case may be properly presented and well understood, we deem it necessary to set forth, substantially, the proceedings which have been had in the case.

During the present term of this court, to wit: on the 9th day of March, 1871, "the board of supervisors of the county of Culpeper," by their counsel, presented a petition to this court, representing, in substance, that, by the laws of the State, they have sole control, power and care of and over all the corporate property of said county, and where none exists they are required to procure and provide all such as may be necessary; that when they came into their said office, they found that the courthouse, the jail, the clerk's office, and most of the public square, on which said

buildings had stood, had all been sold, and the buildings themselves torn down and removed; that finding the portion of the lot remaining undisposed of insufficient and wholly inadequate *for the county purposes, they proceeded, in accordance with a decision of this court upon their powers in this matter, to sell the balance of said lot, and from the proceeds of these sales realized some \$18,000; that then, by virtue of their aforesaid powers, and in discharge of their aforesaid duties, they proceeded to select other suitable ground, and to commence thereupon the buildings required of them by law; that they selected a most suitable and proper spot within the corporation of the town of Culpeper, and, thinking it most prudent, called upon the county court, in accordance with the general provisions relating to corporations, council of towns, &c., to have the damages assessed and the title perfected; that legal notice was given to the tenants of the freehold, and commissioners were appointed, who legally discharged their duties and made their report to the said court. Whereupon sundry citizens, by name "Joseph B. Gorrell," &c. (eight in number, naming them), styling themselves "citizens, taxpayers and real estate owners," who had entered into a conspiracy for the purpose of hindering and harassing the said board in the discharge of their said duty, and for selfish purposes to compel your petitioners to put these public buildings on lots adjoining and adjacent to their stores and other property, came into the said court, offered to make themselves parties on the record, and asked leave to file sundry formal exceptions to the report of said commissioners, denying the powers of the said board, &c.; that said court refused to hear them in this manner, and confirmed the said report, and condemned the lot therein described; that thereupon they appealed to His Honor, Henry Shackelford, judge of the Circuit court of Culpeper county, who granted them an order of supersedeas; the effect of which has been to arrest and delay them in the discharge of their duties and powers aforesaid. For the verification and 498 more full explanation of all *these statements, reference is made to an official copy of the record, which is marked "A" and filed with the petition as a part thereof.

The petitioners further aver, that prior to the said order of Judge Shackelford they had entered into a contract for the erection of the aforesaid buildings, by which the county became liable to pay between eighteen and nineteen thousand dollars by the first day of July, 1872; that the contractor is now at work under said contract, and unless something is speedily done to prevent, the said county will become liable to heavy damages for her failure under her contract. They say they are advised that the said Judge Shackelford had no jurisdiction in this matter; because the power to do whatever is necessary in relation to corporate property is given by law to the board

of supervisors, without any right of appeal, except as therein specified; and because, if this were not so, these persons aforesaid, not being parties, could not appeal, so as to give Judge Shackelford jurisdiction; and further, that if he had any jurisdiction, it was only as to the amount of the damages, the law having denied him all jurisdiction to stop said public work. They therefore pray this court to award a writ of prohibition against the said Henry Shackelford, judge as aforesaid, and the said Joseph B. Gorrell, and other persons named as aforesaid, commanding them to proceed no further under the aforesaid order; and that the latter shall not further plead, and the former shall not further entertain, any pleas in and upon the matters aforementioned.

Annexed to the petition is an affidavit of the truth of the facts therein stated, made by Thomas B. Nalle, who appears to be chairman of the board of supervisors.

Upon the presentation of the said petition, it was ordered by this court that a rule be issued against the said Joseph B.

499 Gorrell and the other persons complained *of therein, including the said Henry Shackelford, judge of the Circuit court of Culpeper county, to appear here on the 17th day of March, 1871, and shew cause why a writ of prohibition should not be awarded against them, according to the prayer of the said petition.

The rule was accordingly issued, and service thereof was duly acknowledged by all the persons against whom it was entered. On the return day of the rule, to wit, the 17th day of March, 1871, three of the said persons, to wit, Charles Waite, John G. Miller, and the Hon. Henry Shackelford, failed to appear, as required by the rule. The other six of the said persons, to wit, Joseph B. Gorrell, Lewis P. Nelson, Edward B. Hill, F. D. Johnson, J. N. Armstrong and Thomas S. Alcocke, appeared by counsel and filed an answer to the said petition and rule. After saving all benefit of exception and demurrer to the said petition and the affidavit of Thomas B. Nalle, thereto annexed, the respondents, in their answer, say, it is not true, as alleged in said petition, "that when they (the said supervisors) came into their said office they found that the courthouse, the jail, the clerk's office, and most of the public square on which said buildings had stood, had all been sold, and the buildings themselves torn down and removed." On the contrary, no part of the clerk's office has been torn down or removed, but is now, and has been, continuously used as such, for a period of not less than half a century; that the portion of the public lot remaining unsold when the said supervisors came into office, was amply sufficient for the erection of a new courthouse and jail; that the nearest of the lots sold off theretofore is more than eighty feet distant from the site of the old courthouse; that it is not true the said supervisors have sold the balance of said public lot; on the contrary, a por-

tion of the said public lot remains to 500 this day unsold; that it is not *true that the said supervisors realized from the sales made by them some \$18,000; on the contrary, all the cash they have received from said sales is \$425, out of which they have paid sundry charges and expenses of sale. The credit instalments of said sales amount only to the sum of \$4,875, no part of which is yet due. It is not true that they selected other suitable ground and commenced thereupon the buildings required of them by law; on the contrary, the lot selected by them is not suitable, nor have they, to this day, commenced any buildings thereupon, nor has any material for building been deposited on said lot, to give the slightest color to said allegation. It is not true that legal notice was given in the proceedings to condemn said lot to the tenants of the freehold; on the contrary, no notice whatever was given to any tenant of the freehold, nor did the commissioners appointed to assess the damages proceed according to law in order to pass the title to said lot; that said respondents are citizens, tax-payers and real estate owners within the county of Culpeper; that it is not true that they had entered into a conspiracy for the purpose of hindering and harassing said board in the discharge of their duties, and for selfish purposes, to compel said board to put the public buildings on lots adjoining and adjacent to their own stores and other property; on the contrary, the steps they have taken were taken to prevent, by an appeal to the law, public officers from proceeding contrary to law, to prevent their own money to be raised by taxation and otherwise, from being expended on a lot to which no title would be acquired by the proceedings in the County court; that it is true these respondents came into the County court of Culpeper, offered to make themselves parties on the record, and asked leave to file sundry exceptions to the confirmation of the report of said commissioners; and that said court 501 refused to allow them to show cause against the confirmation *of said report, but confirmed said report without hearing them; and that they obtained from Judge Shackelford a supersedeas to that order of the County court. They insist that the Circuit court of Culpeper has jurisdiction in the premises, and they pray that the said rule may be discharged. If, however, this court shall be of opinion that said rule ought not to be discharged, then they insist that the said petitioners be required to proceed regularly, and to declare in prohibition.

The answer is supported by an affidavit of the respondents, thereto annexed, of the truth of the facts therein stated.

On the filing of the said answer, the respondents, by their counsel, moved to discharge the said rule; and the cause thereupon came on to be heard upon the said petition and the said motion, and was argued by counsel; on consideration whereof, the court is of opinion as follows:

I. The first question which arises in this case is, as to the powers of the board of supervisors of a county, under the constitution and laws of the State; and whether they have power to acquire land; and if so, in what mode, for the erection thereon of a court-house, clerk's office and jail, and for other public county purposes.

The office of supervisor was unknown to the constitution and laws of Virginia until the adoption of the present constitution, which went into effect during the last year. It results from the system of county organization, taken, substantially, from the constitutions of some of the northern and north-western States, and engrafted upon our constitution.

The provision of the constitution which relates to the subject is the second section of the seventh article; which, so far as it is material to be stated, is as follows:

502 "Each county of the State shall be divided into so many compactly-located townships as may be necessary, not less than three," &c. "The supervisors of each township shall constitute the board of supervisors for that county; and shall assemble at the court-house thereof on the first Monday in December in each year, and proceed to audit the accounts of said county, examine the books of the assessors, regulate and equalize the valuation of property, fix the county levies for the ensuing year, apportion the same among the various townships, and perform such other duties as shall be prescribed by law." Acts of Assembly 1869-'70, p. 624.

In the act approved July 11, 1870, entitled "An act prescribing the duties and compensation of certain township officers," Id. page 269, chap. 188, are the following, among other provisions:

"5. The board of supervisors of each county in this State shall have power at the meeting on the first Monday in December in each year:

"First. To audit the accounts of the county; to settle with the county treasurer his accounts for the year, in the manner prescribed by law; to settle with the sheriff his accounts upon the collection of fines or other monies accruing and belonging to the county; to receive, audit and approve the report and accounts of the superintendent of the poor; and, generally, to settle with any other officer who may have an account with the county, and take such steps as may be necessary to secure a full and satisfactory exhibit and settlement of the affairs of the county.

"Second. To examine the books of the assessors and regulate and equalize the valuation of property.

"Third. To fix the county levies for the ensuing year, upon the information afforded by the above settlements, and to apportion the same among the various townships of the county.

503 "6. The said board of supervisors of each county of the State shall have power, at said meeting in December, or at any other legal meeting:

"First. To make such orders concerning the corporate property of the county as they may deem expedient.

"Second. To examine, settle and allow all accounts chargeable against such county, and when so settled they may issue county warrants therefor, as provided by law. But the board of supervisors of any county shall not issue in any one year a greater amount of county warrants than the amount of the county tax levied in such county for such year; and no interest shall ever be paid by any county on any county order.

"Third. To build and keep in repair county buildings.

"Fourth. To cause the county buildings to be insured in the name of the board of supervisors of said county and their successors in office for the benefit of the county, if they shall deem it expedient; and in case there are no public buildings, to provide suitable rooms for county purposes.

"Fifth. To direct the raising of such sums of money as may be necessary to defray the county charges and expenses, and all necessary charges incident to or arising from the execution of their lawful authority, if the same has not been provided for at the December meeting, and is necessary under the circumstances.

"Sixth. To represent the county, and to have the care of the county property, and the management of the business and concerns of the county in all cases where no other provision shall be made.

"Seventh. To perform all other acts and duties which may be authorized and required by law, not embraced in this act."

I will thus be perceived that, under our new internal organization of the State, the 504 most important powers *and duties, in regard to the police and property of the counties, are devolved on the boards of supervisors thereof respectively. The first section of the act referred to makes them a quasi corporation, with capacity to sue and to be sued. The seventh section declares that they may have a seal; that they shall sit with open doors, and that all persons conducting themselves in an orderly manner may attend their meetings. By subsequent sections, the attorney for the Commonwealth is required to represent the county before the board of supervisors, who are clothed with important judicial functions, and from whose decisions only a limited right of appeal is allowed. The 20th section provides for their compensation and travelling expenses; and the 21st section requires them to give bonds conditioned for the faithful discharge of their duties; and for any violation of the condition thereof makes them and their sureties liable thereon for damages to any party injured thereby, and subjects them to a penalty for refusing or neglecting, without just cause, to perform any of their official duties. The supervisors are to be elected annually by their respective townships; and looking to the great importance of their office, and the deep interest which the people have in its

faithful execution, it may fairly be presumed that the most intelligent, discreet and virtuous men, in the community in which they live, will be elected to the office, and that if any of them should turn out to be unfaithful or unfit, they will not be re-elected.

Having made these general observations in regard to the powers of the board of supervisors, under the constitution and laws of the State, let us now proceed to the particular enquiry with which the question under consideration closes; that is: whether they have power to acquire land, and if so, in what mode, for the erection thereon of a court-house, clerk's office and jail, and for other public purposes of the county.

505 *And, in the first place, have they power to acquire land for those purposes?

No express power is given them to acquire land for any purpose. But power is expressly given them "to build and keep in repair county buildings;" "and, in case there are no public buildings, to provide suitable rooms for county purposes;" and "to represent the county and to have the care of the county property, and the management of the business and concerns of the county, in all cases where no other provision shall be made." How can they discharge these express powers and duties, without the power to acquire land? Suppose a county is without a court-house, clerk's office or jail, and without ground on which to build them: how are the board of supervisors to perform their express power and duty in such a case, "to build and keep in repair county buildings," without first acquiring the ground on which to erect these necessary buildings? The implied power to acquire the ground is as plainly given as the express power to erect the buildings. In the construction of the most naked powers, to which the strictest rules of construction are applied, there is no better settled rule than this, that every power necessary to the execution of an express power is plainly implied.

But this very question has, in effect, been settled by a unanimous decision of this court, in a recent case, to which the board of supervisors of the county of Culpeper were parties. Robert D. Keerl, and four other citizens of said county, obtained an injunction to restrain the said board of supervisors from selling the land on which the public buildings of the county were standing; upon the ground, alleged in the bill, that the said board had no power to sell or convey said public lot, or any portion thereof; that the fee simple title to the land was in the county; and that the said board had no title, and could pass

506 none whatever, to *the property.

Upon the answer of the board of supervisors, claiming power by law to sell the property, the injunction was dissolved by Judge Shackelford. An application was made to this court by the plaintiffs, for an appeal from the said order of dissolution. And on the 9th day of November, 1870, this

court, being of opinion that the said order was plainly right, refused to grant such appeal.

Now, there is no express power to sell the land given by law to the board of supervisors, any more than express power given them to acquire land. The power to sell land in the case referred to was implied, chiefly from the express power "to make such orders concerning the corporate property of the county as they may deem expedient." The implication in this case, of the power to acquire land, seems to be stronger, if possible, than the implication in that case of the power to sell land. After the exercise of the power of sale, which was accorded to them in that case, the power to acquire land became indispensably necessary to the exercise of the express power "to build and keep in repair county buildings."

It is argued by the counsel for the defendants, that the power to acquire land, on which to erect the public buildings of the county, when necessary, is vested by law in the county court, instead of the board of supervisors of such county. He cites, in support of that argument, chapter 50, § 1 of the Code, which declares that "there shall be provided by the court of every county, and by the council of each town wherein there is a corporation court, a courthouse, clerk's office and jail; the cost whereof, and of the land on which they may be, and of keeping the same in good order, shall be chargeable to the county or corporation, and may be levied for by such court or council. The fee simple of the land shall be in the county or corporation,

and the court thereof may purchase so much land as, with *what it may before have had, will make two acres, whereof what may be necessary shall be occupied with the courthouse, clerk's office and jail, and the residue planted with trees, and kept as a place for the people of the county to meet and confer together." And he contends that this law has not been altered by subsequent legislation, but, on the contrary, has been thereby continued in force. In proof of which, he cites chapter 38, § 3, of the act approved April 2, 1870, which declares that "the powers, duties, authority and jurisdiction of said courts (the County courts), shall be and continue as now provided by law, except in so far as the same are modified by the constitution of the State." And he contends that it was by design, and for a reasonable purpose, as well as in accordance with the plan of the Legislature in other similar cases, to vest powers in reference to the same subject in different agents, so as to operate as salutary checks and balances.

We think the effect in this case would be more likely to produce discord and embarrassment where unity and concert are eminently required. We think that the whole law on this subject must be construed together; that the act just cited must be viewed in connection with the act subsequently passed during the same session

of the Legislature, prescribing the powers and duties of the board of supervisors; Id. 269; and, when there is any conflict between the two, the act posterior in date must prevail. According to this rule of construction, the power of the board of supervisors to acquire land for the purposes aforesaid, is, we think, plainly implied.

And now the question comes up, How is the acquisition to be made?

Of course it may be made by purchase, in the ordinary way of acquiring title to land. But to make a purchase, it is necessary that the owner of the land should be competent

508 to sell it, and willing to do so, on *terms which the purchaser may be willing to accept. If the owner be under a disability, as, for instance, be an infant or a feme covert, or be unwilling to sell on terms on which the person wishing to make the purchase is willing to buy, then, to acquire title to the land, some other means must be resorted to than an ordinary contract of purchase and sale between competent parties.

Such appears to have been the case here. The owners, or some of them, of the land selected by the board of supervisors for the location of the county buildings of Culpeper, were under disability, and the board of supervisors thought it necessary or proper to resort to legal proceedings to acquire title to the said land. They accordingly proceeded in the mode prescribed by the Code, chapter 56, §§ 6-16, pp. 324-326. The 6th section provides, that, "If the president and directors of a company incorporated for a work of internal improvement, the court of a county, or the council of a town, cannot agree on the terms of purchase with those entitled to lands wanted for the purposes of the company, county or town, five disinterested freeholders shall be appointed by the court of the county or corporation in which such land, or the greater part thereof shall lie (any three of whom may act), for the purpose of ascertaining a just compensation for such land." The remaining sections referred to prescribe whatever else is to be done to complete the acquisition of the property.

These provisions of law are not confined to cases in which competent contracting parties cannot agree on the terms of purchase, but extend also to cases in which there can be no such agreement, on account of the disability of any of the owners, or otherwise.

But it is argued that these provisions authorize the court of a county to acquire title to land in the mode *and for 509 the purposes thereby prescribed, but not the board of supervisors of a county.

We think that the board of supervisors of a county being now exclusively invested by the constitution and laws of the State, as we have already shewn, with the power and duty of providing public buildings for such county, and procuring the necessary land for that purpose, it follows, as a necessary consequence, that they must have power to proceed in the mode prescribed

by the provisions aforesaid; that being the only mode whereby a good title can be acquired to the land selected by them for the location of the public buildings of the county. It was surely not designed to take away from a county the right it had to select the most suitable location for its public buildings, without regard to the ownership of the land, and to confine it to such a location only as could be acquired by agreement with the owner. These provisions authorized the County court to institute proceedings for the condemnation of land for county purposes, because that court was then the agent of the county for providing county buildings, and procuring the necessary land for that purpose. But the new constitution and laws having created another agency for the purpose, and having transferred the duty of providing county buildings and procuring land for the purpose, from the county court to the board of supervisors, these new agents have implied power to use the means provided by law for the condemnation of land, when necessary to enable them to discharge that duty. The power to acquire land by purchase, and the power to acquire it by condemnation for county purposes, ought to be in the hands of the same agent. And as the former is now in the hands of the board of supervisors, it is fair to presume that it was intended to place the latter there also.

The board of supervisors of the 510 county of Culpeper *had power, therefore, to acquire title to the land selected by them for the location of the public buildings of the county in the mode prescribed by the provisions aforesaid. And we proceed to consider the next question arising in this case, which is,

II. What is the nature of the proceeding instituted by the said board of supervisors for the condemnation of the said land, and had the defendants in this cause a right to appear and show cause against the confirmation of the report as they proposed to do in that case?

The proper mode of acquiring title to land which is needed for public purposes is to purchase it in the ordinary way, if that can be done on reasonable terms. But if that cannot be done, the only other mode which can be pursued is the one prescribed by the 56th chapter of the Code, which was pursued in this case. The provisions of that chapter which relate to this subject are those embraced in sections 6-16, pp. 324-'5 and '6. Their only object is to ascertain the value of the land and to vest the title thereto in the public for the purposes for which it is needed. They do not involve any question as to the propriety of the selection made by the board of supervisors, when they are the parties proposing to condemn the land. That is a question which the law refers to their discretion only; and whether that discretion be wisely or unwisely exercised in the selection made by them, cannot be enquired into in the proceeding instituted to condemn the land.

They can select any land which they think most suitable for the purpose for which it is needed, no matter who owns the land, nor whether he be willing to part with it or not, nor whether he be under a disability or not, nor whether he be a resident of the country or not, nor whether the title be in controversy or under a cloud or not. The eminent domain of the Commonwealth exists in all the land within her limits, and

is prior and paramount to the title of
511 any individual; *and it is in virtue of that right of eminent domain, that land is taken for public purposes. The law has provided the most summary and simple mode of proceeding to acquire title to the land, and at the same time has taken special care to secure just compensation to the owner. One chief object of the law is to avoid delay and to secure to the public the immediate and uninterrupted possession and use of the land. Five disinterested freeholders (any three of whom may act), are to be appointed by the court of the county in which the land shall lie, for the purpose of ascertaining a just compensation for such land. § 6. It is not necessary, as in the case of a chancery suit, to convene all persons interested in the subject as parties to the proceeding. It is not even necessary, in all cases, to give any notice of the proceeding to the owner of the land. "When it is intended to apply for such appointment (of freeholders) ten days previous notice thereof shall be served on the tenant of the freehold, or his guardian or committee. But if there be no such tenant, guardian or committee within the county or corporation, the notice, instead of being thus served, may be published once a week, for four weeks, in some convenient paper, and posted at the door of the courthouse of the county or corporation on the first day of the term next preceding the application." § 7. "Tenant of the freehold," as here used, means tenant in possession, appearing as the visible owner. Such was held to be the meaning of the word "proprietor," in *Pitzer v. Williams*, 2 Rob. R. 241.

The proceeding in that case was to condemn land for the abutment of a dam, proposed to be made by a person desiring to build a machine useful to the public. "No man's property" (says Judge Allen, in whose opinion the other judges concurred), "should be taken without just compensation. The law provides the mode by which

that compensation is to be ascertained,
512 leaving it to the applicant *to pay to the party entitled at his peril. Unless this were so, land for public improvements or other necessary public purposes, could not be condemned where the owner was unknown; and thus enterprises of great utility might be arrested for this cause. This law itself merely requires notice to the proprietor or his agent, when found in the county; but the land of any person may be condemned, no matter whether he be found in the county or not; and when it is so condemned, and the money is paid to the party entitled, the applicant becomes seized in

fee simple. This proves that, in the contemplation of the Legislature, it was not essential that the true owner should be a party to the proceeding by which he is divested of the fee for purposes of this character; that where notice can readily be given, it should be done; but whether it be given or not, a just compensation should be secured to him. I think, therefore, that notice to the tenant in possession as the visible owner was sufficient." These observations apply with increased force to this case, in which the object was to condemn land for the purpose of erecting thereon a court-house, clerk's office and jail. The 8th section of the chapter before referred to requires the day for the meeting of the freeholders to be designated in the order appointing them. The 9th section requires them to take an oath before executing their duties, and requires it to be certified in a prescribed form. The 10th section requires them, after viewing the land and hearing such proper evidence as either party may offer, to ascertain what will be a just compensation for the said land, and for the damages to the residue of the tract, beyond the peculiar benefits to be derived in respect to such residue from the work to be constructed, and to make report in substance as prescribed in the said section. The 11th section provides that the said
513 report and the certificate of the justice shall be forthwith returned to *the court;" "and unless good cause be shown against the report the same shall be confirmed and recorded. The sum so ascertained to be a just compensation may be paid to the persons entitled thereto, or into court. Upon such payment, the title to that part of the land for which such compensation is allowed shall be absolutely vested in the company, county or town, in fee simple," &c. When the owner is known, and at hand, and under no disability, the money will generally be paid to him. But when he is not known, or absent, or under a disability, or there is any controversy about the title, the money will be paid into court; and in either case a good title is thereby acquired. The 12th and 13th sections are as follows:

"12. If, however, good cause be shown against the report, or if the commissioners report their disagreement, or if they fail to report within a reasonable time, the court may, without further notice, as often as seems to it proper, appoint other commissioners; and the matter may be proceeded in as before prescribed.

"13. Whether any such new appointment be made or not, the company, county or town, on paying into court the sum ascertained by the previous report, may, notwithstanding the pendency of proceedings, enter into and contract their work upon or through that part of the land described in such previous report. And no order shall be made, nor any injunction awarded by any court or judge, to stay the proceedings of the company, county or town, in the prosecution of their work, unless it be manifest that they,

their officers, agents or servants, are transcending their authority, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages."

The latter of these two sections plainly expresses the intention of the Legislature, that the proceedings therein referred to are not to be delayed or obstructed
514 *by litigation or otherwise without the greatest necessity. And in *The James River and Kanawha Company v. Anderson and others*, 12 Leigh 278, it was unanimously held by this court that it is not competent to a court of chancery to award an injunction to stay the proceedings of the company in the prosecution of its works of any kind, unless it be manifest, both that it is transcending the authority given by its charter, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages. The two circumstances must concur, to warrant a court in awarding such process. The observations of Tucker, P., and Allen, J., in that case are very emphatic, and apply with great force to the case we now have under consideration; but it is unnecessary to repeat them here. See, also, the case of *The Tuckahoe Canal Co. v. The Tuckahoe Railroad Co.*, 11 Leigh 42, in which the same doctrine was held. The 14th and 15th sections provide for what is to be done in case of another report after the money reported to be due by a former one is paid into court. The 16th, being the last section of the series referred to, is as follows:

"To enable the court to dispose properly of any money so paid into court, it may have enquiries by a commissioner, to ascertain what persons are entitled thereto, and in what proportions; and may make an order of publication, requiring all interested to appear before the commissioner, that their respective claims may be passed upon. After such reference to a commissioner and such publication, the court shall make such disposition of the money so paid into court as may seem to it right."

We see here what careful provision is made by law to secure the payment of the money into the proper hand to receive it; and it can rarely if ever happen that the money will be paid into improper hands.

Should it so happen, however, the
515 only consequence *could be that the company, county or town seeking to have a condemnation of the land, might have to pay for it over again. There would be no danger of losing the buildings or works constructed on the land, or of being delayed in the construction of the work. The claim of the owner, at most, would only be for the value of the land without the works; to which value he might be entitled on the ground that private property cannot be taken for public uses without just compensation to the owner. Whether he would be so entitled, under such circumstances, is a question which does

not arise, and is not intended to be decided here.

And now we come to that part of the question we have under consideration at present, which is, had the defendants in this cause a right to appear and show cause against the confirmation of the report, as they proposed to do?

The board of supervisors of Culpeper county, having selected two acres of land in the town of Culpeper, belonging, as they say, to Eliza T. C. Jameson and others, for the purpose of having the public buildings of the county erected thereon; and finding it necessary to have the same condemned for that purpose, according to law; proceeded accordingly, after giving due notice to the said alleged owners, to have five disinterested freeholders of the county appointed by the County court thereof, who, or any three of whom, being first duly sworn, were to go upon said land, on a designated day, and ascertain, faithfully and impartially, what would be a just compensation for so much thereof as was proposed to be taken by the county of Culpeper for its purposes, and make report to the court, according to law. Three of the said freeholders, accordingly, after being first duly sworn, went upon the said land, ascertained what would be a just compensation for so much thereof as was proposed to be taken as aforesaid, and, on the 9th of December, 1870,

516 *made and returned a report of their proceedings, in which report the boundaries of the two acres of land proposed to be condemned as aforesaid, were specifically set out, and the sum of six hundred dollars was stated to be a just compensation for the land to the owners thereof. On the 20th day of January, 1871, on motion of the board of supervisors, to confirm and record said report, Joseph B. Gorrell and seven others, defendants in this cause, claiming to be citizens of the county of Culpeper, tax-payers and real estate owners therein, moved said court to allow them to shew cause against the confirmation of said report, by filing 12 exceptions in writing for that purpose, which they exhibited. But the court being of opinion that they had no right to be heard in the said proceeding, overruled their said motion to be allowed to shew cause against said report, refused to allow said exceptions to be filed, confirmed the said report, and ordered the same to be recorded. But, on motion of said Gorrell and others, the said judgment was suspended for thirty days, to allow them to apply for an appeal from and supersedeas to the same.

The exceptions referred to are as follows:

1st. Because the board of supervisors of said county have no power to condemn private property, or to ask for a condemnation of the same.

2nd. Because the County court of Culpeper have no power, at the instance of the said board of supervisors, to condemn private property.

3rd. Because the tenants of the freehold of said two acres of land mentioned in said

report of said commissioners, had no notice of the application of said board of supervisors to said County court to appoint commissioners to condemn said two acres of land. The said two acres of land, formerly belonged to said John Jameson, who, by deed dated the day of , conveyed the tract of land, embracing said two
517 acres, *to William Major and William Emerson, upon certain trusts therein specified. Said deed is duly recorded in the clerk's office of the County court of Culpeper, an office copy of which is herewith filed, to prove that said Eliza T. C. Jameson, Philip L. Jameson, in his own right, and as committee of John Jameson, and John W. Jameson, are not tenants of the freehold.

4th. Because Eliza T. C. Jameson, Philip L. Jameson, in his own right, and as committee of John Jameson, and John W. Jameson, have no legal title whatsoever to said two acres of land, as is shewn by said deed mentioned in third exception.

5th. Because, by the decree of the Circuit court of Culpeper, made in the chancery suit now pending in said court, of Major's ex'ors v. Jameson and others, the said two acres of land, together with the tract of land of which it is a part, was decreed to be sold to satisfy a debt due from the said trust estate to the estate of said William Major, trustee, amounting to about \$20,000. The beneficiaries in the estate of said William Major are John C. Major, Thomas B. Nalle and Columbiana his wife, in right of said Columbiana, and Eliza T. C. Jameson, and William Major, whose interest has been vested in Lewis E. Higby, his assignee in bankruptcy, subject to liens theretofore acquired.

6th. Because the said County court cannot divest the said Circuit court of Culpeper of its jurisdiction over said property; the latter having taken jurisdiction and entered decrees in said suit for a sale of said property; which decree of sale has been enjoined at the instance of said Philip L. Jameson.

7th. Because said two acres of land are not sufficiently described in said report.

8th. Because it does not appear, by any of the proceedings, that said board of supervisors could not agree on the terms of purchase with those entitled to said two
518 acres of land, or that it made any effort to *purchase said two acres of land from those entitled thereto.

9th. Because it appears on the face of the order of the 30th of November, 1870, appointing said commissioners, that parties interested in said two acres of land, and not the tenants of the freehold, had legal notice of said motion.

10th. Because the said commissioners did not take the oath prescribed by law before proceeding to ascertain a just compensation for said two acres of land.

11th. Because the said two acres of land are wholly unfit for their said purposes, to wit: the erection of a courthouse and other buildings.

12th. Because the assessment of six hundred dollars as just compensation for said two acres of land is excessive.

There is nothing in any of the said exceptions to show, nor is it pretended, that the parties on whom the notice was served were not in actual possession of the land, and the only persons in such possession; in which case they were, as we have seen, tenants of the freehold within the meaning of the law, on whom it was proper to serve the notice. Nor is there anything in the said exceptions to show, nor is it pretended, that the exceptants, or any of them, had any interest whatever in the land sought to be condemned; nor that any person who had any interest in, or title to the land, legal or equitable, was opposed to its condemnation or to the confirmation of the said report. From what has already been said, it must therefore be manifest that the said exceptants had no right to become parties to the said proceedings and file the said exceptions; that the said county court had no jurisdiction to receive and decide upon the said exceptions; and that the said court was right in overruling the motion of said exceptants to be allowed to show cause against the said report, and refusing to
allow said exceptions to be filed.

519 *And this brings us to the consideration of the next question arising in the case, which is,

III. Had the Circuit court of the county of Culpeper jurisdiction to award to the said exceptants a writ of error and supersedeas to the judgment of the county court of said county, for the condemnation of the said two acres of land for the use of said county, as aforesaid?

We are of opinion that the Circuit court had not such jurisdiction, and for two reasons: 1st, because the said exceptants were not parties to the said judgment nor to the proceedings in which it was rendered; and, 2dly, because the nature and object of said proceeding, and the policy and provisions of law concerning it, forbid that a supersedeas should be awarded in such a case.

1st. It is well settled that a person who is not a party to the proceeding in which the judgment of the court below complained of was rendered, cannot obtain a supersedeas to such judgment. The word "person," in the law giving the right to obtain an appeal, writ of error, or supersedeas, has been construed to mean "party;" and the word "party" is, itself, also used in that law: "Any person who is a party to any case" is a part of the language of that law. Acts of Assembly 1869-'70, p. 221, § 2; 1 Rob. Prac., old edition, pp. 656, 657, and the cases cited, especially Sayre v. Grymes, 1 Hen. & Mun. 404; and Wingfield v. Crenshaw, 3 Hen. & Mun. 245. Holcomb v. Purcell, &c., decided by this court in 1802, and referred to in 1 Rob. Pr. supra, is, as that author truly says, a strong case upon this head. "In that case the court held that a principal obligor in a forthcoming bond, against whom the judg-

ment in the original suit was rendered, but against whom no judgment was rendered on the forthcoming bond, was not entitled to appeal from a judgment against a surety in the forthcoming bond. Upon the face of the record *it must have appeared that the principal obligor was collaterally interested, since the surety would be entitled to recover of him the amount of the judgment whenever the surety should discharge the same; but not being immediately a party to the judgment, the court dismissed the appeal." *Id.* p. 656. A person must not only be a party to the proceeding in the court below, but he must also be aggrieved by the judgment rendered therein, to entitle him to obtain a supersedeas to such judgment: The two circumstances must concur. *Id.* p. 657.

Here the persons who obtained the supersedeas to the judgment of the county court were not parties to the proceeding in which that judgment was rendered. Nor would they have been proper parties, as has already been shown. They proposed to show cause against the confirmation of the report, and to file certain exceptions thereto for that purpose; but the court properly refused to permit them to do so. They were not, therefore, parties to the judgment; nor were they aggrieved thereby. They had not such an interest in the object of the proceeding as entitled them to be parties. It was a mere enquiry, *ad quod damnum*; a proceeding to ascertain the value of certain land in which they had no interest whatever. Any indirect interest they may have had in the subject as citizens, tax-payers, and landholders of the county, was not sufficient to make them proper parties. They did not become parties by merely offering to become so, when that offer was rejected. If they became parties to anything, it was merely to the order of rejection; and not to the order confirming the report. And their supersedeas, if they were entitled to any, would only be to the said order of rejection, and not to the said order of confirmation. But they were not entitled to a supersedeas to the former order, for they were not aggrieved thereby. The order of the County court, made after the rendition of *the judgment, suspending it for thirty days to allow the exceptants to apply for an appeal and supersedeas, did not make them parties to the proceeding in the County court. To give it that effect would be to make the court do, indirectly, what it had just before expressly refused to do.

2dly. The object of the proceeding was merely to ascertain the value of land required by public necessity. The immediate possession of the land was necessary for the public use; and the policy and provisions of the law require that the public should not be unnecessarily or improperly delayed or obstructed in taking or holding possession of the land. On this subject enough has already been said; and what has been said need not be here repeated. If this board

of supervisors have done any wrong; if they have been guilty of any fraud, or abused their trust, or are doing, or about to do, anything to the injury of the county or any of its citizens, persons thereby aggrieved must seek for any redress to which they may be entitled in some other form of proceeding than that which has been pursued by the defendants in this case. The law expressly declares, in regard to proceedings for the condemnation of land for the public use, that no order shall be made, nor any injunction awarded by any court or judge to stay the proceedings of the company, county or town in the prosecution of their work, unless it be manifest that they, their officers, &c., are transcending their authority, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages. Both of these two things, we have seen, must concur, to render such an order or injunction proper; and we think that neither exists in this case. To allow a supersedeas in such a case, therefore, the effect of which might be to delay indefinitely the execution of a work of immediate public necessity, would be a direct violation of an *express mandate of the law. We therefore think the Circuit court had no jurisdiction to award the said writ of supersedeas. And now we come to the next enquiry, which is,

IV. Whether prohibition is the proper remedy in such a case as this.

A prohibition is a proper remedy to restrain an inferior court from acting in a matter of which it has no jurisdiction, or from exceeding the bounds of its jurisdiction. A Circuit court cannot review a judgment of a County court except in the cases and in the mode prescribed by law. If a Circuit court, *ex mero motu*, undertake to review a judgment of a County court, it is an act of usurpation for which prohibition lies; so, if a Circuit court undertake to review such a judgment on the petition of one who is not a party to it, the same remedy lies. A writ of error or supersedeas cannot be awarded on the petition of an *amicus curiae*. *Dunlop v. The Commonwealth*, 2 Call 284. It can only be awarded on the petition of a party thereto who is aggrieved thereby, or his representative. We have seen that the writ of error and supersedeas complained of in this case was awarded on the petition of persons who are not parties to the judgment superseded, nor aggrieved thereby. It follows, therefore, that prohibition is the proper remedy in the case. That a writ of error or supersedeas would lie to a judgment of the Circuit court in the case, does not show that prohibition does not also lie. They may be concurrent remedies; but certainly the remedy by prohibition is the better one in such a case as this. It prevents the mischief before it is done, and avoids the great evil (which the law has so carefully sought to prevent) of the delay and interruption of a necessary public work. And now we come to the last enquiry, which is,

V. Whether it is necessary for the

523 plaintiff to file a *declaration in this case, the respondents insisting upon their alleged right to have one filed?

It certainly seems to be settled, at least as a general rule, both in England and in this country, that a writ of prohibition will not be awarded without first requiring the plaintiff (if the defendant insist upon it) to file a declaration. 7 Comyn's Dig. Prohibition I; Remington v. Dolby, 2 Q. B. 176, 58 Eng. C. L. R. 174, 178; Arnold v. Shields, 5 Dana's R. 18; Mayo, mayor, v. James, 12 Gratt. 17, 24. The reason for that rule, in its origin, is well stated thus in 3 Black. Com. p. 113: "Sometimes the point may be too nice and doubtful to be decided merely upon a motion: and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to declare in prohibition; that is, to prosecute an action, by filing a declaration, against the other, upon a supposition or fiction (which is not traversable), that he has proceeded in the suit below, notwithstanding the writ of prohibition. And if, upon demurrer and argument, the court shall finally be of opinion that the matter suggested is a good and sufficient ground of prohibition in point of law, then judgment, with nominal damages, shall be given for the party complaining, and the defendant, and also the inferior court, shall be prohibited from proceeding any farther." The Code, p. 658, ch. 155, while it recognizes the propriety or necessity of a declaration in some cases, simplifies the form of it, and strips the subject of the fictions which were incident to it at common law. It is manifest that the main object of the rule requiring a declaration, is to put the very point in issue on record, so that the decision of the court upon it may, if necessary, be reviewed by an appellate court. That reason applies to cases of prohibition arising in an inferior court; where they all arose at common law, and, until recently, in this State. We

524 mean, by inferior court, any *court lower than the highest appellate court. In England, the House of Lords is the highest appellate court, but it has no original jurisdiction in a case of prohibition. The courts at Westminster Hall have original jurisdiction in such a case, and an appeal lies from their decision to the House of Lords. But no appeal lies from a decision of this court to any other, even in a case decided by this court in the exercise of its original jurisdiction. There is not, therefore, the same reason or necessity for a declaration, in a case of prohibition in this court, as in such a case in an inferior court. We will not say that a declaration is never necessary or proper in a case of prohibition brought originally in this court. We only mean to say that there is not the same necessity or propriety for it in this as in other courts. It would certainly be not only unusual, but inconvenient, to have a case prosecuted here by declaration and other pleadings, and triable by the court on demurrer, and by a jury on issues of fact.

And where there is no necessity for such a mode of proceeding, and no possible benefit to be derived from it, we think it may properly be dispensed with. Now, here the facts on which we decide this case are undenied and undeniable: being in fact, matters of record; and no good purpose can possibly be attained by requiring a declaration. On the contrary, it would be attended with expense and trouble to the parties, and produce delay, which in such a case is a very great evil, only to be encountered when it is necessary, or for the purpose of avoiding a greater evil. A declaration in a case of prohibition is required by the statute to "set forth, in a concise manner, so much only of the proceedings as may be necessary to shew the ground of the application." The petition fully does that, and more fully perhaps than would be required in a declaration. A declaration in this case, repeating the very words of the

525 petition, would no doubt be *held sufficient: It would be the vainest thing in the world, therefore, to require a declaration; and the most that could be proper would seem to be to order the petition to be treated as a declaration. But there is no necessity for that. The defendants, or such of them as have chosen to do so, have fully answered the petition; and the parties on both sides have been fully heard by counsel on the merits. We are of opinion, therefore, that the plaintiffs ought not to be required to file a declaration in this case.

Upon the whole, we are of opinion that a writ of prohibition be awarded, according to the prayer of the petition.

The order of the court was as follows:

The court, for reasons stated in writing and filed with the record, is of opinion:

1st. That the board of supervisors of the county of Culpeper have power, under the constitution and laws of the State, to acquire land in the town of Culpeper, for the erection thereon of a court-house, clerk's office, and jail, and to have the said land condemned for that purpose, in the mode prescribed by the Code, chapter 56, sections 6-16, pages 324-326.

2d. That the County court of said county properly overruled the motion of the said Joseph B. Gorrell and others to be allowed to show cause against, and file exceptions to, the report of the commissioners appointed by the said court to ascertain a just compensation to the owners of the land proposed to be taken by the said board of supervisors for the purpose aforesaid.

3d. That the said Henry Shackelford, judge of the Circuit court of said county, had no authority to award to the other defendants a writ of error and supersedeas to the judgment of the County court of said county, condemning the said land for the purpose aforesaid; and the said Circuit court has no authority to entertain

526 *jurisdiction of the said writ of error and supersedeas.

4th. That prohibition is the proper remedy for the plaintiffs in such a case as this; and,

5th. That it is not necessary for them to file a declaration in the case.

Therefore, it is adjudged and ordered that the said motion to discharge the said rule be overruled, and that a writ of prohibition be awarded, according to the prayer of the said petition, directed to the said defendants, commanding them to proceed no further upon the writ of error and supersedeas, awarded by the said Henry Shackelford, judge as aforesaid, in favor of the other defendants, to a judgment of the County court of said county, obtained on the 20th day of January, 1871, by the said board of supervisors, against Eliza T. C. Jameson and others, for the condemnation of two acres of land for the use of said county; and superseding the said writ of error and supersedeas, and all proceedings which have been had under the same. And it is further adjudged and ordered that the service of an office copy of this order upon the said defendants shall have the same force and effect as the execution upon them of a writ of prohibition, issued in pursuance hereof. * And it is further adjudged and ordered that the plaintiffs recover against the defendants, except the said Henry Shackelford, judge as aforesaid, their costs by them expended in the prosecution of this proceeding.

Which is ordered to be certified to the said Circuit court of Culpeper county.

Writ of prohibition awarded.

527

*Magill v. Manson.

Same v. Manson & al.

March Term, 1871, Richmond.

1. **Chancery Practice—Cases Heard Together.**—M sues O in equity, to set aside her bond, as having been fraudulently obtained. O files cross bill in the cause, to attach a debt due by S to M for payment of his claim on M. The cases may properly be heard together.

2. **Attachment at Law and in Equity—Election.**—O has attached the effects of M at law as well as in equity. He may dismiss his attachment at law, and proceed on his attachment in equity.

. **Chancery Practice—Conflict of Evidence—Issues Out of Chancery Proper.**†—Upon the question whether the bond of M was obtained by the misrepresentations of O, the evidence being conflicting, an issue should be directed.

***Attachment at Law and in Equity—Election.**—See Bart. Ch. Pr. (2d Ed.) 625. See generally, monographic *note* on "Attachments" appended to Lancaster v. Wilson, 27 Gratt. 624.

†**Chancery Practice—Conflict of Evidence—Issue Proper.**—In Snouffer v. Hansbrough, 79 Va. 177, the court said that upon the general question as to when an issue out of chancery should be awarded the principal case, Smith v. Betty, 11 Gratt. 758; Mettert v. Hagan, 18 Gratt. 281; Beverley v. Walden, 20 Gratt. 157, and Powell v. Manson, 22 Gratt. 177, might be consulted.

As said in the principal case when the evidence is conflicting and unsatisfactory, an issue should be

4. **Advances in Confederate Currency—How Present Value Ascertained.**‡—If the bond is set aside, O will have claims against M for advances made and money lent in Confederate currency; and also for services rendered during the war. These claims are to be ascertained by reducing the currency to its gold value at the time of the advance or loan, or the service rendered. And the decree should be rendered, in the legal currency of the United States, for the equivalent, at the time of the decree, of the amount in gold so ascertained.

In November, 1865, Otis F. Manson instituted an action of debt in the Hustings court of the city of Richmond against Elizabeth Magill, to recover the amount of a bond for \$2,626, with interest thereon from the 13th of May, 1862, executed by the said Magill to Manson. And at the same time he sued out an attachment against the property of Mrs. Magill, which was levied on the building owned by her, called the New 528 *Richmond Theatre, and a lot of household and kitchen furniture.

Upon the issue of the attachment, Mrs.

directed to ascertain the facts. See also, Hooe v. Marquess, 4 Call 416; Marshall v. Thompson, 2 Munf. 412; Bullock v. Gordon, 4 Munf. 450; Knibb v. Dixon, 1 Rand. 249; Isler v. Grove, 8 Gratt. 257; McCully v. McCully, 78 Va. 159; Chapman v. Chapman, 4 Call 440.

But a court will not award an issue in every case where the evidence happens to be conflicting, for, if the court is satisfied, it will not send the case to a trial at law. An issue ought to be directed where the credit and accuracy of the witnesses are impeached, or where the evidence is so clashing as to render it necessary to weigh the character and credibility of the witnesses, or where the evidence is so equally balanced on both sides that it is doubtful which scale preponderates. Williams v. Blakey, 76 Va. 254.

If the evidence on a question of fact in a suit in chancery, though various and conflicting, be such as ought to satisfy the chancellor's conscience as to the truth of the case, he need not direct an issue to try the fact. Samuel v. Marshall, 8 Leigh 567. See also, Keagy v. Trout, 85 Va. 390, 7 S. E. Rep. 329; Hord v. Colbert, 28 Gratt. 49, and *foot-note*.

The directing an issue, for the purpose of ascertaining disputed facts, is discretionary with a court of equity, which may decide on the evidence relative to such facts, without a jury. Rowton v. Rowton, 1 Hen. & M. 92.

But the discretion of the chancellor, in directing or refusing an issue to be tried by a jury, is to be exercised on sound principles and the appellate court must judge whether the discretion has been so exercised. Stannard v. Graves, 2 Call 369; Carter v. Carter, 83 Va. 624; Miller v. Wills, 95 Va. 351, 28 S. E. Rep. 337.

See also, on the subject of Issues Out of Chancery, Beverley v. Walden, 20 Gratt. 146, and *foot-note*; monographic *note* appended to Lavell v. Gold, 26 Gratt. 473.

‡**Advancements in Confederate Currency.**—See Moses v. Hart, 26 Gratt. 802, where the rule laid down in the fourth headnote is modified. See also, the principal case sustained in Moses v. Trice, 21 Gratt. 566.

For the sequel of the principal case, see Powell v. Manson, 22 Gratt. 177.

Magill filed her bill in the Circuit court of the city of Richmond against Manson, in which she charged, that in the month of August or September, 1863, Dr. Manson, who was in the habit of visiting her often, and professed to be one of her best friends, lent her the sum of five thousand dollars in Confederate money, and sold her a parcel of bacon, valued, in Confederate prices, at two thousand dollars; but which proved to be unsound and of no value whatever; for both of which she executed and delivered to him her note for seven thousand dollars. The said Manson held the said note until the 29th of April, 1865, when he came to her with it and proposed to her to execute a new note to him for twenty-six hundred dollars; saying that Mr. John F. Allen and himself had decided that was the value of her obligation for \$7,000, which he held. And she, being ignorant of the value of Confederate money at that time, and of her rights and obligation in the premises, and confiding in the representations, as well as the integrity of the said Manson, and his repeated assurances of friendship for her, complied with his request, and executed her note or bond; for she knew not the difference between bond and note, and does not know whether the paper had a seal to it or not, and delivered it to him, without taking from him the original note for \$7,000. Not long afterwards she ascertained what a mistake she had made, and how great a fraud her friend Manson had practiced upon her, and she sent for him to her house, and requested him to restore her note for \$2,600, and proposed in return to pay him for his seven thousand dollars its value at the time of the loan. She afterwards offered to pay him \$1,200, which was more than twice as much as it was worth, in discharge of

529 her obligation; which he *refused.

And he has taken out an attachment against her, on the pretence and false affidavit that she intends to remove her effects from Virginia. She prays for an injunction to all proceedings upon the attachment until the matters alleged in the bill can be heard in a court of equity. That Manson may be compelled to produce the notes or bonds, as they may be, of the plaintiff; that the court will say upon what terms the note of \$7,000 shall be settled by her, and delivered up to her; that the note for \$2,600 may be cancelled, as executed by mistake on her part and fraudulently procured by Manson; and for general relief.

Manson answered the bill. He said that prior to March, 1863, he had been purchasing through agents, for the use of his own family, provisions, in the State of North Carolina, where he had lived for many years prior to the war, because he could procure them at prices very much below the rates prevailing in the city of Richmond. That being in attendance upon R. D. Ogden, a member of the family of the complaint, and the manager of her theatre, he frequently saw the complainant, and being on friendly terms with her, he, in the course of his visits mentioned to her the fact that he was pur-

chasing supplies in the manner herein stated, for his family; and thereupon she requested the favor of him to procure for her, in the same way, a supply of bacon for her family use, and to advance the money for her to pay for it. This he consented to do, and did procure for her a quantity of bacon costing the sum of \$2,000; which he advanced. This was in March, 1863. He did not sell her the bacon as charged in the bill, or derive the slightest advantage from the transaction. Several months after she had received the bacon she informed him that some of it was unsound, and attributed the unsoundness to the fact that she had put it away in an improper place. He

530 saw *the bacon when it was delivered, and knows it was sound at the time.

He says further, that in August, 1862, he purchased a residence in the city of Richmond, and therefore determined to sell his farm upon which he had resided in North Carolina. This farm, which had cost him, about the year 1857, \$9,000, he sold at public auction, in December, 1862, for \$10,000 in Confederate money, his object being to pay off the purchase money for the residence purchased in Richmond; but he was unable to do this, because a party living out of the State held a lien upon it for \$2,636. That finding it impossible to pay off this lien, he determined to re-invest the money he had on hand in other real estate, so that he would be in a condition to meet the outstanding lien upon his house when the creditor could be found; which he supposed would not be until after the war. He received the last payment for his land in July, 1863, and next month the complainant applied to him to lend her \$5,000, in addition to the \$2,000 previously advanced for her, and he agreed to do so and let her keep the whole amount of \$7,000 during the war, provided she would agree to pay him the amount in legal currency at the end of the war. This the complainant agreed to do, and executed to him her bond for \$7,000, payable on demand. In the summer of 1864 he, at her request, purchased for her, through his agent, two barrels of flour, for which he advanced the money; and after keeping it until the winter she complained of it, and he took it back and sent to North Carolina and purchased two other barrels, for which he paid \$1,000 a barrel, and for which the complainant has never paid him a cent. That being a surgeon in the army he practiced his profession in the city of Richmond, and he frequently prescribed for the complainant, and at her request for members of her theatrical company.

531 *He further states, that a few days after the occupation of the city of Richmond by the federal troops, the complainant saw him at the theatre, and requested him to call at her house; and she then informed him that she wished to have a settlement of their affairs, and she would settle upon any terms he would state; that he had been the best friend she ever had, and the only one of her creditors who had not

troubled her for money. After this interview at the theatre, and before calling upon the complainant, he called upon Mr. John F. Allen, in whom he knew the complainant had great confidence, to consult him on the subject. The defendant believed he had the legal right to demand the sum of \$7,000 in currency, upon the bond of the complainant, but he felt unwilling to do so, and informed the said Allen that he intended to propose to her that if she would assume the payment of the outstanding lien upon his dwelling-house, amounting to the sum of \$2,636, with interest from the 13th day of May, 1862, he would give up her bond and all other claims he had upon her. Allen said that he thought the proposition was exceedingly liberal and generous, as the defendant had the undoubted right to demand the amount of the bond in currency. After the consultation with Allen defendant called to see the complainant as she had requested, and stated to her what had passed between Mr. Allen and himself, and that he had drawn up a bond for the amount due upon his house, and was willing to accept that in full of all claims and demands he had against her. The complainant declared that she would not only sign the bond most willingly, but that she was most grateful to him for his kindness. This was on the 29th of April, 1865. After executing her bond for \$2,636, as aforesaid, and before the defendant left the room, she asked him to let her see the bond again, that she wished to take down the amount of it. He handed her the bond and

532 she put down the amount *on the bond of \$7,000, and then put the last mentioned bond away in her secretary, remarking, as she did so, that she always filed away her papers. He had never seen this last mentioned bond since. At that time no court of conciliation had been established, and no rule had been adopted as to the mode of settling even those debts contracted to be paid in Confederate currency. He denies that the complainant requested him to restore her note of \$2,600, and proposed to pay him, for his \$7,000, its value at the time of the loan. He mentions several interviews between himself and the complainant, and says that he was still unwilling to sue, but having heard that she was going to France and had sold some of her real estate, and believing that unless he took out an attachment against her estate as provided by law, he would ultimately lose his debt, he instituted legal proceedings for its recovery.

The plaintiff and defendant were each examined as a witness. The testimony of the first went to sustain the allegations of the bill, and that of the defendant to sustain his answer. There were also several witnesses who spoke of the bacon, giving very different accounts of it.

In May, 1867, the plaintiff filed a supplemental bill in the cause. She says that soon after she filed her bill she went to New York, and had just returned, and since her return had for the first time seen and read

the answer of defendant Manson; from which she learned that instead of executing a note or bond to him for \$2,600, as of the 29th of April, 1865, he had obtained of her fraudulently, by reason of her great confidence in him, a bond for \$2,636, bearing interest from the 13th of May, 1862. She charges that the procurement of the bond was a deliberate fraud by the said Manson; and she charges that his entire statement in relation to it in his answer is utterly false, so far as it imputes to her any knowledge of or purpose *to sign such a bond. She charges that he falsely denies that he retained the bond for \$7,000, but affirms that it was payable in legal currency after the war. And she says that she has conversed with John F. Allen, and he assures her he never authorized the said Manson to make any such representation as he states in his answer; but, on the contrary, that he told Manson that he ought to settle the bond at what the money was worth when he loaned it.

Manson, in his answer to this bill, refers to his former answer, and makes it a part of this. He says the supplemental bill is but a reiteration of the statements of the original bill—statements which he believes the plaintiff well knew to be false when she made them. She knew well that he did not act fraudulently in the matter; and she did know the amount of the bond for \$2,636, and the purpose for which it was drawn; and she made it as a compromise settlement or adjustment of all claims against her. And he denies the statements of the supplemental bill as to this bond, or that he has had the bond for \$7,000 since the day the bond for \$2,636 was executed; and he believes she has that bond in her possession. And he insists that the evidence of Allen, taken in the cause, substantially supports his statement.

Allen, in his testimony, says: Dr. Manson stated to me he loaned Mrs. Magill, or in other words she was indebted to him early in the war, seven thousand dollars; there was a lien on his house, at the close of the war, for two thousand and odd dollars; I do not know what the amount was. That he was willing to compromise with her for the seven thousand dollars, for an amount equivalent to the lien on his house. I told him I thought it was a liberal proposal he had made. I think Dr. Manson told me that, at the time he loaned the money, it was very slightly depreciated; my

534 impression *was, it was equal to the bank notes then in circulation.

In May, 1868, the court made a decree that the papers in the cause be referred to one of the commissioners of the court, who is directed to enquire into and report:

1st. What was the consideration of the bond for twenty-six hundred and thirty-six dollars, executed by the plaintiff to the defendant.

2d. Whether the defendant, at the time of the execution of said bond, obtained the same of the plaintiff by fraudulent misrep-

resentation of the value of the debt due him by the plaintiff or otherwise.

3d. What were the circumstances attending the execution of the said bond; what representations were made by the defendant to induce the plaintiff to execute the said bond; whether the plaintiff was influenced by said said representations, and whether they were true or false in fact.

4th. Whether the plaintiff executed said bond of \$2,636, under a mistake as to the value of Confederate money, or any other material fact.

5th. What was the amount of the debt due and owing to the defendant by the plaintiff, at the time of executing the bond, and how and when such debt or debts was or were contracted, and how and when such debt or debts was or were to be paid.

6th. From what source any sum or sums of money loaned by the defendant to the plaintiff was or were derived.

In December, 1868, Commissioner Pleasants filed his report. He says he proceeded to examine the papers in the cause, and upon this examination (no other evidence having been introduced before him) he reports. He responds to each of the enquiries directed by the court, sustaining the view of it given by the defendant.

535 *To the report the plaintiff filed various exceptions; but it is not necessary to state them.

Whilst this cause was before the commissioner, viz: in January, 1869, Manson filed a cross-bill in it, in which he stated that he had sued out an attachment at law against the effects of Mrs. Magill, which was still pending; but the papers in that case had been lost or mislaid. That Mrs. Magill had filed the bill in this case. That, though the attachment suit was pending, Mrs. Magill had gone on to dispose of her property, as if the said attachment was not pending; and that she had just contracted to sell to Conrad Sauer a valuable piece of land, with the improvements thereon, in the city of Richmond, for \$6,875, and that Sauer was about to pay the purchase money in part, and execute bonds for the residue. That he has a just claim against Mrs. Magill for \$2,636, with interest thereon from the 13th of May, 1862, until paid. That Mrs. Magill has absented herself from Virginia for several months, and he believes she is not a resident of this Commonwealth. That her purpose seems to be to dispose of all her property. He therefore asks that Mrs. Magill and Conrad Sauer may be made defendants to the bill. That he may have a decree against her for the amount of his claim, and that the purchase money in the hands of Sauer, for which he has executed his bonds, and the cash payment, in the hands of Wellington Goddin or Lancaster & Co., her agents, may be attached to satisfy his claim; and that Mrs. Magill, her agents, &c., may be enjoined and restrained from assigning, conveying away or otherwise disposing of the said bonds, so executed by Sauer; and for general relief.

The subpoena and attachment were served on Sauer, and the bill was taken for confessed as to him.

In February, 1869, Mrs. Magill appeared and demurred to the bill for want of 536 equity, and because *there was another suit pending in the court for the same cause of action. She also answered. She denies that she is indebted to the plaintiff in the sum of \$2,636; and refers to her former bill and amended bill. She repeats the charges of fraud by Manson in procuring the bond for \$2,636. She says that, when he instituted his suit at law, he sued out an attachment against her property, and levied it on the Richmond Theatre, worth sixty thousand dollars; and she gave bond and security, as required by law, to satisfy the plaintiff's recovery, if any, and so discharged the attachment; and she insists that this second suit, for the same cause of action, is illegal and void. She denies that the papers in the first suit are lost, and exhibits a copy of the attachment and the return of the officer thereon; the said suit having been removed from the Hustings to the Circuit court.

The court having required Manson to elect whether he would prosecute his suit at law or the suit in equity, he elected the latter, and on the 6th of March, 1869, on his motion, the action at law was dismissed.

On the 8th of March, 1869, on the motion of Manson, and against the protest of the plaintiff Magill, the causes came on to be heard together, when the court overruled the exceptions of the plaintiff Magill to the commissioner's report in the first, and made a decree against her in favor of Manson for \$2,636, with interest from the 13th day of May, 1862, until paid, and his costs. And it appearing from a statement agreed to by the parties, that the debt of Sauer to Mrs. Magill consisted of four bonds, all bearing date the 8th of December, 1868, and payable respectively at four, eight, twelve and sixteen months from their date, each for \$1,208 06, the court further decreed, that unless Mrs. Magill should pay the said principal sum, interest and costs, within thirty days from the entry of this decree,

537 then that Sauer, in discharge of his first and second *bonds, should pay the amount, as it fell due, to Manson, which was to be credited upon his decree against Magill; and these payments still leaving a balance due to Manson upon his decree, Sauer was directed to pay the amount of his third bond, when it fell due, into bank, to the credit of the court in this cause; and Manson, or his counsel, was authorized to check on the fund for the balance of his decree. And upon the payment of these bonds, as directed, Mrs. Magill was directed to deliver the bonds to Sauer.

From this decree Mrs. Magill obtained an appeal to this court.

Lyons and John Howard, for the appellant.

Steger & Sands and Meredith, for the appellee.

STAPLES, J., delivered the opinion of the court.

The court is of opinion, that no error was committed by the Circuit court to the prejudice of the appellant, in hearing these causes together, and in refusing to dismiss the appellee's attachment in equity. Whatever cause of complaint the appellant may have had in being proceeded against at law and in equity for the same matter, has been removed by the election of the appellee to dismiss the attachment at law.

The court is further of opinion, that an issue ought to be made up and tried by a jury, to ascertain whether the appellant Magill was or was not influenced, in giving the bond for \$2,636, in the proceedings mentioned, to the appellee Manson, by a misrepresentation of fact, fraudulently or otherwise, made by the said Manson to the said Magill or to John F. Allen.

If the said issue shall be found in the negative, then there ought to be a decree in favor of the said Manson against said Magill, for the said sum of \$2,636, with interest thereon from the 13th day of May, 1862, and the costs of suit in the said Circuit court, and for payment of the same out of the money due by Conrad Sauer to the said Magill, heretofore attached, in said Sauer's hands.

But, if the said issue should be found in the affirmative, then there ought to be an order for an account to ascertain the value in gold of the two thousand dollars in Confederate money advanced by said Manson for bacon purchased for the said Magill, and of the five thousand dollars in Confederate money loaned by said Manson to the said Magill; which two sums make up the amount for which the bond for seven thousand dollars was given; the said two amounts of \$2,000 and \$5,000 to be scaled, as of their gold value, at the times they were respectively advanced or loaned; and also for an account of all matters between the said Manson and the said Magill, charging her with the value in gold, as aforesaid, of the said two sums of \$5,000 and \$2,000, with interest thereon from the periods at which they were respectively advanced and paid, and also with the value in gold of the two barrels of flour sold by the said Manson to the said Magill in 1864, and also with whatever amount may appear to be justly due by her to him, in gold, for medical services rendered to her, or on her account, prior to the execution of said bond for \$2,636, with interest on said last mentioned charges; and there ought to be a decree in favor of said Manson for the balance which may be found due to him on said account, after deducting appellant's costs incurred in the said Circuit court; and for the payment of the said balance out of the money due by the said Sauer to the said Magill, as aforesaid. The decree for the balance so found to be rendered for the equivalent in legal currency of the United States, to be ascertained at the date of the decree.

The court is of opinion, that so much of

said decree of said Circuit court, as is inconsistent with the foregoing opinion, is erroneous. It is therefore decreed
539 *and ordered, that the same be reversed and annulled; and that the appellee pay to the appellant her costs by her expended in the prosecution of her appeal here.

And it is ordered, that these causes be remanded to the Chancery court of Richmond, for further proceedings, in conformity with the foregoing opinion. All of which is ordered to be certified to the said Chancery court for the city of Richmond.

Decree reversed.

540

*Magill v. Sauer.

March Term, 1871, Richmond.

1. **Appeal Bond—Release of Attachment.**—Upon a decree in favor of an attaching creditor, and an appeal therefrom, the appellant gives an appeal bond. The giving of this bond does not release the attachment.

2. **Statute—Interpretation.**—The act, Code of 1860, ch. 151, § 81, has no application to the attachment lien upon the estate of the debtor, whether it be real or personal property, or choses in action. To relieve the property attached, bond is to be given as required in § 18 of the act.

This case grew out of the next preceding case of Magill v. Manson. After an appeal had been taken by Mrs. Magill in that case, and whilst it was pending in this court, the trustee in the deed executed by Conrad Sauer, to secure the purchase money of the property purchased of Mrs. Magill, by her directions advertised the property for sale at public auction, for the payment of the purchase money, all of which had then become due. Sauer thereupon, on the 13th of December, 1870, filed his bill in the Circuit court of the city of Richmond, against Mrs. Magill and the trustee, in which he stated that Manson had attached his bonds, then in the hands of Lancaster & Co. as her agents, for the payment of his claim against Mrs. Magill, to which he had made Sauer a party defendant. He stated the decree made in the said causes. That Mrs. Magill did not pay Manson's debt, but appealed from the decree; which appeal was still pending. That since his purchase he has made costly improvements on the property, thereby greatly increasing its
541 value. That it is *not pretended by any one that the security for the money due is not ample; and Manson makes no objection to its standing on its present footing. And he prayed for an injunction to restrain the parties from making the sale of the property until the further order of the court, and for general relief.

On the 19th of December, Mrs. Magill demurred to the bill for want of equity, and also answered. She admitted the decree in the suit of Magill v. Manson, but insisted that decree had been superseded entirely by

*See monographic note on "Bonds."

the appeal and supersedeas awarded by the Supreme Court of Appeals, and by her execution of an appeal bond in the penalty of \$5,000; a copy of which she exhibited, and by the act of Assembly in such case made and provided. And she insisted that, upon the award of the appeal and the execution of the bond aforesaid, she became immediately entitled to the said bonds.

Mrs. Magill having filed her answer, to which the plaintiff replied generally, the court on the same day made an order enjoining Mrs. Magill, the trustee and all others, from proceeding to sell the real estate in the bill mentioned under the deed of trust from Sauer to secure the purchase money of the property, until the further order of the court. On the next day, upon notice to the plaintiff, the defendants, Magill, moved the court to dissolve the injunction, which had been awarded the day before; but the court overruled the motion. And thereupon Mrs. Magill applied to this court for an appeal; which was allowed.

Lyons and John Howard, for the appellant.

Steger & Sands, and Meredith, for the appellee.

STAPLES, J. The construction proper to be given to the 31st section, chap. 151, Code of 1860, is too plain to admit of doubt. In terms it applies only to personal property capable of being levied on and taken *into the custody of the attaching officer. It has no application to the attachment lien upon the estate of the debtor, whether it be real or personal or choses in action. When the appeal bond provided for in that section is given, the officer in whose custody the property may be is required to restore the same to the possession of the owner; but the lien resulting from a proper levy of the attachment, is in no manner affected or impaired by the execution of the bond. If the debtor desires to discharge the lien of the attachment, he can only accomplish that object by giving bond in conformity with the provisions of the 13th section, to perform the judgment or decree of the court. The condition of the appeal bond given by the appellant in "Magill v. Manson," is, that the appellant shall perform and satisfy the decree of the court, should the same be confirmed, or the appeal and supersedeas be dismissed; and also pay all costs and damages which may be awarded against her.

That decree having been reversed at this term, and the cause remanded to the Chancery court of the city of Richmond for further proceedings, the appeal bond has discharged its functions, and no longer imposes any obligation upon the parties. The rights of Manson, however, with reference to his attachment, are not affected by such reversal. On the contrary, this court has decided that the Circuit court committed no error in refusing to dismiss the attachment.

But if the appeal bond has the effect

claimed, Manson, with the decree of this court sustaining his attachment, has lost the security it afforded him, because the Circuit court erred in pronouncing a decree on the merits, instead of directing an issue to be tried by a jury. According to this logic, the appeal bond discharges the lien of the attachment, and the reversal of the decree

discharges the appeal bond, so that the creditor *is in a worse condition than he would have been without a decree in his favor. A construction which leads to such results should never be adopted unless required by the imperative language of the statute. The necessary consequence of this view is, that the Circuit court did not err in refusing, in this case, to dissolve the injunction. A sale of the trust subject, and payment of the proceeds to the appellant, would not release the appellee, Sauer, from his liability to Manson, the attaching creditor, should the latter succeed in establishing his claim against the appellant.

Under these circumstances the interference of a court of equity was proper to prevent a sale until the final adjudication of the matters in controversy between the parties in the case of "Magill v. Manson." Any inconvenience or loss which the appellant may sustain in the meantime, in being deprived of her property, can be easily averted by giving bond to perform the decree of the court, according to the provisions of the 13th section, chap. 151, Code of 1860.

For these reasons I am of opinion the decree of the Circuit court, refusing to dissolve the injunction, is right, and should be affirmed with costs.

The other judges concurred in the opinion of Staples, J.

Decree affirmed.

544 *Bargamin & als. v. Clarke & als.

March Term, 1871. Richmond.

1. Estoppel—Inconsistent Positions—Judicial Admissions in Another Suit.*—A party in a suit will not be estopped from setting up a defence on the ground that it is inconsistent with the defence he made in another suit by other plaintiffs, unless the fact of such inconsistency distinctly appears.
2. Evidence—Judgments—Opinion of Judge.—The judgment in the first suit, of the opinion of the judge in it, is not competent evidence for the plaintiffs in the second suit, to show the nature of the title set up in it by the defendants.
3. Deed of Trust—Equity of Redemption—Laches—Case at Bar.†—In 1819, L conveys a lot of ground to C. in

*Estoppel—Inconsistent Positions—Judicial Admissions in Another Suit.—See *Tabb v. Cabill*, 17 Gratt. 160; *Penn v. Penn*, 88 Va. 361, 13 S. E. Rep. 707; monographic note on "Estoppel" appended to *Bower v. McCormick*, 23 Gratt. 310.

The proposition laid down in the principal case, that the principle of estoppel, invoked by the appellants, rested upon the ground of fraud, was cited and approved in *McCormack v. James*, 36 Fed. Rep. 19.

†Chancery Practice—Effect of Laches.—Many subsequent cases cite and approve the proposition laid

trust, to pay certain debts, some of which are upon executions in the hands of the sheriff, and the other is due to the father of C. Ten years after, the father dies and makes C his executor and one of his residuary legatees. The lot is never sold under the deed of L, but, in 1839, C takes possession of it and encloses it, and some years after leases it, in his own name to R for eight years. In 1854, W, claiming it under another title, sues R for it, and C, being then dead, his heirs make themselves parties and defend the suit, and obtain a final judgment in 1867. Then the heirs of L sue the heirs of C for the lot, alleging that C took and held possession as trustee under the deed, and his heirs held under the trust, and defended the action under that title. The heirs of C deny this, claim that C took possession for himself, and he and they have so held for twenty-eight years, and they defended the suit for themselves. **Held:** The heirs of L are barred.

In October, 1867, Anthony L. Bargamin and Clifford Bargamin, two of the heirs at law of Caleb Lownes, deceased, filed their bill in equity in the Circuit court of the

down in the principal case that equity will generally follow the statute of limitations; but, that, even where there is no absolute bar from lapse of time, it is a principle of courts of equity not to take cognizance of an equitable claim after a great lapse of time, and when from the death of witnesses, and the loss of papers, there is danger of doing an injustice, and there can no longer be a safe determination of the controversy. See *Rowe v. Bentley*, 29 Gratt. 768; *Justice v. English*, 30 Gratt. 576; *Perkins v. Lane*, 82 Va. 62; *Jameson v. Rixey*, 94 Va. 347, 26 S. E. Rep. 861; *Troll v. Carter*, 15 W. Va. 583, 589; *Pusey v. Gardner*, 21 W. Va. 481; *Swann v. Thayer*, 36 W. Va. 56, 14 S. E. Rep. 426. See also, on this point, *Smith v. Thompson*, 7 Gratt. 112; *Morrison v. Householder*, 79 Va. 627; *Carr v. Chapman*, 5 Leigh 164; *Caruthers v. Trustees of Lexington*, 12 Leigh 610, 617; *Foster v. Rison*, 17 Gratt. 321; *Harrison v. Gibson*, 23 Gratt. 212, and *foot-note*; *Carter v. McArtor*, 28 Gratt. 356, and *foot-note*; *Hatcher v. Hall*, 77 Va. 573; *Nelson v. Kownslar*, 79 Va. 468; *Wissler v. Craig*, 80 Va. 22; *Phelps v. Seely*, 22 Gratt. 573, 589; *foot-note* to *Rowe v. Bentley*, 29 Gratt. 756; *foot-note* to *Justice v. English*, 30 Gratt. 565; *West v. Thornton*, 7 Gratt. 177; *Robertson v. Read*, 17 Gratt. 544; *Atkinson v. Robinson*, 19 Leigh 393; *Bart. Ch. Prac.* (2d Ed.) 90; 18 Am. & Eng. Enc. Law (2d Ed.) 97.

In *Jones v. Lemon*, 26 W. Va. 634, the court said: "The doctrine is well settled, that while in cases of direct or express trusts, as between the trustees and *cestui que trust*, the statute of limitations has no application during the continuance and recognition of the trust, yet if the trustee repudiates the trust by clear and unequivocal acts or words, and claims thenceforth to hold and control the estate as his own, not subject to any trust, and such repudiation and claim are brought to the notice or knowledge of the *cestui que trust* in such manner that he is called upon to assert his equitable rights, the statute will begin to run from the time that such knowledge is brought home to the *cestui que trust*. 2 Perry on Trusts, §§ 863, 864; Ang. on Lim. § 174; *Nease v. Capehart*, 8 W. Va. 95; *Cooey v. Porter*, 22 Id. 120; *Bargamin v. Clark*, 20 Gratt. 544; *Rowe v. Bentley*, 29 Id. 756, 760."

See also, *W. M. & M. Co. v. Peytona C. C. Co.*, 8 W. Va. 442; *foot-note* to *Rowe v. Bentley*, 29 Gratt. 756.

city of Richmond, against John Clarke and others, the heirs at law of Henry Clarke, deceased, and the others heirs of Caleb Lownes, deceased, and T. W. Doswell, to recover a lot lying on Franklin street,

545 *in said city; it being the same lot which was the subject of controversy in the cases of *Mitchell & al. v. Baratta and Mitchell, &c. v. Riviera*, reported in 17 Gratt. 445. In their bill, they state that in the year 1819, Caleb Lownes, being indebted to John Clarke and George Savage, conveyed to Reuben Burton and Henry Clarke, a certain lot of ground on Franklin street, to secure the debts due to said Clarke and Savage. That, after the execution of this deed, Burton and Caleb Lownes died, and John Clarke also died, having made a will, be which he appointed Henry Clarke and Wm. John Clarke his executors. That Henry Clarke, some time in the year 1839, entered upon and took possession of said lot, as trustee in said deed; said entry being made by him under claim of title as such trustee. That the said lot was afterwards in litigation. That Clarke, having rented the land as, trustee, to tenants, the rents have amounted to a large sum, the exact amount of which is unknown to the plaintiffs. That they do not know whether the debts secured by the deed have been paid or not. That in the litigation above mentioned, Mitchell and Williams were plaintiffs and Baratta and Riviera were the sole original defendants, both of these actions involving the lot aforesaid; and that the said litigation was pending when John Clarke and the other heirs of Henry Clarke, deceased, procured themselves to be made defendants therein, as having the legal title of the said Henry Clarke, as trustee as aforesaid, in them, and claiming that Henry Clarke, as such trustee, had leased the said lot to Baratta and Riviera; and throughout said litigation the said Clarkes asserted and relied on the title of their ancestor, Henry Clarke, trustee as aforesaid; and finally succeeded in making it good, and defeating the claim of said plaintiffs.

They say that the said Henry Clarke, in his lifetime, never rendered any account of the rents and profits of *said property, and pending the said litigation they were collected and received by Thomas W. Doswell, as receiver of the court, and are now in his hands. They insist that whatever part of the debts secured by the deed of trust remain unpaid should be paid out of these rents; and the balance of these rents, and the lot, after satisfying the lien, belong to the heirs of Caleb Lownes. The plaintiffs are not informed what interest the heirs of Henry Clarke claim in said rents and profits; but suppose they were made defendants merely to defend the true claimants of the property against the plaintiffs in the said actions, as their ancestor, Henry Clarke, entered upon and held the same merely in trust for the heirs of Caleb Lownes. They pray that Doswell may be restrained from paying over the rents to the heirs of Henry Clarke; that

the trusts of the deed may be properly settled; and when the same are satisfied, any balance of said rents and said lot may be decreed to them; and for general relief.

John Clarke and the other heirs of Henry Clarke answered the bill. They say it is not true that they claimed and recovered the property in the bill mentioned, as the heirs of Henry Clarke, as a trustee for the benefit of the creditors of Caleb Lownes. Henry Clarke, and these defendants claiming under him, have held the property for twenty-eight years, claiming it as their own; and they insist their title is valid and perfect against all the world. They deny that the record, in the cases of Mitchell v. Baratta and Riviera, except the judgments, are competent evidence in this cause against them, because neither the plaintiff nor any of the heirs of Caleb Lownes, were parties in the causes. But if the records were evidence they were conclusive against the plaintiffs. That Henry Clarke did not claim or hold the property as trustee under the deed of Caleb Lownes, as was apparent from the fact that he leased the property in

his own name to Baratta and
547 *Riviera. They insisted further, that the plaintiffs were barred by the statute of limitations, as are all the debts secured by the deed of Caleb Lownes. And they rely upon the lapse of time and the laches of the heirs of Caleb Lownes, in not bringing this suit until all the parties to the original transaction were dead.

The lot in controversy in this case lay in the valley of Shockoe creek, a stream which had several times changed its bed. The Lownes claimed it as having been originally on the west of the creek; the Adams claimed it as having been on the east of the creek. In 1815 James Lownes, the father of Caleb Lownes, who owned the land on the west of the creek, conveyed it to Caleb and Wm. Lownes, and in 1817 William conveyed it to Caleb. In 1819 Caleb Lownes conveyed it to Burton and Henry Clarke, in trust to secure debts due to John Clarke, the father of Henry Clarke, and Savage. Several of the debts due to Savage were upon executions against Caleb Lownes, then in the hands of the officer. John Clarke died in 1829, and by his will gave the residue of his estate to his six children, of whom Henry Clarke was one; and he appointed his sons Henry and William John Clarke his executors; both of whom qualified as such.

In 1819, John Adams conveyed this lot, with other property, to Thomas Taylor and Charles J. McMurdo, in trust to secure debts due to the Bank of Virginia. In 1839, McMurdo sold under this deed, and the Bank becoming the purchaser, he conveyed the property to the bank. On the night after this sale, Henry Clarke took possession of this lot, and enclosed it with a fence; and he and those claiming under him have held it since that time. On the 14th of January, 1852, Henry Clarke leased the property to Riviera for eight years, upon a rent of \$300 per annum,

payable quarterly. This deed is in the name of Henry Clarke individually,
548 *without any reference to the trust. Baratta leased a part of the property from Riviera.

In October, 1854, Mitchell and Williams, claiming under the Adams' title, brought ejectments in the Circuit court of the city of Richmond, against Baratta and Riviera, to recover the property. In 1855, Henry Clarke having died since his lease to Riviera, his son John Clarke, and his other children, who were minors, made themselves parties defendants in these suits, and after a contest which lasted in the Circuit court until January, 1861, and in this court until April, 1867, there was a judgment for the defendants.

On the 5th of March, 1869, this cause came on to be heard, when the court dismissed the bill with costs. And thereupon the plaintiffs applied to this court for an appeal, which was allowed.

R. T. Daniel, Steger & Sands, for the appellants.

Lyons, for the appellees.

JOYNES, J. The first point insisted on for the appellants is, that the appellees succeeded in defeating the ejectment of Mitchell & al. v. Baratta & al., to recover the land now in controversy, upon the title and possession of their ancestor, Henry Clarke, as trustee under the deed of trust executed by Caleb Lownes to secure the payment of certain debts, and dated June 10th, 1819; and that the appellees are thereby estopped to maintain, in this action, that the title and possession were those of Henry Clarke individually, and not as trustee. To establish the fact that the ejectment was defended on the title and possession of Henry Clarke as trustee, reference is made to certain expressions in the opinion of the president of this court when that case was before it. 17 Gratt. 445. But the judgment in that case was not admissible in this, as evidence of facts established in that
549 case, because the parties in that *case were not the same as parties in this. So, the opinion of the court in that case could not be referred to in this to establish any fact adjudged or alleged in it. Besides, it was not a question, in that case, whether the Clarkes relied upon the possession of Henry Clarke, individually, or upon his possession as trustee. It was enough, for the purpose of defeating that action, to show that Clarke held adversary possession for a sufficient length of time to defeat the action; and it was immaterial whether it was his individual possession or his possession as trustee.

The appellants further rely upon the evidence filed in the case of Mitchell v. Baratta, to show that the Clarkes defended that action upon the title and possession of Henry Clarke as trustee. This evidence was admissible against the Clarkes, in this case, because they were parties to the ejectment. 1 Greenleaf, Evidence, § 553.

The appellees, in their answer, deny that they defended the ejectment upon the title and possession of Henry Clarke, as trustee. There is no proof that Henry Clarke ever declared, within the period of limitation or at any other time, that he held as trustee, and not in his own right. His heirs deraigned their title in the ejectment suit, by proving the title of Caleb Lowndes; the deed of Caleb Lowndes, in 1819, to Henry Clarke and Reuben Burton as trustees, of whom Clarke was the survivor; and they proved the possession of Clarke by the erection of a fence around the land in July, 1839, and his exclusive and notorious possession from that time. It did not appear that Clarke ever had actual possession until he erected this fence. That was more than twenty years after the date of the deed of trust. It does not appear whether the debts had ever been paid; but after the lapse of twenty years the law will presume that they had been paid. [Cowan & Hill notes to Phil.

Ev. 678-'9, 5th ed.] Besides, the
550 *greater part of the debts provided for by the deed of trust were due upon executions against Lowndes, then in the hands of the sheriff of Henrico. We must presume that these debts were collected, and promptly collected. It was the interest and the duty of the sheriff to collect them. The only other debt provided for was due to John Clarke, who, as has been stated in the argument, was the father of Henry Clarke. John Clarke died early in 1829, as appears from his will and the probate of it; and made Henry Clarke one of his residuary legatees and devisees, and also one of his executors. If this debt was not paid to John Clarke, in his lifetime, there is a strong presumption that it was paid to his executors after his death. It was the duty, as well as the interest of the executors, both of whom were residuary legatees, to collect it.

The presumption that these debts were all paid is so strong that we may assume the fact to be so. They were probably paid, too, within a reasonable time—in a few years, at least, after the date of the deed of trust.

There is no direct evidence to show who paid these debts. They do not appear to have been paid by any public sale of the land under the deed of trust. Caleb Lowndes did not pay them; because he was insolvent. If they were paid by any other person than Henry Clarke, we should have heard something of his claim to reimbursement out of the land. The most probable supposition is, that they were paid by Henry Clarke, upon an agreement that the land should be his. I do not say that the evidence proves this; but I will say that this supposition will account for the subsequent conduct of Clarke and of Lowndes' heirs, and is not inconsistent with any part of the evidence.

It seems to be clear from the evidence, that the equity of redemption was extinguished long ago, and doubtless before July, 1839. It may be inferred, from

551 *the lapse of time, and the acquiescence of Lowndes' heirs. *Prevost v. Gratz*, 6 Wheat. R. 481. If the equity of redemption had not been extinguished, why did not the appellants, the heirs of Lowndes, set up their claim until the institution of this suit, in 1867? They must have known that the debts had been paid. They must have known, from July, 1839, that Clarke had taken possession by enclosure. This was enough to excite enquiry. If Clarke told them that he had taken possession as trustee, did they not ask him what was the necessity for doing so, and why the sale could not be made without further delay? Was not their surprise increased when they found Clarke making a lease of the land, in his own name, for so long a term as eight years? There could not be a stronger indication that he did not hold the land for the benefit of the trust, than the fact that he leased it for so long a term, and appropriated all the rent to himself. When they found Mitchell and Williams suing to recover the land upon a title adverse to that of their ancestor, Caleb Lowndes, why did they not assert their claim?

The presumption, therefore, seems to be irresistible, that the debts, provided for in Lowndes' deed of trust, were satisfied, and the equity of redemption extinguished long ago, and probably before Henry Clarke made his enclosure in July, 1839. The probability is, that Henry Clarke had satisfied the debts and extinguished the equity of redemption, many years before, and that he forebore to take possession until a claim to it was asserted by Macmurdo's sale, in July, 1839. Having no deed from Lowndes, Clarke found it necessary to take actual possession, which he did by his enclosure.

It must be borne in mind, in dealing with the evidence in this case, that if Henry Clarke had been alive when the ejectment was tried, he might have been able to produce evidence of which his heirs had
552 no *knowledge, and that, after so great a lapse of time, evidence known to have existed may have been lost by the death of witnesses and the loss or destruction of papers. It seems to me, therefore, to be a hard inference to say that the heirs of Clarke defended the ejectment upon his title and possession as trustee.

But, if these conclusions are not so well sustained as they seem to me to be, it must be conceded that they are not destitute of force. At any rate, it cannot be said to be certain that the appellees defended the ejectment upon the title and possession of Henry Clarke, as trustee. Now, the principle of estoppel invoked by the appellants to preclude the appellees from setting up, in this case, a title in themselves, as heirs of Henry Clarke, discharged of the trust, rests upon the ground of fraud. *Philadelphia, Wilmington & Balt. R. R. v. Howard*, 13 How. U. S. R. 308. It would seem to be very clear, upon principle, that this rule cannot be applied in any case, in the absence of clear proof, that the party had, in the previous case, made use of a defence inconsis-

ent with that which he proposes to use in the subsequent case. In a case in which the fact distinctly appears, the rule is eminently wise and just, because it prevents a fraud upon the administration of justice. But, when the fact is to be made out by inference and conjecture only, as to the character of the first defence, and it cannot be said to be established with certainty, it would be a violation of the plainest justice to apply the rule. And, I apprehend, that the doctrine of estoppel is never applied, in any of its branches, upon an uncertain and speculative state of facts.

The appellees were, therefore, at liberty to set up, in this case, a title in Henry Clarke individually, and in themselves as his heirs, to the land in controversy. And, as we have seen, the facts and circumstances afford the strongest presumption that the debts provided *for in the deed of trust were all satisfied, and the equity of redemption extinguished long ago, and probably long before Clarke's enclosure of the land, in 1839. That being so, the possession of Clarke must have been adverse, and there was no necessity for Clarke to disclaim the trust, inasmuch as it no longer existed. Twenty-eight years elapsed from the date of Clarke's enclosure before the beginning of this suit; and the lapse of time barred the claim of the appellants.

But, even where there is no absolute bar from lapse of time, it is a principle of courts of equity not to take cognizance of an equitable claim after a great lapse of time, and when, from the death of witnesses and the loss of papers, there is danger of doing injustice, and there can no longer be a safe determination of the controversy. In this case, the appellants have been guilty of great laches in the assertion of their claim: all the original parties to the transactions have long been dead, and the means of explaining those transactions have been lost. On this ground, the bill of the appellants ought to have been dismissed. *Caruthers' Adm'rs v. Trustees of Lexington*, 12 Leigh 610; *Smith & als. v. Thompson's Adm'rs & als.*, 7 Gratt. 112; *West's Adm'rs & als. v. Thornton & als.*, 7 Gratt. 177; *Doggett v. Helm*, 17 Gratt. 96; *Robertson & als. v. Read's Adm'r & als.*, 17 Gratt. 544; *Wagner v. Baird*, 7 How. U. S. R. 234; *Badger v. Badger*, 2 Wall. U. S. R. 87.

It was insisted by the counsel for the appellants, that this being the case of an express trust, the appellees could not take advantage, in any form, of the lapse of time to protect themselves against the claim of the appellants. But in 2 Story's Equity, § 1520 a. is the following: "It is often suggested that the lapse of time constitutes no bar in cases of trust. But this proposition must be received with its appropriate qualifications. As long as the relation of trustee and *cestuis que trust is acknowledged to exist between the parties, and the trust is continued, lapse of time can constitute no bar

to an account or other proper relief for the cestuis que trust. But, when this relation is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties, or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief, upon the ground of lapse of time, and its inability to do complete justice. This doctrine will apply even to cases of express trust, and, a fortiori, it will apply with increased strength to cases of implied or constructive trusts." The cases there cited fully sustain the text.

Upon the whole, I am of opinion that there is no error in the decree, and that it should be affirmed.

The other judges concurred in the opinion of Joynes, J.

Decree affirmed.

555 *Town of Danville v. Sutherlin.

March Term, 1871, Richmond.

Absent, JOYNES and ANDERSON,* J's.

Municipal Securities—Usury.†—The council of the town of Danville has authority, under its charter, to contract loans and issue certificates of debt. In 1863, the council sold the bonds of the city, to be issued, at public auction for Confederate money, and for a bond of \$5,000, bearing six *per cent.* interest, and payable at the end of twenty years, the purchaser gave \$11,050; Confederate currency being at the time as ten for one of gold. This is usury.

This was an action of assumpsit, in the Circuit court of Pittsylvania, brought in February, 1867, by William T. Sutherlin against the town of Danville, to recover three years' interest upon a certificate of debt of said town for five thousand dollars, bearing date the 1st of September, 1863, and payable in twenty years from its date, with interest at the rate of six per cent. per annum, payable semi-annually. The defendant pleaded non-assumpsit, and usury; upon which pleas issues were joined.

On the trial the jury found a special verdict, from which it appeared that, on the 10th of August, 1863, the council of the town of Danville adopted a resolution that the president of the council be authorized to sell bonds of the corporation, in sums of \$500 and \$1,000 each, to the amount of \$30,000, as follows: ten *thousand payable each in ten, fifteen and twenty years, interest payable at six per centum, semi-annually, on the 1st of January and 1st of July of each year; to be sold at public auction or private sale.

*JUDGE ANDERSON was interested in the question involved in this case, and therefore declined to sit in it.

†See principal case cited in *Atwood v. Shenandoah V. R. Co.*, 85 Va. 998, 9 S. E. Rep. 748.

See generally, monographic note on "Municipal Corporations" appended to *Danville v. Pace*, 25 Gratt. 1; monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 698.

In pursuance of this resolution, John W. Holland, president of the council, advertised in the Danville Register a sale to be made on the 26th of August, in the town of Danville, at the auction store of Neal & Sword, of corporation bonds of the town of Danville, to the amount of \$30,000, payable with six per centum, semi-annually, in ten and twenty years. And in pursuance of this notice, Holland proceeded to sell at auction the said bonds, when William T. Sutherlin purchased a bond of \$5,000, payable at twenty years, at the price of \$11,050, which he paid at the time of the sale in Confederate currency; that being the only currency then in use in the State, and being at a discount of ten in such currency for one dollar in gold. The certificates were not then prepared, but they were prepared soon after, and a certificate for \$5,000, payable to Sutherlin at the end of twenty years, with interest, as directed by the resolution, was delivered to him. On the face of the certificate it is said to be according to the provisions of an ordinance passed by the council of the said town of Danville, in pursuance of an act of the General Assembly passed the 7th day of March, 1862.

The act of March 7, 1862, to amend the charter of the town of Danville, § 22, provides that the "council may contract loans and issue certificates of debt, and provide a sinking fund for the payment of the same; but no loan contracted shall be irredeemable for a longer period than thirty-four years; nor shall the outstanding debt of said corporation at any one time exceed the sum of seventy-five thousand dollars." And the same power existed under the charter of 1854.

Upon this special verdict, the Circuit court rendered a judgment for the plaintiff for nine hundred dollars, with interest thereon from the 12th day of August, 1867, till paid, and his costs. And thereupon the town of Danville took the case to the District court of appeals at Lynchburg, where the judgment was affirmed; and there was then an application to this court for a supersedeas, which was awarded.

Ould & Carrington for the appellant.

I. The town of Danville had no authority, under its charter, either to pass the resolution of the 10th of August, 1863, or to issue the bonds named therein. It had no right either "to contract loans or cause to be issued certificates of debt or bonds," for the purposes mentioned in said resolution. The bonds being issued without authority, and certifying in their endorsement the illegal ordinance under which they were issued, are null and void. *Zabriskie v. Cleveland, Columbus and Cincinnati Railroad Co.*, 23 How. U. S. R. 398; 2 Kent's Com. 290, 299; *Niagara County Bank v. Baker*, 15 Ohio St. R. 68; *Clark v. City of Des Moines*, 19 Iowa R. 199; *Hodges v. City of Buffalo*, 2 Denio R. 110; *McCullough v. Moss*, 5 Denio R. 567; *Halstead v. Mayor of New York*, 3 Comst. R. 430; *Tallmage v. Pell*, 3 Seld. R.

328; *Rogers v. Burlington*, 3 Wall. U. S. R. 654; *Mr. Justice Miller in Meyer v. City of Muscatine*, 1 Wall. U. S. R. 384, 395.

II. The authority "to contract loans and issue certificates of debt or bonds," does not confer the right to sell the certificates or bonds. *Gould v. Town of Sterling*, 23 New York R. 456, 460.

III. Even if the transactions set forth in the record were those of purchase and sale, being speculative in their character, they were ultra vires. The city had no right, under its charter, to traffic in depreciated securities, and especially in the promissory notes of its citizens. The power to contract loans, or to issue certificates
558 *of debt or bonds, does not include the authority to purchase a depreciated circulating medium, or promissory notes to be paid in depreciated currency. See *Tallmage v. Pell*, 3 Seld. R. 325, and the authorities cited on first point.

IV. The transactions set forth in the record are usurious.

1. It is admitted that a bona fide sale or purchase of notes or stocks of third parties for more than their market value, not exceeding par, is not usurious, though the strong presumption in any such cases, where the parties know that more than the market value is paid, is that the transaction is not in fact a sale, but a loan. The burthen of proof in such case is on the vendor, to rebut the presumption of a loan by the facts. Where the transaction is found in contemplation of law, or in fact, to be a loan, whatever it may be called, the mere fact that more than their market value is given or agreed to be given, makes the transaction usurious. In all cases of loan, whether so-called or not, the taking of more than lawful rates on value is usurious. *Mumford v. Amer. Life Ins. Co.*, 4 Comst. R. 463, 474, 476.

2. Some transactions are necessarily loans, whatever they may be called. Thus a party cannot sell his own obligation, nor can any person purchase it from him. The first is a borrower of the value which he receives, and the latter is a lender or investor of that value. If more than legal rates on value be taken, the transaction is usurious, how much soever both parties may insist it is a sale and purchase. The nature of the transaction is not changed by calling it "an exchange of securities" or an "exchange of credits," or a "sale of a commodity," as the appellees have done in these cases.

So, there cannot be such a thing as a sale or purchase on credit, even of stocks or other securities, including the obligations of third parties, for more than their market value, and exceeding par; no matter
559 what may *be the form of such a transaction, or the name given to it by the parties, it is necessarily a loan, and usurious. 3 Comst. R. 358, 368.

3. If this case is tested by the rule which is applied to stocks, bonds and notes of third parties, and those classes of securities, the transaction must be declared usu-

rious. But it is submitted, that the true rule which ought to be applied to this case, in determining whether the transaction is usurious, is that which governs money itself. The usury laws control not only money, but its substitute. Confederate money, at the date of these transactions, was the universal currency. If, in point of fact, there be one rule for money and another for securities and commodities of that character, Confederate notes, as to the period of the war, should be controlled by the former rather than the latter. When a circulating medium in its uses supplies the place of gold and silver or legal tender, it should be governed, so far as the question of usury is concerned, by those rules and principles which apply to gold and silver and legal tender, rather than those which apply to collateral securities. While Confederate notes may be a commodity, it is also a currency and a substitute for money, and should be governed by the laws which control the use of money. 14 New York R. 115, 119; 3 Comst. R. 358, 359, 361, 362, 363.

4. Independently of the fact that the bonds were those of the city itself, the other facts clearly show that there was no sale of Confederate money as a commodity by the defendant. The subject of negotiation, or barter, or traffic in these cases, was not the Confederate money, but the bonds of the city. If the Confederate money had been the subject, the obligations of the city would have made their first appearance after the conclusion of the negotiation or sale. Such is the case both at private sale and at auction.

560 If the defendant *had advertised his surplus Confederate notes for sale at auction, and the city had bid for them successfully, and given its obligation, there might have been some countenance to the theory of a sale of Confederate money, though even in that case, if the negotiation had been at a greater rate than six per cent. on the market value, and so known to both parties, the transaction would have been usurious, or at least prima facie usurious. But such was not the fact. The bonds of the town were made the subjects of the pretended sale, and the Confederate currency made to perform the function of money, in measuring their value.

5. These transactions were loans. There was an application by the town for a loan, under the form of an auction sale of its bonds, a negotiation between the town and the appellee in relation to a loan, and an actual loan to the town. Schermerhorn v. Talman, 14 New York R. 93, 115; Dry Dock Bank v. Amer. Life Ins. Co., 3 Comst. R. 344; Ord. 23, 69, 77; Lowe v. Waller, Douglas R. 736; Warfield's Adm'rs v. Boswell, 2 Dana R. 224.

6. The authority of the charter extends only to the funding of an old debt or the making of a new one. The first is done by an "issue of certificates or bonds," the latter by "contracting a loan." It is true that certificates or bonds may be given in both cases, but if the certificate is not

given for a debt already contracted, it must be in pursuance of a contract of loan. These bonds not having been given for a debt already contracted, must have been in consideration of a loan. It was not a case of funding, but of borrowing.

7. There was no sale of the bond or certificate to the appellee, nor could there have been, as they could not be the subjects of sale. Nichols v. Fearson, 7 Peters U. S. R. 103; Schermerhorn v. Talman, 14 New York R. 117; Whitworth v. Adams, 5 Rand. 333.

8. If not a loan, it was at least a case where, upon a *negotiation for a loan, there was a sale of a commodity, wherein a loan was made dependent on a sale, and the sale made at a price above market value. Such a transaction is usurious within the rule laid down by Judge Carr in Bank of the Valley v. Stribling, 7 Leigh 59. Where the commodity is a circulating medium, the case is much stronger. Byles on Bills, 467; Gibson v. Fristoe, 1 Call 62; Skipwith v. Gibson, 4 Hen. & Mun. 490; Bank of Washington v. Arthur, 3 Gratt. 173; Smith v. Nicholas, 8 Leigh 330; White v. Wright, 3 Barn. & Cress. R. 273.

9. If the bonds of the town could have been the subjects of sale, and there was a sale of them, yet, as they were made for the purpose of being sold, and as that fact was known to the appellee and expressed in the endorsement, the transaction was usurious if the bonds were sold at a greater discount than six per cent. Taylor v. Bruce, Gilmer 42; Whitworth v. Adams, 5 Rand. 333; Brummel & Co. v. Enders, &c., 18 Gratt. 873; State Bank North Car. v. Cowan, 8 Leigh 238.

10. Where an obligation is given for the transfer of depreciated currency, other than the promises of the party making the transfer, at a greater discount than six per cent. on the market value at the time of the negotiation, the market value being known to both parties, the transaction will be deemed a usurious loan, even though it may take the form of a sale; more especially is this the case where the depreciated currency is the exclusive circulating medium. Bondurant v. Commercial Bank Natchez, 8 Smedes & Marsh. R. 533; Cook v. Bank of Lexington, Id. 544; Archer v. Putnam, 12 Id. 286; Walker v. Meek, Id. 495; Maury v. Ingraham, 28 Miss. R. 171; Harrison v. Bank of Kentucky, 2 J. J. Marshall R. 140; Warfield's adm'rs v. Boswell, 2 Dana R. 224; Moore's ex'r v. Vance, 3 Dana R. 361; Collins v. Secreh, 7 Monr. R. 336; Swanson v. White, 5 Humph. R. 373; 1 Yerg. R. 243; Weatherhead v. Boyers, *7 Yerg. R. 545; State Bank of Elizabeth v. Ayers, 2 Halstead R. 130; Bank of State of North Car. v. Ford, 5 Ired. R. 692; Cleveland v. Loder, 7 Paige R. 557; Broswell v. Clarksons, 1 J. J. Marsh. 47; Pratt v. Adams, 7 Paige R. 615, 637; Eggleston v. Shotwell, 1 Johns. Ch. R. 536; Gaither v. Farm. & Mech. Bank Georgetown, 1 Peters U. S. R. 37; Bank of United States

v. Owens, 2 Id. 527; Doe v. Barnard, 1 Esp. R. 11; 3 Parsons on Contracts, 108, 115, notes a and f.

11. The contract between the town and the appellee was not that of risk or hazard, as no contract can be where there is an obligation to pay money at all events. Risk and hazard can only be applied to a contract where there is an inherent contingency as to payment in any event, or where the obligation is to repay in something else than money. But it is submitted that if the contract is relieved of the taint of usury on the ground of its inherent risk and hazard, then it is thus shown to be void for want of authority to make it. Steptoe's adm'rs v. Harvey's ex'ors, 7 Leigh 501; State Bank of North Car. v. Cowan, 8 Leigh 238; Smith v. Nicholas, 8 Leigh 330; Bank of United States v. Owens, 2 Peters U. S. R. 527; Parker v. Ramsbottom, 3 Barn. & Cres. R. 257; 3 Parsons on Contracts, 137.

12. The statute of usury applies not only to the "loan of money," but to the loan of any "other thing." Under the statute there may be a direct loan of a thing, or the loan of a thing under the form of a sale, without usury, provided not more than six per cent. upon the value of the thing be taken. But if there be a direct loan of a thing, or the loan of a thing under the form of a sale, and more than six per cent. on the value of the thing be taken, it is usury. The usury, therefore, in the case of a loan of a thing does not depend upon the fact that the parties resorted to the artifice of a sale, but upon the excessive charge upon value.

13. The Virginia decisions bearing 563 upon the facts of *this case, to wit:

Gibson v. Fristoe, 1 Call 62; Skipwith v. Gibson, 4 Hen. & Mun. 490; West v. Belches, 5 Munf. 187; Greenhow's adm'x v. Harris, 6 Munf. 574; Stribling v. Bank of the Valley, 5 Rand. 132; Steptoe's adm'rs v. Harvey's ex'rs, 7 Leigh 501; State Bank of North Car. v. Cowan, 8 Leigh 238; Whitworth v. Adams, 5 Rand. 333; Bank of Washington v. Arthur, 3 Gratt. 173; Brockenbrough's ex'rs v. Spindle, 17 Gratt. 21; Brummel & Co. v. Enders, &c., 18 Gratt. 873; Boulware v. Newton, 18 Gratt. 708; are not only consistent with the foregoing propositions, but sustain the following doctrines, to wit:

1. Where A makes an application to B for a loan, which is not bona fide declined, but a negotiation ensues between them in relation thereto, the result of which is an accepted offer to transfer a commodity at a price exceeding its market value, which is to be paid at all events, and in money at a future day, with six per cent. interest from date, the transaction is usurious.

2. Where a public proposal is made for a loan by A, and without further negotiation in relation thereto, B, in response to such proposal, offers to deliver a commodity at a price well known to both parties to be in excess of its market value, and which is to be paid at all events in money at a

future day, with six per cent. interest, semi-annually from date, and such offer is accepted by A, the transaction is usurious.

3. Where an obligation of A to pay money at all events, with six per cent. interest from date, then in his possession or thereafter to be made by him, is made the subject of negotiation between A and B, and the result of that negotiation is a transfer of such obligation to B for a consideration, whether that consideration be money or a commodity, such a transaction is a loan, and not a sale of the consideration by B to A; and when in such a case the market value of the consideration, if it be a commodity, at the time and place of 564 the *negotiation, is less than the face of the obligation, the transaction is usurious.

4. Where A, with a view of raising an amount of notes, which, though greatly depreciated, constituted the only circulation in use at the time and place, and with which he proposed to make purchases of real estate, makes a contract with B (who is cognizant of such contemplated purchase by means of the notes so to be raised), by which B agrees to furnish a certain amount of such circulation, and A agrees, in consideration thereof, to give his obligation, payable in money at all events, at a future day, with six per cent. interest from date, for a sum largely in excess of the market value of the said notes at the time of said contract, such a transaction is usurious.

By "market value" in each of these propositions, we mean value in the community, according to a money or other legal tender standard.

If either one of these propositions is sustained, the case is with the appellant.

14. Both at law and in commercial circles, persons who invest in bonds or securities of this description are regarded as lenders, and the other parties as borrowers. The corporation which puts such securities upon the market, according to universal acceptance, negotiates a loan when they are taken. Bissell v. City of Jeffersonville, 14 How. U. S. R. 287, 290; Rogers v. Burlington, 3 Wall. U. S. R. 654; Middleton v. Comm'rs Alleghany Co., 37 Penn. R. 237; Mitchell v. Burlington, 4 Wall. U. S. R. 270; Larned v. Burlington, 4 Wall. U. S. R. 275; Parson's Laws of Business for Business Men, 228.

Read & Bouldin, with whom was Marshall, submitted a printed argument for the appellee.

Is the transaction in this case usury on its face—usury direct?

565 *In Bank U. S. v. Waggener, 9 Peters U. S. R. 378, Justice Story says, "If the contract, on its face, stipulate for it (usury), there is no further enquiry; otherwise it must be shewn that there was some agreement or shift dehors the written contract to cover usury."

Unless a Confederate treasury note is different from bank stock, unless State stock is a commodity, and the notes of the Confederate States is money, and not a com-

modity, there cannot, we humbly submit, be a shadow of doubt, under the rulings of the courts of this State and the Supreme court of the United States, that the mere exchange of the notes of the town for the Confederate treasury notes; or a sale be either for the other (for it is immaterial what name is given to the transaction) is not usury per se. And the reason of these decisions is, as we conceive, money is not actually loaned by such a transaction, it being a note given for a commodity, and to constitute usury it must be shown further that it was substantially a loan of money, under the pretext of a sale or exchange. But be the reason of these rulings what it may, the courts referred to have certainly arrived at the conclusion as thoroughly res adjudicata, that the sale of stock or any other commodity, at whatever price, is not usury per se, and that individuals may give their bonds payable at a future day, for depreciated stocks for their face value.

Carr, J., in *Selby v. Morgan*, 3 Leigh 625, says, "We have decided often, that the sale of stock, or any other property, at whatever price, does not, of itself, constitute usury; and further, on the same page, he adds, in *Stribling v. Bank of the Valley*, 5 Rand. 132, we decided that the sale of stock at twenty per cent. above the market price, was usury, because (solely because) there was indissolubly linked to that sale a loan of money by the seller to the buyer."

In *Brockenbrough's ex'ors v. Spindle's adm's*, 17 Gratt. *21, the case of

Selby v. Morgan was especially referred to by Moncure, P., as settling the principles, as announced above by a unanimous court. The same judge, in the same case, on p. 33, says, "That State bonds may lawfully be sold, on a credit, at par, in the market, is admitted, and cannot be denied. Nothing is better settled, in Virginia and elsewhere, than that stock, bonds and notes may be sold, like any other property, at any price not above par, which may be agreed upon between the parties;" on p. 34, *Ibid*, he adds, "there is nothing unreasonable or unfair, in appearance, at least, in a sale or exchange of these bonds for the bond of an individual, of like amount, payable three years after date; it may well be supposed that the market value of the former was at least equal to that of the latter."

It will scarcely be urged that Confederate treasury notes are not commodities, and ought to be put on a different footing from stocks and other commodities, because they had a circulation as money. Is it less a commodity because used as a circulating medium? Surely not! Their circulation cannot alter their intrinsic character as a commodity. They had fewer attributes of money than many other commodities. Certainly fewer than depreciated bank notes, which are adjudged to be commodities in the *Bank of U. S. v. Waggener*, 9 Peters R. 395.

They were constantly fluctuating in value—they were not made a legal tender. They

rose and fell, with the success and disaster of the Confederate arms. If the revolution or rebellion had succeeded, and the government retained its faith and ability to pay, they would have been redeemed, but their collection could not have been coerced in any legal forum; and if the rebellion proved unsuccessful, which has happened, these notes would be [as they are] worthless.

They were a commodity for speculation, each individual fixing *his own idea of value upon them, which was greatly influenced by his belief of the success or failure of the war. The very and only object of the usury law is to prevent speculation in money. The law regards it as the only thing that never rises in value—that it has an immutable value from the inception to the due day of every contract, and having fixed its value by law, one cent above the legal rate of interest at any distant day, is more than it is worth.

This cannot be predicated of anything else, and particularly of Confederate stocks. Men are not subjected to the fearful penalties of usury laws, for speculating in commodities of varying and uncertain value, unless they do it to conceal a loan of money in disguise.

Was the transaction then a shift to evade the statute? Is it a loan of money in disguise?

In the *Bank of the United States v. Waggener* the court decided, in the language of the Syllabus, that "the mere fact that the note was given for an equal amount of bank notes, whose market value depreciated, does not amount to usury." The same decision was made in *Orr v. Lacy*, 4 McLean R. 243.

It may be well, before proceeding further, to advert to an effort to advance the argument on the other side, by denying that there was a sale of the Confederate notes to the town. As there was no money that passed in the transaction, we do insist that it is most properly denominated an exchange of the town scrip, or the notes of the town, for the Confederate notes. But grant that there had been no public auction of these certificates of debt, and the parties met, and Sutherlin gave Confederate notes, payable two years after a ratification of peace, &c., to the amount on their face of \$11,050 to the town, and the town gave its

bond for \$5,000, bearing interest at five per cent., the principal *irredeemable for twenty years. Is there any usury in this?

In *Selby v. Morgan*, Selby gave his bonds, payable in two or three years, and received the stock for them. In *Brockenbrough's ex'ors v. Spindle*, Brockenbrough parted with his stocks and took Spindle's bonds on time, and the judges, in the two last cases mentioned, and in the case of *Bank of United States v. Waggener*, speak of these transactions indiscriminately as a sale or an exchange of securities. Judge Moncure, on p. 34, speaks of "sale or exchange of the State bonds for the bonds of an individual," and on p. 35, "here State

bonds were exchanged for the bond of an individual." And in *Bank of United States v. Waggener*, 9 Peters 395, Story, J., said, "It was a bona fide exchange of credits, and is not per se illegal, though it may be so if it is a mere shift or device to cover usury," p. 401.

We will continue the enquiry, is it a shift to cover usury? The case seems entirely destitute of any of those features that have been termed badges of usury. There was no disguise to cover a loan of money; neither party wanted money; no conversion of the Confederate notes into money, as is frequently done with bank and other stocks as soon as the transaction is closed and money is raised: (and even such cases not pronounced usurious). The sale was made at public auction, in the open face of day—no previous negotiation for a loan of money. The auctioneer stated that the sale was to be made for Confederate States treasury notes. The town was not in search of money, and under no urgent necessity to procure Confederate notes. There was no advantage taken of its necessities. The public had a fair opportunity of bidding, and the result of the bidding showed that in open market one dollar of the certificates of indebtedness of the town, payable in twenty years, was worth about two dollars of the

notes of the Confederate States, payable two years after *a favorable close of the war. The town wanted this commodity to invest in, or exchange for, land; and from what may be judicially known to the court, they made a profitable use of the Confederate bonds, as all did who invested in real estate during the war. The evidence shows that a portion of them was applied in liquidation of old debts.

The town received these Confederate notes, and immediately, according to assumptions on the other side, committed usury on their neighbors, by buying bonds for less than their market value in gold. "If the application be not for a loan of money, but for an exchange of credits or commodities" (and we might add, or for an exchange of credits for commodities), which the parties bona fide estimate at equivalent values, it seems difficult to find any ground on which to rest a legal objection to the transaction. Because an article is depreciated in the market, it does not follow that the owner is not entitled to demand or require a higher price for it before he consents to part with it." Story, J., in the case last cited, p. 401. He was speaking of depreciated bank notes. Further, on p. 402, he adds, "for many purposes they may pass current at par, in payment of his own debts, or in payment of taxes." Sutherlin could use, at that date, these Confederate notes, either in payment of his own debts, or in taxes due the Confederate States. The proof is, the town applied some of them in liquidation of its own debts. *Moncure, J., in Brockenbrough's ex'ors v. Spindle's adm'rs*, p. 34, uses language as pointed, and to the same purport as the language of Justice Story. He states,

"there was nothing unreasonable or unfair, in appearance at least, in a sale or exchange of these bonds," referring to State bonds) "for the bonds of an individual, of like amount, payable three years after date. It may well be supposed that the market value of the former, is at least equal to that of the latter." Sutherlin certainly

570 *gave the market value, for the sale was made in open market, and the public valued the Confederate treasury, as to the town notes, running twenty years, as about two to one. So that the transaction has not even the feature of a sale of bank stock above its market value: as was the case in *Selby v. Morgan*.

And we ask especial attention to the fact that the charge of usury is built on the idea, not that the exchange of the two securities, as to their market value, was not fair and equal, but when the Confederate treasury notes were reduced to the standard of gold (that is, the market value of the Confederate notes in gold), that the gold value would be less than the face value of the town notes. This is a concession that the Confederate notes is a commodity, whose value has to be reduced to money. How hazardous would it be to sell or exchange any commodity of fluctuating value, and take for it the bond of the party, payable in the future, if the penalty of usury is incurred by taking the bond for more than the gold value of the commodity at the precise date of the transaction! And we will remark, in this connection; whenever a case of usury is made out, under cover of a pretended sale of stocks, as where part of the consideration is for money loaned, and part the sale of stocks, the stocks must be sold or exchanged for less than the market value; exorbitant gain enters into the idea of usury. The bond is given for more than the market value of the stock, and in ordinary times it is right to regard as the market value their value in gold and silver. "But gold (to use the apt language of Joynes, J., in another connection), it is well known, was not a currency, but an article of traffic during the late war. Scarcely any article had a value that was less stable and uniform. It went up, and sometimes went down, for short periods, very suddenly, according to the vicissitudes of the war and the demands of speculation and adventure. Its value was

571 *not uniform in different places at the same time. At points remote from the cities, the people paid little or no attention to its fluctuations, and were not governed in their dealings by any reference to its value." Joynes, J., in *Dearing's adm'x v. Rucker*, 18 Gratt. 425, 435. Or, to use the language of another, "The value of gold, as marked by these treasury notes, fluctuated daily and hourly, and was different in different parts of the State. While it was twenty, thirty, or forty, to one these treasury notes had an exchangeable power of two, three, or four, to one, in the different species of property." We respectfully submit, as the contract is not usury

on its face, and resort must be had to the extraneous matter of valuing the commodity in gold, in order to have the contract even a gainful one, it would be wrong to bring the contract to the gold value to prove the animus of usurious gains, when the people were not governed in their dealings by any reference to its value, and when it was really a good contract to the town, and they were getting Confederate treasury notes to invest in land, in reference to which these Confederate notes had an exchangeable power of about two to one. Ten dollars in Confederate treasury notes would then have bought an acre of land intrinsically worth, or worth before the war, five dollars. It was the exchangeable value of these notes for land and personal property that made them practicably valuable. Gold was but little thought of, and to bring the Confederate notes down to the gold standard, to make them worth less than the notes of the town, is an attempt to establish the animus of usury by a technicality, without reason.

It is useless again to refer to the decisions of our own courts. We know of no decision in Virginia in conflict with *Selby v. Morgan*; *Brockenbrough's Ex'ors v. Spindle's Adm'rs*; *Bank of U. S. v. Waggener*; and *Orr v. Lacy*, above cited.

572 *The cases in Virginia that seemingly conflict, are either cases where the consideration was partly a commodity, and partly a loan of money; or where the new security given and adjudged usurious, is based partly on stocks at a price above their market value, and partly on an antecedent debt, in which the premium is given for forbearance, and giving day for payment: in which case we have shown no loan of money is required to constitute usury.

An example of the first: where the bond is given partly for stock and partly for money loaned, is *Stribling v. The Bank of the Valley*, 5 Rand. 132. An example of the second: where part of the consideration is for an antecedent debt, is *Bank of Washington v. Arthur et als.*, 3 Gratt. 173.

We will notice specially the case of *State Bank of North Carolina v. Cowan*, 8 Leigh 238. Cowan in this case made an offer to the State Bank, if they would discount a note for him he would exchange an equal amount of northern funds, then good, for North Carolina bank notes, all depreciated in market. The proposition was accepted, a draft or bill of exchange was drawn on a Virginia firm and accepted, the bill and note offered for discount were both discounted by the bank, with a further condition that Cowan's note to the bank should be paid in Virginia bank notes or other northern funds. At this time the North Carolina banks, although required to pay in specie, had suspended.

The court decided that the contract was not usurious. Tucker, J., only dissenting.

After quoting from the opinions of the judges who decided this case, they say:

There is a peculiar feature in this case,

that would seem to give it more the appearance of a loan in disguise, than a mere exchange of bills of a different market value from their value. It was not only 573 agreed *to exchange an equal amount of northern funds for North Carolina bank notes, if the note should be discounted, but there was a further condition that Cowan's note, when due, should be paid in Virginia bank notes or other northern bank notes; these were generally as good as specie. So the transaction did not stop at a single exchange of commodities, and when the transaction was with a bank bound to pay its own notes in gold, it might have been considered by the judges, from all the surroundings, a shift to cover a loan, except for the view taken by Judges Cabell and Brooke; but, at all events, if, according to the view taken by those judges, it could under no circumstances be adjudged usury, it was very unnecessary to argue the question, whether in an ordinary case the exchange of a bond of an individual or corporation for depreciated stocks is, per se, usury. In fact, as we have before stated, the two judges named did not regard this case as a case of such exchange, because, while it was conceded that the market value of the North Carolina bank notes was less than the northern or Virginia funds or bank notes, Judges Cabell and Brooke were of opinion that the North Carolina bank notes paid to Cowan were equivalent to gold and silver, both to the bank and to Cowan. They were of opinion, that a bank bound to pay its notes in specie could not commit usury by taking the note of a customer for the face value of the bank notes paid to him when the note is discounted. They, therefore, considered it unnecessary to argue the question which Judge Tucker argued, whether, under all the surroundings of this case, it was a shift to avoid the statute. Judge Tucker himself seemed to concede that an exchange of bills or commodities of unequal value was not usury of itself.

Are there any decisions to the effect that the giving of a note or bond for the nominal amount of depreciated bank 574 *notes or for stocks or commodities whose market value is less than their face value is usury per se?

It is admitted that there are—particularly in Mississippi. Some rule, that if a bank gives its own notes, depreciated in market, and takes a note from a customer for face value of the notes given, it is not usury; but, if it takes the depreciated notes of other banks, it is usury; as in *Maury v. Ingraham*, 28 Miss. R. 171.

Some rule that the transaction is usury per se; others, that it is not usury per se. "But in all cases where it is alleged that there was in fact a loan in the form of property sold, the fact that there was an application for a loan, and that the applicant was pressed, are essential in determining the true character of the transaction." *Moore's Ex'or v. Vance*, 3 Dana R. 36.

In the *Bank of the United States v. Wag-*

gener, the court decided that the mere fact that the United States Bank took the note of a customer for an equal amount of the notes of another bank whose market value was depreciated, was not usury, because bank notes were not money.

How is the case affected by the expression in the Virginia statute, loan of money or other thing?

Upon a little reflection, it will be perceived that the expression, "loan" "or other thing," applies to the loan of a commodity to be returned, and has given rise to another distinct class of cases, and has no application to the case under discussion.

The statute of 12 Ann, chap. 11, was continued in the revisal of 1819 in this State, and provided that no person shall take, directly or indirectly, for loan of any moneys, wares, merchandise or other commodities whatsoever, above the value of six dollars for the forbearance of one hundred dollars for a year, &c. The Legislature merely substituted the word "thing," for

the expression, "wares, merchandise
575 or other commodities," *leaving the usury law precisely the same in substance as before the late revisal.

In all the cases we have cited, the question was, whether there was a sale of commodities bona fide or a loan of money under cover of a pretended sale. There are cases of usury arising from a bona fide loan (to be returned) of a thing—a commodity. A contract to borrow stock for five years, and then to be returned, valued at more than the market price, and pay six per cent. interest on this valuation, might be usury. Usury, by the express words of the statute, is taking more than six per cent. interest for the loan of a "thing." Thus, in *Forrest v. Elwes*, 4 Ves. R. 402, annuities were loaned for six months, and the question of usury raised. The person borrowing, of course, generally disposes of the stock, but agrees to replace; buy and replace at the expiration of the limit of the loan.

In *Parker v. Ramsbottom*, 5 Dowl. & R. 138, 3 Barn. & Cres. R. 257, cited by Parsons, vol. 3, p. 110, was decided to be usury, on what might be termed forbearance for the use of stock; the time for which the stock had been loaned had expired, and was worth at that time in market only 84,000 pounds sterling, but the borrower of the stock was released from his contract to return the stock, but it was agreed should account for it in money at the value of ten thousand pounds sterling, paying legal per cent. interest thereon, until the principal and interest should be repaid. There is no pretence of a loan of Confederate stock by Sutherlin, to be replaced. The only semblance for a charge of usury is a loan of money under the guise of a sale of stock; or that Confederate treasury notes is money, and it is usury direct; both of which propositions we have discussed.

Judge Rives, in *Boulware v. Newton*, 18 Gratt. 717, says: "And this court, as
576 in cases of depreciated bank *notes,

has treated these notes as a commodity in trade, while the common understanding, and the literal form of the transaction, justified the court below in describing it as a loan in Confederate treasury notes of \$5,000, we must look beyond the mode of expression into the actual substance of the contract. Had the contract contemplated the repayment of that sum in the same currency in which it was received, then it would have been substantially a loan." The judge means to say, that when a person passes Confederate treasury notes, and takes the bond of the transferee, he does not loan money. But, if the Confederate notes are to be returned in kind, he loans the Confederate notes as a commodity. There is, therefore, no pretext that this transaction was a loan of a "thing" or commodity, but the exchange or sale of a thing or commodity for the note of the town.

Did the town exceed its power under its charter?

Having already protracted this note to a considerable length, we do not propose to argue this question of ultra vires as much in detail or on authority.

The charter of the town of Danville, granted in 1854, gave authority to the council to contract loans and issue certificates of debt. The same authority is conferred by the amended charter of the 4th March, 1862. See Sess. Acts of 1861-2, p. 114. If a question is made as to the validity of the acts of 1862, as not passed by a constitutional Assembly, then the act of 1854 was operative at the date of the contract. But the act of 28th February, 1866, gave validity to all contracts made under laws of Virginia enacted during the war. See Sess. Acts 1866, p. 187.

The question is raised whether, under the power "to contract loans and issue certificates of debt," the town could issue certificates of debt for Confederate treasury notes.

The town has the general authority
577 "to issue certificates *of debt." It is not limited as for what purpose it may issue them. It would seem that, if it was indebted by contract for paving a street, or building a courthouse, it would be entirely competent for the town to give its note or certificate of debt for masonry for their streets or for the courthouse. Why not for Confederate treasury notes or any other commodity purchased for its legitimate use? The Confederate notes were used to exchange, or, in the popular language of the day, to invest in parks and burying-grounds, which were legitimate subjects of investment for the town. If the town could only give its bonds or notes for money borrowed, and be forced to pay all of its engagements with borrowed money, it would be put to great disadvantage. The town, like every other corporation, has many sources of income; some own stocks and buildings to rent, and derive revenue from taxation. Their moneys come in at different times, and it is competent to make contracts and give their bonds, to antici-

pate their revenue and credit. Some towns work their own streets, and give their notes for material and timber, and hire workmen; the expression, "issue certificates of debt," means to give their notes for the obligations they choose to incur.

But it seems to us that this question is put to rest by sec. 24 of chap. 54 Code of Virginia. This provision is not found, so far as we have been able to ascertain, in many States where the question of ultra vires is made. By this section every town is declared to be a corporation, and all the corporate powers thereof shall be exercised by the council; and by the 25th section [same chapter] the council may make ordinances to carry into effect their general powers, as well as the powers therein enumerated.

Chancellor Kent says, "when a corporation is duly created, many powers, rights and capacities are attached to it." "Some 578 of them," he continues, "are *deemed necessary and inseparably incident to a corporation, by tacit operation without any express provisions." Kent's Comm. vol. 2, 9th ed., top p. 325. He mentions, as one of their ordinary powers, the right "to hold land and chattels." In note "A," on the next page [326], it is stated that "every corporation has a capacity to take and grant property and to contract obligations;" "that it may make all contracts necessary and useful in the course of the business it transacts, as means to enable it to effect such object unless prohibited by law or its charter. To attain its legitimate object it may deal precisely as an individual who seeks to accomplish the same end."

With such power the town of Danville could surely make any contract for a chattel, give its notes for a treasury note or for money borrowed; especially when the treasury notes are procured for the purpose of buying, or exchange for, grounds and parks useful to the town, and which they may lawfully acquire and hold. No corporation has a necessity for the exercise of more enlarged powers to make contracts than a town; powers necessary and inseparably incident to its existence. Every town, almost daily, is under necessity to make contracts and payments as an individual.

STAPLES, J. Neither party claims that this is a Confederate transaction. Sutherland treats the certificate as a security for the payment of its nominal amount in lawful money of the United States. The plea of usury is a tacit admission, on the part of the defendant, that this is a proper construction of the contract.

The special verdict does not find that this contract, according to the understanding of the parties, was to be fulfilled in Confederate notes, or that it was entered into with reference to such notes as a standard of value; nor have the jury found any fact from which this court can infer it.

579 We must therefore consider *the cer-

tificate as a promise to pay the sum of \$5,000 in legal currency. The question presented for our consideration is, whether this transaction is usurious.

With an anxious desire to arrive at a correct conclusion upon this point, I have carefully considered the arguments, oral and written, which have been made. I have attentively read the authorities to which we have been referred, and the conviction is forced upon my own mind, that this contract cannot be sustained by the courts. In giving the reasons which have led me to this conclusion, I prefer to present my own views in connection with the argument of the counsel for the appellee.

It is not unworthy of remark, that the counsel do not agree among themselves as to the character of this transaction. By one it is said to be what it professes—a sale of bonds; by another a sale of Confederate notes; by another an exchange of securities; by another admitted to be a loan, but not usurious, because usury cannot be predicated of a loan of Confederate currency, because the nominal amount of the notes advanced is larger than that of the obligation for their repayment. And thus the transaction, Proteus like, has the distinguishing faculty of assuming whatever form or shape the exigencies of the occasion may require. But the courts must look at the real nature and substance of the contract, and not at the name or title the parties or their counsel may be pleased to bestow upon it.

As I have just stated, it is insisted that this contract is a sale of corporate bonds, which the common council might make at any discount without trenching upon the statute against usury.

There is no doubt, whatever, that the owner of a note has the right to sell it for the most he can get; as he would have the right to sell any goods or wares he owned. But, on the other hand, it is quite as certain that no one has a right to make 580 his own note and sell *that for what he can get; for this, while in appearance the sale of a note, is, in fact, the giving a note for money. It is a lending and a borrowing, and nothing else.

It is said, in *Whitworth v. Adams*, 5 Rand. 333: "If A, wishing to raise money, were to make his note payable to B, and then go to B and offer to sell it to him; and B, supposing that a man might lawfully sell his own note, were to give the money for it, verily believing he was purchasing a note, and not lending his money on the security of a note, this would unquestionably be a loan; on the ground that he had intentionally done that which the law makes a loan. And this intention would, if the note were taken at a high discount, be a corrupt intent sufficient to vacate the contract."

This principle of law is in conformity with leading adjudicated cases, and is recognized universally by the elementary writers. *Parson's Mercantile Law* 265; *Brummel & Co. v. Enders, Sutton & Co.*, 18 Gratt. 873; *Brockenbrough's ex'ors v. Spindle*, 17 Gratt. 43.

The reason of this rule is obvious. In every sale there must be not only parties, but a thing to be sold. A man cannot sell his own promise to pay, because such an obligation is not the subject of sale. So long as it remains in his own possession it is payable to no one, and binds no one. It is the delivery alone that gives it vitality, and when delivered it then becomes, and not till then, a promise to pay according to the contract. The sale of the maker's own note to the party advancing the money for it, is precisely the same as an advance of money upon a promise to secure its repayment by the execution of a note. All the authorities agree that in either case the transaction is a loan, whatever may be the intent of the parties.

That these principles apply as well to corporations as to individuals, is conceded by all the authorities I *have
581 seen. Indeed when corporations effect loans they do so by sales of their bonds or certificates. This is the customary mode recognized in the commercial world, and by the statutes conferring authority to borrow money.

The purchaser of such bonds understands he is lending his money to the corporation. He knows that the offer to sell is but an application for a loan, made to any who have funds to invest upon the faith of such securities. The case of *Rogers v. Burlington*, 3 Wall. U. S. R. 654, is a direct authority upon this point. The city of Burlington loaned to the Burlington and Missouri Railroad Company \$75,000, in its own bonds. A part of these bonds passed into the hands of holders for value, and not being paid, were put in suit. It was insisted the city was not responsible, because the bonds shewed, on their face, they were issued as a loan of the credit of the city, and not for any municipal purpose. The Supreme court, in answering this objection, said, "Technically speaking, it may be said that the transaction, as between the company and the city of Burlington, was in form a contract of lending; but as between the city of Burlington and the persons who purchased the bonds in the market, it was undeniably a contract of borrowing money. The cases of *Mitchell v. Burlington*, 4 Wall. U. S. R. 270, 275; *Middleton v. Commissioners of Allegheny County*, 37 Penn. R. 237, are to the same effect. *Bissell v. City of Jeffersonville*, 24 How. U. S. R. 289, 290; 34 Penn. R. 511.

I hold then that the "town of Danville" intended to effect a loan; that the advertisement of the sale of the bonds or certificates of the corporation was in law an application for a loan; and the sale subsequently made was the final negotiation and settlement of the terms of that loan, and the certificate given the security provided for its repayment; and further, that Sutherlin,
582 as a matter of law, must be held to be aware of the *nature and legal effect of the contract to which he was a party. The certificate given him purported, on its face, to be issued in conform-

ity with the act of March 7th, 1862. That act authorized the common council to contract loans and issue certificates for the same; but it gave no authority to purchase depreciated paper, or to exchange its obligations for other securities. If the common council could buy Confederate currency, could traffic in depreciated paper money, what was to prevent its acquiring, by purchase or exchange, Confederate or individual bonds; what to restrain it from dealing in land, stocks or merchandise? It can scarcely be necessary to say that no such power is conferred upon the corporate authorities of the town of Danville; that the rule applicable to all other corporations applies to them; that is, they exercise such powers only as are within the terms of the charter. If the common council of Danville, under the authority "to contract loans," may sell the corporation bonds or certificates, it is only because such sale amounts in law to, and is substantially, a loan. It is only by considering this transaction a loan that the courts can hold the certificate in question obligatory upon the town of Danville. Once divest it of the features and properties of a loan; ascertain judicially that it is entirely a different thing, it will be vain to search the charter for a provision under which this transaction can be sustained. When the plaintiff establishes that his contract is not a loan, he also establishes that it was made without authority.

But it is said that the law infers a loan only where money is advanced upon the discount of the maker's own note; and that Confederate currency was a mere commodity, and not money. I am free to admit, according to the uniform decisions of this court, that money, in a legal sense, is the coin issued or adopted by the sovereign authority, and made a lawful tender

583 *in the payment of debts. It must be remembered, however, that the usury laws apply to the loan of money or other thing. And, in ascertaining whether the transaction be a loan, it is difficult to perceive any substantial distinction between the sale of a note by the maker for money, and a sale for currency, received and recognized as money. When the cases say that an advance of money to the party offering his note for sale constitutes a loan, I think it is quite certain they mean, not only coined money and legal tender notes, but anything which passes current as the common medium of exchange, and measure of value for other articles, whether it be government issues or bank notes. Money is defined, by writers on commercial law, to be cash, that is, gold or silver, or the lawful circulating medium of a country, including bank notes when they are known and approved of, and used in the market as such. *Burwell Law Dictionary*; *McCulloch Com. Dictionary*, Title Money & Banks.

In *Miller v. Race*, 1 Burr. R. 452, 457, Lord Mansfield said, in reference to bank notes: "They pass by a will which bequeaths all the testator's money or cash.

They are never considered as securities for money; but as money itself. They are not goods nor securities, nor covenants for debts; nor are they so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money, to all intents and purposes." See also *Mann v. Mann's Ex'or*, 1 John. Ch. R. 231.

At the time of this transaction Confederate currency was the only money circulating in Virginia. It was exclusively used in the payment of taxes, State and Confederate, and in the purchase of property. For it the merchant sold his goods, the broker his gold, and the farmer the products of his farm. By the laws of the land, by general consent, and in a large majority

584 *of the transactions of men, it became a circulating medium and a standard of value. For nearly four years it performed all the functions of money, and was so treated by the people, not only from motives of patriotic devotion to the cause in which they were engaged, but by the command of a government as potential in Virginia as that which now bears sway over the people. This view is sustained by the opinion of this court in *Dearing's Adm'x v. Rucker*, 18 Gratt., *Joynes, J.*, said it was undoubtedly true that the "parties in that case, and the people generally, dealt with Confederate notes, to a certain extent, as money. They regarded their relation as that of debtor and creditor, and not that of buyer and seller." In *Thorington v. Smith*, 8 Wall. U. S. R. 1, it was said by *Chase, Ch. J.*, "that Confederate notes were the only measure of value which the people had, and their use was a matter of absolute necessity." It was argued that, as these notes were not convertible into gold, and were greatly depreciated, they cannot be treated as money. At an early period of the war, Confederate notes were at par, and readily converted into gold. According to the test suggested, they were at that period money, and so governed by the laws that regulate loans of gold and silver. In September, 1863, however, when at a depreciation of ten for one, they ceased to be money, and became a mere commodity. And the transaction, which, in 1861, would have been a loan, must, if occurring in 1863, be treated as an exchange of securities or the sale of a commodity. And yet, in 1863, Confederate currency constituted the circulating medium of the State more generally than in 1861. True, the depreciation was greater in the latter period; but the only effect of such depreciation was an enhancement of prices: gold and all other commodities commanding higher nominal rates than in 1861.

The counsel for the appellee place 585 much reliance *upon a remark made by Judge Rives in *Boulware v. Newton*, 18 Gratt. 708, to the effect that the transaction there was not to be treated as a loan, but as an engagement to pay for a commodity. Now, this remark, as applicable to that

case, may have been, and no doubt was, correct. But I am sure Judge Rives did not mean to assert that every advance of Confederate money, upon the discount of a note, is to be regarded as the sale of a commodity; that proposition is not sustained by the decisions of this court. It is especially in conflict with the opinions expressed by all the judges in *Dearing's Adm'x v. Rucker*. I have already quoted the views of Judge *Joynes*. *Moncure, P.*, said: "The lender had no idea of selling, nor the borrower of buying, Confederate notes; but the transaction was purely one of a lending and borrowing of money, having reference to Confederate notes as a standard of value, and as a medium and measure of the loan; because, and only because, it was then the only, or almost only, currency of the country."

The same rule prevails in regard to a loan of Confederate notes as any other currency. Nor does it require argument or authority to show that the same rule prevails in regard to the loan of currency as the loan of coined money. Whether it be a bank note, or a Confederate issue, or stock advanced, once stamp the transaction with the impress of a loan, and the law denounces it as usurious if a greater value than the legal rate of interest be reserved. This proposition is sustained by the entire current of American authorities. See *Bank of State of North Carolina v. Ford*, 5 Ired. R. 692; *Cleveland v. Lode*, 7 Paige R. 557; *Bondurant v. Commercial Bank Natchez*, 8 Smedes & Marsh. R. 533, 544; *Maury v. Ingraham*, 28 Miss. R. 171; and the cases collected in a note to the 3d vol. *Parsons on Contracts*; *State Bank of North Carolina v. Cowan*, 8 Leigh 238.

586 *Another view, urgently pressed upon our attention, requires a somewhat extended notice. It was said that an anomalous and extraordinary state of affairs existed during the war; that gold was subject to sudden fluctuations; that it disappeared from circulation and ceased to be a standard of value, and should not be applied as a standard to Confederate contracts. The scarcity of the precious metals, and the fluctuations to which they were subject during the war, though unusual occurrences, are by no means without precedents in history. In 1797, the Bank of England suspended specie payments, and did not resume until 1822. Gold and silver disappeared from circulation; contracts were not made with reference to them, nor payments received in them; and during all that time, a period of immense operations in commerce and war, the entire business and revenue of the country were carried on with the aid of paper currency alone.

It is a fact familiar to all, that in 1836 the banks in this country suspended specie payments, and did not resume until 1842 and 1843; that gold and silver ceased to circulate as money, and the country was flooded with depreciated bank paper, producing unusual distress and embarrassment. In the State of Kentucky, at one period, the issues

of the Bank of the Commonwealth constituted almost the entire circulating medium of the State, and gave rise to innumerable controversies for alleged violation of the usury laws. Illustrations might be drawn from the States of Mississippi and Illinois also, at certain periods of whose history the precious metals disappeared from the channels of circulation. In none of these instances has it been held, so far as I am informed, that gold and silver ceased to be the standard of value; that contracts then made were not to be tested by the rules of law applicable to contracts made in times more auspicious for the debtor class of the community. Look at the Federal

587 States during *the recent struggle.

With all their vast wealth, credit and resources, their currency rose and fell with the rapidly-varying fortunes of the contest, until, at one period, its depreciation was in the proportion of two dollars and ninety cents for one. This fact, alone, incontestibly shows that gold, as a circulating medium, was withdrawn from the channels of trade and commerce, and was the subject of traffic and speculation, as other commodities.

With us of the south, after the disastrous campaigns of 1862, the depreciation was more rapid; but there was not a period during the war when the currency was not available in the purchase of gold, either from individuals or the government. We say that the Confederate treasury notes were depreciated. How depreciated? With reference to what standard? By what rule are we to ascertain the extent of the depreciation? Certainly not by other commodities. Provisions and the means of subsistence were scarce, difficult to be obtained, and commanding exorbitant prices. On the other hand, lands and slaves, thrown upon the market by the necessities of those who were forced into the armies or were driven from their homes, were purchased without difficulty at extremely low rates. The price of commodities is not a safe or reliable standard. All must agree that gold was the standard of value during the earlier period of the war. When did it cease to be such? When did the usury laws cease to operate? What day, or month, or year, in that eventful history is to be designated, when it may be said that all contracts for the loan of money or currency, before such day, are to be controlled by the general rules of law; but if made thereafter, they shall be pronounced legal and valid, no matter how exorbitant the rate of interest reserved. The principle asserted will constrain us to proclaim a suspension of the usury laws in regard to all contracts made during the war. The same rules

588 *of construction must be applied to loans of bank paper, and even of gold and silver. For how can usury be predicated of any contract in communities having no standard of values? It was attempted to make Confederate notes a legal tender in the payment of debts; but the effort was unsuccessful, and the people of the state

could not fail to understand that gold and silver were the only constitutional currency, and, as such, legally, the representative and standard of values.

This principle has been repeatedly recognized, both by the legislative and judicial departments of the state. The acts of 1865 and '6 authorize the nominal amount of Confederate debts to be reduced to their true value; and this court, in Dearing's Adm'x v. Rucker, 18 Gratt., unanimously applied the gold standard in ascertaining the scale of depreciation. Were this a Confederate contract, we should have no difficulty in applying the same standard, in order to fix a just measure of recovery. Are we precluded from so doing because the lender has imposed upon the borrower the hard alternative of paying the debt in United States currency? Is the creditor to be heard, in one breath, to say there was no standard of value, no constitutional currency in existence during the war, to screen his contract from the arm of the law, and in the very next breath to claim that this contract was made with reference to that very standard, and that very currency he seeks to repudiate. It seems to me we must adopt the gold standard from sheer necessity. It is impossible to advance a step in construing contracts, settling controversies and rendering verdicts and judgments, without a resort to some standard. However scarce gold may have been, however fluctuating its value, it is the only safe and reliable standard for the adjustment of the contracts made during the war. Just or unjust, no other has been adopted by the courts.

589 *It has been said there can be no usury unless the parties know all the facts which constitute the usury; and in this case it does not appear that they were informed of the value of the Confederate notes when the transaction took place.

It is unnecessary to decide whether this proposition is law to the extent asserted. Concede that it is: is it to be presumed, is the idea to be for a moment entertained, that the common council, entering the market to buy or borrow \$40,000 in Confederate currency, and that Sutherlin, having in his possession \$20,000 in like currency to lend or sell, were not apprized of the value of the money or the commodity in which they were dealing. Were they alone ignorant of facts relating to this currency, well known to every person in Virginia possessed of ordinary intelligence? Not only the depreciation, but the extent of the depreciation, forced itself, daily and hourly, upon the observation of all men at that eventful period. It is a part of the public history of the country. How does it appear in any case that parties are informed of the market value of the article in which they traffic? I have seen no decision which goes to the extent of holding that this fact is to be established by independent, affirmative evidence. It seems to me the courts have the right to infer that parties dealing in depreciated paper, making it the subject of sale or loan, are aware of that deprecia-

tion. Any other inference would attribute to them the grossest ignorance of matters about which they are presumed to be informed, and tend to encourage usury, by adopting rules calculated to screen it from judicial investigation.

It is said, however, there is no case where an obligation, given for a depreciated currency, in greater nominal amount than the obligation, has been adjudged usurious. The researches of the counsel have not pro-

duced a case in which it has been de-
590 cided that such an *obligation for that reason is not usurious. What real difference is there, with reference to the question of usury, between the loan of \$1,000 in notes, depreciated 25 per cent., taking the obligation of the borrower for that sum, and the loan of a like amount in notes depreciated 50 per cent., taking the obligation of the borrower for \$750, with interest. In the one case the lender contracts to receive \$1,000 for \$750 in value, and in the other \$750 for \$500 in value. In either case the lender unlawfully gains, and the borrower loses, the difference, by the terms of the agreement. In *Parker v. Ramsbottom*, 5 Dowl. & Ryl. 138; 3 Barn. Cres. R. 273, the defendants being indebted to the plaintiff for £18,000 in stock previously advanced, it was agreed between the parties that the defendants should be released from replacing the stock; and that, instead thereof, they should account for it in money, at the value of £10,000, paying six per cent. thereon. At the date of this agreement the market value of the stock was only £8,400. The court held that the statute evidently applies to loans of goods or anything that is called money's worth, as well as loans of money itself; and, as the plaintiff was lending £18,000 in stock worth £8,400 only, and stipulating to be repaid £10,000, with legal interest on that larger sum, the contract was usurious. The authority of this case has never been questioned, so far as I am informed. In *Judy's Adm'r v. Gerard et al.*, 4 McLean R. 360, the defendant had executed his note for \$500, in consideration of an advance of \$1,000 in notes of the Bank of Illinois, worth only thirty-seven and a half cents, as compared with gold. It was held that the contract was not usurious, not because, however, the nominal amount advanced was greater than the note, but for the reason that the transaction appeared to be a bona fide sale of the Illinois notes.

These cases show that, to bring a
591 contract within the *statute, it is only necessary it should be for the repayment of a greater value than the amount of the loan, with an advance thereon at the rate of six per cent.; and the result is not changed, in the slightest degree, by the fact that the nominal amount lent is a larger quantity than that of the obligation executed for its repayment.

It is also contended that the transaction is a contract of sale, in which Sutherlin was the vendor and the town of Danville the vendee of Confederate treasury notes as a mere commodity.

It is not denied that Confederate notes, besides being a currency, may have been the subject of sale under all the modifications that affect dealings in other articles; but such cases were exceptional and not general. As was said in *Dearing's adm'r v. Rucker*, the people generally dealt with Confederate notes as money, regarding their relation as that of debtor and creditor, and not that of buyer and seller. The opinion of the Supreme court of Kentucky in *Warfield's adm'r v. Boswell*, 2 Dana R. 224, though specially directed to the subject of depreciated bank paper, has a strong application to this question here. The Chief Justice said, "Although bank notes current as a circulating medium, like those of the Bank of Kentucky in 1822, are vendible, nevertheless they are more frequently the subject of loan than of sales on credit; and when they are actually sold on credit it is not reasonable to presume that the purchaser will agree to give double their value and interest also. We cannot doubt that when one man lets another have, as in this case, depreciated current bank notes of the value of \$1,500, upon a promise to refund the nominal amount and legal interest in specie, nothing else appearing, the transaction should be deemed prima facie a loan. This would be the only probable or rational conclusion or deduction from the intrinsic character of such isolated *facts."

A, desiring to use immediately \$100 in bank notes worth only \$50 in specie, applies to B for the notes. B delivers to him a bank note of the denomination of \$100, worth only \$50, and takes his note for \$100 in specie, payable in one year, with legal interest from date, no other fact appearing. A affirms the transaction a loan, and B insists it was a sale. Can there be a reasonable doubt that loan is impressed on its face? It has all the features of a loan, and if it should not be deemed a loan until the contrary be made to appear by proof aliunde, no transaction could ever be considered a loan unless the words borrowing and lending be expressly used in the contract."

In the present case, Sutherlin did not propose to sell nor the town of Danville to purchase, Confederate notes. A sale of currency was not contemplated by either of the parties. The certificate was the subject of negotiation and sale, and the Confederate notes the medium of payment. Throughout the transaction the notes were treated as money. They were advanced on the one hand and received on the other under a statute authorizing the corporation of Danville to borrow money; and they were to be used as money in the immediate purchase of property. The special verdict finds, as fact, that the president of the common council was authorized to make sale of the certificates; that the sale was made; that the certificate in question was sold to Wm. T. Sutherlin, he being the highest bidder; that he paid therefor \$11,050 in Confederate notes to the agent of the corporation. In the face of these plain facts, this court is asked to assume that Sutherlin, in bidding for the certificate, was in fact making sale

of his Confederate notes. It is true, upon well settled principles of law, that the corporation of Danville could not sell its own promise to pay. We are not, therefore, authorized to say that Sutherlin sold, or intended to sell, his currency without a
593 fact found *by the jury, or even a scintilla of evidence in the record, warranting such a conclusion.

Again, it has been urged that this was a mere exchange of securities. The case of the Bank of United States v. Waggener, 9 Peters U. S. R. 378, was strongly relied on in support of this proposition. As this is the leading case cited, it may be proper to examine it with care and attention.

Waggener executed his note to the Bank of the United States, at Lexington, for \$5,000. The consideration of this note was an advance by the bank to Waggener, of the Bank of Kentucky notes, to the nominal amount of \$1,100, and a check upon the Bank of Kentucky for \$3,900, which was paid in notes of like description. These notes were then depreciated 40 per cent. At the time of this transaction, the Bank of Kentucky was indebted to the United States Bank in the sum of \$10,000, and was credited with the amount of the check just mentioned, and a short time thereafter paid the Bank of the United States the balance of the \$10,000 in gold. The Supreme Court of the United States held the contract was not usurious. The decision was based upon the ground: 1st, there was no device to evade the statute; 2d, whether the transaction was a loan or exchange of securities, there was no usury, because the parties estimated their respective securities as of equivalent value, and the notes of the Bank of Kentucky, though depreciated in market, were of the full value of their numerical amount to the United States Bank, and were so treated by the borrower. The Bank of Kentucky was solvent and able to pay its debts, and the holders of its notes could have recovered the amount thereof, with interest in gold, from the Bank of Kentucky. The plaintiffs could not, by the negotiation, entitle themselves to more interest than they were already entitled to against the Bank
594 of Kentucky. The court, in commenting upon the instruction *asked for by defendant, say, it was objectionable because it put a bar to the plaintiff's recovery, on the ground that depreciated bank notes were loaned at their nominal value, without reference to the fact whether there was a design to commit usury, or whether the notes were in reality of a higher intrinsic value to the parties; which were the turning points in the case.

If it appeared, in the case under consideration, that Sutherlin's Confederate notes were of equal value with the certificate, and were so treated by the parties; that Sutherlin could not, by the negotiation, entitle himself to a higher interest than he was already entitled to against the Confederate government; and that the amount of these notes might, by the use of due diligence, have been recovered in gold; the cases

might be regarded as analogous, and brought under the influence of the same principles. But, in point of fact, the securities were not of equal value, and were not so considered by the parties. Two dollars and twenty-one cents of Confederate money were estimated as of equal value with one in gold, when the real value was in the proportion of ten for one. In other words, Sutherlin advances to the town of Danville \$10,000 in currency, bearing no interest, worth \$1,000 in gold, and takes the obligation of the town to repay \$5,000 in gold or legal tender notes, with interest thereon from date, payable semi-annually. He therefore lent a thing of the value of \$1,000 only, stipulating for a return of \$5,000 with interest. No interest was due and payable upon the Confederate notes; nor could they, by the exercise of any sort of diligence, have been converted into gold at their full value, as they were only payable two years after the ratification of a treaty of peace.

All the cases in which the courts have held the transaction an exchange of credits or securities, show that the securities exchanged were bona fide estimated by the parties as of equal value, and the de-
595 preciated paper *advanced as readily convertible into coined money. In the absence of these features, an advance of depreciated paper at its nominal value, to the party offering his note for the same, is called a loan unless evidence is adduced to satisfy the mind that something else was intended. In the case already cited, the Supreme Court of the United States say, "If A and B mutually execute their obligations to each other for \$100 with interest, usury cannot be predicated upon such a transaction. If, however, one note bore interest and the other did not, or if one charged a commission for the use of his note, such a transaction would be called a loan, and usurious, whatever the parties might term it."

In Dry Dock Bank v. American Life Insurance Co., 3 Comst. R. 344, the court use this language: "The company advanced their post notes, for these certificates are nothing else, as cash, at their nominal value, in the same manner that a bank of issue would receive and discount a note for a customer. In both cases there would be an exchange of promises. In each case the property in the note issued would vest in the receiver. In neither case would any money be paid. But in both cases a substitute, by the understanding of the parties, is advanced by the lender, and accepted as money by the borrower. Every transaction of the kind, when analyzed, will be found to be a loan of money, whether designed or not, under the form of exchange."

In Schermerhorn v. Talman, 14 New York R. 93, 117-18, Seldon, Judge, said: "It may be said, admitting a mere exchange of obligations not to be a sale, neither is it a loan, and hence it is entirely without the statute of usury, unless brought within it by extrinsic evidence that an evasion of the statute was intended. It is true that, literally, the transaction is neither a sale nor a

loan, but an exchange. I apprehend, however, that, legally, in reference to the question of usury, it must be regarded as
596 a loan or as a sale. No *other distinction has ever been applied to such transactions by the courts.

In *The State Bank of North Carolina v. Cowan*, already cited, no application was made for a loan, but an advance of depreciated paper requested. It was claimed in the argument, that the transaction was a mere exchange of securities. But not a word fell from either of the judges that gave countenance or support to that proposition. The decision was based upon the ground that the funds in which Cowan's note was payable, though at par when the contract was made, might be depreciated in market to the extent of the bank paper loaned, by the time Cowan's note arrived at maturity. It was also said, these notes of the bank, though then depreciated, were the representatives of so much coin, and Cowan might instantly, upon receiving them, have demanded the coin from the bank. But for these features, the contract would have been held a palpable violation of the usury laws.

It seems to me that this case is authority for the proposition that this contract cannot be sustained in Virginia, upon any pretence of an exchange of securities.

I can well understand that if two persons mutually execute their obligations to each other in like sums, such a transaction is ordinarily a mere exchange of credits. But it is difficult to understand how an advance of depreciated bank notes to a person executing or transferring his own obligation therefor, can be termed an exchange of securities. In the first place, according to the authority of Lord Mansfield, a bank note is not considered a security for any purpose. In the second place, as a man cannot sell his obligation, so neither can he exchange it. There is nothing in existence that can be the subject of exchange. A sale is a transmutation of property from one man to another for money. An exchange is a
597 transferring of *goods or property by way of barter. Chitty on Contracts page . But the obligation of a person in his own possession is not property nor a security. When delivered it becomes simply a contract to pay, and nothing more. If it is not a contract to pay upon a sale, it must of necessity be a contract to pay upon a loan. A delivers to B his bond, and the latter delivers to A a chattel. The presumption is, that this is a sale of the chattel; because, ordinarily, a chattel is not the subject of a loan; and because the contract of A is to pay the price agreed on, and not to repay money loaned. This presumption will be rebutted by evidence shewing that a loan and an evasion of the statute were intended under color of a sale. But if A delivers to B his bond, and the latter, in return, delivers a bank note circulating as money, the presumption is, that the transaction is a loan, because such currency is usually the subject of loan rather than sale.

It is true the agreement is not to repay the bank note or notes of like kind. It is, however, a contract to repay the money of which the bank note is the representative. This presumption of a loan may also be rebutted by evidence shewing that the bank note was bona fide the subject of purchase and sale. If, however, the bond is the subject of negotiation and sale, then the transaction is a loan, for the reason, as I have heretofore endeavored to shew, that a party cannot sell his own obligation or promise to pay. The distinction between a purchaser of such an obligation and that of a third person, is founded upon the soundest principles of law. In the latter instance a subsisting debt is the subject of negotiation and sale, and the obligation is merely the evidence of the debt. Where, however, the party sells his own promise or obligation there is no debt in existence which can be the subject of sale. In such case the pur-
598 chase of the obligation *is simply an advance of money upon the security of the parties to the instrument. The transaction in law is a borrowing and lending, and nothing else. This principle is recognized by all the authorities. No solid reason has ever been assigned why the same rule is not applicable to an advance of currency constituting a circulating medium, and performing all the functions of money. With what reason can it be said that if a note is discounted for the maker, at par or below par in gold, it is a loan; if it is discounted 25 per cent. below par in legal tender notes it is a loan; but if bank notes or other depreciated currency be given for it, the transaction is not a loan, but a sale or exchange of securities? In either case, the object of one party is to lend; that of the other to borrow money or its equivalent. In the one case there is a loan of money; in the other a loan of currency—the substitute for money—so recognized and treated by the parties; and as such, the transaction is directly within the statute which applies to the loan of money or other thing. In the absence of evidence tending to impress upon the contract a different character, it seems to me, it is to be presumed, that an advance of a depreciated currency to the party executing therefor his own obligation, is a loan. This presumption, according to many of the adjudicated cases, is materially strengthened by the reservation of interest payable from the date of the contract. It is very justly said that different persons estimate paper money very differently; that one person, supposing it might be equal to specie on a particular day, might be willing to purchase it for his own note, payable at that period; but that a party purchasing upon such a contingency would scarcely contract for the payment of interest in the meantime; and that such a reservation is a strong indication of a loan, and, unexplained, should be conclusive.

599 *In *Moore's ex'or v. Vance*, 3 Dana's R. 361, Judge Marshall, delivering the opinion of the Supreme court of Kentucky, said: "If there was any doubt that the

transfer of the executions was intended as a loan, the fact that the party was to pay interest upon their nominal amount from the date, which would be considered as conclusive if the bank notes themselves had been transferred, must also be taken as conclusive as to the transfer of the executions.

The present transaction, tested by these rules, must be considered a loan; and as, by the terms of the agreement, a greater value is reserved than legal interest, it must be held to be a usurious loan.

In conclusion, it is proper to state there is nothing in the record tending to show any corrupt motive or intention on the part of the plaintiff. I have no doubt the contract was made without a thought on his part of violating the statute against usury. It is well settled, however, that if the lender intends to take more than legal rate of interest, the law will infer the corrupt motive, however innocent the parties may be of any design to violate the law.

In *Marsh v. Martindale*, 3 Bos. & Pull. R. 154, Lord Alvanley said: "Though the jury have found that Sir Charles Marsh did not think he was acting contrary to law, there is nothing in that finding to prevent us from examining the transaction and declaring it to be corrupt, if it appear to us to be so in point of law, without sending the case back to a jury to find the corrupt intent. It is needless to multiply the authorities upon this point, as the law is too well settled to be called in question at this day. The principle pervading the decisions, almost without exception, show that the facts being agreed by the parties, or found by the jury, or arising upon a demurrer to the evidence, the inference
600 *of the law as to the intention of the parties and the character of the contract devolves on the court."

CHRISTIAN, J., concurred in the opinion of Staples, J.

MONCURE, P., dissented.

Judgment reversed.

601 *City of Lynchburg v. Norvell.

Same v. Slaughter.

Same v. Eames, two cases.

Same v. Phelps & Pamplin.

March Term, 1871, Richmond.

Absent, JOYNES and ANDERSON, Js.*

1. *Municipal Securities—Usury.*†—City bonds, payable thirty years after date, and bearing six *per cent.* *per annum* interest from their date, sold in 1864, for Confederate money, at the rate of 2½ for one, when Confederate money was at the rate of twenty to one for gold. This is usury.

*JOYNES, J., was sick, and ANDERSON, J., was interested in the question.

†See 21 Am. & Eng. Enc. Law, 1029; monographic note on "Usury" appended to *Coffman v. Miller*, 28 Gratt. 608.

2. *Same—Same.*—The fact that these bonds might be paid in the currency which at the time they fell due, would be taken by the State for taxes, does not constitute such a contract of hazard as relieved it from the taint of usury.

These are actions brought by the appellees in the Circuit court of Lynchburg, against the city of Lynchburg, to recover interest due upon bonds issued by the council of the city. By agreement of the parties, the causes were heard together by the court, without a jury, and the defendant was allowed to prove anything, under the general issues, which might be proved under any proper pleas; and each party was to be allowed to object to any testimony, if not admissible in his case.

602 *It appears that, in 1864, there was great excitement in the city of Lynchburg on the part of many persons who were unable to provide food for their families, and it seemed probable that it would terminate in some public disturbance. In this condition of things, the council of the city, in June 1864, resolved to sell fifty thousand dollars of the bonds of the city, bearing interest at the rate of six per cent. per annum, and payable in not less than thirty years from their date. Accordingly, the bonds were sold at auction in August of that year, at an average of about \$249, in Confederate money, for \$100; when the difference between such money and gold was from twenty to twenty-five for one. The bonds, which were coupons, bore interest at six per cent. per annum, and were made payable at thirty years from their date. At the time these bonds were sold, it was announced by the president of the council, that they would stand upon the same footing as the old bonds of the city, and would be paid in such currency as was receivable at the time by the State for taxes; and they in fact brought about the same price as the old bonds. The plaintiffs in these actions were the purchasers of the most of them at the sale, though some of the bonds held by Eames were transferred to him by the purchaser; and that was probably the case with the bond held by the plaintiff Norvell.

The object of the sale of these bonds being to furnish supplies for the needy in the city, a store was opened, in which the supplies were sold at cost to all such of the citizens as required assistance.

It appears that, at the end of the war, there was probably goods enough in the store to have paid the principal of the bonds; but, to avoid a riot, it became necessary to continue the sale of the goods for some days for Confederate money.

The Circuit court rendered judgments for the plaintiffs; and the defendant excepted; and took the case *to the District court at Lynchburg; but that court affirmed the judgments; and the city of Lynchburg applied to this court for a supersedeas; which was awarded.

The council of the city has authority, in the name and for the use of the city, to

contract loans, or cause to be issued certificates of debt or bonds; but such loans, certificates or bonds shall not be irredeemable for a greater period than thirty-four years.

Ould & Carrington and Garland & Christian, for the appellant. See argument in the preceding case.

Kean, Kirkpatrick and Wm. Daniel, for the appellees.

1. Position of the cases.

These causes were tried by the court upon an agreement that all defences might be made, and all objections to the testimony taken.

This puts the plaintiff in error in the position here of a demurrant to evidence. *Clafflin & Co. v. Steenbock & Co.*, 18 Gratt. 847; *Ewing v. Ewing*, 2 Leigh 337.

This effectually disposes of the evidence tending to show that these bonds were issued for war purposes, which was disproved at any rate. It also establishes the good faith of the whole transaction, and confines the question of ultra vires to the charter, the ordinance and the bond. It also excludes all idea of a shift, contrivance or indirection, on the question of usury, and makes it necessary for the plaintiff in error to make out a case of usury per se.

We understand the questions now open to be—

1. That the issue of bonds was ultra vires.
2. That the bonds are usurious.

I. Upon the first of these questions, we submit—

1. That the governmental powers of a city are elastic. Richmond has no power to deal in liquors; yet, for the preservation of property and good order, she was competent, under special circumstances, to buy
604 all *the liquor within her limits.

Jones & Co. v. City of Richmond, 18 Gratt. 517.

The construction contended for on the other side is too narrow. In times like those in 1864, these local governments, necessarily, must do acts which, in ordinary times, they might not do.

1. The council were the judges of the necessity to provide funds for general city purposes, in Confederate States treasury notes.

2. They, in good faith, made what they call a sale of bonds; which was a mere mode of exchange of one security for the other, in order to get the benefit of the high premium bonds bore in Confederate States notes.

3. The universality of Confederate States notes shut them up to this mode of effecting a necessary end for the use, and preservation of the city and people.

Gould v. Town of Sterling, 23 New York R. 456, was not a sale of bonds. It was an issue in direct violation of a special statute permitting the issue for a special purpose.

Talmage v. Pell, 3 Seld. R. 328, was a speculation in State bonds by an insurance and banking company for traffic.

II. Upon the question of usury.

Usury is either express or by a shift.

The second—concealed usury—is excluded.

1. By the actual facts of the case, which show affirmatively that no such offence was contemplated by either side.

2. By the rule above referred to, that the plaintiff in error stands as a demurrant to evidence.

Observe:

1. There is no case where an obligation given for a depreciated currency in greater nominal amount than the obligation has ever been adjudged usurious.

2. It is doubtful whether usury can
605 be predicated at *all of a transaction founded upon a fluctuating, yet universal paper currency.

3. All the cases relied on by plaintiffs in error are of transactions in a depreciated currency, which existed along with a good one in actual use—such depreciated notes not being the real currency of the community—and this is always remarked on by the courts as proving the shift to conceal usury.

4. Gold was never referred to during the war as a standard of value. See *Joynes, J.*, in *Rucker's Adm'x v. Dearing*, 18 Gratt. 434.

Gold appreciated more rapidly than any other commodity: greatly more than lands, labor, breadstuffs, subsistence or apparel. Board at the Richmond hotels during the war could be had by foreigners who used specie funds, at a cost of from thirty cents to one dollar a day.

This fact, that gold was not a standard of value at all, is illustrated by this transaction. Lynchburg bonds, issued before the war, were worth 2½ to 1; gold 25 to 1. This \$50,000 of bonds would, at gold rates, have brought one and a quarter millions, which would have redeemed the entire funded debt of Lynchburg, at its then market rate, twice over. (That debt was about \$400,000.)

Again: The council saw in this state of facts a means of making a judicious financial operation. They sold or exchanged \$50,000 of bonds for \$125,000 of Confederate States notes, expended \$75,000 in supporting the city government without taxation, and so used the other \$50,000 that, at the end of the war, they had value sufficient to pay the whole issue of bonds in good money; which they did not do, only because, in order to avoid riot, they distributed over \$40,000 of supplies to the mob after the surrender, and realized \$8,000 to \$10,000 from the residue. This fact that, after using,

to avoid a year's taxation, three-fifths
606 of the proceeds *of these bonds, the proceeds of the residue represented the value of the bonds in good money at the end of the war, demonstrates that,

1. The council acted wisely, judiciously.

2. They understood the subject of relative values, in those times of dislocated standards, and their judgment was vindicated by results.

3. That the pretence of hardship is utterly without foundation.

4. That while, for purpose of scaling, gold is resorted to, it is only *ex necessitate*; and this the Legislature saw was often too unjust to be borne. Hence the amendment of 28th February, '67, to the scaling act.

5. That no such standard can properly be set up for the purpose of inferring a quasi criminal intent, and enforcing this penalty of confiscation on parties who never dreamed of violating any rule of law or morals.

Usury laws are for the protection of the weak against the strong. Here they are invoked by a government armed with unlimited power of taxation, against its own citizens, whose whole estates were at its mercy. Hence, if there is usury, it is by the dry letter of the law, not its spirit.

Again: The city gave its bonds; the defendants in error gave Confederate States notes. Suppose the city bonds were for gold. The exchange was in good faith, between parties capable, in law and in fact, of judging whether the contract was judicious. If the bonds were payable in gold, so were the Confederate States notes, and there was a legal probability that the Confederate States notes would be redeemed in gold in a year or two, and the amount was $2\frac{1}{2}$ to 1.

Such a transaction is not, *per se*, usurious. *Bank of United States v. Waggener*, 9 Peters U. S. R. 378; *State Bank of North Car. v. Cowan*, 8 Leigh, 238; *Boswell v. Clarksons*, 1 J. J. Marsh. R. 47.

Our case is stronger than any of these, because here the facts exclude the idea of any shift, and the premium ($2\frac{1}{2}$ to 1) makes a case essentially different from any case cited by our adversaries. We may safely say there is no case where a premium in depreciated money was given for a man's bond, ever adjudged usurious. *Bracken v. Griffin*, 3 Call 433, illustrates.

But this case differs radically from all those relied on by the plaintiff in error in a vital particular. Our bonds are not payable in money at all events.

These bonds were issued August 22, 1864. On the 14th October, 1863 (see Acts 1863-'4, page 1), the Legislature enacted that after the 20th of that month all contracts for the payment of money should be payable in such currency as the State was receiving at the time the contract became payable, unless some other medium was expressly stated in writing. Now, it was proclaimed at the bidding that these bonds would be payable in whatever was current in Virginia when they matured. Thus, by the law as well as by express understanding of the parties, these bonds had imbedded into their very bodies and constitution the quality of being payable, not in money, but in such currency as the State of Virginia chose from time to time to receive. At that very time she was receiving Confederate States notes. The interest which matured 1st January, 1865, was payable, and was actually paid, in Confederate States notes worth 60 to 1.

The question whether a contract is usurious is determined at the time it is made.

Pollard v. Baylor, 6 Munf. 433, and many cases.

Is there a judge or lawyer on earth who would, in August, 1864, have pronounced this a usurious contract, in view of these facts: the premium; the absence of any ascertainable standard of value; the universal prevalence of Confederate States notes—the act of October 14 making the bonds solvable in a currency then fluctuating, depreciating, changing, and, in the future, payable in no man could or can now say what?

This essential characteristic of these bonds puts them quite outside the principles on which they are assailed, and brings these cases precisely under the rules established in *State Bank of North Car. v. Cowan*; *Selby v. Morgan*; *Steptoe v. Harvey*, and *Boulware v. Newton*. The principal is at risk—not merely in a potential but in an actual legal and practical sense.

These bonds mature in 1894. Who can say how much value the bondholders will receive in interest, payable in any paper which this State makes receivable at its treasury from now till then. If interest had been paid in 1866, they would have received \$40.50 on the \$1,000. In 1875, a war with England may make the interest worth in gold half that sum. And in 1894, when the principal is payable, the bondholder may be under the necessity of receiving that in a medium as bad, or worse, than Confederate notes in 1864, dollar for dollar.

STAPLES, J. In these cases the ground has been taken that the plaintiff's bonds are contracts of hazard, and therefore not within the influence of the principles announced in the case of "*Town of Danville v. Sutherlin*," *supra*. In support of this proposition the act of 14th October, 1863, passed by the Richmond Legislature, has been cited and relied on. That act provides that any contract made on or after the 20th October, 1863, for the payment of money, shall be deemed to be for the payment of the sum, expressed or implied, in the currency which, at the time the contract becomes payable, shall be receivable in payment to the State, unless this intentment shall be expressly excluded. It is further provided, that the act shall continue in force until the expiration of six months after a treaty of peace between the Confederate States and the United States.

*It seems to me the meaning of this act is too plain to admit of discussion. The Legislature, no doubt, thought that contracts thereafter made, as a general rule, would be based upon Confederate currency as a standard of value. The object was to provide a simple rule of evidence by which such contracts might be discharged in the same kind of currency. This view is confirmed by the provision limiting the operation of the act for six months after a treaty of peace, during which period it was supposed Confederate currency would constitute the sole circulating medium of

the country. It is also confirmed by another act passed a short time before, at the same session, providing that Confederate notes should be thereafter receivable in payment of taxes and other public dues. Thus one act declares that Confederate currency shall be receivable in payment of all State dues; another closely succeeding declares that all contracts, after a certain period, shall be presumed to be payable in such currency as the State may receive. The two construed together unmistakably indicate the legislative intent. It is clear that the act was intended as a measure of relief and protection to the debtor class. Such was the understanding when the act was passed, and such has been the construction given to it ever since.

Conceding, however, that these bonds are payable in such currency as the State may receive when they mature, is that such risk or hazard as relieves the contract from the taint of usury. It is well settled, that where, by the terms of the agreement, the repayment of the loan depends upon the happening of contingent events, or is to be made in a currency of fluctuating value, so that the lender may receive nothing, or something less than his principal and legal interest may amount to, the contract is not liable to the imputation of usury. Such loans are not within the statute, because

the excessive premium is regarded as
610 a compensation *for the hazard, and not for the forbearance. Transactions of this character, in fact, are not loans, but a species of wager. The lender, in making the contract, looks to the risk, and fixes his premium by his estimate of that risk. And the question arises in such cases, is this hazard encountered by the lender, a real, substantial hazard, or is it merely colorable? If the latter, it will not take the case out of the operation of the statute, where the substance of the contract is a borrowing and lending. In the *Earl of Chesterfield v. Jansseen*, 1 Atk. R. 301, it is said the true distinction is between a colorable and a fair and absolute hazard of the principal money. If the lender has so made his agreement, he is secure from loss, and has a chance of gain. This, by taking away the contingency, deprives the transaction of its legality. *Barnard v. Young*, 17 Ves. R. 44; *Steptoe's Adm'rs v. Harvey's Ex'ors*, 7 Leigh 501.

In many cases the courts have held the contracts to be usurious, in consequence of the slightness of the risk, though the loans were upon their face contracts of hazard. *Reynolds v. Clayton*, 2 Anderson R. 15; *Mason v. Abdy*, 3 Salk. R. 390; *Gibson v. Fristoe*, 1 Call 62. These are acknowledged principles of law. How do they affect the contracts under consideration? The only risk the plaintiffs incur of the loss of their claim, is that of the insolvency of the corporation. That, however, is a hazard every lender incurs in any case; but it does not enter into the definition of legal hazard, according to all the authorities.

The plaintiffs possibly run some risk of

receiving less than the amount advanced by them; but it must be admitted to be extremely slight. It is within the bounds of possibility, but altogether improbable. The plaintiffs loaned about ninety-two thousand dollars in Confederate notes, of the value of \$4,000 in gold, stipulating for the repayment by the sum of
611 *\$37,000 in gold or legal currency, with interest thereon from the date of the contract. This interest amounts to \$2,200 annually; and, by the time the bonds mature, the plaintiffs will have received, in the way of interest alone, a sum nearly ten times the value of the loan, including principal and interest. And this enormous premium is to be paid before it can be ascertained in what sort of currency the principal is ultimately payable. The interest, for which these suits were instituted, is more than sufficient to repay the amount advanced by the plaintiffs.

Whatever may be the condition of the currency when the bonds mature, the plaintiffs have made themselves secure against loss by the reservation of interest, unless we are to assume that the State, at the expiration of thirty years, and in the meantime each successive year, will continue to receive a highly depreciated currency in payment of her dues. It is idle to say that the parties anticipated or apprehended any such result. If so, why was the enquiry made on the day of sale, whether the bonds were payable in Confederate currency? Why was the assurance given they would be paid in such currency as the State might receive when the day of payment arrived? Why was it made known to the bidders that it was not the purpose of the corporate authorities to make any distinction between these bonds and other liabilities of the city contracted before the war? There can be but one answer to these enquiries. It was apprehended the bonds might be paid in the depreciated currency then in circulation. To remove this apprehension, to give confidence in these securities, the assurance was demanded and given that the common council were determined to make no distinction between these obligations and any other liabilities of the city.

In all real contracts of hazard, the lender charges for the risk, and not for the
612 loan. Here the supposed *risk is held out as an inducement to the lender to invest, and was actually supposed to enhance the value of the securities. Upon the face of the transaction, it is apparent that the usurious premium agreed to be paid was in consideration of the loan, and not of the hazard incurred.

It is very clear, the city of Lynchburg would not have sold its bonds at such an enormous discount, but for the extremities to which it was reduced. Threatened with violence from without and violence within, it could only raise money by sacrifices which no people will ever submit to except from stern and imperious necessity. The condition of the country, the apprehension of riots, mob violence, and outrage upon

the property and peace of the city, could alone have affected its credit to the extent disclosed by this transaction. We all know—universal observation attests—that as the difficulties and embarrassments of the borrower increase, the lender becomes more exacting in his terms, and will only part with his money at rates ruinous to pay.

I do not mean to cast any reflection upon the plaintiffs. They, no doubt, honestly believed they were purchasing the bonds fairly in open market. And so every lender believes, in discounting the paper of the needy and distressed debtor, hawked about the market in search of a purchaser upon any terms. But his faith in the fairness of the transaction has nothing to do with the question of usury. Upon every reasonable calculation, these plaintiffs for the \$4,000 in value advanced by them will ultimately receive little less than \$100,000 in a sound currency. If the statutes against usury do not reach cases like these, it is far better and wiser at once to repeal them, and leave to parties the right to make such contracts as their inclination or necessities may suggest.

It was argued that the city of 613 Lynchburg disposed *of the Confederate notes upon most advantageous terms. The answer is, it would have disposed of the larger sum, it ought to have received upon still more advantageous terms. It is well settled that the use the debtor may make of the money, or the profit he may derive from it, is not to be considered in ascertaining whether the transaction is usurious. In all such cases the true and only enquiry is, does the lender gain more than the legal rate. If so, the transaction is usurious, whatever may be the profit the borrower may realize. The rule is founded on good sense and sound principles of law, and is too well established to be now called in question.

For these reasons, I think these cases must be settled upon the principles laid down in the case of "Town of Danville v. Sutherlin," and the judgment reversed, as in that case.

CHRISTIAN, J., concurred in the opinion of Staples, J.

MONCURE, P., dissented.

Judgment reversed.

614 *The Manhattan Life Ins. Co. v. Warwick.

March Term, 1871, Richmond.

[8 Am. Rep. 218.]

Life Insurance Companies—Payment of Premiums Prevented by War—Effect.*—In July, 1857, W., of Richmond, obtains from the M. Ins. Co. of New York, through their agent in Richmond, a policy of

***Life Insurance Policies—Effect of War.**—The rule laid down in the principal case that an insurance contract is merely suspended and not abrogated by a war, which makes the parties alien enemies, and

insurance for the life of S. his debtor, forfeited if premiums not paid on the day. An endorsement on the policy says: no payment of premiums binding on the company unless the same is acknowledged by a printed receipt, signed by an officer of the company. Payments of premiums are paid and such receipts given, signed by an officer in New York, countersigned by the agent here to whom the money is paid, until 1861; when the premium is paid to the agent here, but only the receipt of the agent here given for it; and the company does not receive it. In July, 1862, W. offers to pay the premium to the agent here; but he declines to receive it, the company having directed him that the premiums must be paid in New York. S. dies in November, 1862. The M. Ins. Co. is liable to W. for the amount of the insurance, less the last premium which he had not paid.

This was an action of covenant in the Circuit court of the City of Richmond, brought in April, 1866, by Corbin Warwick, a citizen of Richmond, against the Manhattan Life Insurance Company of New York. The action was founded on a policy under seal, issued by the defendant to the plaintiff, bearing date the 23d day of July, 1857, whereby the Manhattan Life Insurance Co., in consideration of the sum of \$1,031, to them in hand paid by Corbin Warwick, and of the annual premium of \$1,031, to be paid on or before the 23d day of July in every year during the continuance of the policy, insured the life of Wm. Sidney Warwick, of the county of Powhatan, Va., in the sum of \$10,000, for the

that this suspension extends to the stipulation requiring payment of premiums at dates falling within the period of separation, is approved by several subsequent cases which cite the principal case as settling the doctrine on this subject. See *Mut., etc., Co. v. Atwood*, 24 Gratt. 501; *N. Y., etc., Co. v. Hendren*, 24 Gratt. 540; *Conn., etc., Co. v. Duerson*, 28 Gratt. 638; *Clemmitt v. N. Y., etc., Co.*, 76 Va. 361.

In *Mut., etc., Co. v. Atwood*, 24 Gratt. 502, the court said that the judgment in the principal case necessarily established the following propositions:

1. That a policy of life insurance, providing for the payment of annual premiums under penalty of forfeiture of all payments and all interest in the policy for non-payment, is not such a contract of continuing performance as is abrogated by a state of war, when the underwriter is a citizen of one of the hostile communities and the assured and insured are citizens of the other, but it is suspended merely.

2. In such case the non-payment of premiums by reason of the failure or refusal of the underwriter or his agent to receive the premiums in consequence of the existence of war does not vacate the policy.

In *Abell v. Penn, etc., Co.*, 18 W. Va. 423 *et seq.*, the court said that three essentially distinct views have been taken of the relative rights of the parties to an insurance contract providing for the payment of an annual premium by the assured with a condition to be void on nonpayment promptly, at the close of a war which made them alien enemies. The first view is, that the war did not dissolve the contract of insurance between the parties but only suspended the performance of it till the restoration of peace; and the failure of the assured to pay his annual

term of his natural life, for the sole
615 *use of Corbin Warwick. And the company bound themselves to pay to Corbin Warwick, his ex'ors, &c., the sum insured within ninety days after due notice and satisfactory evidence of the death of the said Wm. Sidney Warwick, and proof of the just claim of the assured under the policy, deducting therefrom the amount of unpaid notes given for premiums or loans on the policy, and all deferred premiums, if any, then existing.

Among other conditions not necessary to mention, it was provided, "in case the said Corbin Warwick shall not pay the said premiums on or before the day hereinbefore mentioned for the payment thereof, and in every such case, the said company shall not be liable for the payment of the sum assured, or any part thereof; and this policy shall cease and determine."

"And it is further agreed by the assured, that in case when this policy shall cease, or become, or be null or void, all previous payments made thereon shall be forfeited to the said company." "Not binding on the company until countersigned by J. B. Macmurdo, Richmond, and the advance premium paid."

On the back of this policy was endorsed, "no payment of premiums binding on the company unless the same is acknowledged by a printed receipt, signed by an officer of the company."

The parties agreed to waive a jury and to submit the whole matter of law and fact to

premiums promptly during the war did not avoid the policy. The principal case is cited as sustaining this view, but the West Virginia court thinks the view, on the whole, unsound.

The second view is that the contract is utterly annulled and vacated, and that neither the assured nor the company has any cause of action on the contract or in any other form by reason of the contract having been made and the premiums not paid during the war because of the illegality of paying or receiving them. The court cites *Dillard v. Manhattan, etc., Co.*, 44 Ga. 119, as the only *known* case sustaining this view, and says this second view is untenable, being not only contrary to reason, but being unsupported by authority.

The third view, intermediate between the first and second, regards the policy of insurance as not forfeited by the failure to make prompt payment of premiums falling due during the war, where the payment was prevented by the existence of the war, but that such policy cannot be revived after the close of the war unless the company so elect. *N. Y., etc., Co. v. Statham*, 3 Otto (98 U. S. R.) 24, is cited as sustaining this view.

The West Virginia court holds this last view, in the main, sound, but too favorable to the insurance company. The court held in this case (*Abell v. Penn, etc., Co.*, 18 W. Va. 400.) that where the failure to pay the annual premium is caused by a war which makes the underwriter and the insured alien enemies, thus making it unlawful for them to have any intercourse, that the policy is nevertheless annulled, if the company insists on it; but the assured is entitled to claim a return of the premiums actually paid after deduction has been made sufficient to

the court; and further, that the defendant, under the plea of "conditions performed," might rely upon any defence which could be made by special plea. And all the evidence having been submitted, the court rendered a judgment for the plaintiff against the defendant for \$8,969 (abating the last premium, which had not been paid, from the \$10,000, the amount of the insurance), with interest from the time the suit was instituted. The whole evidence was thereupon spread upon the record; and
616 *the defendants applied to this court for a supersedeas, which was awarded.

From the evidence it appeared that Wm. Sidney Warwick, the brother of Corbin Warwick, being indebted to Corbin in the sum of about \$20,000, the said Corbin Warwick, prior to the 23d of July, 1857, applied to the late James B. Macmurdo, then the agent of the Manhattan Life Ins. Co. in Richmond, Va., for a policy of insurance by that company, upon the life of Wm. Sidney Warwick; and the policy hereinbefore mentioned was obtained through Macmurdo.

The payment of the first premium was made when the policy was delivered. The payments of the premiums for July, 1858, 1859 and 1860, are evidenced by printed receipts, in which, after stating the receipt of the money, it says: not binding until paid and countersigned by J. B. Macmurdo, Esq., agent at Richmond. And they are signed,

C. Y. Wemple, Secretary.
J. B. Macmurdo, Agent.

compensate the company for the risk which it incurred of having to pay the amount insured, while the policy was in force.

In *Mutual, etc., Co. v. Atwood*, 24 Gratt. 507, the court said: "In support of the decision of this court in the case of *The Manhattan Company v. Warwick*, we have, then, the decisions of JUDGES BLATCHFORD and BOND of the Federal courts above referred to, the decision of the Supreme court of Kentucky in *New York Life Insurance Company v. Clopton*, 7 Bush 179; the decisions of the Supreme court of New York in *Cohen v. New York Life Insurance Company*, 50 N. Y. R. 610, and *Sands v. Same Company*, *Ibid.*, 626; the decision of the Supreme Court of New Jersey in the case of *Hillyard v. The Mutual Benefit Insurance Company*, reported in the second and third numbers of the *Insurance*, vol. 2, pp. 187 and 175; the decision of the Supreme court of Mississippi in the case of *Statham v. New York Life Company*, 45 Miss. R. 58, and the decision of our own Special Court of Appeals above mentioned (*N. Y. L. I. Co. v. White*, Ins. L. J. [Dec. 1873], 917). *Contra*, JUDGE EMMONS of U. S. Circuit court and the Georgia case alone.

"Without prolonging this opinion by a comment in detail on these cases, some of which have gone farther in the same direction than the case of *The Manhattan Company v. Warwick*, and without repeating what is better said in those cases, I feel justified in saying that the propositions of law above deduced from the decision of this court, in the case of *The Manhattan Company v. Warwick*, must be regarded as "*res adjudicata*," whether the payment of premiums be treated as in the nature of conditions precedent or not; for, the contract being

This C. Y. Wemple was the secretary of the company in New York; and the receipts are headed, The Manhattan Life Insurance Co. of New York; New York, July 23d, 1861. There is also a fourth receipt, for the premium due July 23d, 1861. This is a written receipt, dated Richmond, July 23d, 1861, and signed by J. B. Macmurdo, agent for the Manhattan Life Insurance Co. of New York. On this receipt Macmurdo endorsed that Mr. Warwick has paid the exchange on the above \$1,031 (8½ per cent.), \$87 64, thereby making the payment equal to New York currency. When this money was paid to Macmurdo, he stated to Mr. Warwick that he had no printed blanks, but that he would send on the money and get the receipt, and as soon as it was received he would give it to Mr. Warwick, and in the meantime he would give him the

617 written receipt. On the day the money was paid, Macmurdo wrote to C. Y. Wemple, the secretary of the company, saying that Mr. Warwick has paid the premium on his policy, \$1,031. Please send the receipt. And on the 5th of August following he wrote again, saying he had written on the 23d July, requesting Wemple to send him the company's printed receipt for Mr. Warwick's premium on his policy, and that he had not heard from Wemple. "As soon as I get the receipt I will make the remittance to you. I want also the receipts for Leroy J. Grant and Orange Bennett, due on the 10th instant." These letters were received by the company, but the printed receipt was not sent. It appears that Macmurdo, in August, 1861, purchased from R. H. Maury & Co., brokers in Richmond, a draft on a house in New York, but the draft was never presented, and the amount was paid by them to a receiver of the Confederate States; and the Manhattan Insurance Co. did not receive the premium.

When the premium for July 23d, 1862, came due, Warwick called on Macmurdo and offered to pay it in the same way he had paid the former; but Macmurdo declined to receive it, saying he had received instructions not to receive the money, or to renew the policy, or to continue it.

Beside the two letters of Macmurdo, above mentioned, he had written to the company under date of May 8th, 1861. In this letter he states that some of the persons insured in the company are in the army of Virginia, and they wish to know if they fall in battle,

lawful and merely suspended, but not abrogated by the war, the performance of the condition, which is part of the contract, is suspended also or excused."

Agencies—Effect of War.—In *Small v. Lumpkin*, 28 Gratt. 835, and *Hale v. Wall*, 22 Gratt. 430, the principal case was cited as establishing the proposition that limited agencies in the enemy's country may lawfully continue, provided they can be and are exercised without intercourse between the citizens or subjects of the contending powers—such as agencies to collect and preserve, but not to transmit money or property. See also, *Mutual, etc., Co. v. Atwood*, 24 Gratt. 497; *N. Y., etc., Co. v. Hendren*, 24 Gratt. 536.

will their policies be paid. Others, who are not in the army, may be killed whilst defending their families and firesides. How will they stand? He asks for explicit directions upon what terms he may insure all such persons; and do not fail to say, plainly and distinctly, whether the disruption of the late United States vitiates the policies issued by you through me; 618 *should any others apply for a war clause, say what premium I must charge.

Under date of May 30th, 1861, Wemple, the secretary of the company, writes to Macmurdo and says:

We are at a loss what to do in regard to the renewals for June, in consequence of a discontinuance of the mails, and the derangement of the exchanges, as well as the depreciated currency, in which we could not receive our premiums. Under the circumstances we must rely on their paying the premiums here, or make it optional with the insured either to pay the premium or have their policies cancelled, with permission to renew them at present rates at any time within a year, upon satisfactory evidence of good health; and in case of such risks being assumed by the assured, the company will allow and pay the value of such policy at the time of cancellation, in case of death during the time the policy has elapsed.

Under date of August 6, 1861, he again writes:

We are in receipt of your favor in reference to receiving the premiums on policies falling due, for which you have no renewal receipt; to which we cannot consent, as, under the present state of things, the premiums must be paid here or by draft on this city. We wrote you on the 30th of May last, that, in consequence of the discontinuance of the mails, the derangement of the exchange, and the depreciated currency, we would require the renewals to be paid here or by draft on this city, as we could not receive depreciated currency in payment of premiums. In addition to this, we now have the fact that the Southern Confederacy has passed an act declaring all property belonging to the north confiscated. You will, therefore, see the impropriety and impossibility of this company receiving its premiums in your city.

It has been the desire of the company to pursue the most liberal and favorable

Such agencies, however, to be lawful, must, it seems, be created before the war begins, for there is no power it is said to appoint any agent for any purpose after hostilities have actually commenced, and that to this effect are all the authorities. *Small v. Lumpkin*, 28 Gratt. 835.

Foreign Insurance Companies—Statutes.—As to the construction of the statute concerning foreign insurance companies, the principal case is referred to as authority in *N. Y., etc., Co. v. Hendren*, 24 Gratt. 546.

See generally, monographic *note* on "Insurance, Life and Accident" appended to *McLean v. Piedmont, etc., Co.*, 20 Gratt. 361.

619 course towards its southern *policy holders, consistent with the interest of the company, and make it optional with the assured either to pay their premiums or have their policy cancelled, with permission to renew, &c., as in his former letter.

Wm. Sidney Warwick, whose life was insured, died on the 22d of November, 1862; and at the time of his death was indebted to Corbin Warwick upwards of \$20,000.

The case was most elaborately argued by Steger for the appellants, and Lyons, Maury and John Howard for the appellee. But no justice can be done to the argument by the brief note of it which could be given by the reporter; and the questions involved are fully discussed by the judges.

ANDERSON, J. In July, 1857, the defendant in error, for his sole use, effected a policy of insurance for ten thousand dollars with the Manhattan Life Insurance Company, the plaintiffs in error, upon the life of his brother, William Sidney Warwick, of Powhatan county, Virginia, who was largely indebted to him. The plaintiff in error was a New York company, and the policy was effected through their agent in Virginia, J. B. Macmurdo. The premiums on the policy were punctually paid by the defendant in error to their agent in Richmond, up to July 23d, 1862: and the premium for that year, due on that day, he then offered to pay to said agent in New York funds; but he refused to receive payment, under alleged instructions from his principals not to renew or continue policies. Four months after, on the 23d of November, 1862, Wm. Sidney Warwick died; of which the company had due notice.

After his death the company refused to pay the policy to Corbin Warwick, and he brought this suit to recover it in the Circuit court of Richmond city, which rendered judgment in his favor for the amount

620 of the *policy, less the last premium.

And the company has brought the case here upon a writ of error.

The case presented by the record, is this in brief: They refused to receive the last premium when it fell due and was tendered, and now refuse to pay the policy because the premium was not paid; and, moreover, claim of the defendant in error a forfeiture of the premiums which he had paid, amounting to \$5,155, besides interest: and they invoke the intervention of this court to sustain them in these pretensions. If this was the contract, fairly interpreted according to its legal effect, however harsh in its operation upon the defendant in error, it must be carried out.

The first question, therefore, which we have to consider is, What was the contract between these parties? Without incumbering this opinion with a minute and critical examination of the policy, I will simply state what, in my opinion, the contract is, according to the legal import and effect of the policy. It is a contract of the company by deed poll, to pay to Corbin Warwick, for his sole use, ninety days after due notice

and satisfactory evidence of the death of Wm. Sidney Warwick, ten thousand dollars, for the consideration of \$1,031 in hand, paid by the said Corbin, and a like sum of \$1,031, to be paid by him annually, on the 23d of July, "for the term of the natural life of the said Wm. S. Warwick;" subject to defeasance upon the non-performance of various conditions minutely detailed; among others, the non-payment of the premiums, or either of them, on the day they fall due; in which case the company is not to be liable for the sum assured, or any part thereof; but the policy shall cease and determine. And it is further stipulated that, in every case where the policy shall cease or become void, all previous payments thereon shall be forfeited to the company.

The policy is one entire contract, 621 not from year to *year as premiums shall be paid, but for the whole term of the life of Wm. S. Warwick, upon condition, that if the annual premium is not paid on the 23d of July the policy shall cease and be void: as was held in *Ruse v. Mutual Benefit Life Insurance Co.*, 26 Barb. R. 556, upon the construction of the policy in that case; the terms of which are very much the same as in this. That case, and also the case of *Hodsdon, adm'x, v. Guardian Life Insurance Co.*, 1 Bigelow R. 219, 97 Mass. R. 144, fully sustain this construction. It is not a contract of indemnity, as a policy against fire, for a definite period; but it is a contract to pay a certain sum of money, for the consideration mentioned, upon the happening of an event which is inevitable, and only uncertain as to the time it may transpire.

It is a corollary from the contract, thus understood, that the company, when they executed this deed, assumed an obligation to pay the sum assured to Corbin Warwick, from which they could not be relieved by anything they could do or leave undone; but only by the act or omission of the assured. Consequently, the company could not relieve itself from this obligation, or subject the other party to a forfeiture, by refusing to receive payment of a premium; or by hindering or preventing the other party from paying it; or by any disability on its part to receive it, and which prevented the payment, which was not provided for in the contract. If the assured was at the place on the day, where and when payment was to be made, and where he had a right to make payment, ready and prepared to make payment, but was prevented by either of the causes mentioned, it would be unreasonable to say that he had incurred the forfeiture. And I think it is equally clear, upon reason and authority, that the company was not thereby released from its obligation to pay the sum assured. It would be a monstrous

perversion of law, and repugnant to 622 our every sense of *justice, to say that this company, after having received more than half the sum assured, could by this act determine the policy, hold on to the money they had received, and to say to their confiding victim, "you may

whistle to the winds for your merited reward, notwithstanding you relied upon our covenant and good faith to pay it."

And, although the case cannot be so strongly put, I think it is equally clear, that when the assured was involved in no default, but was at the place when and where payment was to be made, ready and willing to pay, but was prevented by the disability of the company to receive payment, from whatever cause, he having had no agency in producing it, the company is not entitled to claim the forfeiture, or to be relieved from its obligation to pay the sum assured.

The question upon this view of the case is suggested, was the assured, on the 23d of July, 1861 and 1862, at the place where the premiums were payable, ready and prepared and offering to pay them? He was at the office of the agent, J. B. Macmurdo, in the city of Richmond, and then and there offered to pay the premiums which fell due on those days respectively, in the kind of funds which the company required. On the first of those days, Macmurdo received payment in New York funds, or its equivalent, in discharge of the obligation, and gave his receipt therefor, as agent of the company. On the last day mentioned, the assured offered to pay Macmurdo, the agent, but he refused to receive it, upon the ground, as he alleged, that he was instructed by the company not to receive payment "nor to renew or continue policies." Now, upon this contract the questions arise, first, was the city of Richmond or the city of New York the place of payment? and, secondly, was Macmurdo the agent, or an officer in New York the agent, to whom payment was to be made?

623 *I think when this contract is interpreted in reference to its terms and subject matter, the situation, character and legal status of the parties; the act of assembly of Virginia, under authority of which it was made, and which must be read as a constituent part of it; and with reference to the usage of the company, and the conduct of the parties in its execution, it must be regarded as a Virginia contract, made in Virginia, with the Virginia agent, and to be performed in Virginia through that agent; and that it was intended by the parties, and so understood by them, that the payment of the premiums were to be made to the agent at Richmond; and if made or tendered to him at the time they respectively fell due, it would be a fulfillment of the condition required of the assured. To take a comprehensive view of the whole case, I cannot come to a different conclusion.

The defendant in error and Wm. S. Warwick were resident citizens of Virginia, and the plaintiff in error a corporation of the State of New York. It was created by a law of that State, and cannot exist outside of its limits. It had no power to make contracts or to do business in Virginia, but by permission of the State. In *Paul v. Virginia*, 8 Wall. R. 168, Mr. Justice Field, delivering the opinion of the Supreme court,

says: "Having no absolute right of recognition in other States, but depending, for such recognition, and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." Again,

on p. 183, he says: "The policies do 624 *not take effect, are not executed contracts, until delivered to the agent in Virginia. They are, then, local transactions and governed by local laws." In *Slaughter's case*, 13 Gratt. 767, J. Samuels says: "I have no doubt of the power of the General Assembly of Virginia to forbid foreign corporations from engaging in any pursuit within the State; and of consequence to grant permission to engage therein only upon terms."

The Legislature of Virginia, consistently with this well established principle, enacted a law with regard to foreign corporations. Chapter 39, section 23, of Code of 1860, provides, "that no insurance company, unless incorporated by the Legislature of this Commonwealth, shall make any contracts of insurance within this State until such insurance company shall have complied with the provisions of this act."

The 24th section provides, "that every such insurance company shall, by a written power of attorney, appoint some citizen of the Commonwealth resident therein its agent or attorney." This is the first provision. And no foreign insurance corporation could make a contract in this State until such agent was appointed. But it imposes this further condition, that such agent shall accept service of process, &c., in these words: "Who shall accept service of all lawful processes against such company in this Commonwealth, and cause an appearance to be entered in any action, in like manner as if such company had existed and been duly served with process in this State." And the 27th section provides, that service of such process on such attorney, shall be "sufficient service upon his principal." These provisions of the act are not words of limitation on the power of the agent, but of enlargement. The first provision requiring them to appoint an agent here is general, and implies, it seems to me, that the company, in all its transactions in this State, must act through

625 that agent, and can act in no *other way. It is only known and recognized in this State through that agent. It implies that the company can only make contracts through him, and receive and enforce their performance through him. He is the sole representative of the company in this State. The term implies a general agency, limited only to the transactions of the company in this State; but would not embrace, I appre-

hend, by that general term, the power to accept the service of legal process, and to enter an appearance for the company when sued, if it had not been so expressed. The right of action or suit against the company in the Virginia courts, without some such express provision, would not have been required merely by providing that they should appoint a resident citizen of this Commonwealth their "general agent" here. But this provision gives to the company a sort of local existence in this State, through their representative agent, and shows a purpose and design, on the part of the Legislature, to make its transactions within this State local, and subject to the jurisdiction of the State, as effectually as if it had been incorporated in this Commonwealth. The 25th section requires the company to file a copy of the power of attorney, duly certified and authenticated, with the auditor of public accounts, &c.

The 26th section requires the company to have an agent here at all times, without interruption, "while any liability remains outstanding on such insurance." The 28th section imposes penalties upon the agent who shall effect policies of insurance in this State without complying with the requisitions of the act. I think, therefore, that the construction given to this act, that it only contemplates and provides for the service of legal process, and the prosecution of suits against the company in this State, is too restrictive. This more clearly appears from subsequent sections. The 29th section

626 requires the agent to make return, on oath, to *the auditor of public accounts, on the first Monday of October and May, in every year, "of the amount of premiums received and assessments collected during the said period." And also that he "shall at the same time pay into the treasury such tax as may be imposed by law, on the amount of such premiums and assessments; and the whole sum received for policies, whether paid in money or other obligations, shall be deemed to be premiums for the purpose of this section." This section treats the agent as if he were the company in Virginia, and imposes duties on him which he could not perform if he were not the receiving agent of the company in Virginia. And this section clearly treats him as such. How could he make oath to the amount of premiums received, if they did not pass through his hands? And, indeed, who else could collect the assessments due the company in the State, and receive the premiums, he being the only agent of the company here? Or, who would be willing to incur such responsibilities for the payment of taxes, as agent for the company in this State, if the premiums and assessments were not to be paid through him, but to be paid directly, by the parties by whom they were payable, to the agent or officer of the company in New York. Such an idea is repugnant to the whole scope and policy of the law.

The 30th section imposes a penalty of \$1,000 upon the agent for failing to make

such returns, or for making a false return. With what reason could the agent have been subjected to such a penalty by the Legislature, if it had not been intended that he should be the only agent of the company for receiving the premiums and collecting the assessments, and therefore would have personal knowledge of what he is required to affirm. A bond in the penalty of from \$1,000 to \$5,000, at the discretion of the auditor, to make the semi-annual
627 *returns, and to pay the tax, is required to be given through the agent.

But the 32d section, I think, fully confirms this construction of the law. It prohibits any one to act as agent of the company, to make or renew, directly or indirectly, any contract of insurance within this State, or with any person resident therein, otherwise than in compliance with the provisions of this act, or in any way contrary to its true intent and meaning, under the penalty of \$500, for every such offence. The prohibition in this section is express. No one, except the agent appointed as is provided in this act, can make or renew such contracts for the company in this State. Consequently, a contract of insurance, or renewal, made by the plaintiff in error within the State of Virginia, or with any person resident in Virginia, through one of its officers in New York, would fall directly within the prohibition of this 32d section. Therefore, reading the contract in connection with this act of Assembly as a constituent part of it, though it professes to have been sealed by the company, and signed by the president and secretary, and delivered in New York (which cannot be true as to the delivery), it was not made by them directly or indirectly; but was made at Richmond with Macmurdo, and countersigned by him, who received the advance premium at Richmond, and there and then, and not until then, it became a contract. The signing by the president and secretary gives no validity to the instrument; but it derives its force and effect, as a contract, from the signing and delivery of Macmurdo at Richmond; and would be as effectually, and to every intent and purpose, a contract binding upon the company, if the signatures of the president and secretary had not been affixed to it. It was not, and could not be, a contract made with them directly or indirectly, by the express enactment of the Legislature

628 of the State; and their signatures to it *have no effect whatever. But the policy itself stipulates that it is "not binding on the company until countersigned by J. B. Macmurdo, at Richmond, and the advance premium paid." It was, then, a Virginia contract, to be performed in Virginia through J. B. Macmurdo, the agent and sole representative of the company in the State. This conclusion is supported by reason and authority. *Daniels & al. v. Hudson River Fire Insurance Co.*, 12 Cush. R. 417, a case directly in point, and *Fant & al. v. Miller & Mayhew*, 17 Gratt. 47.

Interpreting the policy with reference to its terms and subject matter, the situation,

character and legal status of the parties, and the act of the Virginia Legislature, by authority of which it was made, and which must be read as a constituent part of it, I am clearly of opinion that the contract was made and to be performed with Macmurdo, the agent of the company at Richmond, Virginia; and that payment of the premiums to him, as the agent of the company at Richmond, by the defendant in error, as they respectively fell due, was a compliance with the terms of the contract, according to its spirit and legal effect, and as it was understood by the parties. And, if we consider it further, with reference to the conduct of the parties and the usage of the company, we shall find nothing adverse to this construction, but much to confirm it.

In view of the facts, that payment could only be made to some agent of the company; that the assured resided in Virginia, where the contract was made; and that the company had an agent here, with whom the contract was made; and by the law was bound to keep an agent here uninterruptedly, through whom alone they could make or renew contracts of insurance with citizens of Virginia; to say that it was contemplated or intended by the parties, or either of

629 them, that the assured must every year, when the premiums were *about to fall due, leave the agent here and go to a distant city to pay the premium to the agent of the company there, would be a most violent presumption. That the contract was not understood as imposing this needless and burdensome condition on the assured, is shown by the conduct of the parties, and the usage, as far as it is exhibited by the record in this case, of the company. The advance premium, and the three subsequent annual premiums, were paid here to their agent Macmurdo, with the unequivocal acquiescence and ratification of the company: and if any objection was ever made, which is very questionable, to the payment of the premium due in 1861, through their agent Macmurdo, it was not made until long after he had received it; and their agent in receiving it violated no instructions, at any rate none which they could lawfully give; as I shall show. The conduct of the parties, then, was in accordance with the interpretation which I have given to their contract.

But there is an endorsement upon the deed, to which no reference is made on its face, purporting to be a "notice." If this endorsement upon the deed is inconsistent with its terms or legal effect, and repugnant thereto, it is void. *Pullerton v. Agnew*, 1 Salk. R. 172. I propose now to notice only one clause, in connection with the point I am considering. It is in these words: "No payment of premium binding on the company, unless the same is acknowledged by a printed receipt signed by an officer of the company." Is that endorsement inconsistent with the construction I have given to the contract, that the premiums were to be paid here to the agent Macmurdo? It is only in reference to that point that I propose

now to consider it. If it is a condition inconsistent with the deed upon its face, or according to its legal effect, upon the authority cited it would be void. But I do not think it is in this point of view. It

630 does not require that the payment *shall be made to an officer. It only prescribes a particular kind of evidence, a printed receipt signed by an officer. Nor does it exclude the signing by the agent at Richmond. If we will now turn to the receipts which were actually given, we shall find that it does not mean that payment shall be made to an officer in New York; but that, on the contrary, the right of the party to pay to the agent at Richmond is not taken away by this endorsement. To each of these receipts is annexed a condition or declaration, in these words: "Not binding until paid and countersigned by J. B. Macmurdo, Esq., agent at Richmond, Va." That declaration annexed to the receipt shows, most unquestionably, that when the receipt was signed by the secretary the money had not been paid; and it shows, further, that the money was to be paid to Macmurdo, the agent at Richmond, Va.; and, when paid to him there, he was to sign the receipt and deliver it to the assured. This usage of the company, if it may be so called, is in perfect accord with the foregoing interpretation of the contract.

I am clearly of opinion, therefore, that, according to the true intent and meaning of the contract, the premiums were to be paid by the assured to the agent of the company in Richmond, Va., and not to the officer or agent of the company in New York.

But it is contended, for the plaintiffs in error, that Macmurdo was not the agent of the company on the 23d of July, 1861, when the premium for that year was paid to him; or on the 23d of July, 1862, when the premium was tendered to him by the assured, and by him refused; because they say that the war, and also their letter to him of the 30th of May, 1861, was a revocation of his power. We will consider this assumption on both grounds.

But there is another postulate of the counsel for the plaintiffs in error, 631 which lies back of this, and should *be considered first, or in connection with it; and that is, that the breaking out of war annulled the contract between the parties, and exonerated the plaintiffs in error from all obligation under it.

Forfeitures are not to be favored. And I should be very reluctant to apply the rule, "that war dissolves or suspends contracts between alien enemies," to such a contract as this: and would not do it unless it comes strictly within the rule. As was remarked by Ch. J. Kent, in *Clarke v. Morey*, 10 John. R. 70, the ancient severities of war have been greatly and justly softened by modern usages, the result of commerce and civilization. And the doctrine once held in the English courts, that an alien's bond became forfeited by the war, would not now be endured. That would not be more severe

and revolting to our sense of justice, it appears to me, than to hold that the assured had in this case by the war forfeited the money he has paid, and his rights under this contract.

The contract in this case was partly executory, and partly executed. It was altogether executory on the part of the company, in the sense that they had done nothing yet towards the performance on their part. But it had been largely executed on part of the assured, whereby he had become invested with the right to the policy for the life of Wm. S. Warwick, which could only be defeated by his default. This right became vested when the advance premium was paid, and was a right to the insurance, not merely for one year, but for the life of Wm. S. Warwick. A new contract every year was not necessary to give the right; but only the annual payment of the premium was necessary to prevent the divesting of the right. The annual payments and giving receipts therefor were not new contracts, but only the performance of a subsisting contract.

632 The contract being made strictly within Virginia, *with an agent residing there, and who was to continue to reside there as long as any stipulation of the contract was unperformed; an agent with whom the contract was to be performed, and to whom the premiums were to be paid in Virginia, as has been shown; it seems to me that this case does not fall within the rule as applied, or within the reason of it, as explained and illustrated by the judges, in any of the numerous cases cited by the learned counsel. In all those cases the contract was to be performed in the enemy's country. Here, the performance is strictly restricted by the contract itself, according to its intent and legal effect, and by the designed policy of the law, by authority of which it was made, to the limits of Virginia. In those cases, and which were particularly relied upon by Judge Story in the case of the *Rapid*, "they had no power to sue in the public courts of the enemy nation." Upon this contract they could sue or be sued in the public courts of Virginia, even pending the war.

Griswold v. Waddington, 16 John. R. 438, is a leading case relied upon by the learned counsel for the company, and particularly the following passage in the very elaborate and learned opinion of the Chancellor: "Here, then (the Chancellor observes), we have the final consummation of this discussion, and the sanction of the doctrine we have been tracing, solemnly given by the highest judicial authority in the United States. It reaches to all interchange, or transfer, or removal of property, to all negotiation and contracts, to all communication, to all locomotive intercourse, to a state of utter occlusion, to any intercourse but one of open hostility, to any meeting but in actual combat." The Chancellor has given us, here, a compend of all the cases to which this doctrine reaches; but unfortunately for the plaintiffs in error, they

cannot bring their case within the category. In the performance of this contract by the assured, it was not necessary that
633 there should be any *"interchange," "transfer," or "removal" of property, from this State into the enemy's country. Nor did its performance require any "communication," "locomotive intercourse," "negotiation and contracts," between him and the plaintiffs in error, or any alien enemy. And a state of "utter occlusion to any intercourse but one of open hostility, to any meeting but in actual combat" (if there could have been such a meeting between a man near seventy years of age and a New York corporation), was not incompatible with the execution of this contract. It does not appear that there was, before the war, in the making and execution of it, any intercourse or correspondence of any sort between the assured and the officers of the company in New York. Certainly none was necessary. It is most probable that they were not known to each other. And if the contract could be made and performed before the war without any intercourse between them, there is no reason why it could not be done during the war.

If the law had been framed by the Legislature of Virginia with a special reference to a state of war between the States, its adaptation could scarcely have been more complete. The possibility of such a state of war may not have been, and probably was not, in the mind of the Legislature when they enacted this law. But as it was the design of the Legislature to protect the State and her citizens against abuses and impositions by these foreign insurance companies, who were not amenable to her laws or subject to her jurisdiction, in imposing conditions upon those companies for the privilege of operating in this State, sufficient to give the desired security in time of peace, they were necessarily comprehensive enough to embrace a state of war. And to this end, in framing the law, whether for a state of peace or war, it was necessary to make the operations of the companies within this State strictly local, and subject to the jurisdiction of the
634 *State, and completely independent of any foreign jurisdiction in the making, performance, and enforcement of their contracts in this State. This was evidently the leading design of the Legislature in the law which was framed for the purpose. Our difference is not as to the principle, but as to its application.

In the numerous cases reviewed by the chancellor in that leading case, I am under the impression that the principle "that war dissolves the contract," is not applied, in a single instance, to a contract made and executed by one of the parties, in the whole or in part, before the war, and where the execution of the contract, on his part, was to be completed before he was entitled to any performance of the other party, and had been partly performed, or where the dissolution of a contract made before the war would work a forfeiture. Such an ap-

plication of the rule would be unreasonable, arbitrary and immoral. The parties, in entering into the contract before the war, did nothing criminal or unlawful, that they, or either of them, should be liable to the punishment of a forfeiture of their contract. Not so where the contract is made during the war. In that case it is unlawful and criminal, and therefore void. And this, it seems to me, is the proper distinction. When the contract is made before the war, but not executed by either party, and the carrying it into execution would involve a violation of the duty of the parties respectively to their country in the new relations which the war has created; in that case its execution not having been entered upon, and it being uncertain how long the war may last and prevent the execution of the contract, it may be dissolved; and this not to the prejudice of the parties, or either of them, but for their presumed convenience and benefit to be absolved from the obligation of a contract which, in the changed relations of their countries, cannot be carried into execution. On the other

635 hand, if the contract *is partly executed, and rights under it have vested, and it cannot be dissolved without the loss or forfeiture of one of the parties; and it cannot be carried into execution consistently with the duty of the parties to their countries respectively while the war lasts, in such case it should not be dissolved, but only suspended. But if it can be carried into execution, notwithstanding the war, without conflicting with the obligation of allegiance of either party, it will be neither dissolved nor suspended.

In the very case we are commenting on, the contract, which was the subject of the suit, was made during the war between alien enemies; and there is not, I think, a sentence in the opinion of the Chancellor, or in the cases he reviews, in conflict with the distinction I have taken. On p. 471, he cites the case of *ex parte Boussmaker*, 13 Ves. R. 71, which supports it. He says, the Lord Chancellor having had occasion to notice this subject, observed, "that a debt arising from a contract with an alien enemy could not possibly stand; for the contract would be void. But if the two nations were at peace at the date of the contract, it being originally good, upon the return of peace the right to sue would survive."

Chancellor Kent, commenting on this decision of Lord Chancellor Erskine, says, "the Chancellor here very clearly and accurately marks the distinction between debts contracted before and after the commencement of the war; and he holds the latter to be absolutely void." And in the later case of *Buchanan v. Curry*, 19 Johns. R. 137, when this elaborate review of the cases on this subject was fresh in the Chancellor's memory, he enforced an executory contract made and partly executed before the war, between citizens of the two countries respectively which afterwards became involved in war. The performance of the contract was completed, *pendente bello*,

636 by one of the parties, *with the agent of the other, who resided in the same country with the former. And the performance with the agent was held good and binding on the other party, who was an alien enemy, residing in the enemy's country. But the Chancellor said, "If such a contract had been entered into during the war, it would have been illegal and void." And again, "It is not unlawful to pay debts, or perform contracts to alien enemies, if the payment be made, or the duty be performed in one country."

This is a much stronger case than that. In that there was nothing in the contract or law to limit the performance to the State, or to the local agent; in this there is. In that there would have been no forfeiture, or serious loss to the party, by dissolving the contract; in this there would be a cruel forfeiture to one party, and no loss, but a great gain to the other. In that case the act done was in discharge of an obligation which might have been suspended without loss; this, the performance of a condition to save a forfeiture. In that case, the party could not enforce his contract by suit *pendente bello*; in this he could. It was held in that case, that "the rule is founded in public policy, which forbids, during war, that money or other resources shall be transported, so as to aid or strengthen our enemies. The crime consists in exporting the money or property, or placing it in the power of the enemy; not in delivering to an alien enemy, or his agent residing here, under the control of our government." The principle of that case is not in conflict with the cases relied upon by the company's counsel, but clearly takes this case out of the rule applied in those cases; and the decision, it seems to me, is a complete refutation of the argument of plaintiff's counsel, that the war was a revocation of the agency in this case; a point upon which much stress was laid, and which I will now consider further.

637 *In *Clarke v. Morey*, 10 John. R. 70, Kent, Ch. J., says: "It is even held, if aliens are ordered away in consequence of the war, they are still entitled to leave a power of attorney, and to collect their debts by suit." In *King v. Hanson*, 4 Call 259, Hanson, a native of England, came to Petersburg several years before the war of the revolution. After the declaration of independence he refused to take the oath of allegiance to Virginia, and returned to England. Before leaving, he appointed Atkinson & Taylor his attorneys in fact, to make sale of his house and lot in Petersburg. His attorneys made sale of it in 1778, for £1,000, for which they took the bond of the purchaser, payable on demand. After the war Hanson returned, and brought suit on the bond given to his agents for the purchase money; and this court affirmed the judgment of the court below, so far as it gave validity to the execution of the power by the agents, and enforced the bond with interest. The only ground upon which interest could have been allowed was, that

the creditor had an agent here, to whom payment could have been made. In the case of *Monseax v. Urquhart*, 19 Louis. R. 485, it was held that the agency was not "dissolved or even suspended by the occurrence of the late war." In *Denniston v. Imbrie*, 3 Wash. C. C. R. 396, 403, the court say: "The last question respects interest during the war. We think that if the alien enemy has an agent in the United States, or if the plaintiff himself was in the United States, and either of these facts known to the debtor, interest ought not to abate." "The debtor might have paid his debt, either to the creditor, or his agent in this country, without the danger of violating his duty or the laws of the land." This case reaffirms the principle decided by the same court in *Conn & als. v. Penn, &c.*, 1 Peters C. C. R. 496. The principle of these cases is settled by the highest court in the land,

in the recent case of *Ward v. Smith*, 638 *7 Wall. U. S. R. 447, 452. Mr. J.

Field, delivering the opinion of the court, says: "The objection that the bonds did not draw interest, pending the civil war, is not tenable. The defendant, Ward, who purchased the land, was the principal debtor, and he resided within the lines of Union forces, and the bonds were there payable." (The creditor lived within the Confederate lines.) "When an agent appointed to receive the money resides in the same jurisdiction with the debtor, the latter cannot justify his refusal to pay the demand, and of course the interest which it bears. It does not follow that the agent, if he receive the money, will violate the law by remitting it to his alien principal. Nor can the rule apply when one of several joint debtors resides in the same country with the creditor, or with the known agent of the creditor."

These cases, and others which might be cited to the same effect, are not limited in their application to contracts wholly executed. And I am unable to perceive why it should not be applicable to our case as well as to an executed contract. The only acts to be done by the assured, were to pay money to the agent at stated periods; and the only thing to be done by the company, through their agent, was to give a receipt for the money so paid, until after the death of Wm. S. Warwick. And we have seen that, even in that event, it was not necessary for the assured to go out of the State to enforce his contract against the insurers for the policy even by suit. Now, it seems to me, that, if there is any difference between this case and an executed contract, it is in favor of this case; for these payments were not necessary to be made in discharge of debt; which could be done, and perhaps as well done, after the war; but they were necessary to be done in the performance of a condition, to prevent a forfeiture; and the payments were
639 made at the place where, *and to the agent to whom, the contract required them to be made.

As to the form of the receipt, and that it

should be signed by an officer of the company, that was prescribed by the company, as the kind of evidence which it required of the payments. It could not change the law of the contract, which authorized payment to be made to the agent; and, I think I have shown, was not so intended. The obligation of the assured, by his contract, was to pay to the agent; and this requisition was not in conflict with that obligation. To say that the company could withhold these printed receipts on the day of payment, would be to say that they could refuse to receive payment, and thereby release themselves from the obligation of the policy, and subject the assured to a forfeiture, without any default of his, of all the premiums he had paid: a conclusion against which the moral sense of mankind would revolt. I hold, then, if, on the day and place when and where payment was to be made, the assured offered to pay to the agent, who had not been provided with the printed receipts, the company will be presumed to have waived that requisition; and a payment to the agent, without them, would be good, and a sufficient compliance with the contract.

But it is contended that, by the letter of May 30th, 1861, the agency was revoked.

I do not think so. On the contrary, it evidently recognizes a continuing agency. It authorizes the agent to adjust difficulties as to policies, in a certain way, and requests, "if this does not meet your views, let us know what you would advise." If the instruction must be construed, that the premium should be paid in New York city, and not in Richmond, I think it is clear that they had no right, under the contract, to impose such a condition. And we find in their next letter they say, "must be paid

here, or by draft on this city." Again
640 they say, *"we wrote you on 30th May last," &c.; "renewals to be paid here, or by draft on this city." And thus their agent seems to have understood their letter of 30th May. For he received payment of the premium on the 23d July, 1861, and on the same day wrote to them to send the printed receipt. And again, on the 5th of August following, he wrote to them: "I wrote you on the 23d ultimo, requesting you to send me the company's printed receipt for Mr. Corbin Warwick's premium on policy No. 4758, and have not heard from you; as soon as I get the receipt I will make the remittance to you."

Whilst this company had no authority, under the contract, to change the place of payment, they had undoubtedly the right to refuse payment in Confederate money, and to require it to be made by draft on New York or in New York funds. This their agent was prepared to do. But in their letter of 6th of August, although they acknowledge that, in their letter of May 30th, they had authorized payment of the premium to be made by draft on New York, they refused or failed to inclose the printed receipt. By neglecting or refusing to send the printed receipt to their agent as re-

quested, they failed to receive the draft, which would have been remitted to them upon its receipt. And this being their last communication to him during the war, he did not remit to them the draft, but held it until probably 1863, when it was taken from him under the sequestration act. It was the implied refusal of the company, therefore, to receive payment from their agent in the mode prescribed by themselves, which prevented the remittance being made. And, if it is a loss to them, they have nobody to blame but themselves. It was certainly not the fault of the assured, who had honestly paid it in the kind of funds which they required: and it would be unjust to require him to pay it again.

641 *In all their correspondence with their agent, I do not find an intimation of a purpose to revoke his agency. And under the act of Assembly, which is to be read as a part of their contract, they could not, until they appointed another agent in his place. Were they relieved from this obligation by the war? Or could their failure to have an agent here to receive payment of the premiums, release them from the obligation of the policy, or entitle them to a forfeiture? It seems to me that both these questions must be answered in the negative. And that they could not avail themselves of their own disability for such a purpose. But they are questions which do not arise in this case, inasmuch as there had been no revocation of the agency of Macmurdo.

In their letters they express a disposition to act liberally towards their southern policy holders. In this they may have been sincere. But their failure to send the printed receipt to their agent, when requested, to enable him to remit to them a check upon New York, as they required, in payment of the premium, which he informed them had been received, does not show a disposition to afford any facility of the assured to fulfil the condition of his policy. If the receipt had been sent and lost they could not have sustained any loss by its miscarriage. But the probability is, it would have reached its destination, as did their letters both ways, and that they would have received a draft from their faithful agent, on New York, for the premium. It is impossible to shut our eyes to the fact that the company was largely interested in defeating these policies; and considerations of that sort may have had more influence upon their conduct than a desire to promote the interests of their policy holders. I am well satisfied that, in this case, they might have received the premiums from the assured in New York

642 funds, if they had been very desirous to receive them. At any *rate their agent, in receiving payment of the premium for 1861, in a draft on New York, did not violate his instructions; and in refusing to receive that for 1862 at Richmond, if he acted under instructions, they were instructions which the company had no right to give. I am, therefore, of opinion to affirm the judgment.

CHRISTIAN, J. In considering this case, and in seeking to arrive at a satisfactory solution of the novel and difficult questions which it presents, there is one thing which must be kept steadily in view; and that is, that this is an action at law for the breach of a covenant upon a contract in writing, under seal, in which the parties have made their own agreement. It is not a case in which a party comes into a court of equity to ask relief against a forfeiture, but it is a case in which, in a court of law, the parties invoke the judicial interpretation of the contract which they have entered into, to ascertain their legal rights and liabilities. We are not at liberty, therefore, to consider what peculiar hardship may result to either party from the legal effect of their own contract. But the sole question is, what is the nature of the contract which the parties have made for themselves, and what are their legal rights and liabilities under that contract, interpreted according to the rules of law?

The record shews that the defendant in error, Corbin Warwick, effected a policy of insurance upon the life of William Sidney Warwick for the sum of ten thousand dollars, with the plaintiff in error, the Manhattan Life Insurance Company.

Looking to the policy of insurance as fixing the terms of the contract between the parties, we find that the Manhattan Life Insurance company bound themselves to assure the life of the said William Sidney Warwick, for the sum of ten thousand dollars, for the term of his natural life, 643 for the sole use of the said *Corbin Warwick, in consideration of the "sum of one thousand and thirty-one dollars to them in hand paid by Corbin Warwick, and of the annual premium of one thousand and thirty-one dollars, to be paid on or before the 23d day of July in every year during the continuance of this policy." It was further stipulated that "in case the said Corbin Warwick shall not pay the said premium, on or before the day hereinbefore mentioned for the payment thereof, the said company shall not be liable for the payment of the sum assured or any part thereof." And it was further agreed by the assured, that "in every case, where this policy shall cease, or become, or be null or void, all previous payments made thereon shall be forfeited to said company."

Endorsed upon this policy of insurance, under the head of "notice," and which is as much a part and parcel of the contract as if embodied in it (see 2 Philips on Insurance, § 2,014) are to be found the following stipulations, in addition to those already referred to: "The premiums are always due on the several days stipulated in the policy, and all risk to the company commences at the time of the actual payment of the first premium, without regard to the date of the policy (unless otherwise stipulated in the policy), and continues until the day named in the policy for the payment of the next premium at 12 o'clock noon, and no longer;" * * * "and no payment of premiums

binding on the company unless the same is acknowledged by a printed receipt, signed by an officer of the company."

It will thus plainly appear, by the express provisions of the policy itself (to which alone we can look to ascertain the agreement of the parties), that the Manhattan Life Insurance Company bound itself to assure the life of William Sidney Warwick, upon the express condition that the annual premium should be paid on or before the day named in the policy; and expressly *stipulating that if the annual premium was not so paid, the company should not be liable for the sum assured, or any part thereof.

The annual premium was the consideration for the risk. The risk assumed by the company on the one hand, and the premiums paid by the assured, as the price of that risk, on the other, are correlative obligations whose mutual operation constitutes the very essence of contracts of insurance. Marshall on Insurance, 648; Angel on Fire and Life Insurance, 461, § 399. Under this policy, the obligation of the assured was to pay the annual premiums to the company on the day specified, and that of the company was to assume the risk from the day of payment for twelve months from that day. These were the mutual and correlative obligations which the parties respectively assumed by their own written contract. The liability of the company is fixed only upon the condition that the annual premiums are paid on the day specified. The breach of that condition (whether it be regarded as a condition precedent or subsequent), by the express terms of the contract, discharges the company from all liability. The conditions imposed by the policy arise from the contract which the parties themselves have made; they are not conditions imposed by law, but by the express terms of the contract, and strict performance of these conditions will be required before any liability can be fixed. It is plain that, looking alone to the policy, as containing the contract of the parties, the obligations of the company cease upon the failure of the defendant in error to pay the annual premium on the day fixed in the policy for such payment. Ruse v. Mutual Life Ins. Co., 23 New York R. 516; Simpson v. The Accidental Death Ins. Co., 2 Com. Bench, N. S., 257; 1 Big. R. 578; Harmony v. Bingham, 12 New York, 2 Kern. R. 99; Wood v. Worsely, 2 H. Bl. R. 574, note 582.

645 *It is a well-settled principle of law, that the relative claims and obligations of the parties are always fixed and determined by their own written contract. In Atkinson v. Ritchie, 10 East R. 533, Lord Ellenborough said: "The relative claims of the parties upon, and their duties in respect of, each other, are conclusively fixed and defined by the terms of their own written contract. No exception, which is not contained in the contract itself, can be engrafted upon it by implication, as an excuse for its non-performance. When a party, by his own contract, creates a duty,

or charge upon himself, he is bound to make it good if he may; notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." The principles thus announced in this case were recognized and approved by this court in the case of "The Merchants' Ins. Co. v. Edmond, Davenport & Co.," 17 Gratt. 146, 157. (See also Paradine v. Jane, Aleyn 27.)

The Manhattan Insurance Company was domiciled in the city of New York. The contract of the defendant in error was to pay his annual premiums to the company. There was no stipulation in the policy which bound the company to keep an agent in the city of Richmond. It is true, they did once have such agent in the person of one J. B. Macmurdo, through whom the policy of insurance in this case was at first effected. But his powers, as agent, were expressly limited and defined by the terms of the policy, and there was nothing in these terms which prevented the company from revoking the agency at any time. The limitation referred to is found in the endorsement upon the policy, and is in these words: "No payment of premiums binding on the company unless the same is acknowledged by a printed receipt signed by an officer of the company." The manifest object of this stipulation was to limit

646 and control the power of their *agent, and to insure the receipt of the premiums, and its plain effect was to notify all parties, dealing with their agents, that they were authorized to receive the premiums only when they presented such a receipt as the notice required, to wit: a printed receipt, signed by an officer of the company. Payment to a party not presenting such a receipt, was a payment to one not authorized to receive it, and could not bind the company by the express terms of their contract. I have said the contract, on the part of the defendant in error, was to pay the premiums to the company. Of course, payment to its authorized agent was payment to the company; but here the agent was not authorized to receive the premiums except upon certain conditions, which were well known to the assured, and were embodied in the very contract which he seeks to enforce.

I do not mean to say, that where the company prevents payment on the day specified by withholding a printed receipt, signed by an officer of the company, that it would be released from its obligation as insurer; for that would be a fraud upon the rights of the assured. But I refer to this stipulation for the purpose of shewing that the contract of the defendant in error was to pay the annual premiums to the company, which was domiciled in the city of New York; and that, so far from there being any obligation to keep an agent in the city of Richmond to receive premiums and give receipts for the same, the appellee had expressly stipulated, when he accepted the policy of insurance, that "no payment of premiums should be binding on the company

unless the same be acknowledged by a printed receipt signed by an officer of the company."

In times of peace it was both convenient and profitable to the company to keep an agent in the city of Richmond, to solicit patronage and extend the business of the company. It was convenient to the assured to pay the premiums here instead of
647 New York. Accordingly, *we find that, up to the commencement of the late war, the premiums were regularly paid to J. B. Macmurdo, the agent of the company, but in every case upon printed receipts signed by an officer of the company, as stipulated in the policy. On the 23d day of July, 1861, after hostilities between the States had commenced, and when mail facilities had ceased between the two sections, the defendant in error paid to J. B. Macmurdo \$1,031, the amount of the premium then due on his policy, and took his written receipt for the same, signed by him and not by an officer of the company; with the promise on the part of Macmurdo that he would write to New York and get the proper receipt. Warwick called on Macmurdo several times to get this receipt, but failed to do so. This money, so received by Macmurdo from Warwick, he attempted to remit to the company in New York, by a draft purchased of R. H. Maury & Co., on Carpenter & Vermyle of New York; but the draft never reached the company, and it was afterwards paid by R. H. Maury & Co. to a receiver of the Confederate States, under their sequestration act. It further appears from the evidence that, some time before July, 1862, the precise time is not stated, Macmurdo informed Warwick that he had received instructions from the company not to receive any more premiums; but, on the 23d day of July, 1862, Warwick tendered to Macmurdo funds sufficient to purchase a draft on New York (in the currency circulating there), for the sum of \$1,031, the annual premium due on that day, which Macmurdo refused to receive.

Several letters are exhibited in evidence, written by the company to Macmurdo, in reply to letters received from him. In one of these letters, dated May 30th, '61, the company wrote that "in consequence of a discontinuance of the mails, and the derangement of exchanges, as well as the depreciation of the currency"

648 *they would require the premiums to be paid in New York, or if the assured should prefer, their policies might be cancelled upon certain terms proposed. On the 6th day of August, 1861, they wrote another letter, from which the following extract is taken: "We are in receipt of your favor in reference to receiving the premiums on policies falling due, for which you have no renewal receipt, to which we cannot consent, as under the present state of things the premiums must be paid here, or by a draft on this city. We wrote you, on the 30th May last, that in consequence of the discontinuance of the mails, the derangement of exchange, and the depreciated cur-

rency, we would require the renewals to be paid here, or by draft on this city, &c. * * * In addition to this we now have the fact that the Southern Confederacy has passed an act declaring all property belonging to the North confiscated. You will, therefore, see the impropriety and impossibility of this company receiving its premiums in your city."

Here, then, we find, that as early as August, 1861, the agent had direct and positive instructions from the company not to receive any more premiums; and they refuse to furnish him with the renewal receipts (printed and signed by an officer of the company), which, according to the express terms of the policy, known to all the policy holders, was the authority to him to receive the premiums, and thus they, in effect, revoked his power as their agent to receive them.

Now, from what has been said, the following propositions are undoubtedly true, and cannot be gainsaid:

1st. The condition, upon which alone the company can be held liable, is the payment of the annual premiums on the days specified; and the breach of that condition, by the express terms of their contract, discharges the company from all liability, and causes the policy, in its own language, to "cease and determine."

649 *2nd. The contract of the assured was to pay the annual premiums to the company, which was domiciled in the city of New York. And

3rd. There was nothing in the contract which bound the company to keep an agent in the city of Richmond to receive the premiums and give renewal receipts.

It therefore follows, logically and inevitably, that the tender to Macmurdo, who was once the agent of the company, but whose powers had been revoked, could not, in law, under their contract, fix any liability upon the company, unless it can be shewn that under some law or usage or statute, regulating policies of insurance in this State, the company was bound, both in time of war as well as in times of peace, to keep an agent here to receive the annual premiums when they fell due, upon the policies they had issued to persons resident in this State.

The counsel for the appellee insist, that the policy of our laws regulating foreign insurance companies is to put them on the same footing as home companies; that the provision in the policy, that it is "not binding on the company until countersigned by their agent here, makes the contract what they are pleased to call a "Virginia contract;" and great stress is laid upon the statute of this State regulating foreign insurance companies, which they insist imperatively requires every foreign insurance company to keep an agent here, ready to receive the premiums upon their policies as they become due; and they argue, with great plausibility, that though the policy is an insurance for the life of Wm. Sidney Warwick, upon the express condition that

the annual premiums shall be paid, yet that the defendant in error was prevented from paying the premiums by the failure of the company to provide a hand to receive them, and that thus the performance of the condition was defeated by the act of the company; *and that therefore they are not to be discharged of their liability to pay the insurance.

To meet this view of the case, it becomes necessary to refer to the statute law regulating foreign insurance companies, and ascertain whether, upon a fair interpretation of this statute, the construction contended for can be maintained. It is found in the 39th chapter of Code of 1860, sections 23 to 35 inclusive. The 23d section provides that no insurance company not incorporated by the Legislature of this Commonwealth, shall make any contracts of insurance in this State until it shall have complied with the provisions of the act. "Section 24. Every such insurance company shall, by a written power of attorney, appoint some citizen of this Commonwealth, resident therein, who shall accept service of all lawful processes against such company in this Commonwealth, and cause an appearance to be entered in any action in like manner as if such corporation had existed and been duly served with process in this State."

The 25th section makes provision for filing with the auditor a certified copy of such power of attorney. The 26th section requires the company to make a new appointment if such attorney or agent shall die, resign or be removed; and provides further, that such power of attorney shall not be revoked until another competent person is appointed. Section 27 declares that service of process upon such attorney shall be deemed to be sufficient service upon his principal. Section 28 prescribes penalties upon an agent who acts for a company that "shall make insurance without complying with the requisitions of this act."

The remaining sections provide for the making of the semi-annual returns to the auditor of "all premiums received and assessments collected" by agents of foreign insurance companies, and pay a certain tax into the treasury; require bond with security for the true returns; and prescribe additional penalties for a failure to observe all the requirements of the act.

Now, in all these sections there is not a line or word which imposes upon the company the obligation to keep an agent for the purpose of receiving the premiums upon their policies as they become due, or which requires the payment here instead of the place where the company has its domicil. The object of the statute is twofold: first, to enable parties assured by foreign insurance companies to bring their suits in the courts of this State, instead of going before foreign tribunals to assert their rights; and therefore the law imposes a condition upon such companies, that they shall not engage in business in this State unless they keep an agent, as long as they have out-

standing liabilities, "who shall acknowledge service of process," which shall be deemed sufficient service on his principal. And, second, to insure the punctual payment, into the treasury of the State, of all taxes assessed upon such companies.

These, upon a fair interpretation of the statute referred to, are its leading and manifest objects. It would be a strained and unwarrantable construction to carry it to the extent for which it is invoked by the counsel for the appellee.

But, giving to this statute the most liberal and latitudinous construction, making it embrace objects which neither its language nor spirit indicates, can it be maintained that this statute, enacted in times of peace, applicable to times of peace, shall override the public and universal law of nations, and compel obedience even from alien enemies not within its jurisdiction? Could this statute compel the appellant to appoint an alien enemy to act as his agent in Virginia, or to keep an alien enemy as his agent, when, by the law of the Confederate

States, which was admitted and recognized as the supreme law of Virginia, such agent was bound to pay over every dollar belonging to his principal to the public sequestrator? I think not. The refutation of such a proposition is found in its simple statement. It would be a solecism in law and reason to say that the appellants should (though their contract did not require it, upon some vague and undefined notions of supposed hardship and injustice), be required to keep an agent in the enemy's country to receive premiums due his principal, which it was his duty to remit or keep safely for his principal, but which he was required by the laws of the belligerent State, under heavy penalties, to pay over to the public sequestrator.

And this view of the subject brings me to consider the important question, how far the contract between these parties was affected by the war between the two sections.

It is earnestly insisted, that such a contract as the one we have to deal with belongs to that class of contracts which are not abrogated, but only suspended, during the war. And in the view of the case presented by the counsel for the appellees, it hinges upon the solution of this question. War existed between the State of New York, where the appellants resided, and the State of Virginia, where the appellee resided, from June, 1861, to April, 1865; during which time the assured, Wm. S. Warwick, died. The question recurs, What was the effect of war upon such a contract? Was it simply suspended, or was it totally abrogated and annulled? The numerous authorities referred to on both sides would seem to be conflicting; but that conflict is rather apparent than real; and, when critically examined and compared, are easily to be reconciled as referring to a different class of contracts. Cases like *Buchanan v. Curry*, 19 John. R. 137; *Conn. &c. v. Penn & al.*, 1 Peters C. C. R. 524; *Denniston v. Imbrie*,

3 Wash. C. C. R. 396; Ward v. Smith, 653 7 Wall. *U. S. R. 447; and United States v. Grossmayer, 4 Id. 72, refer to cases where the contracts are executed, and nothing more is required to be done to complete them; such as intercourse or negotiation between the parties. These cases decide that it is lawful for an alien enemy to keep an agent in the enemy's country to receive money or to take care of his property during war. But they certainly do not go to the extent of saying that an alien enemy is obliged to keep an agent in the enemy's country to keep alive contracts, or even to receive money due him. But this class of cases, in my view of their scope and legal effect, simply go to this extent, that if the contract is of such a character that its continued existence is not dependent upon any further intercourse between the parties, or where no acts or negotiations between the parties are necessary to carry out or complete the objects of the contract, according to its terms; in such cases the contract is suspended during the war; and, upon a return of peace, the rights of the parties under their contract may be enforced. But it is equally well settled (by cases whose name is legion, and whose authority since the great leading case of *Griswold v. Waddington*, 16 John. 438, has never been questioned in any court) that, where the contract is of such a character that its continued existence and obligation require and depend upon acts to be done by or between the parties, during the war, then such contract is abrogated and annulled by the breaking out of the war; for, in the language of Judge Story, in the case of the *Julia*, 8 Cranch R. 181, 194, "it is a fundamental proposition, that in war all intercourse between the citizens and subjects of the belligerent countries is illegal, unless sanctioned by the authority of the government, or in the exercise of the rights of humanity."

It seems to me that in this day of enlightened international jurisprudence, no principle of international law is more firmly established than that the declaration 654 *of war arrests all intercourse between belligerents. War puts every individual of the respective governments, as well as the governments themselves, in a state of hostility to each other. There is no such thing as a war for arms and a peace for commerce. The existence of civil contracts and relations is contradictory to a state of war. Sir William Scott, one of the most profound jurists of his age, repeatedly declared in numerous cases adjudged by him, that a state of war was a state of interdiction of all communication. The remittance of money for any purpose, the acceptance of trusts, the creation of any civil obligation whatever, is unlawful and forbidden. The belligerent governments have placed their respective citizens in an attitude of hostility towards each other, and no relation inconsistent with hostility can be lawfully created by the acts of individuals. Lawrence's *Wheaton* 556, 557, note, and cases there cited. In the case of *The*

Rapid, 8 Cranch R. 155, 161, Judge Johnson uses the following emphatic language: "The universal sense of nations has acknowledged the demoralizing effect that would result from the admission of individual intercourse between belligerents. The whole nation is embarked in one common bottom, and must be reconciled to one common fate. Every individual of one nation must acknowledge every individual of the other nation as his enemy, and the enemy of his country." In the case of the *Julia* before cited, Judge Story says: "Independent of all authority, it would seem a necessary result of a state of war to suspend all negotiations or intercourse between the subjects of belligerent nations." In the leading case of *Griswold v. Waddington* (supra), Chancellor Kent, reviewing all the English and American cases, in an opinion which is universally recognized as a masterpiece of legal learning and judicial eloquence, uses the following language:

655 "Here, then, we have the final summation *of this discussion, and the sanction of the doctrine we have been tracing, solemnly given by the highest judicial authority of the United States. It reaches to all interchange, transfer or removal of property, to all negotiations or contracts, to all communication, to all locomotive intercourse, to a state of utter occlusion, to any intercourse but one of open hostility, to any meeting but in actual combat." See also 18 How. U. S. R. 110; 90 Eng. Com. Law R. 736; 7 Peters R. 586; Law. *Wheaton* 556; 1 Gallison R. 295; *Ib.* 248; 6 Wall. U. S. R. 536.

Mr. Duer, in his work on Insurance, referring to the case of *Griswold v. Waddington*, 16 John. R. 438, says: "The propriety of this decision, as applied to a commercial partnership, that from its nature supposes and requires a frequent intercourse and communication, cannot be disputed. There are, doubtless, contracts of which war suspends the existence, without dissolving the obligation." "The distinction," says Mr. Duer, "is probably this: a vested right, under a subsisting contract, is not affected by a subsequent war; but where the contract is executory, and would have been illegal if made in time of war, it becomes so from the time that hostilities commence as to all acts to be performed by either party during the war." Duer on Insurance, vol. 1, p. 478; Hosack *Rights of Neutrals*, p. 83; *Hanger v. Abbott*, 6 Wall. U. S. R. 532. In the last named case, the court says, that "executory contracts with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are dissolved by the declaration of war."

The policy under consideration was clearly executory. The vital principle and spirit of the contract is the payment of the annual premium by the appellees, and the consequent liability of the company, 656 in the event *that Wm. S. Warwick should die during the year for which the premium had been paid. The continued

existence of the policy depended upon the punctual payment every year by the appellee; and, by its express terms, no obligation whatever was imposed upon the appellants until the premium was paid. In this respect the contract was certainly executory, and its continued existence absolutely demanded continued intercourse and dealings between the parties; so that this contract is brought within the very definition of the authorities as an executory contract. It is no answer to say that these premiums might be paid to an agent here without intercourse with the belligerent country. I have already shown that the powers of Macmurdo had been revoked, and also that there was no law or usage or statute which required the company to keep an agent here, nor did their contract compel them to keep such agent.

But it is said the hardship of this case is peculiar, remediless, operating (if the views here taken prevail) as a forfeiture of upwards of five thousand dollars actually paid in the shape of premiums to the company; and it is earnestly and eloquently pressed in argument that the very right and justice of the case requires a different adjudication. The answer is, the parties have made their own contract, and that they are now in a court of law seeking their legal rights and legal remedies. The large sum which the appellee has paid he has received a legal and valid consideration for, it being according to the terms of his contract, the risk of the life of the assured carried during that time by the company. If the judgment of a court of law, refusing to fix any liability upon the appellant would seem to be harsh and inequitable, it is because it is the enforcement of a legal right, operating oppressively, it may be, in a particular case, but against which it is impossible
657 *to afford relief, without substituting the undefined, and therefore dangerous, discretion of a court, for the fixed and immutable principles upon which the law in relation to contracts should be administered.

My opinion is that the judgment should be reversed.

JOYNES and STAPLES, Js., concurred in affirming the judgment.

MONCURE, P., concurred in the opinion of Christian, J.

Judgment affirmed.

658 *Lipscombe v. Rogers & als.

March Term, 1871, Richmond.

Judicial Sales—Liens—Priorities.*—R is entitled to a decree for a sale of real estate to pay a debt due to him, secured by a deed of trust upon the property; but before the decree is made, T, by petition

***Judicial Sales—Liens—Priorities.**—The rule laid down in the head-note that it is an error to decree the sale of land before taking an account of the liens and their respective priorities seems to be too well

in the cause, alleges that he holds a prior lien upon the property, to secure a debt due him; and he exhibits his bond and deed of trust. It is error to decree a sale of the property, and that the proceeds of sale be brought in court, before passing upon the claim of T, and ascertaining whether or not it is a valid prior lien, and the amount thereof.

This is the sequel of the case of *Alley & als. v. Rogers*, reported in 19 Gratt. 366. After the cause went back, Charles J. Terrell filed his petition in it, alleging that he held a prior lien upon a part of the property upon which Rogers held a lien, to secure a debt of \$624, with interest from February, 1854, subject to a credit of \$100; and he exhibited the bond and deed of trust; and asked to be satisfied out of the proceeds of the property.

Before passing upon the claim of Terrell, the court, on the 15th of May, 1869, made a decree, by which it was provided that unless the defendants, or some one for them, do, within sixty days from that date, pay into the Planters' National Bank of Richmond, to the credit of the cause, the sum of \$5,113 55, with legal interest on \$3,672 02, part thereof, from the 27th day of February, 1868, until paid, that being the amount of principal money and interest remaining due to Rogers on account of the debt secured to him by the trust deed of the 24th of May, 1859, from B. W. Green to Williams and

Young, then commissioners named,
659 *should proceed to sell the several lots of land which were conveyed to the said trustees by said deed, except such as had been released upon terms stated in the decree; and after paying the expenses of sale, to pay the cash proceeds into the Planters' Bank to the credit of the cause, &c.; and make report, &c. The court reserved until the coming in of the report, the consideration of the questions whether and to what extent the petitioner Terrell was entitled to priority of satisfaction out of said proceeds of sale, on account of the claim asserted in his petition, &c. From this decree Adeline T. Lipscombe, by Martin M. Lipscombe, her husband, and the said Martin M. Lipscombe in his own right, applied to this court for an appeal; which was allowed.

Lyons, for the appellants.

Page & Maury, for the appellee.

MONCURE, P., delivered the opinion of the court.

The court is of opinion, that in the decree

settled by a long line of authorities to be controverted.

See principal case cited as authority in *Moran v. Brent*, 25 Gratt. 106; *Horton v. Bond*, 28 Gratt. 823; *Alexander v. Howe*, 85 Va. 200, 7 S. E. Rep. 248.

See also, *Iaeger v. Bossieux*, 15 Gratt. 83, 76 Am. Dec. 189; *foot-note* to *Crawford v. Weller*, 23 Gratt. 835, where many authorities on the point are collected; and see, generally, monographic note on "Judicial Sales."

appealed from in this case, there is nothing inconsistent with anything in the opinion or decree of this court in *Alley, &c. v. Rogers*, 19 Gratt. 366. This court did not decide in that case the question whether it was necessary to sell the whole of the land conveyed by the deed of trust of the 24th day of May, 1859, not released by the deed of the 28th of August, 1860, in the proceedings mentioned, for the purpose of satisfying the said deed of trust; and it would have been premature, and therefore improper, so to have done; the Circuit court not having decided that question, which indeed it was unnecessary to decide, in the view taken of the case by that court. But, when the decree of this court was entered as the decree of that court, it became necessary for that court to consider and decide

the question; and it accordingly decided it in the decree *appealed from.

The court is of opinion that there is no error in that decision.

But the court is further of opinion, that no decree for such sale should be made until it is ascertained whether Charles J. Terrell has a prior lien to that of the appellee B. F. Rogers, on a part of the said land, as claimed by the said Terrell in his petition filed in this case, and what is the amount of that lien; and, therefore, that the said decree, appealed from, was premature in directing such a sale, and must be reversed on that ground; according to the cases (referred to by the counsel of the appellee) of *Cole's adm'r v. McRae*, 6 Rand. 644; *Buchanan v. Clark, &c.*, 10 Gratt. 165, 182; *Jage, &c. v. Bossieux*, 15 Id. 84, 103; *Smith, &c. v. Flint, &c.*, 6 Gratt. 40. But the court, in remanding the cause for further proceedings, deems it unnecessary, if not premature, to give any directions for the appointment of a receiver, as is urged by the counsel of the said appellee Rogers, on the authority of the case above cited from 6 Rand. 644; it being perfectly competent for the Circuit court, on consideration of the pleadings and proofs in the cause, and of any other proofs which may be introduced by any party, to appoint a receiver whenever it shall by that court be deemed proper to do so.

The court is therefore of opinion, that the said decree appealed from is erroneous in the respect and for the reason aforesaid, and doth decree and order that the same be reversed and annulled; and that the appellee B. F. Rogers do pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And it is ordered that the cause be remanded to the said Circuit court for further proceedings to be had therein.

Which is ordered to be certified to the said Circuit court.

Decree reversed.

661 *Langhorne & Scott v. Robinson.

March Term, 1871, Richmond.

Statute—Tax by Municipality Outside of Corporate Limits—Valid.*—Under the constitution of Virginia

*Municipal Corporations—Power of Taxation.—The

of 1830, an act authorizing the common council of the city of Lynchburg to tax persons and property within the corporate limits, and for half a mile around and outside of the corporate limits, to pay the interest upon the guaranty by the city of six *per cent. per annum* upon the stock of the Virginia and Tennessee Railroad Company, to the amount of half a million of dollars, is not a violation of that constitution.

This was an action of trespass in the Circuit court of Lynchburg, brought in March, 1861, by Langhorne & Scott against Robinson, the collector of the taxes of the city of Lynchburg. By the sixth section of the act incorporating the Lynchburg and Tennessee Railroad Company, since changed to the Virginia and Tennessee Railroad Company, it was enacted as follows:

"That the common council of the town and corporation of Lynchburg be, and they are hereby, authorized and empowered, by deed, bond or otherwise, to guaranty the payment of six per centum per annum interest to her citizens or other stockholders in the said Lynchburg and Tennessee Railroad Company, in semi-annual dividends, upon an amount not exceeding half a million of dollars."

To meet this guaranty the ninth section of the act provides: "That the said common council of the town and corporation of Lynchburg shall have full power and authority to assess and collect taxes upon the lands, property and persons, of all persons within the town *proper and corporation, and for half a mile round, about and beyond its present tax-paying limits, for the foregoing purposes only; provided, that the assessments so made shall be equal."

In pursuance of the authority vested in them by the said sixth section of the act, the council of the city of Lynchburg did guaranty an interest equal to six per centum per annum on half a million of the stock of the said company; and by authority of the said ninth section, the council, in 1860, assessed a tax on lands, property and persons within the corporation limits

principal case is cited in *Whiting v. Town of West Point*, 88 Va. 910, 14 S. E. Rep. 698, and *Kaufle v. Delaney*, 25 W. Va. 412, as authority for the proposition that the legislature can confer upon a municipal corporation the power to extend its jurisdiction beyond the corporate limits for the purpose of laying and collecting certain taxes.

Constitution of 1830.—In *Norfolk City v. Ellis*, 26 Gratt. 235, the court said: "The case of *Langhorne & Scott v. Robinson*, 20 Gratt. 661, is under the constitution of 1830, which contained no restriction on the taxing power, and consequently has no application to this case." See also, *City of Norfolk v. Chamberlain*, 89 Va. 224, 16 S. E. Rep. 730.

Taxation—Jurisdiction of Courts.—The principle, set forth in the principal case, that the courts are not authorized to interfere merely because they may consider the taxation impolitic, or even unjust and oppressive, but that in such cases the remedy is in the legislative department, was cited and approved in *Norfolk City v. Ellis*, 26 Gratt. 228, and *Davis v. Lynchburg*, 84 Va. 871, 6 S. E. Rep. 230.

and revolting to our sense of justice, it appears to me, than to hold that the assured had in this case by the war forfeited the money he has paid, and his rights under this contract.

The contract in this case was partly executory, and partly executed. It was altogether executory on the part of the company, in the sense that they had done nothing yet towards the performance on their part. But it had been largely executed on part of the assured, whereby he had become invested with the right to the policy for the life of Wm. S. Warwick, which could only be defeated by his default. This right became vested when the advance premium was paid, and was a right to the insurance, not merely for one year, but for the life of Wm. S. Warwick. A new contract every year was not necessary to give the right; but only the annual payment of the premium was necessary to prevent the divesting of the right. The annual payments and giving receipts therefor were not new contracts, but only the performance of a subsisting contract.

The contract being made strictly
632 within Virginia, *with an agent residing there, and who was to continue to reside there as long as any stipulation of the contract was unperformed; an agent with whom the contract was to be performed, and to whom the premiums were to be paid in Virginia, as has been shown; it seems to me that this case does not fall within the rule as applied, or within the reason of it, as explained and illustrated by the judges, in any of the numerous cases cited by the learned counsel. In all those cases the contract was to be performed in the enemy's country. Here, the performance is strictly restricted by the contract itself, according to its intent and legal effect, and by the designed policy of the law, by authority of which it was made, to the limits of Virginia. In those cases, and which were particularly relied upon by Judge Story in the case of the *Rapid*, "they had no power to sue in the public courts of the enemy nation." Upon this contract they could sue or be sued in the public courts of Virginia, even pending the war.

Griswold v. Waddington, 16 John. R. 438, is a leading case relied upon by the learned counsel for the company, and particularly the following passage in the very elaborate and learned opinion of the Chancellor: "Here, then (the Chancellor observes), we have the final consummation of this discussion, and the sanction of the doctrine we have been tracing, solemnly given by the highest judicial authority in the United States. It reaches to all interchange, or transfer, or removal of property, to all negotiation and contracts, to all communication, to all locomotive intercourse, to a state of utter occlusion, to any intercourse but one of open hostility, to any meeting but in actual combat." The Chancellor has given us, here, a compend of all the cases to which this doctrine reaches; but unfortunately for the plaintiffs in error, they

cannot bring their case within the category. In the performance of this contract by the assured, it was not necessary that
633 there should be any "interchange," "transfer," or "removal" of property, from this State into the enemy's country. Nor did its performance require any "communication," "locomotive intercourse," "negotiation and contracts," between him and the plaintiffs in error, or any alien enemy. And a state of "utter occlusion to any intercourse but one of open hostility, to any meeting but in actual combat" (if there could have been such a meeting between a man near seventy years of age and a New York corporation), was not incompatible with the execution of this contract. It does not appear that there was, before the war, in the making and execution of it, any intercourse or correspondence of any sort between the assured and the officers of the company in New York. Certainly none was necessary. It is most probable that they were not known to each other. And if the contract could be made and performed before the war without any intercourse between them, there is no reason why it could not be done during the war.

If the law had been framed by the Legislature of Virginia with a special reference to a state of war between the States, its adaptation could scarcely have been more complete. The possibility of such a state of war may not have been, and probably was not, in the mind of the Legislature when they enacted this law. But as it was the design of the Legislature to protect the State and her citizens against abuses and impositions by these foreign insurance companies, who were not amenable to her laws or subject to her jurisdiction, in imposing conditions upon those companies for the privilege of operating in this State, sufficient to give the desired security in time of peace, they were necessarily comprehensive enough to embrace a state of war. And to this end, in framing the law, whether for a state of peace or war, it was necessary to make the operations of the companies within this State strictly local,

and subject to the jurisdiction of the
634 *State, and completely independent of any foreign jurisdiction in the making, performance, and enforcement of their contracts in this State. This was evidently the leading design of the Legislature in the law which was framed for the purpose. Our difference is not as to the principle, but as to its application.

In the numerous cases reviewed by the chancellor in that leading case, I am under the impression that the principle "that war dissolves the contract," is not applied, in a single instance, to a contract made and executed by one of the parties, in the whole or in part, before the war, and where the execution of the contract, on his part, was to be completed before he was entitled to any performance of the other party, and had been partly performed, or where the dissolution of a contract made before the war would work a forfeiture. Such an ap-

plication of the rule would be unreasonable, arbitrary and immoral. The parties, in entering into the contract before the war, did nothing criminal or unlawful, that they, or either of them, should be liable to the punishment of a forfeiture of their contract. Not so where the contract is made during the war. In that case it is unlawful and criminal, and therefore void. And this, it seems to me, is the proper distinction. When the contract is made before the war, but not executed by either party, and the carrying it into execution would involve a violation of the duty of the parties respectively to their country in the new relations which the war has created; in that case its execution not having been entered upon, and it being uncertain how long the war may last and prevent the execution of the contract, it may be dissolved; and this not to the prejudice of the parties, or either of them, but for their presumed convenience and benefit to be absolved from the obligation of a contract which, in the changed relations of their countries, cannot be carried into execution. On the other

635 hand, if the contract *is partly executed, and rights under it have vested, and it cannot be dissolved without the loss or forfeiture of one of the parties; and it cannot be carried into execution consistently with the duty of the parties to their countries respectively while the war lasts, in such case it should not be dissolved, but only suspended. But if it can be carried into execution, notwithstanding the war, without conflicting with the obligation of allegiance of either party, it will be neither dissolved nor suspended.

In the very case we are commenting on, the contract, which was the subject of the suit, was made during the war between alien enemies; and there is not, I think, a sentence in the opinion of the Chancellor, or in the cases he reviews, in conflict with the distinction I have taken. On p. 471, he cites the case of *ex parte Boussmaker*, 13 Ves. R. 71, which supports it. He says, the Lord Chancellor having had occasion to notice this subject, observed, "that a debt arising from a contract with an alien enemy could not possibly stand; for the contract would be void. But if the two nations were at peace at the date of the contract, it being originally good, upon the return of peace the right to sue would survive."

Chancellor Kent, commenting on this decision of Lord Chancellor Erskine, says, "the Chancellor here very clearly and accurately marks the distinction between debts contracted before and after the commencement of the war; and he holds the latter to be absolutely void." And in the later case of *Buchanan v. Curry*, 19 Johns. R. 137, when this elaborate review of the cases on this subject was fresh in the Chancellor's memory, he enforced an executory contract made and partly executed before the war, between citizens of the two countries respectively which afterwards became involved in war. The performance of the contract was completed, *pendente bello*,

636 by one of the parties, *with the agent of the other, who resided in the same country with the former. And the performance with the agent was held good and binding on the other party, who was an alien enemy, residing in the enemy's country. But the Chancellor said, "If such a contract had been entered into during the war, it would have been illegal and void." And again, "It is not unlawful to pay debts, or perform contracts to alien enemies, if the payment be made, or the duty be performed in one country."

This is a much stronger case than that. In that there was nothing in the contract or law to limit the performance to the State, or to the local agent; in this there is. In that there would have been no forfeiture, or serious loss to the party, by dissolving the contract; in this there would be a cruel forfeiture to one party, and no loss, but a great gain to the other. In that case the act done was in discharge of an obligation which might have been suspended without loss; this, the performance of a condition to save a forfeiture. In that case, the party could not enforce his contract by suit *pendente bello*; in this he could. It was held in that case, that "the rule is founded in public policy, which forbids, during war, that money or other resources shall be transported, so as to aid or strengthen our enemies. The crime consists in exporting the money or property, or placing it in the power of the enemy; not in delivering to an alien enemy, or his agent residing here, under the control of our government." The principle of that case is not in conflict with the cases relied upon by the company's counsel, but clearly takes this case out of the rule applied in those cases; and the decision, it seems to me, is a complete refutation of the argument of plaintiff's counsel, that the war was a revocation of the agency in this case; a point upon which much stress was laid, and which I will now consider further.

637 *In *Clarke v. Morey*, 10 John. R. 70, Kent, Ch. J., says: "It is even held, if aliens are ordered away in consequence of the war, they are still entitled to leave a power of attorney, and to collect their debts by suit." In *King v. Hanson*, 4 Call 259, Hanson, a native of England, came to Petersburg several years before the war of the revolution. After the declaration of independence he refused to take the oath of allegiance to Virginia, and returned to England. Before leaving, he appointed Atkinson & Taylor his attorneys in fact, to make sale of his house and lot in Petersburg. His attorneys made sale of it in 1778, for £1,000, for which they took the bond of the purchaser, payable on demand. After the war Hanson returned, and brought suit on the bond given to his agents for the purchase money; and this court affirmed the judgment of the court below, so far as it gave validity to the execution of the power by the agents, and enforced the bond with interest. The only ground upon which interest could have been allowed was, that

the creditor had an agent here, to whom payment could have been made. In the case of *Monseax v. Urquhart*, 19 Louis. R. 485, it was held that the agency was not "dissolved or even suspended by the occurrence of the late war." In *Denniston v. Imbrie*, 3 Wash. C. C. R. 396, 403, the court say: "The last question respects interest during the war. We think that if the alien enemy has an agent in the United States, or if the plaintiff himself was in the United States, and either of these facts known to the debtor, interest ought not to abate." "The debtor might have paid his debt, either to the creditor, or his agent in this country, without the danger of violating his duty or the laws of the land." This case reaffirms the principle decided by the same court in *Conn & als. v. Penn, &c.*, 1 Peters C. C. R. 496. The principle of these cases is settled by the highest court in the land,

in the recent case of *Ward v. Smith*, 638 *7 Wall. U. S. R. 447, 452. Mr. J.

Field, delivering the opinion of the court, says: "The objection that the bonds did not draw interest, pending the civil war, is not tenable. The defendant, Ward, who purchased the land, was the principal debtor, and he resided within the lines of Union forces, and the bonds were there payable." (The creditor lived within the Confederate lines.) "When an agent appointed to receive the money resides in the same jurisdiction with the debtor, the latter cannot justify his refusal to pay the demand, and of course the interest which it bears. It does not follow that the agent, if he receive the money, will violate the law by remitting it to his alien principal. Nor can the rule apply when one of several joint debtors resides in the same country with the creditor, or with the known agent of the creditor."

These cases, and others which might be cited to the same effect, are not limited in their application to contracts wholly executed. And I am unable to perceive why it should not be applicable to our case as well as to an executed contract. The only acts to be done by the assured, were to pay money to the agent at stated periods; and the only thing to be done by the company, through their agent, was to give a receipt for the money so paid, until after the death of Wm. S. Warwick. And we have seen that, even in that event, it was not necessary for the assured to go out of the State to enforce his contract against the insurers for the policy even by suit. Now, it seems to me, that, if there is any difference between this case and an executed contract, it is in favor of this case; for these payments were not necessary to be made in discharge of debt; which could be done, and perhaps as well done, after the war; but they were necessary to be done in the performance of a condition, to prevent a forfeiture; and the payments were
639 made at the place where, *and to the agent to whom, the contract required them to be made.

As to the form of the receipt, and that it

should be signed by an officer of the company, that was prescribed by the company, as the kind of evidence which it required of the payments. It could not change the law of the contract, which authorized payment to be made to the agent; and, I think I have shown, was not so intended. The obligation of the assured, by his contract, was to pay to the agent; and this requisition was not in conflict with that obligation. To say that the company could withhold these printed receipts on the day of payment, would be to say that they could refuse to receive payment, and thereby release themselves from the obligation of the policy, and subject the assured to a forfeiture, without any default of his, of all the premiums he had paid: a conclusion against which the moral sense of mankind would revolt. I hold, then, if, on the day and place when and where payment was to be made, the assured offered to pay to the agent, who had not been provided with the printed receipts, the company will be presumed to have waived that requisition; and a payment to the agent, without them, would be good, and a sufficient compliance with the contract.

But it is contended that, by the letter of May 30th, 1861, the agency was revoked.

I do not think so. On the contrary, it evidently recognizes a continuing agency. It authorizes the agent to adjust difficulties as to policies, in a certain way, and requests, "if this does not meet your views, let us know what you would advise." If the instruction must be construed, that the premium should be paid in New York city, and not in Richmond, I think it is clear that they had no right, under the contract, to impose such a condition. And we find in their next letter they say, "must be paid

here, or by draft on this city." Again
640 they say, *"we wrote you on 30th May last," &c.; "renewals to be paid here, or by draft on this city." And thus their agent seems to have understood their letter of 30th May. For he received payment of the premium on the 23d July, 1861, and on the same day wrote to them to send the printed receipt. And again, on the 5th of August following, he wrote to them: "I wrote you on the 23d ultimo, requesting you to send me the company's printed receipt for Mr. Corbin Warwick's premium on policy No. 4758, and have not heard from you; as soon as I get the receipt I will make the remittance to you."

Whilst this company had no authority, under the contract, to change the place of payment, they had undoubtedly the right to refuse payment in Confederate money, and to require it to be made by draft on New York or in New York funds. This their agent was prepared to do. But in their letter of 6th of August, although they acknowledge that, in their letter of May 30th, they had authorized payment of the premium to be made by draft on New York, they refused or failed to inclose the printed receipt. By neglecting or refusing to send the printed receipt to their agent as re-

quested, they failed to receive the draft, which would have been remitted to them upon its receipt. And this being their last communication to him during the war, he did not remit to them the draft, but held it until probably 1863, when it was taken from him under the sequestration act. It was the implied refusal of the company, therefore, to receive payment from their agent in the mode prescribed by themselves, which prevented the remittance being made. And, if it is a loss to them, they have nobody to blame but themselves. It was certainly not the fault of the assured, who had honestly paid it in the kind of funds which they required: and it would be unjust to require him to pay it again.

641 *In all their correspondence with their agent, I do not find an intimation of a purpose to revoke his agency. And under the act of Assembly, which is to be read as a part of their contract, they could not, until they appointed another agent in his place. Were they relieved from this obligation by the war? Or could their failure to have an agent here to receive payment of the premiums, release them from the obligation of the policy, or entitle them to a forfeiture? It seems to me that both these questions must be answered in the negative. And that they could not avail themselves of their own disability for such a purpose. But they are questions which do not arise in this case, inasmuch as there had been no revocation of the agency of Macmurdo.

In their letters they express a disposition to act liberally towards their southern policy holders. In this they may have been sincere. But their failure to send the printed receipt to their agent, when requested, to enable him to remit to them a check upon New York, as they required, in payment of the premium, which he informed them had been received, does not show a disposition to afford any facility of the assured to fulfil the condition of his policy. If the receipt had been sent and lost they could not have sustained any loss by its miscarriage. But the probability is, it would have reached its destination, as did their letters both ways, and that they would have received a draft from their faithful agent, on New York, for the premium. It is impossible to shut our eyes to the fact that the company was largely interested in defeating these policies; and considerations of that sort may have had more influence upon their conduct than a desire to promote the interests of their policy holders. I am well satisfied that, in this case, they might have received the premiums from the assured in New York funds, if they had been very desirous

642 to receive them. At any *rate their agent, in receiving payment of the premium for 1861, in a draft on New York, did not violate his instructions; and in refusing to receive that for 1862 at Richmond, if he acted under instructions, they were instructions which the company had no right to give. I am, therefore, of opinion to affirm the judgment.

CHRISTIAN, J. In considering this case, and in seeking to arrive at a satisfactory solution of the novel and difficult questions which it presents, there is one thing which must be kept steadily in view; and that is, that this is an action at law for the breach of a covenant upon a contract in writing, under seal, in which the parties have made their own agreement. It is not a case in which a party comes into a court of equity to ask relief against a forfeiture, but it is a case in which, in a court of law, the parties invoke the judicial interpretation of the contract which they have entered into, to ascertain their legal rights and liabilities. We are not at liberty, therefore, to consider what peculiar hardship may result to either party from the legal effect of their own contract. But the sole question is, what is the nature of the contract which the parties have made for themselves, and what are their legal rights and liabilities under that contract, interpreted according to the rules of law?

The record shews that the defendant in error, Corbin Warwick, effected a policy of insurance upon the life of William Sidney Warwick for the sum of ten thousand dollars, with the plaintiff in error, the Manhattan Life Insurance Company.

Looking to the policy of insurance as fixing the terms of the contract between the parties, we find that the Manhattan Life Insurance company bound themselves to assure the life of the said William Sidney Warwick, for the sum of ten thousand dollars, for the term of his natural life, 643 for the sole use of the said *Corbin Warwick, in consideration of the "sum of one thousand and thirty-one dollars to them in hand paid by Corbin Warwick, and of the annual premium of one thousand and thirty-one dollars, to be paid on or before the 23d day of July in every year during the continuance of this policy." It was further stipulated that "in case the said Corbin Warwick shall not pay the said premium, on or before the day hereinbefore mentioned for the payment thereof, the said company shall not be liable for the payment of the sum assured or any part thereof." And it was further agreed by the assured, that "in every case, where this policy shall cease, or become, or be null or void, all previous payments made thereon shall be forfeited to said company."

Endorsed upon this policy of insurance, under the head of "notice," and which is as much a part and parcel of the contract as if embodied in it (see 2 Philips on Insurance, § 2,014) are to be found the following stipulations, in addition to those already referred to: "The premiums are always due on the several days stipulated in the policy, and all risk to the company commences at the time of the actual payment of the first premium, without regard to the date of the policy (unless otherwise stipulated in the policy), and continues until the day named in the policy for the payment of the next premium at 12 o'clock noon, and no longer;" * * * "and no payment of premiums

binding on the company unless the same is acknowledged by a printed receipt, signed by an officer of the company."

It will thus plainly appear, by the express provisions of the policy itself (to which alone we can look to ascertain the agreement of the parties), that the Manhattan Life Insurance Company bound itself to assure the life of William Sidney Warwick, upon the express condition that the annual premium should be paid on or before the day named in the policy; and expressly *stipulating that if the annual premium was not so paid, the company should not be liable for the sum assured, or any part thereof.

The annual premium was the consideration for the risk. The risk assumed by the company on the one hand, and the premiums paid by the assured, as the price of that risk, on the other, are correlative obligations whose mutual operation constitutes the very essence of contracts of insurance. Marshall on Insurance, 648; Angel on Fire and Life Insurance, 461, § 399. Under this policy, the obligation of the assured was to pay the annual premiums to the company on the day specified, and that of the company was to assume the risk from the day of payment for twelve months from that day. These were the mutual and correlative obligations which the parties respectively assumed by their own written contract. The liability of the company is fixed only upon the condition that the annual premiums are paid on the day specified. The breach of that condition (whether it be regarded as a condition precedent or subsequent), by the express terms of the contract, discharges the company from all liability. The conditions imposed by the policy arise from the contract which the parties themselves have made; they are not conditions imposed by law, but by the express terms of the contract, and strict performance of these conditions will be required before any liability can be fixed. It is plain that, looking alone to the policy, as containing the contract of the parties, the obligations of the company cease upon the failure of the defendant in error to pay the annual premium on the day fixed in the policy for such payment. *Ruse v. Mutual Life Ins. Co.*, 23 New York R. 516; *Simpson v. The Accidental Death Ins. Co.*, 2 Com. Bench, N. S., 257; 1 Big. R. 578; *Harmony v. Bingham*, 12 New York, 2 Kern. R. 99; *Wood v. Worsely*, 2 H. Bl. R. 574, note 582.

645 *It is a well-settled principle of law, that the relative claims and obligations of the parties are always fixed and determined by their own written contract. In *Atkinson v. Ritchie*, 10 East R. 533, Lord Ellenborough said: "The relative claims of the parties upon, and their duties in respect of, each other, are conclusively fixed and defined by the terms of their own written contract. No exception, which is not contained in the contract itself, can be engrafted upon it by implication, as an excuse for its non-performance. When a party, by his own contract, creates a duty,

or charge upon himself, he is bound to make it good if he may; notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." The principles thus announced in this case were recognized and approved by this court in the case of "*The Merchants' Ins. Co. v. Edmond, Davenport & Co.*," 17 Gratt. 146, 157. (See also *Paradine v. Jane*, Aleyn 27.)

The Manhattan Insurance Company was domiciled in the city of New York. The contract of the defendant in error was to pay his annual premiums to the company. There was no stipulation in the policy which bound the company to keep an agent in the city of Richmond. It is true, they did once have such agent in the person of one J. B. Macmurdo, through whom the policy of insurance in this case was at first effected. But his powers, as agent, were expressly limited and defined by the terms of the policy, and there was nothing in these terms which prevented the company from revoking the agency at any time. The limitation referred to is found in the endorsement upon the policy, and is in these words: "No payment of premiums binding on the company unless the same is acknowledged by a printed receipt signed by an officer of the company." The manifest object of this stipulation was to limit

646 and control the power of their *agent, and to insure the receipt of the premiums, and its plain effect was to notify all parties, dealing with their agents, that they were authorized to receive the premiums only when they presented such a receipt as the notice required, to wit: a printed receipt, signed by an officer of the company. Payment to a party not presenting such a receipt, was a payment to one not authorized to receive it, and could not bind the company by the express terms of their contract. I have said the contract, on the part of the defendant in error, was to pay the premiums to the company. Of course, payment to its authorized agent was payment to the company; but here the agent was not authorized to receive the premiums except upon certain conditions, which were well known to the assured, and were embodied in the very contract which he seeks to enforce.

I do not mean to say, that where the company prevents payment on the day specified by withholding a printed receipt, signed by an officer of the company, that it would be released from its obligation as insurer; for that would be a fraud upon the rights of the assured. But I refer to this stipulation for the purpose of shewing that the contract of the defendant in error was to pay the annual premiums to the company, which was domiciled in the city of New York; and that, so far from there being any obligation to keep an agent in the city of Richmond to receive premiums and give receipts for the same, the appellee had expressly stipulated, when he accepted the policy of insurance, that "no payment of premiums should be binding on the company

unless the same be acknowledged by a printed receipt signed by an officer of the company."

In times of peace it was both convenient and profitable to the company to keep an agent in the city of Richmond, to solicit patronage and extend the business of the company. It was convenient to the assured to pay the premiums here instead of
647 New York. Accordingly, *we find that, up to the commencement of the late war, the premiums were regularly paid to J. B. Macmurdo, the agent of the company, but in every case upon printed receipts signed by an officer of the company, as stipulated in the policy. On the 23d day of July, 1861, after hostilities between the States had commenced, and when mail facilities had ceased between the two sections, the defendant in error paid to J. B. Macmurdo \$1,031, the amount of the premium then due on his policy, and took his written receipt for the same, signed by him and not by an officer of the company; with the promise on the part of Macmurdo that he would write to New York and get the proper receipt. Warwick called on Macmurdo several times to get this receipt, but failed to do so. This money, so received by Macmurdo from Warwick, he attempted to remit to the company in New York, by a draft purchased of R. H. Maury & Co., on Carpenter & Vermyle of New York; but the draft never reached the company, and it was afterwards paid by R. H. Maury & Co. to a receiver of the Confederate States, under their sequestration act. It further appears from the evidence that, some time before July, 1862, the precise time is not stated, Macmurdo informed Warwick that he had received instructions from the company not to receive any more premiums; but, on the 23d day of July, 1862, Warwick tendered to Macmurdo funds sufficient to purchase a draft on New York (in the currency circulating there), for the sum of \$1,031, the annual premium due on that day, which Macmurdo refused to receive.

Several letters are exhibited in evidence, written by the company to Macmurdo, in reply to letters received from him. In one of these letters, dated May 30th, '61, the company wrote that "in consequence of a discontinuance of the mails, and the derangement of exchanges, as well as the depreciation of the currency"

648 *they would require the premiums to be paid in New York, or if the assured should prefer, their policies might be cancelled upon certain terms proposed. On the 6th day of August, 1861, they wrote another letter, from which the following extract is taken: "We are in receipt of your favor in reference to receiving the premiums on policies falling due, for which you have no renewal receipt, to which we cannot consent, as under the present state of things the premiums must be paid here, or by a draft on this city. We wrote you, on the 30th May last, that in consequence of the discontinuance of the mails, the derangement of exchange, and the depreciated cur-

rency, we would require the renewals to be paid here, or by draft on this city, &c. * * * In addition to this we now have the fact that the Southern Confederacy has passed an act declaring all property belonging to the North confiscated. You will, therefore, see the impropriety and impossibility of this company receiving its premiums in your city."

Here, then, we find, that as early as August, 1861, the agent had direct and positive instructions from the company not to receive any more premiums; and they refuse to furnish him with the renewal receipts (printed and signed by an officer of the company), which, according to the express terms of the policy, known to all the policy holders, was the authority to him to receive the premiums, and thus they, in effect, revoked his power as their agent to receive them.

Now, from what has been said, the following propositions are undoubtedly true, and cannot be gainsaid:

1st. The condition, upon which alone the company can be held liable, is the payment of the annual premiums on the days specified; and the breach of that condition, by the express terms of their contract, discharges the company from all liability, and causes the policy, in its own language, to "cease and determine."

649 *2nd. The contract of the assured was to pay the annual premiums to the company, which was domiciled in the city of New York. And

3rd. There was nothing in the contract which bound the company to keep an agent in the city of Richmond to receive the premiums and give renewal receipts.

It therefore follows, logically and inevitably, that the tender to Macmurdo, who was once the agent of the company, but whose powers had been revoked, could not, in law, under their contract, fix any liability upon the company, unless it can be shewn that under some law or usage or statute, regulating policies of insurance in this State, the company was bound, both in time of war as well as in times of peace, to keep an agent here to receive the annual premiums when they fell due, upon the policies they had issued to persons resident in this State.

The counsel for the appellee insist, that the policy of our laws regulating foreign insurance companies is to put them on the same footing as home companies; that the provision in the policy, that it is "not binding on the company until countersigned by their agent here, makes the contract what they are pleased to call a "Virginia contract;" and great stress is laid upon the statute of this State regulating foreign insurance companies, which they insist imperatively requires every foreign insurance company to keep an agent here, ready to receive the premiums upon their policies as they become due; and they argue, with great plausibility, that though the policy is an insurance for the life of Wm. Sidney Warwick, upon the express condition that

ceived the scrip, and if so, what disposition he has made of it, and upon what terms he sold it. Upon all these points the plaintiffs may properly invoke the aid of a court of equity to compel a full and explicit discovery of all matters appertaining to his execution of the agency. The jurisdiction of a court of equity in such cases is not taken away, because the statutes now authorize the examination of the adverse party as a witness.

The plaintiffs were also entitled to resort to a court of equity to avoid multiplicity of actions; but it is unnecessary to enlarge upon this view, as the equitable jurisdiction is clear upon the first ground.

681 *The third ground of error assigned is, that the court improperly charged the defendant Segar with one dollar and twenty-five cents as the price per acre of the scrip.

Segar, in his answer, states, and his deposition is to the same effect, that he sold the scrip at 91 cents per acre. There is not a scintilla of evidence in the case contradictory of these statements. It is true that the defendant Fant, in his answer, states that he paid Segar between \$1 and \$1 20 per acre; but he does not profess to be exact or positive. Besides upon well settled principles, the answer of Fant is, in no view of the case, evidence against Segar. If the plaintiffs desired the benefit of Fant's statement of the transaction, it was their right, as it was their duty, to take his deposition, and thereby afford his co-defendant an opportunity of cross-examination.

The fourth ground of error is the refusal of the court to allow the defendant Segar the compensation of one-third of the scrip, to which he was entitled under the contract. What was the contract? Not merely, I imagine, to recover the scrip and sell it, but to pay over the proceeds to his principals. It may be fairly presumed they were willing to allow him a compensation of one-third in consideration of receiving the other two-thirds in a reasonable time. The defendant has, however, not accounted for any part of the funds. When called upon to say what he had done with the plaintiffs' money, he repels the enquiry somewhat indignantly, by saying that he had disposed of it according to his sovereign will and pleasure. His subsequent explanation, "that he had disposed of the money as any gentleman believing himself solvent would use funds under his control," does not materially improve his claim to compensation.

However solvent agents and trustees may be, or however honest may be their intentions, if they deliberately *retain trust funds in their own hands, appropriate them to their own private use, and refuse or fail for years to render any account to their principals, they should be held to forfeit all claim for compensation. Any other rule is a premium for negligence and an encouragement to persons occupying relations of trust and confidence, to retain money not their own.

The fifth ground of error is the failure of the Circuit court to allow any credit for the payments made by the defendant Segar. His answer states that he has paid some of the parties, but no receipts or vouchers are filed, or evidence adduced establishing the existence of such payments. I think the court did not err in disregarding this claim.

Sixth assignment, that the court erred in rendering a decree against the defendant Fant. The plaintiffs claim that Fant was their substituted agent, and as such responsible to them. To sustain this view they rely upon letters of attorney to Segar, and Segar's appointment of Fant as agent by substitution. On the other hand Fant insists that the firm of Sweeney, Rittenhouse, Fant & Co., of which he was a member, purchased the scrip from Segar, and settled with him in full for the purchase money; that the sale was a fair and bona fide one, made in the usual course of trade, and at a fair market rate; that his own name was substituted as the attorney because he was the member of the firm who usually attended to such business; that as the scrip had not been issued the substitution was necessary to enable him, as the purchaser and owner, to draw the scrip from the general land office, according to a well known usage and custom of the department at Washington. This statement is fully sustained by the testimony of the defendant Segar.

The plaintiffs have adduced no evidence contradicting the statement, either as regards the purchase of the scrip by Fant, or the usage at Washington. Such
683 *purchase and such usage must, therefore, be regarded as established facts in the case. Now, if Fant is estopped by reason of this substitution, to deny the agency, it is clear the departments at Washington have adopted a custom which converts every purchaser of scrip, not already issued, into an agent; and imposes upon him all the responsibilities and duties incident to that relation. The injustice of this proceeding is too manifest to require comment. The agent informs the purchaser of the scrip that this substitution is the regular and recognized mode of effecting the sale: the purchaser acts upon the information thus imparted, accepts the power of attorney, and nominally the position of substituted agent. Is the principal to be permitted to repudiate the acts and declarations of his agent, upon the faith of which the purchaser has acted, and to insist that the purchaser occupies the double relation of purchaser and agent?

The plaintiffs must be presumed to know the usage at Washington, and in executing the power of attorney in the mode observed, they no doubt intended to conform to that usage. It is manifestly unjust for them now to insist that they were ignorant of it; that they did not intend their business should be conducted according to the well established mode universally recognized; and the purchaser must at his peril see to it that their own agent properly executed

his trust. If Fant bona fide purchased and paid for the scrip, what interest have the plaintiffs in the subsequent arrangements between him and Segar, in no manner affecting their interests. It was a transaction between Segar and Fant, and not between the plaintiffs and Fant. As between the plaintiffs and Segar, there was nothing to be done but the payment of the money. The failure to receive it only tends to shew that the plaintiffs were unfortunate in the selection of an agent. The case would be

684 a very different if it appeared there was a *fraudulent combination between Segar and Fant. In the absence of evidence establishing that fact, I think it is clear no decree should have been rendered against Fant. The doctrine of estoppel, so elaborately discussed by the counsel for the appellee, has, in my judgment, no application to the case.

The other judges concurred in the opinion of Staples, J.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the Circuit court erred in not dismissing the bill as to the defendant Hamilton G. Fant. The court is further of opinion, that the Circuit court erred in charging the defendant Joseph Segar with one dollar and twenty-five cents per acre as the value of the scrip in the bill and proceedings mentioned, instead of ninety-one cents per acre, with which he is properly chargeable: and that there is no other error in said decree. It is therefore decreed and ordered, that the said decree be reversed and annulled, so far as it is herein declared erroneous; and in all other respects affirmed. And it is further decreed and ordered, that the appellee Martha Skinner, executrix of Thomas Skinner, deceased, out of the assets in her hands to be administered, and the other appellees out of their own estates, pay to the appellants their costs by them expended in the prosecution of their appeal here. And this court, proceeding to render such decree as the said Circuit court ought to have rendered, it is further decreed and ordered, that the bill of the complainants be dismissed as to the said appellee Fant; and that they pay to him, that is to say, the said Martha Skinner, executrix of Thomas Skinner, out of the assets in her hands to be administered, and the other appellees out of their own estates, his costs by him expended about his defence in the said Circuit court.

685 *And it is further decreed and ordered, that the appellees recover against the appellant Segar the sum of four thousand eight hundred and fifty-three 34-100 dollars, with interest thereon from the 31st day of March, 1858, till paid; and their costs by them about their said suit in the said Circuit court expended.

Which is ordered to be certified to the Chancery court of the city of Richmond.

Decree reversed.

686 *Winston & als. v. The Midlothian Coal Mining Co. & als.

March Term, 1871, Richmond.

Injunctions—Jurisdiction of Courts.—Where a bill seeks relief, and asks for an injunction to restrain the sale of real estate in another county, as ancillary to the relief sought, the court of the county or city where the defendants, or some of them reside, has jurisdiction of the cause; and the order for the injunction properly proceeds from the court of that county or city.

On the 19th day of May, 1869, Joseph P. Winston and a number of other persons, claiming to be creditors of the Midlothian Coal Mining Company, and suing for themselves and all other creditors and stockholders of said company who would come in and make themselves parties in the cause, filed their bill in the Circuit court of the city of Richmond, in which they allege that they are creditors of the company to the amount of about \$40,000. That, in 1866, the directors of the company had issued its bonds to the amount of \$60,000, secured by a deed of trust upon the real property of the company in the county of Chesterfield, in which deed Robert A. Lancaster and Charles S. Mills were the trustees. That these bonds were placed in the hands of Lancaster & Co., who were brokers, for sale upon commission. That in March, 1867, the said board of directors directed the issue of not more than \$75,000 of the bonds of the company, which were secured by another deed upon the said property of the company, in which the said Lancaster and James R. Branch were the trustees. That \$60,000 of these bonds were issued and placed in

687 the hands of Lancaster & Co. *for sale. And that another deed was executed, conveying all the unincumbered property of the company to Lancaster and Mills, to secure certain negotiable notes executed by the directors of the company individually, to the amount of \$15,000, for the benefit of the company. They charge that there was both usury and fraud in the mode of Lancaster & Co.'s dealings with these bonds, which they set out; and that they had sold to one Burrus a large amount of them at a great sacrifice, they being at the same time the agents of the company to sell, and the agents of Burrus to buy. They insist that the bonds and deeds of trust are void because of the frauds practiced, and because they are in contravention of the act of Assembly of Virginia, and the bankrupt law of the United States; or

***Injunctions—Interpretation of Statute.**—In *Muller v. Bayly*, 21 Gratt. 531, the court said: "It is well settled that § 4, of chapter 179, aforesaid, applies only to a pure bill of injunction, and not to a bill seeking other relief, to which the injunction sought is merely ancillary. This was expressly decided by this court in the recent case of *Winston & als. v. The Midlothian Coal Mining Company & als.*, 20 Gratt. 686. See also, 2 Rob. Old Pr. 249, and the cases there cited of *Hough v. Shreeve*, 4 Munf. 490; *Singleton v. Lewis, etc.*, 6 Munf. 397; and *Pulliam v. Winston*, 5 Leigh 325."

under the former the plaintiffs are entitled to share equally with the creditors, attempted to be secured by them.

They state, further, that the trustees in the deeds of trust had advertised to sell the property on the next day, and if the sale is made it must be, under the circumstances, at a ruinous sacrifice; and in fact can only be purchased by Burrus, to be paid for by the bonds of the company which he holds. And making the trustees in said deed, the directors of the company, Lancaster & Co. and Burrus, parties defendants, and calling for a discovery from Lancaster & Co. and Burrus, they pray that Lancaster & Co. may be required to render an account of all their dealings and transactions in the premises with the said Midlothian Coal Mining Company; that the alleged sales of said bonds, as against the said company and the complainants, may be decreed to be null and void, and that they may be required to be given up and cancelled; that said deeds of trust may be declared void; that an account may be taken by one of the commissioners of the court, of all the said dealings and transactions; that the plaintiffs,

688 *as creditors of said company, may in any event be let into and have equal benefit under said deeds of trust with Lancaster & Co. and others, if said deeds or any of them shall be held to be valid; that the trustees and all others may be enjoined from selling the said property until the further order of the court; that a receiver may be appointed; and for general relief.

Before filing the bill in the clerk's office, the plaintiffs presented it to the judge of the Circuit court for an injunction, which he awarded. But whilst the clerk was making out the process, another order of the judge was presented to him, by which it was ordered, that if any of the defendants in said bill, or any one for them, shall execute and file with the clerk of the court a bond in the penalty of \$60,000, with good security, with condition to comply with the decree which may be rendered by the court on the hearing of the cause, then the sale may take place in accordance with the terms of the advertisement. And this bond was executed.

On the 20th day of May, 1869, George L. Bidgood and others, creditors and stockholders of the Midlothian Coal Mining Company, filed their petition in the cause, in which they prayed to be admitted as plaintiffs therein. They adopt the allegations of the bill, and the stockholders who unite in said petition, pray for themselves and the other stockholders, that the sale of the property may be enjoined. Upon the filing of this petition the judge awarded a peremptory injunction restraining and forbidding the trustees from selling the property.

The process issued on this last injunction was served on Mills at 20 minutes past ten o'clock of that day, by leaving a copy at his dwelling-house, and on Branch at 15 minutes past eleven o'clock, in the same

way. Lancaster was returned not found, and no inhabitant.

On the 12th of June, 1869, Julia A. 689 Woolridge, *Thomas C. and John C.

Howard, filed their petition in the cause, asking to be made parties; they claimed as large stockholders in the company. After setting out their interest, they stated that the trustees, notwithstanding the injunction, and that they were notified of it by written notice from the counsel of the plaintiffs, had proceeded to sell the property, and that Burrus had become the purchaser at \$145,000, with notice that the injunction had been issued.

It appears that the plaintiffs proceeded regularly to mature the case for a hearing; process was issued which was served on the company and on several of the directors, on Lancaster & Co., and on the three trustees, and at the rules held on the last Monday in June, the bill was taken for confessed as to them.

It appeared in the case that the real estate of the Midlothian Mining Company, and the personal property included in the deeds of trust, was located in the county of Chesterfield; but the principal office of the company was in the city of Richmond. The trustees, Mills and Branch, two of the partners of the firm of Lancaster & Co., and several of the directors of the company, lived in the city.

On the 21st of July, 1869, Lancaster and Mills filed their motion in writing in the cause, praying that the injunction awarded on the 19th of May and on the 20th of May, 1869, be dissolved, and that the plaintiffs' bill be dismissed. And they assigned, as the ground of the motion, that the bill in the cause is a bill for an injunction to restrain a sale apprehended by the plaintiffs, which was to take place in the county of Chesterfield; and that the orders awarding said injunctions were improperly directed to the clerk of the Circuit court of Richmond. That jurisdiction of the bill was in a Circuit, County or Corporation court of Chesterfield; and that the Circuit court of Richmond had no jurisdiction of this bill.

690 This motion the court *overruled.

But on the 13th of October, 1869, on the motion of Lancaster & Co. to dissolve the injunction and dismiss the bill and petitions, on the ground that the court had no jurisdiction of the suit; the court did dissolve the injunction. And though in that order the question of dismissing the bill was reserved, yet on the next day it was taken up; and the bill and petitions were dismissed. From these orders the plaintiffs obtained an appeal from a judge of this court.

Lyons, J., Alfred Jones and John Howard, for the appellants.

Neeson, Meredith and Ould & Carrington, for the defendant.

JOYNES, J., delivered the opinion of the court.

Though the bill in this case prays an injunction to restrain the sale of the property of the Midlothian Company then about to be made, it also prays that the deed of trust under which the sale was to be made, may be set aside for usury and fraud. The prayer for the injunction was merely ancillary to the other and principal relief prayed for, its object was only to hold and preserve the property until the title to it could be litigated and decided. Our opinion is, that section 4, ch. 179, of the Code, does not apply to a case like this; but applies only to what may be called a pure bill of injunction: that is to say, to a bill which has no other object than an injunction. It is hardly necessary to add, that if it should appear in any case that the prayer for other relief beyond the injunction is merely colorable, and thrown in to give jurisdiction, it will not be allowed to take the case out of the provision of section 4, ch. 179, of the Code.

The Circuit court of Richmond, therefore, had jurisdiction of the case, and its order dissolving the injunction and dismissing the bill must be reversed.

691 *The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that though the bill in this case prays an injunction, it also prays other relief, to which the prayer for an injunction is ancillary; and that the orders of the said Circuit court of Richmond, dissolving the injunction and dismissing the bill are erroneous. Therefore it is decreed and ordered that the said orders of the Circuit court of Richmond, dissolving the injunction and dismissing the bill, be reversed and annulled, and that the appellees pay to the appellants their costs by them expended in the prosecution of this appeal; and the cause is remanded to the Chancery court of Richmond for further proceedings, &c.

Decree reversed.

692 *May v. Joynes & als.*

March Term, 1871, Richmond.

Wills—Interpretation—Life Estate with Power to Dispose of Fee.—Testator says, I give to my

*This case was decided at the January term, 1857, but was not then directed to be reported. It is now published at the request of some of the judges.

†**Wills—Interpretation—Devise for Life with Unlimited Power to Dispose of Fee—Effect on Limitations Over.**—The rule laid down in the principal case, that limitations over, after a devise for life with unlimited power in the first taker to dispose of the subject, are void for repugnancy, and the fee vests in the first taker, is known as the doctrine of May v. Joynes, and has been cited and approved in many subsequent cases.

See *Sprinkle v. Hayworth*, 26 Gratt. 400; *Missionary Society v. Calvert*, 32 Gratt. 364; *Haymond v. Jones*, 33 Gratt. 335, 337; *Carr v. Effinger*, 78 Va. 206, 207; *Cole v. Cole*, 79 Va. 253; *Farish v. Wayman*, 91 Va. 425, 21 S. E. Rep. 810; *Davis v. Heppert*, 96 Va. 776,

beloved and excellent wife, subject to the provisions hereafter declared, my whole estate, real and personal and especially all real estate which I may hereafter acquire, to have during her life, but with full power to make sale of any part of the said estate and to convey absolute title to the purchasers; and use the purchase money for investment or any purpose that she pleases; with only this restriction, that whatever remains at her death shall, after paying any debts she may owe, or any legacies that she may leave, be divided as follows: There are then limitations to his children and grandchildren. **Held:** The wife takes a fee simple in the real, and an absolute property in the personal, estate; and the limitation over of whatever remains at her death, is inconsistent with and repugnant to such fee simple and absolute property in said real and personal estate, and fails for uncertainty.

John F. May, of Petersburg, died in July, 1856, leaving, surviving him, his wife, Margaret B. May, and two daughters. One of the daughters, Mrs. Bayly, was a widow,

32 S. E. Rep. 467; *Milhollen v. Rice*, 13 W. Va. 520; *Willmoth v. Willmoth*, 34 W. Va. 431, 12 S. E. Rep. 732; *Watson v. Conrad*, 38 W. Va. 545, 18 S. E. Rep. 747; *Bank of Berkeley Springs v. Green*, 45 W. Va. 176, 31 S. E. Rep. 263. See also, as following the doctrine of *May v. Joynes*, *Hall v. Palmer*, 87 Va. 354, 12 S. E. Rep. 618; *Bowen v. Bowen*, 87 Va. 438, 12 S. E. Rep. 885; *Robertson v. Hardy* (Va.), 23 S. E. Rep. 766.

See in accord, in *Madden v. Madden*, 2 Leigh 377, opinion of GREEN, J., at p. 390; *Nixon v. Rose*, 12 Gratt. 425; *Burwell v. Anderson*, 3 Leigh 356, 357, and *foot-note* to *Missionary Society v. Calvert*, 32 Gratt. 357, where there is a collection of authorities in point.

The principal case was distinguished in *Randolph v. Wright*, 81 Va. 616; *Johns v. Johns*, 86 Va. 335, 336, 10 S. E. Rep. 2; *Miller v. Potterfield*, 86 Va. 877, 11 S. E. Rep. 486; *Smythe v. Smythe*, 90 Va. 640, 19 S. E. Rep. 175; *Cresap v. Cresap*, 34 W. Va. 323, 12 S. E. Rep. 531; *Lee v. Law* (Va.), 19 S. E. Rep. 258; in each of which cases, the limitations over were held valid.

In *Randolph v. Wright*, 81 Va. 608, the court, at p. 616, said: "That case (*May v. Joynes*) was decided in 1857, and not ordered to be reported by the judges who decided it; perhaps regarded by them as *authority only for itself*, and it was not reported until 14 years after, when, as the reporter states, it was reported at the request of some of the judges—one of the judges of this court, at that time, being a party to the cause. But whatever may be its authority, it is easily distinguished from this case by the learned council for the plaintiff in error."

In *Johns v. Johns*, 86 Va. 333, 10 S. E. Rep. 2, the will read: "I will and desire that my wife, Rebecca, shall have and hold all my estate during her natural life, for the benefit of herself and children, to be used as she may think proper." The testator left, surviving him, his wife and eight children. He left no real estate but a small personal estate. The court held that the wife took a life estate, with remainder to her children free from her debt. The court, at p. 336, said: "In the case of *Randolph v. Wright*, 81 Va., JUDGE LACY says that the case of *May v. Joynes*, is authority for itself alone, and commenting upon the cases of *Riddick v. Cohoon*, 4 Rand. 547; *Burwell v. Anderson*, 3 Leigh 348; *Melson v. Cooper*, 4 Leigh 408; *Brown v. George*, 6 Gratt. 424; *Cole v. Cole*, 79 Va. 251; *Carr v. Effinger*, 78 Va. 197, he shows that in all these cases, either expressly or

whose husband died shortly before the testator, and had two daughters; both under age. The other daughter of the testator was the wife of William T. Joynes, and had a daughter and two sons; all under age. These grandchildren were all living at the date of the testator's will, and were the only grandchildren then living; and they and their mothers were the only descendants of the testator.

693 *The testator left a will dated May 21, 1853, and several codicils. A question arose whether, upon the true construction of the will, the widow took a fee simple in the real estate, except that embraced by the second codicil, and an absolute title to the personal property, or only a life estate in both. This question depended on the second clause of the will, which is as follows:

"2. I give to my beloved and excellent wife, subject to the provisions hereafter declared, my whole estate, real and personal, and especially all real estate which I may hereafter acquire, to her during her life,

by necessary implication, authority was conferred on the first taker of the estate to consume it or dispose of it absolutely; but in the case under consideration, the words, 'to be used as she may think proper,' are only apt and proper words to describe the use of the life estate given to Mrs. Johns by the clause of which they are a part."

In *Farish v. Wayman*, 91 Va. 430, 21 S. E. Rep. 810, the devise was to W. and J. in trust for A. during her natural life; should A. die and leave no child, in that case the property devised, or what may remain of the same, to go to N. The court, following the doctrine of *May v. Joynes*, *held*, that the words, "What may remain of the same," showed the intention of the testator to give A. the unrestrained power of disposition of the whole property converting her life estate into a fee, and that the limitation over was void. JUDGE BURKS, criticising this case in 1 Va. L. R. 219, 220, says: "If the property had been both real and personal, or personal only, it might have been contended with some force, that by 'what may remain of the same' was intended only of such of the personal property as did not perish from natural causes. But such intention could not reasonably be predicated of property wholly real—of land. To give land for life, and, at the death of the tenant, to give 'what may remain of the same' to another, would seem to imply of necessity that the first taker shall have the power to dispose of the absolute estate or interest in the land; otherwise, the words 'or what may remain of the same' would be meaningless.

"But it would seem to be essential to this view that these words should be predicated of the estate of the first taker from its inception, and throughout, without contingency. For instance, if the devise of the land in this case had been to or for the benefit of Agnes Priscilla Redd during her life, and of 'what may remain of the same' at her death, to Nancy J. Massie, the devise would have vested the fee-simple estate in Agnes Priscilla Redd. The limitation over would have been void both for repugnancy to the estate previously granted and for uncertainty.

"But was the devise in this case of that character? With great deference, we submit, that it is not so clear as not to admit of doubt, at least. The prop-

erty is devised in express terms to Agnes Priscilla Redd during her natural life. It is only upon her death *without a child* that the property devised to her, 'or what may remain of the same' at her death, is to go to Nancy J. Massie. But suppose Agnes Priscilla Redd dies leaving a child or children surviving her: would they not be entitled *under the will* to the property devised to her for life? Does not the testator, by *implication*, devise the *remainder* to them? Such we understand to be the rule of construction laid down in *Wine v. Markwood*, 81 Gratt. 43. If this rule be applied, the clause of the will written out so as to express fully the testator's intention would, in substance, be this: 'I give to Agnes Priscilla Redd one-fifth share of my real estate during her life. If she die leaving a child or children surviving her, then, at her death, I give that share to such surviving child or children. If she die leaving no child surviving her, "in that case" I give said share, "or what may remain of the same," to my sister Nancy J. Massie.' Should not the words 'or what may remain of the same' be confined in their operation to the event of the death of Agnes Priscilla Redd without a child surviving her, and in that event and that *only*—"in that case," as expressed in the will—the life-estate be construed as enlarged into a fee-simple? See 2 Minor's Inst. (4th Ed.) 454, 462.

"This construction, suggested with diffidence, while it would defeat the ultimate limitation over to Nancy J. Massie, would at the same time secure the *corpus* of the estate to the children of Agnes Priscilla Redd (now Mrs. Farish) who may survive her, which would seem to have been the testator's intention."

As said by JUDGE BURKS in the above-mentioned article, the question, whether, in the particular will to be construed, the testator intended to give the first devisee or legatee a life estate only, with a limitation over to another, or to give him an absolute estate is wholly a matter of intention. But where, an estate for life is given in expressed terms, the language in other parts of the will relied on to enlarge that into an absolute estate ought to be very clear indeed to have that effect. See also, article 3, Va. L. R. 65.

limitations over upon the death of any of the grandchildren. He appoints his wife executrix, with power to appoint executors of his will to succeed her.

In the first codicil he provides that, in case of the marriage of his grand-
694 daughter Anna Joynes, he *wishes an annuity of \$500 for five years, out of her mother's share of his estate, but with her consent only, to be paid to Anna. And he makes the like provision in favor of Anna and Evelyn Bailly.

By the second codicil he refers to a sum of nearly \$5,000 which his wife will derive from the United States for the naval services of her father; and that he had directed an investment of \$6,000, which he considers wholly hers. If she dies without disposing of it, he wishes each of their five grandchildren, then living, to have one thousand dollars of the principal, and the other thousand dollars of the principal and all the interest to be divided between his two daughters, for their sole and separate use respectively. And he appoints his sons-in-law executors after the death of his wife. There was a devise in this codicil of a tract of land to the wife of William B. Green, about which there was no dispute.

To settle the construction of this second clause of the will, a friendly suit in chancery was instituted in the Circuit court of Petersburg, at November term, 1856. The

bill was filed by the children of Mrs.
695 *Joynes. Mrs. May, in her own right and as executrix of her husband, Mrs. Bayly and her children, and Mrs. Joynes and her husband, were made defendants.

The bill insisted that Mrs. May was entitled to the real and personal property for her life only; and that the plaintiffs, who claimed to be interested in remainder, were entitled to demand from her an inventory of all such money and personal property in her hands, as she elected to hold as legatee; and like inventories, from time to time, as other money or personal property should come into her hands as legatee; and as she should, under the power given her by the

NOTE BY THE REPORTER.—Another paper was propounded for probate by Anna M. Joynes and others, by their next friend, as another codicil to the will of John F. May, which was rejected; and an appeal was taken, and the case was heard at the same time with this; but the judgment of the court was affirmed. The paper was as follows: "I empower my wife, by deed or will, to settle any portion of my estate upon my daughters or their issue, or both, in any manner she may deem proper, so that there may be some safe provision for their comfort beyond the casualties of life, to which all are subject; and yet I know of no men less liable to them, in my opinion, than my sons-in-law.

JOHN F. MAY.

"July 27, 1840."

On the back of this paper was an endorsement, which had the appearance of being written in different ink from the inside of the paper; and was as follows: "Another codicil to my will, probably unnecessary, but showing a strong motive of action in my testamentary action.

JOHN F. MAY."

will, convert one sort of property into another; and that they were also entitled to require that she should register the slaves that had come, or might come, to her hands as legatee, as provided by the statute. Code of 1849, ch. 103, sec. 8. The prayer of the bill was, that the court would construe the will and settle the rights of the parties, and order Mrs. May, as tenant for life, to file the inventories and to make the registry of slaves, as the plaintiffs claimed they had a right to demand.

The answer of Mrs. May claimed that she was entitled absolutely to the whole estate, real and personal, except that embraced in the second codicil; and denies the right of the plaintiffs to demand of her an inventory or a registry of the slaves. Answers were filed by the other defendants, all of which, so far as they related to the rights claimed by Mrs. May, were merely formal, and submitted the question to the decision of the court. The following facts were agreed in the pleadings; that the testator, at the date of the will, was about seventy years of age, and his wife nearly as old; that the testator's estate consisted of land, slaves, money and other personalty, worth not less than \$200,000, and yielding an income of about \$12,000 per annum; that the debts were of inconsiderable amount; that the husbands

of the testator's daughters were men
696 *in easy circumstances; that the testator was a man of ability and sound judgment, a lawyer of distinction and great experience, and was for several years a judge of the General court.

The case was heard, by consent, on the bill and answers, and the Circuit court being of opinion that Mrs. May was not entitled to a fee simple in the real estate and an absolute title to the personal property, as claimed by her, but was entitled only to a life estate in both classes of property: decreed that she should file the inventories, and make the registry of slaves, prayed for by the bill.

Mrs. May, in her own right and as executrix of John F. May, dec'd, applied for an appeal from this decree, which was allowed.

Conway Robinson for the appellant.

It is true that the testator, in the second clause of his will, begins by giving to his wife, subject to the provisions thereafter declared, his whole real estate during her life; and if the clause had stopped there, the court might well have pronounced the opinion that she is entitled to the same, except the part embraced in the second codicil, for life only. But the clause extends farther. Not only does it give her full power to make sale of any part of said estate, and to convey absolute title to the purchaser, and use the purchase money for investment, but it authorizes her to use it for "any purpose that she pleases, with only the restriction that whatever remains at her death shall, after paying any debts that she may owe, or any legacies that she may leave, be divided as follows." These

words show a clear intent in the testator to give to his widow an absolute control over his whole estate, and vests in her absolute property.

The case in 20 Elizabeth, 3 Leon. R. 71, which might seem to sustain the pretensions of the appellees, *it has been judicially declared is not law. After it, in the 29 Elizabeth, was decided *Jenner v. Hardie*, 1 Leon. R. 283, where lands were devised to one Edith for life, and after some intervening estates there was provision that if A died without issue in the life of Edith, that then the land should remain to the said Edith, to dispose thereof at her pleasure; and it was held that by these words Edith had a fee simple estate.

It is enough that the testator places the subject at the disposal of his wife. Although it is given in terms to be at her disposal in and by her will, yet if she may dispose of it to whom she shall think fit to give the same, it has been decided that the whole interest and property of the subject vests in her. *Robinson v. Dugate*, 2 Vern. R. 181; *Maskelyne v. Maskelyne*, Amb. R. 750; *Tomlinson v. Dighton*, 1 P. Wms. R. 149; 1 Salk. R. 239. In this last case, Parker, Ch. J., p. 171, speaking of a power given to executors to give or sell, he says: "As the persons intrusted are to convey a fee, they must consequently, and by a necessary construction, be supposed to have a fee themselves." As Mrs. May is clothed with full power to make sale of any part of the estate, and to convey absolute title to the purchaser, she must consequently, and by necessary construction, have herself the fee simple or absolute property to enable her to pass the absolute title.

The whole question is, whether the proceeds is not equally absolute; as absolute as was the wife's title to one-half in *Shermer v. Shermer's ex'ors*, 1 Wash. 266. It would not be, if she was only authorized to use the proceeds for investment. But when we find that she may use the proceeds for any purpose whatever that she pleases, it follows that however absolute was her title to the property, her right to the proceeds is no less so. *Elton v. Sheppard*, 1 Bro. Ch. R. 532; *Hales v. Margerum*, 3 Ves. R. 299; *Hixon v. Oliver*, 13 Ves. R. 108. This must be so, unless a different conclusion *be necessary because of the restriction as to what remains at her death. *Upwell v. Halsey*, 1 P. Wms. R. 651, 10 Mod. R. 441. But this cannot be; for a limitation is not valid when it is of no more than the first taker shall have left unspent. *Attorney-General v. Hall*, Fitzg. R. 314; 8 Vin. Abr. 248, pl. 21; 2 Equ. Cas. Abr. 293, pl. 21; *Bland v. Bland*, 2 Cox R. 349. In such a case it cannot be maintained that the widow has only a usufructuary interest. The power to her to spend the whole is an absolute gift, and confers on her the absolute property. *Flanders v. Clark*, 1 Ves. Sen. R. 9; 3 Atk. R. 509.

In *Goodtitle v. Otway*, 2 Wils. R. 6, the devise was to Agnes Pearson for and during

her life, and after her death to her issue; and, if she shall have no issue, that she shall have power to dispose thereof at her will and pleasure. And the whole court held "that the testator, by giving Agnes power to dispose thereof at her will and pleasure, in case she had no issue, had given her a fee simple, according to what was said by Sergeant Shuttleworth in 1 Leon. R. 283, where the words are the same as here." "Against this opinion was cited 3 Leon. R. 71, where the like devise was only held to be an estate for life, with authority to dispose of the reversion. But the court said that case was not law; and that the case in 1 Leon. R. 283, was determined after that in 3 Leon. R. 71."

The grounds taken in *Lightburne, &c. v. Gill, &c.*, 3 Bro. P. C. 250 (Tomlin's edi.), are as applicable here as there. Here is no partial interest in the estate given to the widow, which would render her a usufructuary owner, entitled to the annual produce only, but without power over the capital. She might sell, give or waste the whole capital itself as her absolute property, and no court could interfere to prevent her.

When such an unrestrained power has been given to the widow, and an absolute interest vested in her, *there can be no valid limitation over to other persons. If the testator imagine, that after giving to the widow such absolute power of disposition, he might by law make further limitations, he was mistaken, as was the testator in *Grey v. Montagu*, 3 Bro. P. C. 316 (Tomlin's edi.). But in truth he did not mean to create a limitation valid against her. He "meant his fortune to pass through the pleasure of his wife, leaving it to her to use what she pleased, and consequently to make the residue what she chose." He never meant that any court should have the power to order the money to be laid out, and that she should have the interest for her life, and then it should go over. *Wynne v. Hawkins*, 1 Bro. Ch. R. 179. In *Sprague v. Barnard, &c.*, 2 Bro. Ch. R. 585, the testator employed similar language. The gift for the first taker's use was followed by these words: "At his death, the remaining part of what is left, that he does not want for his own wants and use, to be divided between," &c. There, as here, the first taker was the personal representative. The chancellor declared him absolutely entitled to the subject.

Thus the principle was established, that when there is in the first taker a power to spend or dispose of the whole subject, and the limitation over is of no more than he shall have left unspent or undisposed of, the first taker is thereby vested with the absolute property, and the limitation over is void.

The counsel then proceeded to shew that the will did not create a trust in Mrs. May, within the principles laid down in *Malim v. Keighley*, 2 Ves. Jr. R. 333; and *Pushman v. Filliter*, 3 Id. 7; and that class of cases. And he then proceeded:

Whenever it is the clear intention of the testator that the devisee shall have an absolute property in the estate devised, a limitation over must be void, because it is inconsistent with the absolute property supposed in the first devisee. And a right in the first devisee to *dispose of the estate devised at his pleasure (as distinguished from a mere power of specifying who may take), amounts to an unqualified gift. *Ide v. Ide, &c.*, 5 Mass. R. 500. In this case, the gift to Peleg Ide was followed by a limitation over of "what estate he shall leave." And it was held, Peleg Ide took the absolute, unqualified interest in the estate; and that the limitation over was void. A similar decision was made by the Supreme court of New York, where the limitation over was of property the first taker "died possessed of." *Jackson v. Bull*, 10 John. R. 19. And the same principle was applied where the testator devised his estate, with the provision that, if the first taker died "without giving, devising, selling or assigning it," &c., the estate should go over. *Jackson v. De Lancy*, 13 John. R. 537, 552; *Jackson v. Robins*, 15 Id. 169; 16 Id. 537, 584. And it was applied to the limitation of real as well as personal estate. Id. 586.

The limitation over cannot be valid as a remainder; for no remainder can be limited after an estate in fee. Nor can it operate by way of executory devise; for it is a settled rule that a valid executory devise cannot be prevented or defeated by any alteration of the estate out of which or after which it is limited, or by any mode of conveyance. An absolute ownership or capacity to sell, in the first taker, and a vested right by way of executory devise in another, which cannot be affected by such alienation, are, says Chancellor Kent, perfectly incompatible estates, and repugnant to each other; and the latter is to be rejected as void. *Jackson v. Robins*, 16 John. R. 537, 589. The language used by the chancellor in delivering his opinion in that case, is equally applicable to that now before the court. See Id. 590.

We find, then, the principle established by the English courts, that although the will shews it to have been the testator's intention, in respect to the property *given to the first taker, that whatever may "remain at her death," or whatever is "left undisposed of by her," should go to another, this is an intention which must fail on account of its uncertainty, and the first taker in such case has the absolute property. *Bull v. Kingston*, 1 Meriv. R. 314. He cannot make a valid limitation of such property as she happens to possess at her death. Leaving her to deal with his estate as she pleases, no trust can be created by a request as to the uncertain property which she may be possessed of at his death. *Eade v. Eade, &c.*, 5 Madd. R. 118. If you give absolute property to a person, you cannot subject it for his life to a proviso, that if he does not spend it, his interest shall cease. One of the conse-

quences, Sir Thomas Plumer remarks, would be, that, if he had not spent it, and were to die indebted to any amount, his creditors would be excluded from it. *Ross v. Ross*, 1 Jac. & Walk. R. 154. The two objects being inconsistent, to invest the wife with the absolute property, and then provide for the event of her not exercising her rights over it, the latter must yield to the former. *Cuthbert v. Purrier*, Jacob's R. 415, 4 Cond. Eng. Ch. R. 191; *Bourn v. Gibbs*, 1 Tamlyn's R. 414, 5 Cond. Eng. Ch. R. 457; *Green v. Harvey*, 1 Hare's R. 428, 23 Eng. Ch. R. 428; *Huskinson v. Bridge*, 3 Eng. L. & Eq. 180.

The law has been thus established not only in England but also in Virginia. The Virginia cases distinctly recognize the rule, that after an absolute property given to one, with an unlimited power to dispose of it, expressed or implied, a disposition by the owner of so much of the property as may not be disposed of by the donee or legatee, to another, is void because of the inconsistency and uncertainty as to what part of the property is intended to go over. *Riddick v. Cohoon*, 4 Rand. 547; *Madden v. Madden's ex'ors*, 2 Leigh 377, 385; *Burwell's ex'ors v. Anderson, adm'r, &c.*, 3 Id. 348, *355. As before mentioned,

a like doctrine is established in Massachusetts and New York. *Helmer v. Shoemaker*, 22 Wend. R. 139. The same doctrine is sustained by many elementary writers. 1 Roper Leg. 640-643; 2 Id. 1431-32; 1 Sugd. Powers 119; 3 Lomax Digest p. 116-17, old, and 193 new, edi.; 2 Story's Eq. § 1070 to 1073; Keyes on Chattels, p. 110, § 144 to 146, citing at p. 113-14-15, *Flinn v. Davis, &c.*, 18 Alab. R. 132. No distinction between a gift of real and personal property is recognized in 2 Powell on Dev. 460, or in 1 Jarm. on Wills 321-22, or in the early English cases before mentioned, or by the cases in Massachusetts, New York or Virginia. It was suggested, in *Nelson v. Cooper*, 4 Leigh 408, but held untenable.

Lord Eldon considered there might be cases in which, there being a particular, limited interest and a sort of power, liberty or authority, though the latter, without a particular, partial, limited interest pointed out, might have amounted to an absolute gift, yet both occurring, the gift is to be held to be of the limited interest, and the other but a power and not an interest. *Nannock v. Horton*, 7 Ves. R. 392, 398. A case of that class is *Reid v. Shergold*, 10 Ves. R. 370, 379, where there was an express limitation for life, with a power to dispose by will, but in no other way. In the present case what is given to the wife is more than power, it is property. The opinion of Sir Wm. Grant, in *Bradley v. Westcott*, 13 Ves. R. 444, 451, shews that the wife could not have what she has here without its being property distinct from powers. He says: "it is necessary to construe this (the residue as given) to be either a mere interest for life, or to be property in the widow. There is no medium; for I cannot say she shall have an interest for life, with a power to

dispose of the whole as she thinks fit; but the will of the husband shall operate upon what she shall leave undisposed of. Upon that construction it would be property, as it would be absolutely uncertain what would be the subject of the residuary bequest."

In a subsequent case, wherein an estate for life was given to a woman with power to dispose of the estate by deed, writing or will, Sir Wm. Grant laid down, that "an estate for life, with an unqualified power of appointing the inheritance, comprehends everything." And the trustee was directed to convey the fee according to the prayer of her bill. *Barford v. Street*, 16 Ves. R. 135. And to the same effect is *Irwin v. Farrar*, 19 Ves. R. 86.

The counsel referred to and commented on the cases of *Curtis v. Rippon*, 5 Madd. R. 434; *Horwood v. West*, 1 Sim. & Stu. 387, 1 Cond. Eng. Ch. R. 387; *Madden v. Maden's ex'ors*, 2 Leigh 377; *Burwell's ex'ors v. Anderson*, 3 Id. 348; *Comber v. Graham*, 1 Russ. & Myl. 450, 4 Eng. Ch. R. 510; *Doe dem Herbert v. Thomas*, 3 Adol. & Ell. 123, 30 Eng. C. L. R. 48; *Archibald v. Wright*, 9 Sim. R. 161, 16 Eng. Ch. R. 161; *Knight v. Boughton*, 11 Clark & Fin. R. 551; *Williams v. Williams*, 1 Sim. R. N. S. 358, 40 Eng. Ch. R. 358. And he then proceeded:

The terms employed shew here clearly, as to the whole estate, that the testator intended his wife to have the enjoyment of it during her life, with the fullest power to dispose of it beyond her life, without limitation as to the mode or object of disposition. They give a dominion and control which are precisely the dominion and control of an owner. No owner could have greater. When (says Johnson, Ch.) a life estate is created in terms, and to this is added a power of ulterior disposition, unconfined as to mode or object, no case has been produced suggesting that this power is a naked power, and requiring to be executed in order to divest the grantor of the fee. Such a power, united to such an interest, is not a power requiring to

be actually executed; but the two together are descriptive of the most absolute title known to the law. *Pulliam, &c. v. Byrd, &c.*, 2 Strobb. Eq. R. 134, 138.

There are, no doubt, some cases in England which hold that where there is a gift for life with a testamentary power of disposition over the property, she has not the absolute property, but only a power added to her life estate. *Borton v. Borton*, 15 Sim. R. 552, 39 Eng. Ch. R. 552. And if the passage in 1 Jarm. on Wills 321, referred to in 3 Lomax Dig. 117, is to be confined to cases of that class, there is no occasion to comment upon it in the present case. It is very certain that the present case is in no wise affected by the case which Jarman refers to of *Cooper v. Williams*, decided in 1697, and reported in Prec. Ch. 71. And with respect to *Gibbs v. Tait*, 8 Sim. R. 132, it is sufficient to observe, 1, that ac-

cording to Jarman the point was not made in that case; and 2, that according to the adjudged cases, new as well as old, there must be a certainty of the subject to make such a trust as can be enforced, and there is not such certainty in a case "where there is a right in the donee to spend the subject of the gift." If, in such a case, there is a precatory trust to bequeath it over to any other person, the court collects from the fact of a power in the donee to dispose of the subject, that he is to be at liberty to disregard the ulterior intentions of the testator, and holds that a trust which could not be enforced shall not be raised. Such cases are considered to fall completely within the same class as those where in the testator makes a gift of so much as be left at the decease of the person to whom he has given the use. *Conman v. Harrison*, 17 Eng. L. & Eq. 290; *Green v. Marsden*, 21 Id. 538.

In this case the conclusion that Mrs. May has the absolute property, both in realty and personalty, is strengthened by the 2d codicil, and is sustained by all the Virginia decisions; not only by those which have been reported and hereinbefore referred to, but by two others. One of these was made in or about 1850, by the special Court of Appeals, in the case of *White's ex'or v. White's ex'or*, upon the will of Moses White, who left his son land, slaves and other personal property, with a provision that in case his son should die without lawful heir, all the property so left to him should go to the children of the testator's daughter, unless his said son "has made sale of it in his lifetime." The son died without issue, and without having ever married, and without making sale of any of the property in his lifetime. Yet the special court held that the giving the son the right to make sale of the property in his lifetime, vested in him the absolute property. The other was the case of *Kee-see's adm'r v. Sharpe, &c.*, which related also to the proceeds of realty as well as personalty; and in which, in addition to the life estate, there was, in the event that happened, to be one-fourth of the estate at the wife's own disposal at her death, by will or otherwise, with a limitation over if she should fail to dispose of it; and it was held that to defeat the limitation there was no necessity for any further disposition than was made by her in that case. In the present case it will be seen that Mrs. May, in her answer, claims the right to hold and deal with the estate as her own, unless it shall be decided that such are not her rights.

James Alfred Jones, for the appellees.

In construing this will of Judge May, we are to bear in mind that his wife was not the only object of his bounty. He had children and grand-children; and he owned a large estate. It was natural, therefore, for him to embrace within the scope of his dispositions his offspring as well as his wife. And this he did: he gave to his wife the life estate, and to his children and grand-children the remainder.

But, it is said, there are powers conferred upon the life tenant, which are destructive of the remainder. These are: 1. The implied power to spend; 2. The testamentary power to dispose of the property.

The enquiry is, Was it intended by this testator to confer such powers? for the intention is the life and soul of the will; and, where it violates no rule of law, must govern with absolute sway. Carr, J., 5 Leigh 222. To ascertain this intention, the surrounding circumstances are to be looked to as well as the will itself.

This testator left a wife and issue—the wife old and infirm. He left an estate of great amount, and producing a large income. This income exceeded his wife's wants. To leave her to digest a scheme for the disposition of this large estate, would be to impose a burthen upon her unnecessarily, unless some change in the family's circumstances might be expected to require it; of which there is no intimation. Under these circumstances, Judge May deliberately (returning to it repeatedly) digested his own scheme of disposition. This scheme, embracing alike his wife and issue, was perfected in the minutest detail; and left by him to have effect as his will. He did not leave it as a chart merely, to guide his wife in her dispositions—as words of request or of trust—but as his own complete and deliberate will, towards his children and children's children, as well as his “beloved and excellent wife.”

An ignorant testator, inops consilii, might defeat his scheme of disposition by repugnant provisions. But the testator was learned in the law; knew the legal effect of the words he used. In Judge May's will we would not expect to find such repugnancy; to find the detailed and carefully digested provisions for his own descendants rendered utterly nugatory by grants to his

wife incompatible with the estate limited to them. *And the greater the success in showing that the powers claimed to be granted to Mrs. May amount to the full property, the stronger is the argument resulting, that they were not granted.

That the powers granted do not amount to property, even though they be considered to extend to the whole estate, and not to the life estate merely, I refer the court to Tomlinson v. Dighton, 1 Pr. Wms. R. 149; Reith v. Seymour, 4 Russ. R. 263; Jackson v. Robins, 16 John. R. 537, 538; Caleb v. Field, 9 Dana's Ken. R. 346; Burwell's ex'ors v. Anderson, 3 Leigh 348, 357. But, with the tendency of the courts to aid defective executions of powers, illustrated in Irwin v. Farrar, Barford v. Street, and other cases cited in Burwell's ex'ors v. Anderson, 3 Leigh 348, 357, it is of less importance to consider the question, whether the powers given in this will be mere powers, or amount to property, since Mrs. May's answer claiming the property.

It is argued here, as it was argued in Madden v. Madden's ex'or, 2 Leigh 377, that the testator “meant to give to Mrs.

May the absolute power of disposal of the property; and that this converts the estate for life into an absolute estate, and destroys the intention to give it for life.” But the court, in that case, did not suffer a doubtful phrase to defeat the will of the testator; and it ought not to suffer it here. Effect should be given to the entire will—every part of it—as well that in which children are provided for as that which provides for the widow. We should so construe the will “as to the devisor's intention, by giving effect to all the words used by him.” Coleridge, J., Doe dem Herbert v. Thomas, 3 Ad. & Ell. R. 123, 30 Eng. C. L. R. 48. “No word is to be rejected which can have any construction.” 2 Prest. Est. 102 m. No effort to explain the words in a different sense can do so much violence to the clause as the total rejection of the whole bequest given in express terms over.” Marshall, Ch. J., Smith v. Bell, 6 708 *Peters U. S. R. 79. And by Dargan, Ch. J., Flinn v. Davis, 18 Alab. R. 132 (cited in Keyes on Chattels, p. 114, § 146), “If it be doubtful about the first taker's power to dispose, this doubt should not defeat the remainder over.” Even the dissenting judge in Madden v. Madden's ex'or admitted (see 2 Leigh 386), “the character of the estate first given may, in doubtful cases, influence the construction of the will, as to the extent of the power given. Opinion of Green, J.

We should not, then, struggle against the estate in remainder; but should so read the words of power annexed to the life estate as to preserve the remainder, if possible, to carry out the intention. “Such a sense, if possible, ought to be put upon a will as is agreeable to the intention of the party and consistent with the rules of law.” By Sir Joseph Jekyl, in Upwell v. Halsey, 10 Mod. R. 441. For “the estate being the testator's to give, his will is the law of the subject, unless that will be against the law of the land.” By Tucker, P., in Burwell's ex'ors v. Anderson, 3 Leigh 348, 356. And unless what the testator gave Mrs. May amounts to the absolute property, there is no law of the land to forbid the gift of a remainder to children.

The express estate given to Mrs. May is for life only; and “the express estate for life negatives the intention to give the absolute property.” Tucker, P., S. C. p. 357. And shall the words of the will, confining Mrs. May to a life estate, and the words granting the estate in remainder to the children, both, be rejected? If words are to be rejected, is it not better to reject the words giving the powers than reject the words limiting the estates? Certainly, as was said by Chief Justice Marshall, “no effort to explain the words in a different sense can do so much violence to the clause as the total rejection of the whole bequest given in express terms” to the children and grandchildren. Would it do so much violence to this will, to construe 709 *the words of power to Mrs. May to relate to the life estate, as to allow

them to overrule the words limiting both estates: enlarging one over the express estate granted, and defeating the other entirely. Such words of power were so limited in the construction in the before cited cases of *Madden v. Madden's ex'or*, and *Smith v. Bell*; and they were understood to be confined to the first taker's estate; authorizing the first taker to sell, convert, &c., the estate; but no more.

The manner in which the clause granting the powers is introduced, indicates that they are intended to qualify the already granted estate, rather than to confer a new and larger estate: thus "to have during her life, but with full power to make sale," &c. And the grants "to make sale," "to convey absolute titles," "to use the purchase money for investment," neither imply the fee (for the appointee takes under the original deed, 2 Sugd. Powers 26-7 m), in the subject sold, nor the property in the price. They are but a cautious expression of the mere power of conversion, and an implied negation of property; for *expressio unius exclusio alterius*.

It would not be expected that the next words would convey absolute power; presenting a striking contrast, not only with the life estate, but also with the cautious expressions of power, just used. The power "to use the proceeds for any purpose she pleased," could not be given that she might herself enjoy them: she did not want them; the income exceeded the wants of this old lady. And, if this power had been intended to enable her to give away the whole estate, why was she forced to convert it by selling before she could give? To require a lady of her age to bring so large an estate into market, would be an inconvenient restriction on the *jus disponendi*, if intended to be granted, and might damage the estate. It might not be judicious to sell it to convert it into the state to be given away.

710 *Like the power to invest, it was designed for the improvement of the estate; while it exonerated her from accountability; as in *Bradley v. Westcott*, 13 Ves. R. 444.

It is argued that these words import an absolute power of disposition. These words are "to use;" and though for any purpose, it is still to use: And the use of money is not the gift of it. *Green, J.*, in *Madden v. Madden's ex'or*, 2 Leigh 377, 389; *Dunbar's ex'ors v. Woodcock's ex'or*, 10 Leigh 628; *Keesee v. Sharpe*, decided by the special court of Appeals; 1 Jarm. Wills 793 note (1st Amer. edi. by Perkins). It means such use as is consistent with the life estate; as in *Smith v. Bell*, 6 Peters U. S. R. 68. On the other side the following cases were cited to maintain a different view, viz: *Elton v. Sheppard*, 1 Bro. Ch. R. 532; *Hales v. Margerum*, 3 Ves. R. 299; *Hixon v. Oliver*, 13 Ves. R. 108; *Robinson v. Dugate*, 2 Vern R. 181; *Maskelyne v. Maskelyne*, Amb. 750; *R. Tomlinson v. Dighton*, 1 P. Wms. R. 149. But in these cases there is a general bequest, with express power to dispose. They decide nothing as to the effect of such words,

in such a connexion as in this will. 1 Sugd. Powers 125-6; 1 Roper Leg. 429-30 (1 Amer. 3 London edi.). And I refer to *Keyes on Chattels*, s. 154, as to the case of *Green v. Harvey*; *Grey v. Montagu*; *Bradley v. Westcott*; *Ross v. Ross*; and *Cuthbert v. Purrier*. For the effect of such words, see 2 Preston Est. 74, 75 c. m.; but that "the general power of disposition, without an express limitation of estate, is their distinguishing feature; and that express words would qualify or restrict the estate," see *Id.* 80 m, 85 m; *Keyes Chattels*, p. 131, s. 167; *Reith v. Seymour*, 4 Russ. R. 263.

The law does not incline to enlarge express estates by implication. 1 Sugd. Powers 124 m. And if this was a power to dispose, rather than use, it would be restricted by the context to Mrs. May's lifetime. *Madden v. Madden's ex'or*, supra; *Smith v. Bell*, 6 Peters U. S. R. 68; *Keyes Chattels*, s. 262. In *Smith v. Bell*, the gift being of personalty, was absolute; and the absolute interest was cut down by implication; and this construction prevailed. Ch. J. Marshall reviewed the authorities; and, as to *Upwell v. Halsey*, it is sustained by *Cooper v. Williams*, Prec. ch. 71; *Surman v. Surman*, 5 Madd. R. 123; *Stevens v. Winship*, 1 Pick. R. 318; *Larned v. Bridge*, 17 Id. 339. And see also *Bradley v. Westcott*, 13 Ves. R. 444.

In support of the argument that the express grants of power do not give Mrs. May power over the estate beyond her life, I refer to 1 Jarm. Wills 321; *Keyes Chattels*, s. 75, p. 56, s. 78, p. 59, s. 147, p. 115; *Lomax Dig.* 117 marg. 193 top; *Kinnard v. Kinnard*, 5 Watts Pa. R. 100, 110; *Dunbar's ex'ors v. Woodcock's ex'ors*, 10 Leigh 628. And that it is even so where the estate is cut down to a life estate; see *Constable v. Bull*, 15 Eng. L. & Eq. R. 424; *Duhomel v. Ardovin*, 2 Ves. Sen. R. 162; and whether the life estate be express or implied; *Constable v. Bull*, supra; *Gibbs v. Tait*, 8 Sim. R. 132; *Upwell v. Halsey*, 1 P. Wms. R. 651, 10 Mod. R. 441; *Keyes Chattels*, s. 74; *Smith v. Bell*, 6 Peters U. S. R. 68, 74; and equally if on a contingency the first taker was allowed to diminish the capital; as for support. *Cooper v. Williams*; *Surman v. Surman*; *Stevens v. Winship*; *Larned v. Bridge*, supra; *Upwell v. Halsey*, 10 Mod. R. 441; *Smith v. Bell*, 6 Peters U. S. R. 68, 83. That no gift is void for uncertainty; but that the uncertainty may be removed by an account; see *Keyes Chattels*, s. 73-78.

In this case the express powers are followed by the clause, "with only this restriction, that whatever remains at her death shall, after paying any debts that she may owe, or any legacies that she may leave, be divided as follows, viz.," &c. And because the remainder only, after paying her debts and legacies, is 712 *limited over, it is said Mrs. May has the power to dispose, by will, of the whole estate.

But at most she can dispose only of so much as would fall under the denomination

of legacies. This testator knew the difference between legacies and devises; and if it be said the testator intended to enable her to make devises, too, the answer is, this is not a case to be helped out by intendment; that we should struggle rather to save the remainder, than to enlarge the first estate. And because power to convert realty into personalty, so as to draw the entire estate within the vortex of her power, is given to Mrs. May, it does not follow that she has the devising power. The testator might confide in her discretion in converting the property; that she would not injure the estate, but improve it. This does not imply that he would leave his scheme of disposition of his realty to be disturbed.

The cases of *Comber v. Graham*, 4 Cond. Eng. Ch. R. 510, and *Doe dem Herbert v. Thomas*, 30 Eng. C. L. R. 48, cited on the other side, do not oppose this view. In these cases the first gift was clear, and of the absolute estate; and if the subsequent words mentioned some of the incidents of the estate, it was not thereby abridged. But here it is not enough that the subsequent words do not abridge the estate; they must help it out; for the estate is limited to Mrs. May for life in express terms.

Then, is this a grant of power? In terms this clause is a restrictive clause. Is not the grant or reservation, as to debts and legacies, simply and clearly an exemption from the restriction about to be thrown on the life estate already granted. A life estate had been granted, subject to provisos. The words of the grant were, "I give to my wife, subject to the provisions hereafter declared." These provisions were

about to be declared, to wit, that at
713 her *death what remained of it should go over. But this restriction is qualified by allowing her debts to be paid, and legacies to be given by her, out of the life estate left, before any of it goes over. The testator intended to do no more than dedicate to her debts and legacies the large revenues of the life estate, ample enough to afford handsome legacies, and leave a surplus. This construction avoids the objection of making of a restrictive clause an enlarging clause, whilst it suits the language and arrangement of the provision.

If it had been intended to give the general disposing power, proper words would have been used by this learned testator; and if so important a power had been intended, a distinct grant of it would be expected of him.

This view is aided by the testamentary paper of 1840, the admission of which to probate is contested. The express grant by it to Mrs. May, of a limited power to make settlements, is fatal to her claim of the absolute estate. And why should not that paper be admitted to probate? The counsel then discussed that question; but the court refused to admit the paper to probate, and the argument need not be reported. He then proceeded.

The powers granted to Mrs. May, then, are powers over the life estate.

So far attention has been confined to the will, but the second codicil does not conflict with the view presented. What was done by it is no more than was done in *Devaux v. Barnwell's ex'or*, 1 Dess. R. 497; *Doe dem Stevenson v. Glover*, 50 Eng. C. L. R. 447, and *Gibbs v. Tait*, 8 Sim. R. 132.

In *Huskisson v. Bridge*, 3 Eng. L. & Eq. R. 180-183, Knight Bruce, speaking of all the will except the last paragraph, said, "If no more had been done, he would not have known when or how to decide it."

And yet with the last clause omitted,
714 that will was stronger by *far, for the

first taker, than the will of Judge May for Mrs. May. With the express life estate given to Mrs. May, the main case is unlike *Shermer v. Shermer's ex'ors*, 1 Wash. 266; *Burwell's ex'ors v. Anderson*, 3 Leigh 348; *Keesee v. Sharpe*; *White v. White*, (the last two decided in the special Court of Appeals); *Melson v. Cooper*, 4 Leigh 408, and *Riddick v. Cohoon*, 4 Rand. 547. In the last three the first estate was absolute; and in *White v. White* and *Riddick v. Cohoon* the limitations over were bad for remoteness. In *Shermer v. Shermer's ex'ors*, *Burwell's ex'ors v. Anderson*, and *Keesee v. Sharpe*, the life estates were either separated from the estates over which the powers were given, or a new corpus was created, or both; in which case it is as if the powers stood unconnected with the life estate; as to which see *Morris v. Phaler*, 1 Watts Pa. R. 389; *Reith v. Seymour*, 4 Russ. R. 263, and 1 Sugd. Powers 124 m.

Mrs. May then takes the life estate only, with powers over that, and the estates limited over are good.

ALLEN, P., delivered the opinion of the court.

This day came the parties, by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the Circuit court erred in holding that Margaret B. May is not entitled to a fee simple in the real estate, and an absolute property in the personal estate, of her late husband, John F. May, deceased, under his last will and testament, as claimed by her in her answer; but that she is entitled to the same, except the part embraced by the second codicil, for life only, with remainder to the children and grand-children of the testator. The court then reversed the decree of the Circuit court, with costs, and proceeded:

"And this court, proceeding to pro-
715 nounce *such decree as the said Circuit court ought to have pronounced, doth declare that, by the last will and testament of John F. May, the said Margaret B. May is entitled to a fee simple in the real estate, and an absolute property in the personal estate, of her late husband, the said John F. May, deceased, under his last will and testament, as claimed by her in

her answer; and that the limitation over of whatever remains at her death is inconsistent with, and repugnant to, such fee simple and absolute property in said real and personal estate, and fails for uncertainty; and doth adjudge and decree that such are the rights of said Margaret B. May under said will; and that no interest vested in the other parties by the limitation over in said will." The court proceeded, therefore, to dismiss the bill with costs.

SAMUELS, J., dissented.

Decree reversed.

716 *Leftwich v. The Commonwealth.*

November Term, 1870, Richmond.

1. **Larceny—False Pretense—Form of Indictment.**†—The statute for punishing persons obtaining money or other property which may be the subject of larceny, by any false pretense, makes the offence larceny; Code, ch. 192, s. 49, p. 796; and an indictment for the offense may be, either in the form of indictment for larceny at common law, or by charging the specific facts which the act declares shall be deemed larceny.

*For monographic note on False Pretenses and Cheats, see end of case.

†Indictment—Larceny—What May Be Shown.—In *Anable v. Commonwealth*, 24 Gratt. 566, it was said: "The principle settled in *Dowdy's Case*, 9 Gratt. 727, followed in *Leftwich's Case*, 20 Gratt. 716, and recently in *Price's Case*, 21 Gratt. 846, have fixed the judicial interpretation of the statute (*i. e.*, Code 1860, chap. 192, § 49). That interpretation, accepted and acted upon by the profession since the year 1852, and the legislature, with full knowledge of this judicial interpretation, never having amended the statute, it would be mischievous to the last degree now to change it; and the rule *stare decisis* must now prevail. It must, therefore, be now held as the settled law of this State, that upon an indictment simply charging larceny, the commonwealth may now show either that the subject of the larceny was received with a knowledge that it was stolen, or that it was obtained by a false token or false pretence."

In the same case, *MONCURE, P.*, agreeing with the above, said, page 583: "It happened that I was a member of the legislature which framed the Criminal Code, and also the legislature which enacted the Code of 1849. It also happened that I prepared the opinion of this court in each of the cases of *Dowdy*, *Leftwich*, and *Price*, before referred to. It is not strange, therefore, that I should have a decided view of the question under consideration." See also, *Dull's Case*, 25 Gratt. 982. See *Pitsnogle's Case*, 91 Va. 811, 22 S. E. Rep. 351; *State v. Halida*, 28 W. Va. 503, all citing the principal case as authority.

See monographic note on "False Pretenses," at end of case.

Same—Same—Embezzlement.—For a collection of cases supporting the proposition that on an indictment for larceny, proof of embezzlement is sufficient to sustain the charge, see *foot-note* to *Fay v. Com.*, 28 Gratt. 912.

See generally, monographic note on "Larceny" appended to *Johnson v. Com.*, 24 Gratt. 555.

2. **Same—Indictment—Must Show the Kind of Currency.***—In an indictment under this statute, for obtaining money upon a false pretense, it is not sufficient to describe it as "ninety dollars in United States currency;" but it should shew what kind of United States currency was obtained.

3. **Habeas Corpus—A Function of.**—When a prisoner has been taken to the penitentiary, before the judgment against him is reversed by the Court of Appeals, that court will bring him before them by *habeas corpus*, and discharge him.

4. **Escaped Prisoner—Action of Court of Appeals.**†—The Court of Appeals will not hear a case where the prisoner has escaped, and is going at large; but will make an order to dismiss the appeal unless he returns into custody. But having heard and reversed a case without having been informed of the escape of the prisoner, the court will not afterwards set it aside.

This was an indictment in the County court of Montgomery county, against *Lewis Leftwich*, found at the November term, 1868. The indictment contains three counts. The first count charges that *Leftwich*, designing and intending feloniously to defraud one *Jeremiah K. Montague* of his money, on the 6th day of May, 1868, in the said county, did designedly, falsely and feloniously, personate and represent himself to the said *Montague* to be one *Gabriel May*, and as such, he, the said *Lewis Leftwich*, was then and there the owner of a negotiable note executed, &c., by *William Mahone*, *president, to *Gabriel May*, or his order, &c., for one hundred and twenty-eight dollars. Whereas, the said note was the property of the said *Gabriel May*, &c., and was of the value of ninety dollars, United States currency; and under such assumed name and character, and by means of such false and felonious pretence, he, the said *Lewis Leftwich*, did, &c., receive for said note, from the said *Jeremiah K. Montague*, the sum of ninety dollars in United States currency, of the value of ninety dollars, of the property of

*Same—Same—United States Currency.—In *Dull v. Commonwealth*, 25 Gratt. 974, the principal case was cited as holding, that, in an indictment for larceny, a description of the subject as "United States currency" is not sufficient, and such an indictment is radically defective. The court then said, that, in consequence of the above decision the act, approved February 28, 1874, was passed by which it was enacted that "in a prosecution for the larceny of United States currency," "it shall be sufficient if the accused be proved guilty of the larceny of national bank notes or United States treasury notes;" and, therefore, an indictment for an offense committed since the passage of that act, charging the offense as larceny of the "United States currency," does charge an indictable offense under that act.

On the general subject, "Indictments," see monographic note.

†Escaped Prisoner—Action of Court of Appeals.—See the principal case cited in *Franklin v. Peers*, 95 Va. 604, 29 S. E. Rep. 321; *Allen v. State of Georgia*, 17 Sup. Ct. Rep. 527; *State v. Connors*, 20 W. Va. 6, 9, 12. See also, *Sherman's Case*, 14 Gratt. 677.

said Montague, &c., with intent to defraud him, &c.

The second count sets out that Leftwich pretended and represented that he was authorized to sell the note; and by means of such fraudulent pretence, he did feloniously and fraudulently receive from Montague, for the note, the sum of ninety dollars in United States currency, &c.

The third count is like the first, with the addition—and so the jurors aforesaid, upon their oaths aforesaid, do say that the said Lewis Leftwich then and there, in manner and form aforesaid, the said ninety dollars, United States currency, of the value of ninety dollars of the goods and chattels and property of the said Jeremiah K. Montague feloniously did steal, take and carry away, against the peace, &c.

The prisoner, when brought into court, moved the court to quash the first and second counts in the indictment; which motion the court overruled. He then demurred to the indictment; and the court overruled the demurrer.

The prisoner then pleaded not guilty; and upon his trial the jury found him guilty, and fixed the term of his imprisonment in the penitentiary at three years; and the court sentenced him accordingly. On the trial the prisoner, by his counsel, filed four bills of exceptions to the rulings of the court; but the questions arising
718 *upon these exceptions were not noticed in this court.

The prisoner obtained a writ of error to the Circuit court of Montgomery county, where the judgment of the County court was affirmed; and he then brought the case to this court.

Phlegar, for the prisoner.

The Attorney-General, for the Commonwealth.

MONCURE, P., delivered the opinion of the court.

The plaintiff in error was convicted and sentenced to three years' imprisonment in the penitentiary, for the felony created by the Code, chapter 192, section 49, page 796, which declares that "If a free person obtain by any false pretence or token from any person, with intent to defraud, money or other property, which may be the subject of larceny, he shall be deemed guilty of the larceny thereof," &c. The indictment contained three counts, in each of which the offence was set out specially, and not in general terms, as in the case of a larceny at common law; except that to the third count there is a conclusion in these words: "And so the jurors aforesaid, upon their oath aforesaid, do say that the said Lewis Leftwich, then and there, in manner and form aforesaid, the said ninety dollars, United States currency, of the value of ninety dollars, of the goods, chattels and property of the said Jeremiah K. Montague, feloniously did steal, take and carry away, against the peace and dignity of the Com-

monwealth of Virginia." In each of the counts, the subject charged to have been obtained by false pretences is described in the same words, as "the sum of ninety dollars, in United States currency, of the value of ninety dollars, of the goods and chattels and property of the said Jeremiah K. Montague." There was a motion

719 to quash *the first and second counts, which was overruled; and there was a general demurrer to the whole indictment, which was also overruled. There was then a plea of not guilty, on which verdict and judgment were rendered.

Several errors are assigned in this case, but only two of them need be noticed. They are, in overruling the motion to quash the first and second counts; and in overruling the demurrer to the whole indictment.

In regard to the motion to quash the first and second counts, it is contended that they ought to have been quashed, because they are not in form as for larceny at common law, and do not allege the stealing, taking and carrying away of the subject of the larceny.

It would certainly have been competent for the pleader to have counted as for a larceny of the subject in the form of an indictment for larceny at common law; and proof of the special facts set out in the act as constituting the offence, would have sustained the charge. Dowdy v. Commonwealth, 9 Gratt. 727, 734. But it is also competent for the pleader, instead of counting for a larceny of the subject in the form of an indictment for larceny at common law, to charge the specific facts which the act declares shall be deemed larceny. The legal conclusion deducible from these facts is drawn by the act itself, and need not, of necessity, be drawn in the indictment.

The Circuit court, therefore, did not err in overruling the motion to quash, on that ground. The motion was also placed upon another ground, which, however, need not be noticed, in the view we have taken of this case.

In regard to the demurrer to the indictment, it is contended that the demurrer ought to have been sustained, "because no particular kind of property is alleged to have been stolen; the words, 'United
720 States *currency,' being nomen generalissimum, which is not a sufficient description."

The statute on which the indictment is founded, declares that if a person obtain, by any false pretence, from any person, with intent to defraud, money or other property, which may be the subject of larceny, he shall be deemed guilty of the larceny thereof. We think that the "money or other property," which a person may be charged under this statute with having obtained by false pretences, ought to be described in the indictment with the same particularity which would be required in an indictment for the larceny thereof. The indictment, as we have already seen, may either be for larceny generally, or for the

specific acts which this statute says shall be deemed larceny; and in either case the same particularity of description of the subject is necessary. The same reason for such particularity exists in the one case as in the other.

Then, is the description of the subject in this case sufficient?

In all the counts of the indictment the subject alleged to have been obtained by the false pretences set out therein, is described as "the sum of ninety dollars in United States currency, of the value of ninety dollars of the goods, chattels and property of the said Jeremiah K. Montague." "Ninety dollars in United States currency," is the subject of the larceny in each of the counts. Is that a sufficient description of the subject?

We think not. "United States currency" may be gold, or silver, or treasury notes, or bank notes. Proof that any of these subjects were obtained by the false pretence alleged, would be perfectly consistent with the indictment; which, therefore, is too vague. It ought to show what kind of United

States currency was obtained. An indictment in the common law form, for a larceny of "United States currency," *eo nomine*, would surely not be sufficient. And for the same reason an indictment for obtaining "United States currency" by false and fraudulent pretences, which is deemed in law, larceny, is not sufficient. An indictment for obtaining "bank notes" by false pretences would be good, as in an indictment for stealing "bank notes;" because the statute makes the stealing of "any bank note" larceny. Code, p. 789, ch. 192, § 15. But there is no law making the stealing of "United States currency," *eo nomine*, larceny.

In *The State v. Longbottoms*, 11 Humph. R. 39, the indictment charges a larceny of "ten dollars good and lawful money of the State of Tennessee." This was held to be an insufficient description of the thing stolen. The court said: "Where personal chattels are the subject of an offence, as in larceny they must be described specifically by the names usually appropriated to them, and the number and value of each species or particular kind of goods stated." 2 Hale 182, 183; Arch. Cr. Pl. 49 (London edition). Money should be described "as so many pieces of the current gold or silver coin of the realm. And the species of coin must be stated by its appropriate name." R. & R. 482; Arch. 50.

In *the People v. Ball*, 14 Calif. R. 101, it was held that an indictment for larceny, describing the subject stolen as "three thousand dollars, lawful money of the United States," is insufficient. The particular denomination or species of coin must be set forth. Citing Arch. Cr. Pl. 61; Whart. Cr. Law 132; and the case in 11 Humph., before referred to. See also 2 Russ. on Crimes, ed. of 1857, pp. 107-113.

We think the cases cited are sustained by the authorities relied on for that purpose and other authorities; from which it follows

that the demurrer to the indictment in this case ought to have been sustained.

722 *Without considering any other question arising in this case, we are, therefore, of opinion, that the judgment of the Circuit court affirming that of the County court, and also the judgment of the County court, is erroneous, and ought to be reversed and annulled, and judgment entered in favor of the plaintiff in error, on the demurrer to the indictment. But, as he is now confined in the penitentiary under the said judgment of the County court, affirmed by the said judgment of the Circuit court, it is necessary that he be brought before this court by habeas corpus, to be disposed of as may be proper; which is ordered accordingly.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the indictment is radically defective, and the demurrer thereto ought to have been sustained, instead of being overruled; and that on that ground both of the said judgments of the Circuit court and of the County court are erroneous. Therefore it is considered that the said judgments be reversed and annulled. And this court, proceeding to give such judgment as the said County court ought to have given, it is further considered by the court that the said demurrer be sustained, and that the said Lewis Leftwich go quit of the offence charged against him by the said indictment; which is ordered to be certified to the said Circuit court.

But it appearing that the said Lewis Leftwich is now in confinement in the penitentiary, under the said judgment of the County court, affirmed by the said judgment of the Circuit court, a writ of habeas corpus is awarded, directed to the superintendent of the penitentiary, commanding him to have the body of the said Lewis Leftwich before this court to-morrow morning at eleven o'clock, together with the day and cause of his capture and detention, in order that the court may make such order concerning him as may be proper.

723 Upon the return of the superintendent of the penitentiary, it appeared that the prisoner had been hired to a contractor on the Covington and Ohio Railroad, and had escaped; when the court made the following order:

This day George F. Strother, superintendent of the penitentiary, appeared in court and made his return to the writ of habeas corpus which was awarded in this case on yesterday, from which return it appears that the said Lewis Leftwich is not now in his custody, or in the penitentiary, and has not been since he has been superintendent thereof; but that the said Lewis Leftwich was hired out by a former superintendent of the penitentiary to a contractor on a railroad, from which he made his escape on the 22d of June, 1869, and is now going at large. And although the court, if informed of these facts before hearing and deciding this case, would have pursued the same

course which was pursued by the court in *Shearman v. The Commonwealth*, 14 Gratt. 677, and in *Haze v. The Commonwealth*, in 1867 (not reported); that is, would not have decided or heard the case while the plaintiff in error was going at large, but would have made an order that the said writ of error should be dismissed on a certain day, unless it should be made to appear to this court on or before that day, that the said plaintiff in error was in custody of the proper officer of the law; yet, as the case was heard and decided without such information, the court deems it proper not to set aside the judgment entered in this case on yesterday, but to permit the same to stand and remain in full force, and to dismiss the said writ of habeas corpus; which is ordered accordingly.

FALSE PRETENSES AND CHEATS.

I. False Pretenses.

- A. Definition and Distinction.
- B. Made Larceny by Statute.
- C. Essential Elements.
- D. Subject-Matter of Offence.
- E. The Indictment and Charge.
- F. Defenses.
- G. Evidence.
- H. Principal in Second Degree.

II. Cheats.

Cross-References.—*Note* on "Larceny" appended to *Johnson v. Com.*, 24 Gratt. 555; *note* on "Forgery and Counterfeiting" appended to *Coleman v. Com.*, 25 Gratt. 865; *note* on "Autrefois, Acquit and Convict" appended to *Page v. Com.*, 26 Gratt. 948; *note* on "Accessories" appended to *Maybush v. Com.*, 29 Gratt. 857.

I. FALSE PRETENSES.

A. DEFINITION AND DISTINCTION.

Definition.—"The obtaining by any false pretense, or taking from any person with intent to defraud, money or other property." *State v. Hurst*, 11 W. Va. 54; W. Va. Code, ch. 145, § 23.

Distinction between Larceny and False Pretenses.—"The distinction between cases in which the *property*, and cases in which the mere *possession* of property is fraudulently obtained from the owner by a person who converts the same to his own use, *animo furandi*, is well settled and familiar law, the offence in the latter case being larceny but not in the former." *MONCUBE, J.*, in *Dull v. Com.*, 25 Gratt. 965. And where a man was induced to hand over his money merely as a kind of pledge and in the expectation of getting it back immediately, and the money is made away with, this was held larceny rather than false pretenses. *Dull v. Com.*, 25 Gratt. 965.

B. MADE LARCENY BY STATUTE.—In *Dull v. Com.*, 25 Gratt. 965, the court held that the language of the statute was intended to, and did make the offence of obtaining property under false pretenses, larceny, and identical in punishment with larceny. In accord. *State v. Hurst*, 11 W. Va. 54. See also, *Fay v. Com.*, 28 Gratt. 912; *Leftwich v. Com.*, 20 Gratt. 716; Va. Code 1887, § 8722; W. Va. Code 1899, ch. 145, § 23.

C. ESSENTIAL ELEMENTS.—The court in *Anable v. Com.*, 24 Gratt. 563, gave the following analysis: To

constitute the statutory offence of obtaining money under false pretenses four things must concur: 1. There must be an intent to defraud. 2. There must be an actual fraud committed. 3. *False pretenses* must be used for the purpose of perpetrating the fraud. 4. The fraud must be accomplished by means of the false pretenses made use of for the purpose; that is, they must be in some degree the cause, if not the controlling and decisive cause, which induced the owner to part with his property.

Essential Elements Must Be Proved.—Although the statute makes false pretenses equivalent to larceny, yet one cannot be found guilty under a simple count charging him with larceny any more than under one charging specifically the offence of obtaining money, etc., by false pretenses, if there is wanting in the proof any of those elements which constitute that offence. *Anable v. Com.*, 24 Gratt. 563; *Fay v. Com.*, 28 Gratt. 912; *Trogdon v. Com.*, 31 Gratt. 862.

The Fraudulent Intent.—To come within the statute there must have been an *intent to defraud* and this fraudulent intent must have existed at the time the false pretenses were made, by which the money was obtained. *Fay v. Com.*, 28 Gratt. 912.

The Intent a Question of Fact for the Jury.—*Trogdon v. Com.*, 31 Gratt. 862.

The False Pretenses.—Especially, is the gravamen of the offence, that the pretenses are false and if the prisoner can show that the representations upon which he obtained the property from the owner are true, he cannot be convicted. *Anable v. Com.*, 24 Gratt. 563.

In the above case where the accused was prosecuted for selling warrants on the treasury, without having enough money there to his credit to meet them, the court of appeals held that the lower court erred in refusing the following instruction: "If the jury believe from the evidence that the prisoner had sums of money, audited and allowed him, sufficient to pay all existing legal warrants drawn by him and passed to other parties, which had been registered before the warrants said to have been sold to Dr. White and also to pay the warrants of Dr. White, then they must acquit him;" since, if this supposition is supported by proof, it negatives the essential elements of false pretense and intent to defraud. But see able dissenting opinion of JUDGE MONCUBE.

The Scienter.—In an indictment for false pretenses the *scienter* must be alleged, but the form "did knowingly, designedly, etc., pretend" is sufficient. *State v. Hurst*, 11 W. Va. 54.

In *State v. Halida*, 28 W. Va. 499, although the word "designedly" is omitted in the indictment, the court held its omission was sufficiently supplied by the use of the words "knowingly" and "falsely."

False Pretense Must Be the Controlling Cause.—Other inducements may have combined with the false pretenses to induce the owner to part with his property, but it must appear that, but for the false pretenses, the owner would not have parted with his property, that they had the controlling, prevailing influence. *Fay v. Com.*, 28 Gratt. 912; *Anable v. Com.*, 24 Gratt. 563; *Trogdon v. Com.*, 31 Gratt. 862.

D. SUBJECT-MATTER OF OFFENCE.

The Note of a Bank is Neither "Money nor Goods."—In *Com. v. Swinney* (1st Case), 1 Va. Cas. 146, 5 Am. Dec. 512, taken in connection with the 2nd case, a bank was held to come within the scope of the statute punishing "the falsely and deceitfully, contriving, etc., privy tokens and counterfeit letters in other

men's names unto divers persons, their particular friends and acquaintances." But in the statute saying "money or goods," a note of the bank of Va. was held not to come under the denomination of "money or goods," but to be a mere promissory note, and judgment was arrested. In the 2nd case the language of the indictment was "money, current in the Com. of Va.," and this was held sufficient and the judgment sustained."

E. THE INDICTMENT AND CHARGE.

Form of Indictment.

Indictment for Larceny.—In *Anable v. Com.*, 24 Gratt. 563, the court said that it was the settled law of Virginia that upon an indictment simply charging larceny, the state may show that the subject of the larceny was obtained by a false token or pretense. In accord, *Dowdy v. Com.*, 9 Gratt. 727; *State v. Halida*, 28 W. Va. 499; *Leftwich v. Com.*, 20 Gratt. 716; *Fay v. Com.*, 28 Gratt. 912.

Indictment Charging Specific Facts.—It is competent for the pleader instead of counting for a larceny of the subject in the form of an indictment for larceny at common law, to charge the specific facts which the act declares shall be deemed larceny. The legal conclusion deducible from these facts is drawn by the act itself and need not of necessity be drawn in the indictment. *Leftwich v. Com.*, 20 Gratt. 716.

The Same Offence Charged in Several Counts.—JUDGE MONCURE says in *Dowdy v. Com.*, 9 Gratt. 727: "Where the several counts of an indictment are all for the same offence and are in themselves good counts, I know of no case where the indictment will be quashed or the prosecutor compelled to elect on which count he will proceed. It is every day practice to charge a felony in different ways, in several counts, for the purpose of meeting the evidence as it may come out upon the trial." See also, *State v. Halida*, 28 W. Va. 499; *Anthony v. Com.*, 88 Va. 847, 14 S. E. Rep. 834.

Sufficient Allegation That False Pretense Was Inducing Cause.—In *State v. Hurst*, 11 W. Va. 54, the allegation in the indictment that "by means of which said false pretenses, the said H. did, etc., feloniously obtain, etc., this money" is a sufficient allegation that the prosecutor was induced by the false pretenses to part with his money.

Sufficient Record of an Indictment.—The record of an indictment in these words: "An indictment against C. G. & D. G. for obtaining property by false pretense," is sufficient, although the language used does not contain every element of the offence charged. *State v. Geyer*, 44 W. Va. 649, 29 S. E. Rep. 1020.

Particularity of Description of Subject-Matter of Offence.—In *Anable v. Com.*, 24 Gratt. 563, it was held, that where a check was described in the indictment as endorsed by a certain person to whose order it was payable, and the evidence showed that it was not endorsed by said person when it was handed to him but was so endorsed afterwards, this was not a fatal variance, the court saying, "The law of larceny does not require a minute description of the property stolen. The general rule is that it should be described with such a certainty as will enable the jury to decide whether the chattel proved to have been stolen is the very same with that upon which the indictment is founded, and show judicially to the court that it could have been the subject-matter of the offence charged and enable the defendant to plead his acquittal or

conviction to a subsequent indictment relating to the same chattel." See also, *State v. Hurst*, 11 W. Va. 54.

On the other hand in *Leftwich v. Com.*, 20 Gratt. 716, it was held that a demurrer to the indictment ought to have been sustained where the indictment only charged the obtaining of "United States currency" since that is a general term and not a sufficient description, as there was no law making the stealing of U. S. currency, *eo nomine*, larceny, the court saying that the "money or other property" obtained by false pretense should be described, in an indictment for that offence with the same particularity which would be required in an indictment for the larceny thereof. But in consequence of this case, the Act of Feb. 28, 1874, Va. Code 1887, § 3994 was passed, providing that, "in a prosecution for the larceny of U. S. currency, it shall be sufficient if the accused be proved guilty of the larceny of National Bank notes or U. S. treasury notes;" and in the case of *Dull v. Com.*, 25 Gratt. 965, though it was declared better to describe a statutory offence in the very language of a statute, still the court held that the words "national currency of the U. S." were equivalent and came within the statute.

Number.—In a prosecution for obtaining under false pretenses, notes, circulating as currency, the number of the notes need not be stated. *State v. Hurst*, 11 W. Va. 54.

Variance at the Trial.—Where the indictment charges the larceny of divers notes of the U. S. currency, in the whole amounting to \$208 and the evidence does not show that the accused received notes but that he received \$50 in cash and the promise to pay the balance in monthly installments of \$15 each; this is a fatal variance and is ground for a reversal of the judgment against accused. *Fay v. Com.*, 28 Gratt. 912.

Proper Charge to Jury.—The charge to the jury in a case of obtaining property under false pretenses may be in precisely the same form as in a case of larceny, and if the evidence in the course of a trial make out a case of false pretenses, the charge need not be changed to correspond. *Dull v. Com.*, 25 Gratt. 965.

F. DEFENSES.

Plea of "Autrefois Acquit" on Former Charge of Forgery Not Good.—Where a person acquitted on a charge of forgery, is afterwards indicted on the same facts for fraudulently obtaining goods, etc., he cannot plead "autrefois acquit" of the former charge to the latter. *Com. v. Quann*, 2 Va. Cas. 89.

Obtaining Just Debt by False Pretenses.—A person is not guilty of the offence of false pretenses, who uses false pretenses to obtain payment of a debt justly due him. *State v. Hurst*, 11 W. Va. 54.

G. EVIDENCE.

Admissibility of Evidence of Other Transactions to Show Intent.—Where, as in prosecutions for obtaining goods under false pretenses, the fraudulent intent is a necessary ingredient of the offence, evidence of other transactions of similar character, (such evidence not being too remote in time or place to throw light upon the intent of the accused in the main transaction), is admissible. But such evidence is only to be considered by the jury as explanatory of such intent and not as proof that the accused has committed other offences not charged in the indictment. *Trogdon v. Com.*, 31 Gratt. 862.

A Statement to One Member of a Firm a Statement to All.—A statement to one member of a firm is a

statement to the firm and to every member of it and must be admitted, since it is material evidence to show the grounds upon which the partners acted. *Trogdon v. Com.*, 31 Gratt. 862.

Record in Bankruptcy.—The record in bankruptcy is competent to show the fact of bankruptcy, also to show the petition and schedules filed by accused, the statements therein contained and any other act done, or declaration made by the *accused* in the progress of the proceedings in bankruptcy on the ground that they are the deliberate declarations of record of the *accused*, not as a judgment. The identity of the petitioner in the record of bankruptcy with the accused may be established by circumstantial evidence. *Trogdon v. Com.*, 31 Gratt. 862.

But the schedules of *third parties* also forming part of the record in bankruptcy, are not admissible, being merely the admissions in writing of those persons which the accused had no opportunity of controverting. *Trogdon v. Com.*, 31 Gratt. 862.

Circumstantial Evidence.—A letter touching the financial condition of a firm, signed by the firm will be presumed to be written by the accused when he is the only member of the firm residing where the letter was written and he had the exclusive control of the business. *Trogdon v. Com.*, 31 Gratt. 862.

List of Property in Another State.—A paper purporting to be a copy of a list of property given in to the assessor of another state and certified to be correct by the register of deeds of his county is not admissible evidence, 1st, because it was without date; 2nd, because it was not proved by the statutes of the said state that such a copy was legal evidence; 3d, such paper, whether copy or original is nothing more than a statement by the party, on oath it may be, to some North Carolina officer as to the amount and value of his property. It was not made in the presence of the accused; he had no interest or concern in the matter and he had no opportunity of cross-examining the person who made it. It is difficult to find even a plausible ground upon which such a paper can be used upon a criminal trial. *Trogdon v. Com.*, 31 Gratt. 862.

Evidence Improperly Admitted Ground for Reversal.—It the accused *may* have been prejudiced by the evidence admitted even though it be doubtful whether in fact he was so or not, it is sufficient for reversing the judgment. *Trogdon v. Com.*, 31 Gratt. 862.

H. WHAT PRESENCE IS NECESSARY TO CONSTITUTE ONE A PRINCIPAL IN THE SECOND DEGREE.—In *Dull v. Com.*, 25 Gratt. 965, the court approved the refusal by the lower court to give the following instruction: "That the jury could not find the accused guilty of the larceny charged against him unless they were satisfied that he was present, aiding and abetting therein" without the following addition, "But if the prisoner was within easy call, to aid or assist them in their purpose, or in escaping or in getting rid of, or misleading the person from whom such money was obtained, that is a presence aiding and abetting, and the prisoner is as guilty as if he were personally present." This addition was held to imply the *intent* sufficiently, in answer to the argument that *presence* was not sufficient, but that there must be the *intent* to aid. *Dull v. Com.*, 25 Gratt. 965.

The court also approved the following instruction: If the jury believe from the evidence that the prisoner and others concerted and conspired together to induce, by false representations, the wit-

ness Fowlkes, or any other persons who might be induced by such representations, to enter the house of the prisoner, and to obtain the money of such persons by false pretenses, or rented his house to be used for such purposes by said conspirators, and that in pursuance of such concert, one of the prisoner's confederates induced the witness to go into said house, and by false pretenses did obtain a large sum of money from said Fowlkes, and that the prisoner was present, or within easy call, etc., as in former instruction, then the prisoner is as guilty as if he himself had obtained the money from said Fowlkes, the court saying, that though the mere fact of renting a house to others to be used by them for the purposes of committing a felony, would not make the landlord or lessor a principal, either in the first or second degree, that fact is connected with a good many other facts in the instruction, which clearly make the accused a principal in the second degree in the felony charged against him. *Dull v. Com.*, 25 Gratt. 965.

II. CHEATS.

Falsely procuring the goods of others by means of a false and counterfeit note, purporting to be the note of a bank, but which bank never existed, knowing said note to be false and counterfeit is indictable as a cheat at common law. Such an offence does not come within the scope of the act of 1789, against those who "counterfeit letters or privy tokens to receive money or goods in other men's names." *Com. v. Speer*, 2 Va. Cas. 65.

Scienter Necessary.—The "scienter" is a necessary averment in an indictment for a cheat at common law. *Com. v. Speer*, 2 Va. Cas. 65.

724 *Thompson v. The Commonwealth.

November Term, 1870, Richmond.

JOYNES, J., absent, sick.

1. **Indictments—Counts—Conclusion of.***—Every count in an indictment must conclude "against the peace and dignity of the Commonwealth;" or the count which omits it is fatally defective.
2. **Same—Proper Endorsement.**—The only proper endorsement on an indictment is "a true bill," or "not a true bill," with the name of the foreman; and anything else is not a part of the finding of the grand jury.
3. **Same—Finding of Grand Jury—Surplusage.**†—The record of the finding of the grand jury, saying, in commission of rape, which was on the indictment, is mere surplusage.

***Indictments—Counts—Conclusion of.**—The proposition, that every count must conclude "against the peace and dignity of the commonwealth," and every count which omits it is fatally defective, has met with approval in *Early v. Com.*, 86 Va. 924, 11 S. E. Rep. 795; *State v. McClung*, 85 W. Va. 285, 13 S. E. Rep. 655.

See also, in accord, *Carney's Case*, 4 Gratt. 546. But see *Lemons' Case*, 4 W. Va. 757, which is cited in 10 Enc. Pl. & Pr. 443, as contrary to all authority.

†**Same—Finding of the Grand Jury—Surplusage.**—See the principal case cited in *State v. Fitzpatrick*, 8 W. Va. 709.

Same—Murder—Form.—In *Kibler v. Com.*, 94 Va. 809, 26 S. E. Rep. 858, the court said: "In the case of *Thompson v. Com.*, 20 Gratt. 730, the court says: 'It is not necessary, in consequence of the statute

4. Confessions—When Admissible as Evidence—Must Be Voluntary.†—That a confession of a prisoner tried for murder is voluntary, is a condition precedent of its admissibility; and the court must be satisfied that the confession was voluntary, before it can be permitted to go to the jury; the

defining the different degrees of murder, and subjecting them to different punishments, to alter the form of indictments for murder in any respect, nor to charge specially such facts as would show the offence to be in the first degree.'

"If, therefore, any proposition of law can be considered as settled by decision and no longer open to debate, this is one of them."

See also, in accord, *Miller v. Com.*, 1 Va. Cas. 810; *Wicks v. Com.*, 2 Va. Cas. 887; *Livingston v. Com.*, 14 Gratt. 596.

See generally, monographic *note* on "Indictments."

†**Confessions—When Admissible as Evidence—Must Be Voluntary.**—In *Smith v. Com.*, 10 Gratt. 734, it was declared as the condition of the admissibility of a confession, that it be free and voluntary; and the court said, at p. 739, that the established rule is, that a confession may be given in evidence unless it appear that it was obtained from the party by some inducement of a worldly or temporal character in the nature of a threat, or promise of benefit, held out to him in respect of his escape from the consequences of the offence or the mitigation of the punishment, by a person in authority or with the apparent sanction of such a person. This rule was reaffirmed by the principal case at p. 730, and followed by subsequent cases, citing the principal case, and *Smith v. Com.*, 10 Gratt. 734, as establishing the rule. See *Wolf v. Com.*, 30 Gratt. 838; *Early v. Com.*, 86 Va. 928, 11 S. E. Rep. 795; *State v. Morgan*, 35 W. Va. 267, 13 S. E. Rep. 886.

Same—Same—Same—Exception.—In *Fredrick v. State*, 3 W. Va. 697, the court said: "It is well settled as a general rule, that the confession of the accused, made under inducements to officers in whose custody he was at the time, or others having authority over him, are to be excluded on the trial. But the exception to the rule is also fully established, where the confession is accompanied with the surrender and restoration of the stolen property."

Same—Same—Same—Persons in Authority.—But it should be noted well that to exclude confessions, as not voluntary, the inducements must be held out by *some one in authority*.

The principal case was cited as authority on this point in *Early v. Com.*, 86 Va. 928, 11 S. E. Rep. 795; *State v. Morgan*, 35 W. Va. 267, 13 S. E. Rep. 887. See also, a collection of cases in *foot-note* to *Mitchell v. Com.*, 33 Gratt. 845; *Vaughan v. Com.*, 17 Gratt. 576.

Persons in authority, within the meaning of the rule, are such as are engaged or concerned in the apprehension, prosecution, or examination of the accused. *Smith v. Com.*, 10 Gratt. 734; *Thompson's Case*, 20 Gratt. 724; *Early's Case*, 86 Va. 928, 11 S. E. Rep. 795.

Therefore one who is merely a private detective, employed to "work up the case" is not such a person. *Early v. Com.*, 86 Va. 928, 11 S. E. Rep. 795; *United States v. Stone*, 8 Fed. Rep. 232.

Same—Same—Same—Burden of Proof.—The proposition, advanced by the principal case, that the burden of proving that the confession is voluntary, is upon the state, was approved in *Morgan's Case*, 35 W. Va. 265, 13 S. E. Rep. 886.

burden of proof that it was voluntary is on the Commonwealth.

5. Same—Rule as to Repeated Confessions.*—Though a confession may be inadmissible because not voluntary, it may become admissible by being subsequently repeated by the accused when his mind is perfectly free from the undue influence which induced the original confession. *Prima facie*, the undue influence will be considered as continuing; though the presumption may be repelled by evidence; which, however, must be strong and clear.

At the quarterly term of the County court of Goochland county, Willis Thompson, a colored boy, was indicted for the murder of Alice Brown, a colored girl. The indictment contains two counts. In the first count the prisoner is charged with having made an assault on Alice Brown, and feloniously to have ravished her, and that then and there, in the commission of the rape aforesaid, murdered her by choking her and thrusting *dirt, &c., into her nose, mouth and throat. But the count omits the conclusion "against the peace and dignity of the Commonwealth."

The second count charges the murder by the same means, except that it does not charge that it was done in the commission of a rape. This count concludes against the peace and dignity of the Commonwealth. The endorsement on the indictment is, An indictment against Willis Thompson, for murder in commission of rape. True bill. James W. Goodman, foreman of the grand jury.

When the prisoner was arraigned he elected to be tried in the Circuit court; and when the cause was called in that court, he demurred to the indictment and each count thereof; but the demurrer was overruled: and he then pleaded not guilty. On the trial the jury found a general verdict of guilty of murder in the first degree, and the court sentenced the prisoner to be hung.

In the progress of the trial, the prisoner, by his counsel, took exceptions to the rulings of the court, on the admissibility of his confessions; and after the verdict he moved in arrest of judgment, which motion the court overruled, and the prisoner excepted.

From the first exception, it appears that the attorney for the Commonwealth introduced a witness, by whom he proposed to prove certain confessions of the prisoner. Whereupon, the prisoner, by his counsel, objected to the introduction of the said confession as evidence in the cause, unless it was shown, affirmatively by the prosecution, to the satisfaction of the court, that said confession had been made freely and voluntarily, and without any improper in-

***Same—Rule as to Repeated Confessions.**—As authority for the proposition, that, in the absence of clear proof to the contrary, a second confession will be presumed to have been influenced by the same motive which prompted the first confession and made it inadmissible, the principal case was cited and approved in *Venable v. Com.*, 24 Gratt. 640.

See generally, monographic *note* on "Confessions" appended to *Schwartz v. Com.*, 27 Gratt. 1025.

duancements, either of promises or threats, or other improper means. But the court overruled the objection, and decided to admit said confessions to go to the jury, unless the prisoner could show, by proper testimony, that the said confessions

726 *had been obtained from him contrary to the rules of law in such case made and provided; being of opinion that when confessions are offered in evidence the law presumes they are voluntary and free from exception; and that if the prisoner desires to exclude them, the onus is upon him to show that they have been obtained from him by improper inducements, and not upon the Commonwealth to show affirmatively that they were free and voluntary. To which opinion of the court the prisoner excepted. But before the confession was admitted, evidence was introduced which satisfied the court that the first confession made was made under a fear of being hanged by the mob of excited negroes who surrounded him; and that confession was excluded.

After the first confession was excluded, the attorney for the Commonwealth proposed to give in evidence a confession made at a subsequent time; to which the prisoner, by his counsel, objected, unless the Commonwealth first showed clearly that the influence exerted on the mind of the prisoner, by the previous threats and the circumstances surrounding the prisoner, had been removed; that the presumption of law was, that those influences continued to exist on the mind of the prisoner, and induced all subsequent confessions.

The facts as to this second confession having been proved, the prisoner, by his counsel, moved the court to exclude this confession, on the ground that, to say the least, it was doubtful whether the influences brought to bear on the mind of the prisoner, by the threats made against him when the first confession was made, and the circumstances which surrounded him, had been removed; but the court overruled the objection and permitted the confession to go to the jury. As this court did not express any opinion upon the sufficiency of the evidence to authorize the admission of the confession, it is unnecessary to state it.

727 *The motion to arrest the judgment was on the grounds—

1st. That it was uncertain whether the verdict was a general one, applying to both counts, or only on one; and if on one only, which?

2d. If the verdict was on the first count, it should be arrested because the demurrer to that count should have been sustained, for the want of the constitutional conclusion.

3d. If the verdict was on the second count it was a nullity, because the endorsement on the indictment shows that the grand jury only acted on the first count.

4th. If there was no finding of the grand jury on the second count, it should have been stricken out on the demurrer to it.

5th. That the evidence required to convict

the prisoner, on the first count, of murder in the first degree, is different from the evidence which was required to convict him of that crime on the second count. The proof of an attempt to commit a rape, the homicide being proved, would have been sufficient on the first count; on the second, willful and premeditated killing would have been necessary.

Upon the application of the prisoner, a writ of error was allowed him to this court.

Tutwiler, for the prisoner, insisted—

1st. It was error to overrule the demurrer to the first count in the indictment. That count omitted the constitutional conclusion "against the peace and dignity of the Commonwealth." Each count of an indictment must be perfect in itself; and the omission of the conclusion against the peace and dignity of the Commonwealth is fatal. Carney's case, 4 Gratt. 546.

2d. The demurrer should have been sustained to the first count, because it charges both rape and murder.

728 3d. The court below erred in requiring the prisoner *to prove to the satisfaction of the court that the confession proposed to be given in evidence against him, had been obtained from him by undue influence, before it would exclude them. Confession must be shewn by the Commonwealth, affirmatively, to have been free and voluntary, before they can be introduced. In the case of Regina v. Waverton, 2 Led. Crim. Cas. 157, it is said, "in order to render a confession by a prisoner admissible, the prosecution must shew, affirmatively, to the satisfaction of the judge, that it has not been made under the influence of any improper inducement; if it appear doubtful on the evidence, the confession ought to be rejected."

4th. The prisoner having proved, to the satisfaction of the judge, that the first confession had been obtained by threats, so that it was excluded, the court erred in admitting the same confession made at a subsequent time, without requiring the clearest proof that the influences which had induced the first confession, which had been excluded, had been removed from the mind of the prisoner; the presumption of law being that those influences continued. 1 Archb. Cr. Pr. & Pl. 417, 418; 2 Russ. Crimes, Confessions; Smith's case, 10 Gratt. 734.

5th. The verdict of the jury was general. If it was on the first count, it was a nullity, because that count was defective for the reasons before stated; if it was on the second count, it was equally a nullity, because the endorsement on the indictment shews that on this count there was no finding by the grand jury.

Phleger, for the Commonwealth, insisted—

1st. The two counts charge exactly the same facts, and the same offence; and there could be no proof or punishment under one

count which could not be under the other. The description as to the rape is a statement of the surrounding circumstances not essential *to the charge of murder.

2 Russ. Crimes 793. This distinguishes this case from Carney's case, 4 Gratt. 546. The constitution says every indictment shall conclude against the peace and dignity of the Commonwealth; but it does not say that each count shall so conclude; and, in a case like this, the one conclusion will apply to every count in the indictment.

2d. The first count does not charge the offence of rape as a distinct offence, but as the attendant upon the crime of murder; which it is the intention of the count to charge. Tiernan's case, 4 Gratt. 545; Ratcliff's case, 5 Id. 657.

3d. The finding of the grand jury applied to both counts. The only proper endorsement upon an indictment is "a true bill," or "not a true bill;" and any addition is surplusage. Cohen's case, 2 Va. Cas. 158.

4th. As to the confessions, he referred to 2 Russ. Crimes 858, Griffith's case.

MONCURE, P., delivered the opinion of the court.

The court is of the opinion, that as the constitution, article VI, sec. 26, requires that indictments shall conclude, "against the peace and dignity of the Commonwealth," and as the first count of the indictment in this case does not so conclude, though the second count does, the first count is therefore fatally defective in that respect, and the demurrer thereto ought to have been sustained instead of overruled; according to the authority of Carney's case, 4 Gratt. 546.

The court is further of opinion, that although the grand jury might lawfully have found the first count of the indictment "a true bill," and the second count "not a true bill;" yet, they did not in fact do so, but found the whole indictment, including both counts, "a true bill." The endorsement, "an indictment against Willis Thompson, murder in commission of rape," which appears to have been on the indictment *when found by the grand jury and when presented by them in court, was not a part of their finding, which consisted only of the words, "true bill," endorsed on the indictment and signed by their foreman. And, although the same words of description, endorsed on the indictment as aforesaid, are used in the record of the finding thereof; yet, it is a sufficient record of the finding of the whole indictment; the words, "in commission of rape," included in that description, being mere surplusage.

The court is further of opinion, that it is not necessary, in consequence of the statute defining the different degrees of murder, and subjecting them to different punishments, to alter the form of indictments for murder in any respect, nor to charge specially such facts as would shew the offence to be murder in the first degree. 3 Robin-

son's Practice, old edition, p. 43; Commonwealth v. Miller, 1 Va. Cas. 310; Wicks v. Commonwealth, 2 Id. 387. Therefore, the first count of the indictment in this case, which charges specially a rape, in the commission of which the murder, which is the object of the prosecution, is charged to have been committed, is wholly unnecessary, although not on that ground demurrable; and the second count, which is in the common form, will answer every purpose which could have been answered by the first count as an indictment for murder, even if the latter had been otherwise unexceptionable.

The court is further of opinion, that in a criminal case a confession of the accused is admissible evidence against him, only when it is voluntary; that is, when made without being induced by motives of hope or fear of temporal advantage or injury, excited by a person in authority, or with the apparent sanction of such a person. Smith's case, 10 Gratt. 734. Persons in authority, within the meaning of the rule, being such as are engaged or concerned

in the apprehension, prosecution
731 *or examination of the accused. Id.

742, '3. That the confession is voluntary, being therefore a condition precedent of its admissibility, and the duty of deciding on its admissibility being a duty which devolves on the court, it follows, necessarily, that the court must be satisfied that the confession was voluntary, before it can be permitted to go before the jury; in other words, that the burden of proof that it was voluntary, devolves on the Commonwealth.

The court is further of opinion, that though a confession may be inadmissible because not voluntary, it may become admissible by being subsequently repeated by the accused, when his mind is perfectly free from the undue influence which induced the original confession. Prima facie, the undue influence will be considered as continuing; though the presumption may be repelled by evidence, which, however, must be strong and clear. The rule on this subject has been well stated to be, "that, although an original confession may have been obtained by improper means, yet subsequent confessions of the same or like facts may be admitted, if the court believes, from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. In the absence of any such circumstances, the influence of the motives proved to have been offered, will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will therefore be rejected." 2 Russ. on Crimes 838; Greenl. Ev. 257; and cases cited. It follows that the burden of showing the contrary devolves on the Commonwealth, as the condition on which the confession will be admissible.

The court is further of opinion, that the original confession, which was offered in evidence in this case, *was clearly inadmissible; having been made under the influence of fear, produced by the presence and the threats of a large number of negroes, some of whom were armed, who attended the person who made the arrest, and threatened to hang the accused, and the Circuit court was therefore right in excluding it.

But the court declines at this time to express any opinion as to the admissibility of the subsequent confessions which were given in evidence; deeming it sufficient to state the principles of law which govern the subject, and leaving it to the Circuit court to apply them, according to a sound discretion, in view of all the facts, as they may be developed in the future trial of the case.

Therefore, it is considered that the said judgment, for the reason aforesaid, is erroneous, and that it be reversed and annulled; that the demurrer to the first count of the indictment be sustained; that the verdict of the jury be set aside; and that the cause be remanded to the said Circuit court, for a new trial to be had therein on the second count of the indictment; on which new trial the said court is to be governed by the principles herein declared, as far as they may be applicable. Which is ordered to be certified to the said Circuit court.

Judgment reversed.

733 *Chahoon v. The Commonwealth.*

January Term, 1871, Richmond.

JOYNES, J., absent, sick.

1. **Indictment before Arrest—Quære—Is There a Right to Examination before Trial.**†—C. is indicted for felony in the Corporation court of R., the proper court to try him for the offence. When indicted he is not in custody, and has not been arrested or examined by a justice. QUÆRE: If he should be arrested and sent before a justice to be examined, or whether he may be taken on a *capias*, and tried upon the indictment, without an examination by a justice.

*For monographic note on Juries, see end of case.

†Indictments—Right to Examination before Trial.—

In *Jackson v. Com.*, 23 Gratt. 925 *et seq.*, MONCURE, P., in delivering the opinion of the court, said that the question whether, under the act of April 27, 1867 (entitled "An act to revise and amend the criminal procedure"), a person indicted for felony in the proper court to try him—the person, when indicted, not being in custody, nor having been arrested or examined by a justice—should be arrested and examined before a justice, or whether he might be taken on a *capias* and tried without examination, had been fully considered in the principal case and since the court there was equally divided in opinion, the judgment of the lower court was affirmed, and Chahoon was tried and convicted without being previously examined by a justice. MONCURE, P., then continuing, said that, as there had been two sessions of the legislature since the decision of the

2. **Constitution—Effect on Existing Laws in Conflict Therewith.**‡—The third section of the third article of the constitution, in relation to the qualification of jurors, does not operate *proprio vigore*, and without any legislation on the subject, to repeal all existing laws in conflict therewith; but until such legislation is had, the existing law continues in force.

3. **Same—Same—Case at Bar.**—Even if this provision of the constitution did operate *proprio vigore*, a grand jury summoned and empaneled under the existing law, which requires that they should be freeholders, could not be objected to on this ground; it not appearing that they did not have the qualifications required by the constitution.

4. **Same—Statute—Venire Facias Should Conform to the Statute.**—The act in force at the time of the adoption of the constitution, not having been since altered by legislation, a *venire facias* for the trial of a prisoner for felony, should be conformed to the act; under the second and fourth sections of the schedule to the constitution.

5. **Forgery—Proof of Handwriting—Admissible Evidence.**—Upon a trial for forgery, to prove that the paper was forged, a witness was introduced, who said that he knew H., the party whose signature was in question, and who was dead, about two years; was his tenant; had seen him write; thinks he knew his handwriting tolerably well; but could not swear to a particular signature as his, without knowing the fact; thought he had a sufficient knowledge or recollection of his signature to enable him to give an opinion as to the genuineness of his signature, though he would not swear absolutely above it. Says: I think it is

734 not his handwriting; but at *the same time, I cannot say on oath positively it is not. This is admissible evidence.

principal case, and as neither session had changed the law nor passed any act declaratory of the meaning of the legislature in the existing law on the subject, it must be presumed that the legislature was satisfied with the decision of the principal case; and, therefore, the court was of the opinion that the decision in Chahoon's Case must be accepted and regarded as a settlement of the question as to the proper construction of the said act. CHRISTIAN, J., while he had not changed his opinion, as laid down in the principal case, acquiesced in the decision of MONCURE, P., above laid down. STAPLES, J., concurred in the decision because he thought the prisoner had waived his right to examination by a justice. ANDERSON concurred in the opinion of MONCURE; while BOULDIN, J., dissented. See principal case cited in Chahoon's Case, 21 Gratt. 825. The point was also discussed in *Butler v. Com.*, 81 Va. 161. The principal case, however, is also cited by the court in *Jones v. Com.*, 86 Va. 661, 10 S. E. Rep. 1005. In this last case, the offence was committed in October 1867; and the court said at p. 662: "At the time of the commission of the offence the law required that the prisoner should be sent before the justice of the peace to be examined. Acts 1865-6; Chahoon's Case, 20 Gratt. 764; Jackson's Case, 23 Gratt. 919; Butler v. Com., 81 Va. 161."

See generally, monographic note on "Indictments."

‡Constitution—Effect on Existing Laws in Conflict Therewith.—In *Supervisors v. Stout*, 9 W. Va. 705, the principal case is cited as authority for the proposition that where legislation is necessary to give effect to a constitutional provision, laws in existence

6. Same—Evidence—Pecuniary Condition of Obligor.—On such a trial the Commonwealth may prove that H. was prompt in the payment of his debts, and that he owned a large property, real and personal, and was doing a good business.

7. Same—How It May Be Committed.—Forgery of a paper may be by performing the act in person, or by being present, procuring and assisting in the forgery.

8. Uttering Forged Paper—How It May Be Proved.—Uttering a forged paper may be proved by showing that the prisoner attempted to employ as true, the forged writing, with a knowledge, at the time of the said attempt, that the same was forged, with the intent to defraud. And any assertion or declaration, by word or act, that the forged writing is good, with such knowledge or intent, is an uttering or attempt to employ as true, the said writing, if such assertion or declaration was made in the prosecution of the purpose of obtaining the money mentioned in the said writing.

9. Forgery—Failure of Accused to Produce Evidence in His Own Behalf—Effect.—To convict of forgery, the jury must be governed entirely by the testimony before them, and they must not presume or assume the guilt of the accused, by reason of his failure or neglect to produce evidence in his own behalf. But if the jury believe that it is in the power of the accused to produce evidence in elucidation of the subject matter of the charge against him, then his failure or neglect to produce such evidence may be considered by the jury, in connection with the other facts proved in the case.

10. Same—In Fraud of Whom.—The forgery charged was the note of H., an unnaturalized foreigner. The forging or uttering it was in fraud of the adm'r of H., and the heirs of H., if he had any, or the State, if he had none.

11. Suit on Forged Note—Knowledge of Counsel—Effect.—The bringing a suit at law, as counsel,

when a new constitution is adopted remain the law until legislation is had to enforce the provision of the constitution which conflicts with the old law. The principal case is also cited as authority on this point in *Johnson v. City of Parkersburg*, 16 W. Va. 422.

§Forgery—Evidence—Pecuniary Condition of the Accused.—In *State v. Henderson*, 29 W. Va. 164, 1 S. E. Rep. 237, the court said, that the same reason, which, in the principal case, admitted evidence to prove the pecuniary condition of him whose name was forged to the bond, would permit evidence in the case at bar to show that the person in whose favor the alleged receipt was executed, was, at the time, in embarrassed circumstances, so as to show that it would not be probable that he could have paid so large a sum.

See generally, monographic *note* on "Forgery and Counterfeiting" appended to *Coleman v. Com.*, 25 Gratt. 865.

§Failure of Accused to Produce Evidence in His Own Behalf—Effect.—In *Goodman v. R. & D. R. Co.*, 81 Va. 584, the court said: "MONCUBE. P., in *Chahoon's Case*, 20 Gratt. 797, says: 'The conduct of a party in omitting to produce that evidence in elucidation of the subject-matter in dispute, which is within his power, and which rests peculiarly within his knowledge, frequently affords occasions for strong presumptions against him, since it raises a strong suspicion, that such evidence, if adduced, would operate to his prejudice.' "

upon the forged note, and recovering judgment thereon, and the filing a bill to enforce payment of the judgment out of the real estate of H., and having the same sold and receiving the proceeds—the same being done with the knowledge that the note was a forgery—was an attempt to employ the said note as true, within the meaning of the statute.

12. Jurisdiction of Hustings Court of Richmond.—

Though the suit at law was brought in the County court of Henrico, and the suit in equity was in the Circuit court of Henrico, yet as both these courts were held within the limits of the city of Richmond, and the prisoner lived in the city, the Hustings court of the city had jurisdiction to try the prisoner.

On the 4th of June, 1870, being the May term of the court, in the court of Hustings for the city of Richmond, an indictment for forgery was found against
735 *George Chahoon. The indictment contained four counts. The first count was for the forgery of a bond purporting to be assigned by Solomon Haunstein, promising to pay to John W. Thompson or order, on demand, the sum of seven thousand dollars, and dated the 1st of April, 1861. The second count was for uttering and attempting to employ as true the said bond, with intent to defraud. The third count was for forging an indorsement of the name of Thompson on said bond; and the fourth count was for uttering and attempting to employ the said endorsement, with intent to defraud.

Chahoon not being in custody when the indictment was found against him, a *capias* was issued to bring him into court on the first day of the next term to answer the indictment. Under this *capias* he was brought into court at the same term, and gave bail with condition to appear at the next term of the court. He then appeared, and on his motion the trial was postponed until the September term; and then it was again continued until the October term.

At the October term of the court the prisoner was arraigned; and he then moved the court to quash the indictment, and to direct, by proper process, that he be taken before a justice of the peace in order that he might be examined for the offence with which he stands charged in the said indictment; he not having been arrested or examined for said offence before the finding of the indictment. This motion the court overruled; and the prisoner excepted.

When the prisoner was required to plead,

***Jurisdiction of Courts.**—See the decision of the principal case approved in *Sands' Case*, 20 Gratt. 824.

In *Supervisors v. Cox*, 98 Va. 274, 36 S. E. Rep. 380, the court said: "The courthouse and other public buildings of a number of the counties of the State are situated in cities within the territorial limits of the counties, and it has been held by this court that jurisdiction over the locality is in the court of the city, and not in the court of the county. *Fitch's Case*, 92 Va. 824, 24 S. E. Rep. 272, and *Chahoon's Case*, 20 Gratt. 733."

For a continuation of the principal case, see *Chahoon's Case*, 21 Gratt. 822.

he moved the court to quash the indictment, because the grand jury that found the indictment were required to be freeholders, because the officer who summoned them, summoned none but freeholders, and that the clerk, before they were sworn, demanded to know of each of them whether they were

freeholders; which facts appeared
736 *to the satisfaction of the court. But the court overruled the motion; and the prisoner excepted. This is his second exception. The prisoner then tendered a plea raising the same question; but the court rejected it; and he again excepted. This is his third exception.

The prisoner then moved the court to quash the venire facias; upon the ground that it restricted the sergeant in summoning the venire, to freeholders only. And this motion the court sustained, and quashed the venire. And thereupon a new venire was ordered, directing the officer to summon twenty-four good and lawful men of the corporation, who are qualified to vote and hold office under the constitution of Virginia, and who reside remote from the place where the felony was committed, each of whom is twenty-one years of age. The officer having returned the venire executed, the prisoner moved the court to quash it, because it was not in conformity to law, and for errors apparent on its face. But the court overruled the motion; and the prisoner again excepted. This is the fourth bill of exceptions.

Upon the trial, the first witness introduced for the Commonwealth was Oscar Cranz. He had known Solomon Haunstein from about 1852 to the time of his death, in April or May, 1861. He had had dealings with him during that period, and had frequently received orders from him for the purchase of liquors, but that these orders were very seldom in writing. He could not say how often he had seen his written orders; had never seen him write; and from the few orders in writing he received, and the lapse of time, he could not give a decided opinion as to his handwriting; thinks he could remember it, but would not like to give an opinion about it after this lapse of time. Whereupon it was proposed by the Commonwealth to ask the witness

whether, from his recollection of the
737 *handwriting of Haunstein, the signature to the writing charged to be forged, which was then offered in evidence, was the signature of said Haunstein. To this question the prisoner objected: but the court overruled the objection; and permitted the question to be put to the witness: and the prisoner again excepted. This is his fifth exception.

To the question stated above, the witness said: It is hard for me to give an answer; it looks like it, and it don't look like it, as far as my recollection goes. Whereupon the Commonwealth proposed to the witness the following question: If you have an opinion, after an inspection of the signature before you, whether it is or is not the handwriting of Solomon Haunstein, declare it. To

this question the prisoner excepted: but the court overruled the objection, and allowed the question to be put to the witness: and the prisoner excepted. This is his sixth exception.

The Commonwealth introduced another witness—Emanuel Francis—who stated that he knew Haunstein intimately; had known him twenty or twenty-one years; was familiar with his handwriting after he commenced business as keeper of a restaurant; he did not believe the signature to the paper to be Haunstein's: and he described some peculiarities in Haunstein's genuine signatures. And then he was asked by the Commonwealth, Was Solomon Haunstein prompt or not in the payment of his debts? To this question the prisoner objected; but the court overruled the objection: and the prisoner excepted. This is his seventh exception.

After the witness had answered the question stated in the last exception, he was further asked by the Commonwealth what were Haunstein's circumstances about April, 1861, as to property, and whether he owned real estate in Richmond or elsewhere, and the witness had answered, he had plenty of money in his pocket,
738 and *property, real and personal, outside, and was doing a good business, the prisoner moved the court to reject both the question and answer aforesaid, and to direct the jury to disregard them; but the court refused to do so: and the prisoner again excepted. This is his eighth exception.

The Commonwealth introduced another witness—John H. Gibbon—who said that he knew Haunstein about two years, having occupied one of his houses as his tenant, for about eighteen months; had seen him write several times; thinks he knew his handwriting tolerably well, but could not swear on oath, positively, that a particular signature was in his handwriting without knowing the fact that the signature was his. And he further stated that he thought he had a sufficient knowledge or recollection of his handwriting to enable him to give an opinion as to the genuineness of his signature; though he would not swear absolutely about it. The Commonwealth thereupon proposed to ask the witness whether, from his knowledge of Haunstein's handwriting, the signature to the writing named in the indictment was the signature of Haunstein or not. To which question the prisoner objected; but the court overruled the objection, and permitted the question to be put: and the prisoner again excepted. This is his ninth exception.

After the foregoing exception was signed, the witness, in answer to the question, said: I think it is not his handwriting; but at the same time I cannot say on oath positively it is not. Which answer the prisoner moved the court to exclude from the jury, and to instruct them to disregard the same as evidence. But the court overruled the motion: and the prisoner again excepted. This is his tenth exception.

The Commonwealth introduced another witness—William Folkes—the clerk of the County court of Henrico, who stated that the prisoner brought to his
739 *office a declaration, with its accompanying paper, being the paper set out in the indictment, and directed process to issue thereon; and filed the same in his office. The witness produced the record of the case, which was the record of an action of debt in the County court, by Wm. Gleason, assignee of John W. Thompson, against Richard D. Sanxay, curator of the estate of Solomon Haunstein, dec'd, upon a bond for \$7,000, purporting to be executed by Haunstein to Thompson, and endorsed by Thompson, dated the 1st day of April, 1861. The record shewed that the office judgment had not been set aside, but was confirmed at the March term of the court for 1867. He was asked whether there had been counsel marked for the defendant, and he replied, yes—Mr. J. H. Sands was marked on the record as counsel for the defendant. He was then asked if any plea was pleaded by him for defendant; and he answered no; that the judgment went by default. Whereupon, on cross-examination, it was asked by the prisoner if any reason had been given to him by the counsel for not filing a plea in the case. And thereupon the attorney for the Commonwealth asked witness if prisoner was present at the conversation; to which witness replied he was not. And the Commonwealth then objected to the question; and the court refused to permit the witness to answer the same; J. H. Sands, the counsel so marked for the defence, being then present in court at the time of the enquiry proposed. To this opinion of the court the prisoner again excepted. This is his eleventh exception.

After the signing of the last mentioned bill of exception, the prisoner asked the witness whether Sanxay, the defendant in said action, was present with his counsel in the clerk's office, and what was said by him as to why he would not defend the suit, but let the judgment go by default: and it was proved that Sanxay
740 *was dead. But the court refused to permit the said question to be put; Sands being present in court; and the prisoner not having been present at said conversation. And the prisoner again excepted. This is his twelfth exception.

After all the evidence had been introduced, the prisoner moved the court to instruct the jury as follows:

1st. That, to convict the accused upon the first and third counts in the indictment, they must be satisfied, from the evidence, that he actually and with his own hand forged the writing or endorsement therein named respectively, or some part thereof, with intent to defraud, and to the prejudice of another's right.

2d. That, to convict the accused upon the second and fourth counts in the indictment, the jury must be satisfied, from the evidence, that the accused uttered or attempted to employ as true, the forged writ-

ing, or the forged endorsement, therein respectively mentioned, with a knowledge at the time of the said uttering, or attempting to employ as true, that the same was forged, and with the intent therein charged.

3d. That, to convict the accused upon the said last mentioned counts, the jury must be satisfied that, at the time the said forged writing and said endorsement were filed by the accused in the clerk's office of the County court of Henrico, he knew that the same were forged.

4th. That the bringing of a suit upon a forged paper, as counsel, does not amount in law to an uttering or attempting to employ the same as true.

5th. That, to convict the accused of the guilty knowledge imputed to him in the second and fourth counts in the indictment, it must be proved against him, as a substantive fact, by the evidence in the cause, or by fair inferences therefrom; and
741 that the law *does not presume guilty knowledge from any state of the proof against the accused.

6th. That to convict the accused, the jury must be governed entirely by the testimony before them and the inferences therefrom; and that they must not presume or assume the guilt of the accused by reason of his failure or neglect to produce evidence in his own behalf.

7th. That to convict the accused, the jury must be satisfied, beyond any reasonable doubt, as to the proof of every fact essential to his conviction; and where the evidence as to the proof of any such fact is preponderating, without being conclusive, they must find for the accused.

The court refused to give these instructions in the form in which they were asked; and in lieu thereof gave the following:

1st. That, in order to convict the accused upon the first and third counts in the indictment, they must be satisfied, from the evidence, that he himself with his own hand forged the said writing or endorsement therein named respectively, or some part thereof, or was present procuring or assisting in the forgery of said writing or endorsement, with intent to defraud, to the prejudice of another's right.

2d. That, to convict the accused upon the second and fourth counts in the indictment, the jury must be satisfied, from the evidence, that the accused uttered, or attempted to employ as true, the forged writing or the endorsement therein respectively mentioned, with the knowledge at the time of said uttering or attempting to employ as true, that the same were forged, and with the intent therein charged: but any assertion or declaration, by word or act, that the forged writing or endorsement is good, with such knowledge and intent, is an uttering and attempting to employ as true of the said writing or endorsement.

742 *3d. That the bringing of a suit upon a forged paper, as counsel, does not amount, in law, to an uttering or attempting to employ the same as true, unless

the accused, at the time of bringing such suit, knew that the paper was a forgery.

4th. That to convict the accused under the second and fourth counts of the indictment, the guilty knowledge therein imputed to him must be proved by the evidence in the cause, or by fair inferences therefrom.

5th. That to convict the accused the jury must be governed entirely by the testimony before them, and they must not presume or assume the guilt of the accused by reason of his failure or neglect to produce evidence in his own behalf; but that is a fact which, if it appears, may be considered by the jury in connection with the other facts proved in the cause.

6th. That to convict the accused, the jury must be satisfied, beyond any reasonable doubt, as to the proof of every fact essential to his conviction; and where the evidence and the reasonable inferences therefrom leave any reasonable doubt upon the mind of the jury as to the proof of such fact, they must find for the accused.

To the refusal of the court to give the instructions asked for, and to the giving the instructions given by the court, the prisoner excepted. This is his thirteenth exception. The bill of exceptions contained a statement of all the evidence introduced on the trial; but a sufficient statement of it will be found in the opinion of the court.

After a trial extending through ten days, the jury, on the 27th of October, 1870, found the prisoner not guilty on the first and third counts in the indictment, and guilty on the second and fourth counts, and ascertained the term of his imprisonment in the penitentiary at four years. The prisoner thereupon moved the court for a new trial, on the ground that the verdict

743 *was contrary to the law and the evidence; but the court overruled the motion, and refused to certify the facts, because the evidence was conflicting and contradictory.

The prisoner then moved the court to set aside the verdict of the jury, on the ground that there was no evidence of an intention, on the part of the accused, to defraud the United States, or any State, or any county, corporation, officer or person. This motion the court overruled; and the prisoner excepted. He then moved the court to set aside the verdict, on the further ground that there was no evidence to shew that the writing in the indictment mentioned was uttered or attempted to be employed as true to any person, but was filed with a declaration in a suit at law in the clerk's office of Henrico county court. This motion the court overruled; and the plaintiff excepted. And the prisoner then moved the court to set aside the verdict, on the ground that the alleged uttering and attempting to employ as true, occurred in the County court of Henrico, and within the jurisdiction of that court, and not within the jurisdiction of the Hustings court of the city of Richmond. But the court overruled the motion; and the prisoner excepted.

Upon overruling the three last motions to set aside the verdict of the jury, the court certified, upon the record, the facts proved bearing upon them respectively; and these facts are substantially as follows:

Solomon Haunstein, an unnaturalized foreigner, died in the year 1861, in the city of Richmond, leaving no heirs, and seized and possessed of a large amount of real estate in the county of Henrico, and State of Virginia, as well as a good deal of personal property; said real estate being subject to escheat to the State of Virginia. The writing mentioned in the indictment was forged; and the accused, knowing it to be forged, uttered the same by claim-

744 ing payment thereof from *the estate of Haunstein, by presenting and demanding payment of a claim based upon said forged writing, for the sum of seven thousand dollars, from Richard D. Sanxay, the curator of said estate. He, with such knowledge, brought suit upon the said writing, in the name of Gleason, assignee, against Sanxay, curator of said estate, and obtained judgment thereon, in the County court of Henrico. The accused thereupon filed a bill in the Circuit court of the county of Henrico, in the name of Gleason, assignee, against Sanxay, as curator of the estate of Haunstein, to enforce satisfaction of said judgment, by sale of said Haunstein's land, and obtained a decree in this suit, directing the sale of said land; had it sold under said decree, and received the proceeds of the sale.

At the time these suits were brought, the County court held, and still holds, its sessions, and had, and has, its clerk's office and courthouse within the corporate limits of the city of Richmond. The accused filed the bill, and obtained the decrees, and instituted the proceedings, and filed his receipt for \$4,996 94, the nett proceeds of the sale of the real estate in the aforesaid chancery suit; and the Circuit court of Henrico county then held its sessions, and had its clerk's office, in the capitol, in the city of Richmond. The accused and Sanxay lived in the city during the time of the alleged uttering and attempting to employ as true, the said forged writing by the accused; and the law office of the accused was in the city of Richmond during that time.

After the aforementioned motions were made and overruled, the prisoner moved in arrest of judgment upon the verdict, which motion the court overruled; and then passed sentence upon him. And the prisoner thereupon applied for and obtained a writ of error to this court.

745 *Wells and Crump, for the prisoner.

The Attorney General and George Wise, for the Commonwealth.

Upon the first point the judges were divided, and delivered opinions upon it. On the other points they concurred in opinion, and on these points Moncure, P., delivered the judgment of the court.

MONCURE, P. The first error assigned in this case is, the refusal of the court to remand the accused for examination before

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compel him to answer the indictment, there is no occasion for any examination by a justice. And now let us see which of these two conflicting constructions of the act—that of the counsel of the accused, or that which I maintain—is more conform-
 750 able *to the terms of the 15th and 16th sections, and of the other parts of the act.

The 15th section was intended to apply, and expressly does apply, only to a case of felony. "Upon a presentment, indictment or information of a felony," is the language in which it commences. And it thus proceeds: "For which the party charged has not been arrested, the presiding judge or justice shall issue a warrant." From which it is argued that whenever the party charged, whether it be in a court of competent jurisdiction to try him, or any other court, has not been arrested, a bench warrant, and not a capias, must of necessity be issued against him. By reference to 1 Rev. Co. 1819, p. 605, ch. 169, § 20, we see the source from which § 15 of the present law was derived; and we plainly see the original meaning and object of the provision. It there commences thus: "When a presentment shall be made by a grand jury of this Commonwealth in any of the Superior courts thereof having criminal jurisdiction, of a felony committed by any person, and the person so presented would be entitled to a trial before an examining court of his or her county, it shall be the duty of the judge who presides, when such presentment is made, to issue his warrant," &c. All persons charged with felony were then entitled to the benefit of an examining court. So that the provision applied to cases only in which the party presented had not had such benefit, and one of the objects, if not the main object of the provision, plainly was to secure to him that benefit. In the act of 1847-8, Acts of Assembly, pp. 93-164, called the "Criminal Code," this provision is revised, amended and embodied, and constitutes section 16 of chapter 20 of that Code. That section made some formal, but no very material change of the former law. Instead of saying, as § 20 of the act of 1819 did, "and the person so presented would be entitled to a trial be-
 751 fore an examining court," *it said, "for which the party charged therewith shall not have been already arrested." Now, this was a merely verbal, and not a material change of the act of 1819. A party who had been examined had, of necessity, already been arrested; whereas, a party who had not been examined, had not, at least as a general thing, already been arrested. And the Legislature of 1847-8, in saying, "shall not have been already arrested," intended in effect to say, "would be entitled to a trial before an examining court." Perhaps the meaning would have been plainer if the language of the old law had remained unchanged; but I am confident that no change of meaning was intended by the change made in the language. Another, and perhaps the only other change

made by § 16, chapter 20 of the "Criminal Code," may be considered of more importance. It required the party, when arrested, to be carried before some justice of the peace of the county or corporation in which the offence might be charged to have been committed, in order that the case might be proceeded within the same manner as if the arrest had been by virtue of a warrant originally issued by him; whereas § 20 of the act of 1819 required the party, when arrested, to be committed to the jail of the county where the offence might be charged to have been committed; whereupon the jailor was required to notify some justice of the peace of the county, thereof, who was required to issue his warrant for summoning a court of examination, as in other cases. Now this change is not so material as would seem to be supposed, if in fact it be of any materiality. It seems to be supposed that it tends to show that the Legislature of 1847-8 thereby recognized that a party charged with a felony was entitled, in all cases and notwithstanding he may have been presented therefor by a grand jury, not only to the benefit of an examining court, but also to the *benefit of a preliminary examination by a justice of the peace. In other words, that this latter examination was an independent right of the accused, and not a mere incident of the examining court. Such, I think, was plainly not the fact. The Legislature of 1819 considered the presentment of the grand jury as a sufficient foundation for calling a court of examination, and therefore directed the accused to be committed to jail, and the jailor to notify a justice of the fact, and the justice to issue his warrant to summon a court. The Legislature of 1847-8 no doubt agreed with that of 1819 in so considering; but it occurred to them that it would be one link less in the chain of proceeding to carry the accused directly before a justice, instead of committing him to jail, and that the accused might avoid being committed to jail by satisfying the justice of his innocence of the offence charged, or at least by giving bail, if the offence was a bailable one; and therefore the change was made.

The 16th section of chapter 20 of the act of 1847-8, was copied, almost literally, into the Code of 1849, at least only verbal changes were made therein; and the same provision remained unchanged, until the passage of the act of 1866-7. In the Codes of 1849 and 1860, it formed the 15th section of ch. 207. And in the act of 1866-7, the same provision, as then amended, forms the same section of the same chapter.

Why, then, it may be asked, was the provision retained at all in that act, since the examining courts, which had chiefly, if not entirely, been the cause of its adoption originally, were thereby themselves abolished? And why were the words "indictment or information" inserted in the section as it is embodied in that act?

Although the chief office of the provision was to afford a means of having a person

presented of felony carried before an examining court, to the benefit of
753 *which he was entitled, before he could be tried for the offence, yet that was not its only office. It served another purpose, which it might continue to serve, and with more effect, under the act of 1866-7. A person might be presented of a felony in a court which had no jurisdiction of the case; and then it was necessary to have the accused arrested and carried before a justice of the county in which the offence was charged to have been committed, in order that it might be prosecuted there. In such a case, of course it would have been improper to issue a *capias*, and the only mode of causing an arrest and carrying on the prosecution, was by issuing such a warrant as is directed to be issued by the provision in question. That this was one of the purposes of the provision, is plainly apparent from its very words, which direct the accused to be carried before "a justice of the county or corporation in which he ought to be tried;" not "in which he was presented:" thus showing that the Legislature had in their contemplation cases in which a felony committed in one county might be presented in another. The language of the provision, from its first adoption in our code of criminal procedure, has been substantially the same in this respect. This useful purpose of the provision, as I have already said, it may continue to serve, and with more effect, under the new act. For there is now occasion for it, not only where a person is presented of a felony committed in another county, but also where he is presented in a Circuit court of a felony committed in the same county in which the court is held. In either case, a bench warrant, as it is called, is necessary, or at least convenient, as a means of securing the arrest and prosecution of the accused. The Circuit courts have now no jurisdiction to try felonies, except certain cases to be brought before them in a certain manner prescribed by law. Therefore, the provision has been retained in the present law. But, it may be
754 *said, that the Legislature might have directed an indictment found in a Circuit court, for a felony committed in the county in which the court is held, to be certified to the County court of such county for trial, as is provided in the case of an indictment for a misdemeanor. Still, the case of a presentment for a felony committed in another county would be left unprovided for. And even in the case of a felony committed in the same county, if the indictment were directed to be certified to the County court for trial, some time would necessarily elapse before a *capias* could be awarded by the county court in such case, during which time there would be danger of an escape from justice by the accused. The provision in question, which the Legislature of 1866-'7 found already in the code of criminal procedure which they were then revising, seemed to answer well the purpose in view, and it was therefore retained, as

everything in the former law was which did not plainly conflict with the scheme which they contemplated in making the revision.

As to the words "indictment or information," inserted in the 15th section of the amendatory act, these words were no doubt inserted after the word presentment (which alone was used as descriptive of the form of the charge in the provision as it stood in former laws), because it had just been said, in the 1st section of the same chapter as amended, that "prosecution for offences against the Commonwealth, unless otherwise provided, shall be by presentment, indictment or information;" and conformity seemed to require that the same words should be used in the 15th section. The Legislature may have supposed that the word "presentment" did not comprehend "indictment," as it does; and it was used in that comprehensive sense, in the provision as it stood in former laws. As to the word "information," it was not compre-

hended in the word presentment, and
755 it could only have been used *for conformity, as before stated, and because it might happen that an information might be filed charging a person with felony, merely for the purpose of having him arrested by a bench warrant and carried before a justice of the proper county for prosecution. It could have been inserted for no other purpose, because a person cannot be prosecuted for felony by information, but only by indictment. See § 2, chap. 207 of the amended act, and Matthews' and Garner's cases, 18 Gratt. 989.

And now let us examine the next, or 16th, section of chapter 207, hereinbefore set out, and enquire what effect that has upon the question under consideration. I think it strongly confirms my view of that question. It commences thus: "When a presentment is made, or indictment found, in a case other than that provided for in the preceding section, if it be in a Circuit court, a copy of such presentment or indictment, and of all papers relating to the case, shall be certified by the clerk to the court of the county or corporation in which the offence is charged to have been committed." We notice here that the word "information," which occurs in the preceding section, is dropped in this. Why so, does not appear, unless it was because an information, being a mere charge drawn by the attorney for the Commonwealth, the Legislature supposed, that instead of directing an information to be certified from one court to another, for the purpose of having process issued thereon; a simpler process would be to file a new information in the court of the county in which the offence is charged to have been committed. Still no means are provided for causing the new information to be filed. This omission of the word "information" is more strange when we see that it occurs in the section as it stood in the act of 1847-8, and in the Codes of 1849 and 1860, while the word "indictment" does not there occur, though it is expressed in the

756 section *as it stands in the present law. Why it does not there occur, is explained by the fact that the word "presentment" was there used in its generic sense, which comprehends an indictment. The words "presentment" and "indictment," as used in the commencement of § 16 of the present law, refer only to presentments and indictments made or found in a Circuit court and in cases of misdemeanor. That they are so confined as to a Circuit court, is expressly declared in the section. That they are so confined as to cases of misdemeanor, is apparent from the words, "other than that provided for in the preceding section;" the case there provided for being only a case of felony. These words "presentment" and "indictment" have not here precisely the same application which the words "presentment" and "information" have in the corresponding section of the act of 1847-8, and the Codes of 1849 and 1860. That is, the words "other than that provided for in the preceding section," have not precisely the same meaning or effect in the present law which they had in those Codes. As there used they served to show that the words "presentment" and "information," in the 16th section, referred not only to all cases of misdemeanor, but also to certain cases of felony; that is, a case of felony other than that provided for in the preceding section, which was a felony for which the party had not "been arrested," according to the language of the act of 1847-8, and the Codes of 1849 and 1860, or for which he "would be entitled to a trial before an examining court," according to the language of the Code of 1819; which, as we have seen, meant the same thing. That the words "presentment" and "information," as used in the 16th section of chapter 207 of the Code of 1849, were intended to refer to certain cases of felony, is shown by the fact that the revisors, in their report, supposing that there was a conflict between §§ 16 and 17 of the *20th
757 chapter of the act of 1847-8, recommended that it should be avoided by inserting certain words in the 16th section of chapter 207 of the Code (which corresponds with the 17th section of chapter 20 of the act of 1847-8), so as plainly to confine the operation of that section to cases of misdemeanor. But the Legislature rejected their proposed amendment, and instead of the words recommended by them, inserted the words "in a case other than that provided for in the preceding section," which we find in the law as it now stands. Thus showing clearly that the 16th section was intended to embrace in its operation a case of felony not embraced in the operation of the 15th section; and as that section, as we have seen, was confined to a presentment of a felony for which the party charged had not been arrested; that is, had not had the benefit of a trial before an examining court, § 16 was intended to embrace a case of felony in which he had already had such benefit, but was not in custody at the time of finding the indictment, as he might not

be by reason of his escape, or if bailed, by his failure to appear in discharge of his recognizance.

The 16th section, as it stands in the present law, then proceeds: "Upon such presentment or indictment, and upon any like presentment or indictment made or found, or information filed in such county or corporation court, process shall be awarded by the court, or be issued by the clerk thereof in vacation." The word "such," last used, refers to the "county or corporation in which the offence is charged to have been committed," as mentioned just above. And the words "upon any like presentment or indictment made or found," embraces cases of felony as well as misdemeanor; as plainly appears from what follows, which is, "Such process, if the prosecution be for a felony, shall be a *capias*; if it be for a misdemeanor, for which an infamous or corporal punishment may be inflicted,

758 *it may be a *capias* or a summons, at the discretion of the court; in all other cases it shall be, in the first instance, a summons; but if a summons be returned executed, or two be returned 'not found,' and the defendant do not appear, the court may award a *capias*." This last clause, in regard to process, formed the subject of a separate section in the act of 1847-8, while it is embodied in the 16th section of the act of 1866-7; but its meaning is the same in both.

My construction of the 15th and 16th sections then is, that the 15th is confined to cases where the charge of felony is made in a court not having jurisdiction to try the offence, whether such court be a Circuit, County or Corporation court; while the 16th section applies to cases where the charge, whether it be for felony or misdemeanor, is before a court having jurisdiction to try the offence, that is, "the court of the county or corporation in which the offence is charged to have been committed:" including in the latter cases a presentment or indictment for a misdemeanor, certified to such court by the clerk of a Circuit court, as required by the section. In the former case, a *capias* to answer the charge is not the proper process for the arrest of the accused, because he cannot answer it in a court not having jurisdiction to try it, and therefore a warrant is directed to be issued to arrest him, "and carry him before a justice of the county or corporation in which he ought to be tried," who is to "proceed in the case as if the warrant had been issued by himself." In the latter case, that is, in regard to the 16th section, there being a proper charge before a court of competent jurisdiction to try it, nothing remains to be done in order to its trial, but to compel the accused, by proper process, to answer the charge. Accordingly, the section directs such process to be thereupon awarded or issued, and prescribes what the process shall be, declaring

759 *that it shall be a *capias*, if the prosecution be for a felony.

If it be asked, why did not the Legisla-

ture direct the presentment, &c., mentioned in the 15th section to be certified to the court of the county or corporation in which the offence is charged to have been committed, as is done by the 16th section in regard to a misdemeanor, instead of directing a warrant to be issued? The answer is, that it would produce delay in the arrest of the accused to send the charge to another court, in order that process might be awarded therein, instead of issuing a warrant immediately against him; and, hearing of the charge, as he no doubt soon would, he would be apt to make his escape before he could be arrested. Other reasons might be suggested, but it is unnecessary.

Again, it may be said that a person might be arrested under a *capias* in a distant county from that in which he would have to be tried, and be carried to the latter county, and there committed to jail; whereas, by being carried under a warrant before a justice, he might be able to show that he was not guilty of the offence, and obtain his discharge, or might be admitted to bail. The answer is, that this possible inconvenience is obviated in a great degree, if not entirely, by the right which he has to obtain relief by *habeas corpus*, and by a speedy trial of the case, which the law secures to him.

But whatever arguments, *ab inconvenienti* or otherwise, may be made against the construction for which I contend, I think they are greatly outweighed by the reasons which exist in support of that construction. I cannot bring my mind to the belief that the Legislature, in abolishing the examining courts, intended at the same time to make an examination by a justice of the peace, indispensably necessary before there can be a trial for felony, even though

760 the charge be made by *indictment found by a grand jury of the county or corporation in which the offence is charged to have been committed, and in a court of competent jurisdiction to try the offence. If the Legislature had so intended, they would not have left so very important a matter to be vaguely inferred from language which, I think, admits, much more plausibly and reasonably, of a different construction; but would have expressly declared such intention, as they did in the former law in regard to examining courts. The law in regard to those courts, as it stood in the Code when the act of 1866-7 was passed, declared that, "before a white person, charged with a felony—, is tried before a Circuit court, he shall be examined as hereinafter provided, unless, by his assent, entered of record in such court, such examination be dispensed with." Code of 1860, ch. 205, § 1, p. 827. And it further declared, that "if the court, in which a person is examined as aforesaid, discharge him, he shall not thereafter be questioned or tried for the same offence." *Id.* § 11, p. 828. Thus, in substance, the law had been for a great many years. Is it credible that the Legislature of 1866-7, with the Code of criminal procedure, containing these two important

provisions, before their eyes, and engaged in the work of revising and amending it, would have repealed the whole chapter containing these provisions, without expressly declaring, if they had so intended, that, before a person charged with a felony is tried therefor, he shall be examined before a justice of the peace, &c.? Not only would they have so declared, but they would also, no doubt, have further declared what should be the effect of a discharge by such justice, and whether it should be, as was the case in regard to an examining court, that the accused should "not thereafter be questioned or tried for the same offence." Instead of so expressly declaring their intention, if

761 it, *with great difficulty, in regard to the necessity of an examination before a justice; and they have left us in total darkness, as to what would be the effect of a discharge by such justice; and whether or not it would be necessary, in case the accused was committed or recognized for trial, to have a new indictment found by the grand jury, even though one may already have been found against him in the court which has to try the offence.

The construction for which I contend, is expressly maintained by the decision of the late "Military Court of Appeals," in the case of Shelly v. The Commonwealth, 19 Gratt. 652; and I entirely concur in the opinion of the court in that case. It is also strongly maintained by the decisions in Clore's case, 8 Gratt. 606; and Wormeley's case, 10 Ib. 658. In Clore's case, there was a motion to quash, and a plea in abatement, on the ground of alleged irregularities in the proceedings before the justice who committed the accused for examination by the County court, without any previous enquiry or examination into the truth of the offence by the justice himself. On this subject, Judge Lomax, in delivering the opinion of the court, said: "No precedent has been referred to for sustaining either a plea in abatement, or a motion to quash, upon the ground of such irregularities in the initiatory proceedings of the justice, which are designed merely to ascertain that there is a degree of suspicion against the accused, requiring that he should be held in custody until a more solemn examination can be had as to the probabilities of the charge, and a trial had of his guilt or innocence. Whatever inconveniences he may complain of, as to the examination or want of examination before the justice, they can have no relevancy as objections to the indictment, which has given the sanction of the grand inquest of the county to the charge for which the justice committed him. At

762 that stage of the proceedings, *after the finding of the grand jury upon the examinations and proofs before them, charging him with the murder, what defence, in reason or in law, can or ought it to be to the prisoner, that the justice who committed him for the crime, did not, in his prior examination, examine the case according to legal rules of evidence?" The

court then refers to the case of the Commonwealth v. Murray, 2 Va. Cases, 504, as giving a decisive answer to the question, and thus proceeds: "The principle of that decision is not at all varied, because of any subsequent amendments of the law in ch. 204, Code of 1849, relating to arrest, commitment and bail." These views are fully sustained by this court in Wormeley's case, cited supra. See the opinion of the court, delivered by Judge Daniel, pp. 666-670. These cases clearly show, that a preliminary examination by a justice was never regarded in Virginia as a necessity in a criminal case, further than as a means of summoning or authorizing a court of examination in a case of felony; and that the act of 1847-8 produced no change of the law in that respect. The act of 1866-7 has given no greater effect to the examination by a justice than it formerly had. And, as it owed its necessity at any time only to the existence of examining courts, it seems to follow, as a matter of course, that such necessity, if it can be so called, ceased to exist when the examining courts ceased to exist.

I owe an explanation for having said so much upon this question. I have done so, because, 1st, the question is a most important one; 2dly, it was argued at very great length by the learned counsel of the plaintiff in error, who much relied on the assignment of error on which it arises; and, 3dly, there is a diversity of opinion upon it among the judges of this court, now in session.

Since writing the foregoing opinion, I have heard read, in conference, the 763 opinion about to be delivered *by my brother Staples; which, though certainly able and ingenious, has yet produced no change of the views I have presented. But I have already said so much on the subject, that I would be inexcusable in prolonging this opinion to much, if any extent, for the purpose of further enforcing the views I have already presented, or of presenting other views suggested by his opinion. I will venture, however, to say this much at least, that his construction requires us to strike out of the 16th section the important words: Such process, "if the prosecution be for a felony;" not because they are unmeaning, and mere surplusage, but because they are in direct conflict with what goes before in the same section, according to his construction of it? That construction also requires us to confine the words "presentment" and "indictment," wherever they occur in the previous part of the section, to a case of misdemeanor, although "misdemeanor" is not once mentioned in that part of the section, and although the word "indictment" at least, if not "presentment" also, applies as well, in its ordinary and proper signification, to felony as to misdemeanor. But a more serious, and to me an insuperable obstacle in the way of that construction is, that it requires us to believe that the Legislature, while abolishing examining courts, intended to

make an examination by a single justice, a matter of necessity, before a person can be tried for a felony, though indicted therefor in solemn form by a grand jury of the county in which the offence is charged to have been committed; and that the Legislature conveyed so important an intention, not in express and apt language, which was plainly called for, but by leaving it to be inferred from equivocal words, which may have no such meaning. On the other hand, my construction leaves the 16th section unchanged and in full force, according to its literal, and, as I think, true meaning, except that the word "like,"

764 *where it occurs has, I think, no material meaning; and it is only necessary to supply the words, "in a court not having jurisdiction to try it," after the word "felony," in the second line of the 15th section (which words, indeed, seem to be implied by the rest of the section), to express plainly the meaning of the Legislature, in my view of it. And then I get rid of the insuperable difficulty before referred to. But, whether it was intended to confine the 15th section to courts not having jurisdiction of the offence, or to extend it also to courts having such jurisdiction; still, I think, it was not intended thereby to give a person accused of felony a right to be examined by a justice before he can be tried for the offence; but its only object was, to insure the arrest of the accused, in order that he may be tried for the offence: It is directory, not mandatory. Upon a presentment, indictment or information of a felony, some legal means must at once be used to have the accused arrested, in order that he may be tried for the offence. The best means, according to the circumstances of each particular case, which the law affords for that purpose, ought to be used by the court. If the court in which the presentment, &c., is made, has no jurisdiction to try the offence, then the best means would generally be a warrant, as directed by the 15th section. But, if an indictment for a felony is found in a court having jurisdiction to try the offence, then generally, if not always the best means, would be a *capias*, which is the proper process to compel an answer to an indictment of felony, as well by the common law as by the statute, which, in this respect, is only declaratory of the common law.

I am of opinion that the Hustings court did not err in refusing to remand the accused for examination before a justice of the peace, when he was arraigned to answer the indictment found against him.

765 *STAPLES, J. No one entertains a higher respect than myself for the opinions of the president of this court. His enlarged and varied experience as a judge, and as one of the revisors of the Code of 1849, and his thorough knowledge of the Virginia statutes, entitle his views, touching the construction of these statutes, to peculiar consideration and respect. It is, therefore, with real regret, and no little

distrust, that I venture to express my dissent from the opinion he has delivered.

I think it was the duty of the judge of the Hustings court, after indictment found, to issue a warrant against the accused, under which he ought to have been arrested and taken before a justice, with a view to the preliminary examination prescribed by the statute; and that the accused could not, against his consent, be put upon his trial without such preliminary examination.

I propose to state at length the reasons which have conducted me to this conclusion. The 15th section of chap. 207, Acts of 1866-'67, provides that "upon a presentment, indictment or information of a felony, for which the party charged has not been arrested, the presiding judge or justice shall issue a warrant to any sheriff, sergeant or constable, commanding him to arrest such party and carry him before a justice of the county or corporation in which he ought to be tried; and to summon the witnesses on whose information the presentment, indictment or information was made, to appear and testify before the justice." The justice to whom such warrant is returnable shall proceed in the case as if the warrant had been issued by himself."

The 16th section provides: "When a presentment is made, or indictment found, in a case other than that provided for in the preceding section, if it be in a Circuit court, a copy of such presentment or indictment, and of all papers relating to the

766 case, shall be certified by *the clerk to the court of the county or corporation in which the offence is charged to have been committed. Upon such presentment or indictment, and upon any like presentment, indictment or information, filed in such County or Corporation court, process shall be awarded by the court, or be issued by the clerk thereof in vacation. Such process, if the prosecution be for a felony, shall be a *capias*. If it be for a misdemeanor for which an infamous or corporal punishment may be inflicted, it may be a *capias* or a summons, at the discretion of the court; in all other cases it shall be in the first instance a summons."

The action of the court below, in awarding the *capias*, and in refusing to send the accused to a justice for examination, was doubtless based upon the provisions of the 16th section. That there is an apparent conflict between the two sections is universally conceded. The 15th section is positive, in terms requiring the presiding judge or justice, upon presentment made or indictment found of a felony, for which the accused has not been arrested, to issue his warrant for the apprehension of the accused. The 16th seems to be equally positive that the process in a prosecution for a felony shall be a *capias*. How are these conflicting provisions to be reconciled, one with the other? When an indictment is found, what is to be done by the presiding judge? Is he to issue a warrant or *capias*? Shall the accused be arrested and put upon his

trial, or taken before a justice for examination?

It is well settled that when a doubt arises upon the construction of a statute, all acts on the same subject matter are to be taken together and examined, in order to arrive at the legislative intent. In *The Earl of Ailesberry v. Patterson*, Douglas R. 20, Lord Mansfield said, "Where there are different statutes, in *pari materia*, though made at different times, or even expired and not referring to each other, they shall be taken and *construed together as one system, and as explanatory of each other." And in *Bassey v. Storey*, 4 Barn. & Ad. 98-108, Parke, J., said, "The provisions of a repealed act of Parliament were important as aiding in the construction of the enactments of existing statutes." An examination of the earlier legislation of the State, regulating criminal proceedings, will tend to remove some of the difficulties in the way of construing and harmonizing the sections cited, in order to give effect to each.

In the year 1792, jurisdiction in cases of treason and felony was conferred upon the District court. Previous to that time it was vested exclusively in the General court. When a free person was charged before a justice with treason or other felony, a warrant was issued for his arrest; if, in the opinion of the justice, the charge deserved investigation, the accused was committed to jail to await an examination before the County court. If, upon such examination, the justices of said court thought the evidence sufficient to convict the prisoner of treason or felony, they remanded him to the jail of the county, and thence he was removed by mittimus to the public jail, or he was bailed for his appearance before the District court having jurisdiction; where he was tried upon indictment found by a grand jury empanelled in that court. If the accused was already in custody at the time of finding the indictment, no other process was necessary, and he was immediately arraigned and tried. If he was on bail and did not appear, or if, being in custody, he escaped and did not appear in answer to the indictment, some process was necessary to enforce his appearance. It was therefore provided, by the various enactments of 1786 and 1792—after any person shall be indicted of treason or felony or other crime, to which by law an infamous punishment is affixed, if he or she be not already in custody, the sheriff shall be commanded to attach his or her body by written precept, which is *called a *capias*; with provision, if the accused should not be found, for other process against the body and goods.

This, however, was not the only mode of instituting prosecutions for felony. They could be, and indeed were often, commenced by indictment in the District court under which a *capias* was issued, the accused arrested and tried on the indictment. In such case there was no statute requiring a warrant to be issued, or a preliminary exami-

nation before a justice. It was so held by the General court in *Commonwealth v. Blakely*, 1 Va. Cas. 129, upon a plea in abatement, that the defendant had not been examined by the justices of the county court, as required by the act of 1786.

This decision probably led to the act of 1804, which provided that before any person should be tried in a District court for a felony, he should be tried by an examining court. After this act the course of proceeding was materially changed. Whether the prosecution was commenced by warrant emanating from a justice, or by presentment or indictment, the accused was nevertheless entitled to the examining court. If an indictment or presentment was the foundation of the prosecution, it was the invariable rule to issue a warrant for the apprehension of the accused, under which, if arrested, he was taken before a justice of the peace. In such case, however, the justice had no authority to enquire into the offence; his duty was purely ministerial, to summon the examining court, which enquired into the fact, and discharged the accused from further prosecution, or remanded him for trial before the Circuit court. Thus stood the law until the revision of 1847 and '8, when important changes were made in the mode of procedure. Under that law, when complaint was made before a justice, of the commission of an offence, it was his duty to issue a warrant for the arrest of the offender.

The arrest *being made, the justice examined the complaint, the witnesses for the prosecution and for the accused, who had the right to be assisted by counsel. If it appeared, upon the whole examination, that no offence had been committed, or there was not probable cause for charging the accused with the offence, he was discharged. If, on the other hand, it appeared that a felony had been committed, and there was probable cause to believe the accused guilty, he was committed or bailed for examination before the next County court.

The 16th section, chapter 20, of the same act, provided that "when a presentment shall be made by a grand jury of any felony for which the party charged shall not have been arrested, it shall be the duty of the court to issue a warrant commanding the proper officer to arrest the accused and take him before a justice, and to summon the necessary witnesses to appear before such justice; and the latter was directed thereupon to proceed with the case in the same manner as if the arrest had been made by virtue of a warrant originally issued by him."

The 17th section provided, that upon any presentment being found or information filed, if the accused be not already in custody, the court shall order the clerk to issue the proper process against such party, to answer such presentment or information on the first day of the next term, or at such other time as may be prescribed by law or directed by the court.

The Commonwealth introduced another witness—William Folkes—the clerk of the County court of Henrico, who stated that the prisoner brought to his
739 *office a declaration, with its accompanying paper, being the paper set out in the indictment, and directed process to issue thereon; and filed the same in his office. The witness produced the record of the case, which was the record of an action of debt in the County court, by Wm. Gleason, assignee of John W. Thompson, against Richard D. Sanxay, curator of the estate of Solomon Haunstein, dec'd, upon a bond for \$7,000, purporting to be executed by Haunstein to Thompson, and endorsed by Thompson, dated the 1st day of April, 1861. The record shewed that the office judgment had not been set aside, but was confirmed at the March term of the court for 1867. He was asked whether there had been counsel marked for the defendant, and he replied, yes—Mr. J. H. Sands was marked on the record as counsel for the defendant. He was then asked if any plea was pleaded by him for defendant; and he answered no; that the judgment went by default. Whereupon, on cross-examination, it was asked by the prisoner if any reason had been given to him by the counsel for not filing a plea in the case. And thereupon the attorney for the Commonwealth asked witness if prisoner was present at the conversation; to which witness replied he was not. And the Commonwealth then objected to the question; and the court refused to permit the witness to answer the same; J. H. Sands, the counsel so marked for the defence, being then present in court at the time of the enquiry proposed. To this opinion of the court the prisoner again excepted. This is his eleventh exception.

After the signing of the last mentioned bill of exception, the prisoner asked the witness whether Sanxay, the defendant in said action, was present with his counsel in the clerk's office, and what was said by him as to why he would not defend the suit, but let the judgment go by default: and it was proved that Sanxay
740 *was dead. But the court refused to permit the said question to be put; Sands being present in court; and the prisoner not having been present at said conversation. And the prisoner again excepted. This is his twelfth exception.

After all the evidence had been introduced, the prisoner moved the court to instruct the jury as follows:

1st. That, to convict the accused upon the first and third counts in the indictment, they must be satisfied, from the evidence, that he actually and with his own hand forged the writing or endorsement therein named respectively, or some part thereof, with intent to defraud, and to the prejudice of another's right.

2d. That, to convict the accused upon the second and fourth counts in the indictment, the jury must be satisfied, from the evidence, that the accused uttered or attempted to employ as true, the forged writ-

ing, or the forged endorsement, therein respectively mentioned, with a knowledge at the time of the said uttering, or attempting to employ as true, that the same was forged, and with the intent therein charged.

3d. That, to convict the accused upon the said last mentioned counts, the jury must be satisfied that, at the time the said forged writing and said endorsement were filed by the accused in the clerk's office of the County court of Henrico, he knew that the same were forged.

4th. That the bringing of a suit upon a forged paper, as counsel, does not amount in law to an uttering or attempting to employ the same as true.

5th. That, to convict the accused of the guilty knowledge imputed to him in the second and fourth counts in the indictment, it must be proved against him, as a substantive fact, by the evidence in the cause, or by fair inferences therefrom; and
741 that the law *does not presume guilty knowledge from any state of the proof against the accused.

6th. That to convict the accused, the jury must be governed entirely by the testimony before them and the inferences therefrom; and that they must not presume or assume the guilt of the accused by reason of his failure or neglect to produce evidence in his own behalf.

7th. That to convict the accused, the jury must be satisfied, beyond any reasonable doubt, as to the proof of every fact essential to his conviction; and where the evidence as to the proof of any such fact is preponderating, without being conclusive, they must find for the accused.

The court refused to give these instructions in the form in which they were asked; and in lieu thereof gave the following:

1st. That, in order to convict the accused upon the first and third counts in the indictment, they must be satisfied, from the evidence, that he himself with his own hand forged the said writing or endorsement therein named respectively, or some part thereof, or was present procuring or assisting in the forgery of said writing or endorsement, with intent to defraud, to the prejudice of another's right.

2d. That, to convict the accused upon the second and fourth counts in the indictment, the jury must be satisfied, from the evidence, that the accused uttered, or attempted to employ as true, the forged writing or the endorsement therein respectively mentioned, with the knowledge at the time of said uttering or attempting to employ as true, that the same were forged, and with the intent therein charged: but any assertion or declaration, by word or act, that the forged writing or endorsement is good, with such knowledge and intent, is an uttering and attempting to employ as true of the said writing or endorsement.

742 *3d. That the bringing of a suit upon a forged paper, as counsel, does not amount, in law, to an uttering or attempting to employ the same as true, unless

the accused, at the time of bringing such suit, knew that the paper was a forgery.

4th. That to convict the accused under the second and fourth counts of the indictment, the guilty knowledge therein imputed to him must be proved by the evidence in the cause, or by fair inferences therefrom.

5th. That to convict the accused the jury must be governed entirely by the testimony before them, and they must not presume or assume the guilt of the accused by reason of his failure or neglect to produce evidence in his own behalf; but that is a fact which, if it appears, may be considered by the jury in connection with the other facts proved in the cause.

6th. That to convict the accused, the jury must be satisfied, beyond any reasonable doubt, as to the proof of every fact essential to his conviction; and where the evidence and the reasonable inferences therefrom leave any reasonable doubt upon the mind of the jury as to the proof of such fact, they must find for the accused.

To the refusal of the court to give the instructions asked for, and to the giving the instructions given by the court, the prisoner excepted. This is his thirteenth exception. The bill of exceptions contained a statement of all the evidence introduced on the trial; but a sufficient statement of it will be found in the opinion of the court.

After a trial extending through ten days, the jury, on the 27th of October, 1870, found the prisoner not guilty on the first and third counts in the indictment, and guilty on the second and fourth counts, and ascertained the term of his imprisonment in the penitentiary at four years. The prisoner thereupon moved the court for a new trial, on the ground that the verdict

743 *was contrary to the law and the evidence; but the court overruled the motion, and refused to certify the facts, because the evidence was conflicting and contradictory.

The prisoner then moved the court to set aside the verdict of the jury, on the ground that there was no evidence of an intention, on the part of the accused, to defraud the United States, or any State, or any county, corporation, officer or person. This motion the court overruled; and the prisoner excepted. He then moved the court to set aside the verdict, on the further ground that there was no evidence to shew that the writing in the indictment mentioned was uttered or attempted to be employed as true to any person, but was filed with a declaration in a suit at law in the clerk's office of Henrico county court. This motion the court overruled; and the plaintiff excepted. And the prisoner then moved the court to set aside the verdict, on the ground that the alleged uttering and attempting to employ as true, occurred in the County court of Henrico, and within the jurisdiction of that court, and not within the jurisdiction of the Hustings court of the city of Richmond. But the court overruled the motion; and the prisoner excepted.

Upon overruling the three last motions to set aside the verdict of the jury, the court certified, upon the record, the facts proved bearing upon them respectively; and these facts are substantially as follows:

Solomon Haunstein, an unnaturalized foreigner, died in the year 1861, in the city of Richmond, leaving no heirs, and seized and possessed of a large amount of real estate in the county of Henrico, and State of Virginia, as well as a good deal of personal property; said real estate being subject to escheat to the State of Virginia. The writing mentioned in the indictment was forged; and the accused, knowing it to

be forged, uttered the same by claim-
744 ing payment thereof from *the estate of Haunstein, by presenting and demanding payment of a claim based upon said forged writing, for the sum of seven thousand dollars, from Richard D. Sanxay, the curator of said estate. He, with such knowledge, brought suit upon the said writing, in the name of Gleason, assignee, against Sanxay, curator of said estate, and obtained judgment thereon, in the County court of Henrico. The accused thereupon filed a bill in the Circuit court of the county of Henrico, in the name of Gleason, assignee, against Sanxay, as curator of the estate of Haunstein, to enforce satisfaction of said judgment, by sale of said Haunstein's land, and obtained a decree in this suit, directing the sale of said land; had it sold under said decree, and received the proceeds of the sale.

At the time these suits were brought, the County court held, and still holds, its sessions, and had, and has, its clerk's office and courthouse within the corporate limits of the city of Richmond. The accused filed the bill, and obtained the decrees, and instituted the proceedings, and filed his receipt for \$4,996 94, the nett proceeds of the sale of the real estate in the aforesaid chancery suit; and the Circuit court of Henrico county then held its sessions, and had its clerk's office, in the capitol, in the city of Richmond. The accused and Sanxay lived in the city during the time of the alleged uttering and attempting to employ as true, the said forged writing by the accused; and the law office of the accused was in the city of Richmond during that time.

After the aforementioned motions were made and overruled, the prisoner moved in arrest of judgment upon the verdict, which motion the court overruled; and then passed sentence upon him. And the prisoner thereupon applied for and obtained a writ of error to this court.

745 *Wells and Crump, for the prisoner.

The Attorney General and George Wise, for the Commonwealth.

Upon the first point the judges were divided, and delivered opinions upon it. On the other points they concurred in opinion, and on these points Moncure, P., delivered the judgment of the court.

MONCURE, P. The first error assigned in this case is, the refusal of the court to remand the accused for examination before

a justice of the peace, when he was arraigned, to answer the indictment found against him.

This assignment of error rests upon the view, that, as the law now stands, a person accused of felony, no matter how accused, and even though accused by an indictment found by a grand jury in a court of competent jurisdiction to try him, is yet entitled, as matter of right, to be examined by a justice of the peace before he can be put upon his trial.

With all deference for the opinions of those who differ with me, I think that view of the law is unsound.

The question arises as to the true construction of the act passed April 27, 1867, entitled "An act to revise and amend the criminal procedure." Acts of Assembly 1866-'67, pp. 915-946, chap. 118.

This act made radical changes in the code of criminal procedure. Its main intent was to expedite the trial of persons charged with crime, and thus to prevent the unnecessarily long confinement of such persons in jail, and to save unnecessary expense to the Commonwealth. Its chief inducement, no doubt, was the effect produced by the abolition of slavery, in making it necessary that white people and negroes, being put upon an equality in this respect, should be prosecuted, tried and punished in the same manner.

The cardinal changes thus made by
746 the act were: *the abolition of examining courts, and giving to the county

and corporation courts, at any term thereof, exclusive jurisdiction in trials for felony, except that a person to be tried for a felony punishable with death, or for any one of certain other enumerated felonies, may, upon his arraignment in the County or Corporation court, demand to be tried in the Circuit court having jurisdiction of the said county or corporation; but no such demand shall be allowed in any Corporation or Hustings court held by a judge, and in which, by especial statute, capital felonies may now be tried. Chapter 205 of the Code of 1860, concerning "examining courts," was entirely repealed, and nothing was enacted in its stead. The same may be said of chapter 212, "of proceedings against negroes." The other chapters, concerning criminal procedure, to wit: chapters 201, 202, 203, 204, 206, 207, 208, 209, and 210, 211, were amended and re-enacted, making no further changes in the substance or language of the old law than seemed to be required by the intent and object of the new. Several sections of these chapters, as they stood in the Code, were copied with little or no change in the amendatory act, although they were originally prepared with reference to the system of criminal procedure which then existed, and especially to the institution of examining courts, which formed an important part of that system; but which, as we have seen, was abolished by the amendatory act. We must bear this fact in mind in construing this act, and so interpret these sections as to give effect, as far as

we can, to the intent and meaning of the Legislature.

Two of the sections referred to being those on which, chiefly, the question we are now considering arises, are §§ 15 and 16, of chapter 207, which, as they stand in the amendatory act of 1866-'67 (Session Acts p. 929), are in these words:

15. Upon a presentment, indictment
747 or information *of a felony, for which the party charged has not been arrested, the presiding judge or justice shall issue a warrant to any sheriff, sergeant or constable, commanding him to arrest such party and carry him before a justice of the county or corporation in which he ought to be tried, and to summon the witnesses on whose information the presentment, indictment or information was made, to appear and testify before the justice. The justice to whom such warrant is returned, shall proceed in the case as if the warrant had been issued by himself.

16. When a presentment is made or indictment found in a case, other than that provided for in the preceding section, if it be in a Circuit court, a copy of such presentment or indictment, and of all papers relating to the case, shall be certified by the clerk to the court of the county or corporation in which the offence is charged to have been committed. Upon such presentment or indictment, and upon any like presentment or indictment made or found, or information filed in such County or Corporation court, process shall be awarded by the court, or be issued by the clerk thereof, in vacation. Such process, if the prosecution be for a felony, shall be a capias; if it be for a misdemeanor, for which an infamous or corporal punishment may be inflicted, it may be a capias or a summons, at the discretion of the court; in all other cases it shall be, in the first instance, a summons; but if a summons be returned executed, or two be returned not found, and the defendant do not appear, the court may award a capias. All copies certified under this section shall be used with the same effect as the originals.

The counsel for the plaintiff in error insist, that under the 15th section, a party charged with a felony is entitled of right to an examination before a justice of the county or corporation in which he ought to
be tried, before he can be put upon

748 his trial, just as he *would have been entitled to an examination by an examining court under the former law; although one of the counsel seemed to think that, to sustain that construction of the 15th section, it would be necessary to disregard and strike out of the 16th section the words: "if the prosecution be for a felony (such process) shall be a capias."

I differ with the learned counsel in this construction, and think that a party charged with felony is not entitled, as matter of right, to an examination by a justice before he can be put upon his trial, according to the true construction of the law as it now stands. And this view seems to me

to be strongly sustained, both by reason and authority. It would require plain language to satisfy me that the Legislature, while they expressly abolished examining courts, at the same time intended to put a single justice in the place of such courts—that is, in the place of a court of five justices. This would be contrary to the plain policy of the amendatory act, which was to avoid unnecessary delay and expense by abolishing examining courts and otherwise. These courts were in existence in Virginia for a very long period, and were held in high esteem by the public. They were originally established, no doubt, to secure to an accused the benefit of an examination by a court of the county in which the offence was charged to have been committed (generally his own county), before he could be sent to the General court (which might be held at a great distance from him) for trial. Afterwards, when the jurisdiction of the General court in the trial of criminal cases was distributed among the District courts, the same reason existed, though not to so great an extent, for the continuance of examining courts; and they were accordingly continued during the existence of those courts. And even after those courts were abolished, and their jurisdiction in

749 criminal cases was transferred to superior courts held in the *counties and corporations respectively; though the reason which had previously existed for the institution of examining courts then apparently ceased to exist, yet the public had become so wedded to the institution by long use and habit, that it was continued in existence down to its abolition by the act of 1866-'67. The examination of an accused, by a justice of the peace, was never considered in Virginia as a matter of right, but merely as a means to an end: that is, as a means of bringing the accused to justice, and giving him the benefit of an examining court, to which he was entitled by law, and which could only be called by the warrant of a justice of the peace. When examining courts were abolished, the necessity for a preliminary examination by a justice of the peace, in order to the constitution of such a court, also ceased; and there was then no occasion for an examination by a justice, except as a means of bringing the accused to justice.

Generally, a prosecution for felony is commenced by a complaint before a justice of the peace, and a warrant issued by him to arrest the accused and bring him before the same or some other justice to be examined and disposed of according to law; and this is the case as well now as it was before the abolition of examining courts. It is the most convenient mode of bringing the accused to justice; that is, of compelling him to answer an indictment found, or to be found, against him, in a court of competent jurisdiction for his trial. But where he is already in the custody of the court in which such an indictment is so found, or can be brought into such custody by a *capias*, issued under the 16th section of the act, to

compel him to answer the indictment, there is no occasion for any examination by a justice. And now let us see which of these two conflicting constructions of the act—that of the counsel of the accused, or that which I maintain—is more conformable *to the terms of the 15th and 16th sections, and of the other parts of the act.

The 15th section was intended to apply, and expressly does apply, only to a case of felony. "Upon a presentment, indictment or information of a felony," is the language in which it commences. And it thus proceeds: "For which the party charged has not been arrested, the presiding judge or justice shall issue a warrant." From which it is argued that whenever the party charged, whether it be in a court of competent jurisdiction to try him, or any other court, has not been arrested, a bench warrant, and not a *capias*, must of necessity be issued against him. By reference to 1 Rev. Co. 1819, p. 605, ch. 169, § 20, we see the source from which § 15 of the present law was derived; and we plainly see the original meaning and object of the provision. It there commences thus: "When a presentment shall be made by a grand jury of this Commonwealth in any of the Superior courts thereof having criminal jurisdiction, of a felony committed by any person, and the person so presented would be entitled to a trial before an examining court of his or her county, it shall be the duty of the judge who presides, when such presentment is made, to issue his warrant," &c. All persons charged with felony were then entitled to the benefit of an examining court. So that the provision applied to cases only in which the party presented had not had such benefit, and one of the objects, if not the main object of the provision, plainly was to secure to him that benefit. In the act of 1847-8, Acts of Assembly, pp. 93-164, called the "Criminal Code," this provision is revised, amended and embodied, and constitutes section 16 of chapter 20 of that Code. That section made some formal, but no very material change of the former law. Instead of saying, as § 20 of the act of 1819 did, "and the person so presented would be entitled to a trial before an examining court," *it said, "for which the party charged therewith shall not have been already arrested." Now, this was a merely verbal, and not a material change of the act of 1819. A party who had been examined had, of necessity, already been arrested; whereas, a party who had not been examined, had not, at least as a general thing, already been arrested. And the Legislature of 1847-8, in saying, "shall not have been already arrested," intended in effect to say, "would be entitled to a trial before an examining court." Perhaps the meaning would have been plainer if the language of the old law had remained unchanged; but I am confident that no change of meaning was intended by the change made in the language. Another, and perhaps the only other change

made by § 16, chapter 20 of the "Criminal Code," may be considered of more importance. It required the party, when arrested, to be carried before some justice of the peace of the county or corporation in which the offence might be charged to have been committed, in order that the case might be proceeded within the same manner as if the arrest had been by virtue of a warrant originally issued by him; whereas § 20 of the act of 1819 required the party, when arrested, to be committed to the jail of the county where the offence might be charged to have been committed; whereupon the jailor was required to notify some justice of the peace of the county, thereof, who was required to issue his warrant for summoning a court of examination, as in other cases. Now this change is not so material as would seem to be supposed, if in fact it be of any materiality. It seems to be supposed that it tends to show that the Legislature of 1847-8 thereby recognized that a party charged with a felony was entitled, in all cases and notwithstanding he may have been presented therefor by a grand

752 jury, not only to the benefit of an examining court, but also to the *benefit of a preliminary examination by a justice of the peace. In other words, that this latter examination was an independent right of the accused, and not a mere incident of the examining court. Such, I think, was plainly not the fact. The Legislature of 1819 considered the presentment of the grand jury as a sufficient foundation for calling a court of examination, and therefore directed the accused to be committed to jail, and the jailor to notify a justice of the fact, and the justice to issue his warrant to summon a court. The Legislature of 1847-8 no doubt agreed with that of 1819 in so considering; but it occurred to them that it would be one link less in the chain of proceeding to carry the accused directly before a justice, instead of committing him to jail, and that the accused might avoid being committed to jail by satisfying the justice of his innocence of the offence charged, or at least by giving bail, if the offence was a bailable one; and therefore the change was made.

The 16th section of chapter 20 of the act of 1847-8, was copied, almost literally, into the Code of 1849, at least only verbal changes were made therein; and the same provision remained unchanged, until the passage of the act of 1866-7. In the Codes of 1849 and 1860, it formed the 15th section of ch. 207. And in the act of 1866-7, the same provision, as then amended, forms the same section of the same chapter.

Why, then, it may be asked, was the provision retained at all in that act, since the examining courts, which had chiefly, if not entirely, been the cause of its adoption originally, were thereby themselves abolished? And why were the words "indictment or information" inserted in the section as it is embodied in that act?

Although the chief office of the provision was to afford a means of having a person

presented of felony carried before an examining court, to the benefit of
753 *which he was entitled, before he could be tried for the offence, yet that was not its only office. It served another purpose, which it might continue to serve, and with more effect, under the act of 1866-7. A person might be presented of a felony in a court which had no jurisdiction of the case; and then it was necessary to have the accused arrested and carried before a justice of the county in which the offence was charged to have been committed, in order that it might be prosecuted there. In such a case, of course it would have been improper to issue a *capias*, and the only mode of causing an arrest and carrying on the prosecution, was by issuing such a warrant as is directed to be issued by the provision in question. That this was one of the purposes of the provision, is plainly apparent from its very words, which direct the accused to be carried before "a justice of the county or corporation in which he ought to be tried;" not "in which he was presented:" thus showing that the Legislature had in their contemplation cases in which a felony committed in one county might be presented in another. The language of the provision, from its first adoption in our code of criminal procedure, has been substantially the same in this respect. This useful purpose of the provision, as I have already said, it may continue to serve, and with more effect, under the new act. For there is now occasion for it, not only where a person is presented of a felony committed in another county, but also where he is presented in a Circuit court of a felony committed in the same county in which the court is held. In either case, a bench warrant, as it is called, is necessary, or at least convenient, as a means of securing the arrest and prosecution of the accused. The Circuit courts have now no jurisdiction to try felonies, except certain cases to be brought before them in a certain manner prescribed by law. Therefore, the provision has been retained in the present law. But, it may be

754 *said, that the Legislature might have directed an indictment found in a Circuit court, for a felony committed in the county in which the court is held, to be certified to the County court of such county for trial, as is provided in the case of an indictment for a misdemeanor. Still, the case of a presentment for a felony committed in another county would be left unprovided for. And even in the case of a felony committed in the same county, if the indictment were directed to be certified to the County court for trial, some time would necessarily elapse before a *capias* could be awarded by the county court in such case, during which time there would be danger of an escape from justice by the accused. The provision in question, which the Legislature of 1866-'7 found already in the code of criminal procedure which they were then revising, seemed to answer well the purpose in view, and it was therefore retained, as

everything in the former law was which did not plainly conflict with the scheme which they contemplated in making the revision.

As to the words "indictment or information," inserted in the 15th section of the amendatory act, these words were no doubt inserted after the word presentment (which alone was used as descriptive of the form of the charge in the provision as it stood in former laws), because it had just been said, in the 1st section of the same chapter as amended, that "prosecution for offences against the Commonwealth, unless otherwise provided, shall be by presentment, indictment or information;" and conformity seemed to require that the same words should be used in the 15th section. The Legislature may have supposed that the word "presentment" did not comprehend "indictment," as it does; and it was used in that comprehensive sense, in the provision as it stood in former laws. As to the word "information," it was not compre-

hended in the word presentment, and
755 it could only have been used *for conformity, as before stated, and because it might happen that an information might be filed charging a person with felony, merely for the purpose of having him arrested by a bench warrant and carried before a justice of the proper county for prosecution. It could have been inserted for no other purpose, because a person cannot be prosecuted for felony by information, but only by indictment. See § 2, chap. 207 of the amended act, and Matthews' and Garner's cases, 18 Gratt. 989.

And now let us examine the next, or 16th, section of chapter 207, hereinbefore set out, and enquire what effect that has upon the question under consideration. I think it strongly confirms my view of that question. It commences thus: "When a presentment is made, or indictment found, in a case other than that provided for in the preceding section, if it be in a Circuit court, a copy of such presentment or indictment, and of all papers relating to the case, shall be certified by the clerk to the court of the county or corporation in which the offence is charged to have been committed." We notice here that the word "information," which occurs in the preceding section, is dropped in this. Why so, does not appear, unless it was because an information, being a mere charge drawn by the attorney for the Commonwealth, the Legislature supposed, that instead of directing an information to be certified from one court to another, for the purpose of having process issued thereon; a simpler process would be to file a new information in the court of the county in which the offence is charged to have been committed. Still no means are provided for causing the new information to be filed. This omission of the word "information" is more strange when we see that it occurs in the section as it stood in the act of 1847-8, and in the Codes of 1849 and 1860, while the word "indictment" does not there occur, though it is expressed in the

756 section *as it stands in the present law. Why it does not there occur, is explained by the fact that the word "presentment" was there used in its generic sense, which comprehends an indictment. The words "presentment" and "indictment," as used in the commencement of § 16 of the present law, refer only to presentments and indictments made or found in a Circuit court and in cases of misdemeanor. That they are so confined as to a Circuit court, is expressly declared in the section. That they are so confined as to cases of misdemeanor, is apparent from the words, "other than that provided for in the preceding section;" the case there provided for being only a case of felony. These words "presentment" and "indictment" have not here precisely the same application which the words "presentment" and "information" have in the corresponding section of the act of 1847-8, and the Codes of 1849 and 1860. That is, the words "other than that provided for in the preceding section," have not precisely the same meaning or effect in the present law which they had in those Codes. As there used they served to show that the words "presentment" and "information," in the 16th section, referred not only to all cases of misdemeanor, but also to certain cases of felony; that is, a case of felony other than that provided for in the preceding section, which was a felony for which the party had not "been arrested," according to the language of the act of 1847-8, and the Codes of 1849 and 1860, or for which he "would be entitled to a trial before an examining court," according to the language of the Code of 1819; which, as we have seen, meant the same thing. That the words "presentment" and "information," as used in the 16th section of chapter 207 of the Code of 1849, were intended to refer to certain cases of felony, is shown by the fact that the revisors, in their report, supposing that there was a conflict between §§ 16 and 17 of the *20th
757 chapter of the act of 1847-8, recommended that it should be avoided by inserting certain words in the 16th section of chapter 207 of the Code (which corresponds with the 17th section of chapter 20 of the act of 1847-8), so as plainly to confine the operation of that section to cases of misdemeanor. But the Legislature rejected their proposed amendment, and instead of the words recommended by them, inserted the words "in a case other than that provided for in the preceding section," which we find in the law as it now stands. Thus showing clearly that the 16th section was intended to embrace in its operation a case of felony not embraced in the operation of the 15th section; and as that section, as we have seen, was confined to a presentment of a felony for which the party charged had not been arrested; that is, had not had the benefit of a trial before an examining court, § 16 was intended to embrace a case of felony in which he had already had such benefit, but was not in custody at the time of finding the indictment, as he might not

be by reason of his escape, or if bailed, by his failure to appear in discharge of his recognizance.

The 16th section, as it stands in the present law, then proceeds: "Upon such presentment or indictment, and upon any like presentment or indictment made or found, or information filed in such county or corporation court, process shall be awarded by the court, or be issued by the clerk thereof in vacation." The word "such," last used, refers to the "county or corporation in which the offence is charged to have been committed," as mentioned just above. And the words "upon any like presentment or indictment made or found," embraces cases of felony as well as misdemeanor; as plainly appears from what follows, which is, "Such process, if the prosecution be for a felony, shall be a *capias*; if it be for a misdemeanor, for which an infamous or corporal punishment may be inflicted,

758 *it may be a *capias* or a summons, at the discretion of the court; in all other cases it shall be, in the first instance, a summons; but if a summons be returned executed, or two be returned 'not found,' and the defendant do not appear, the court may award a *capias*." This last clause, in regard to process, formed the subject of a separate section in the act of 1847-8, while it is embodied in the 16th section of the act of 1866-7; but its meaning is the same in both.

My construction of the 15th and 16th sections then is, that the 15th is confined to cases where the charge of felony is made in a court not having jurisdiction to try the offence, whether such court be a Circuit, County or Corporation court; while the 16th section applies to cases where the charge, whether it be for felony or misdemeanor, is before a court having jurisdiction to try the offence, that is, "the court of the county or corporation in which the offence is charged to have been committed:" including in the latter cases a presentment or indictment for a misdemeanor, certified to such court by the clerk of a Circuit court, as required by the section. In the former case, a *capias* to answer the charge is not the proper process for the arrest of the accused, because he cannot answer it in a court not having jurisdiction to try it, and therefore a warrant is directed to be issued to arrest him, "and carry him before a justice of the county or corporation in which he ought to be tried," who is to "proceed in the case as if the warrant had been issued by himself." In the latter case, that is, in regard to the 16th section, there being a proper charge before a court of competent jurisdiction to try it, nothing remains to be done in order to its trial, but to compel the accused, by proper process, to answer the charge. Accordingly, the section directs such process to be thereupon awarded or issued, and prescribes what the process shall be, declaring

759 *that it shall be a *capias*, if the prosecution be for a felony.

If it be asked, why did not the Legisla-

ture direct the presentment, &c., mentioned in the 15th section to be certified to the court of the county or corporation in which the offence is charged to have been committed, as is done by the 16th section in regard to a misdemeanor, instead of directing a warrant to be issued? The answer is, that it would produce delay in the arrest of the accused to send the charge to another court, in order that process might be awarded therein, instead of issuing a warrant immediately against him; and, hearing of the charge, as he no doubt soon would, he would be apt to make his escape before he could be arrested. Other reasons might be suggested, but it is unnecessary.

Again, it may be said that a person might be arrested under a *capias* in a distant county from that in which he would have to be tried, and be carried to the latter county, and there committed to jail; whereas, by being carried under a warrant before a justice, he might be able to show that he was not guilty of the offence, and obtain his discharge, or might be admitted to bail. The answer is, that this possible inconvenience is obviated in a great degree, if not entirely, by the right which he has to obtain relief by *habeas corpus*, and by a speedy trial of the case, which the law secures to him.

But whatever arguments, *ab inconvenienti* or otherwise, may be made against the construction for which I contend, I think they are greatly outweighed by the reasons which exist in support of that construction. I cannot bring my mind to the belief that the Legislature, in abolishing the examining courts, intended at the same time to make an examination by a justice of the peace, indispensably necessary before there

760 can be a trial for felony, even though the charge be made by *indictment found by a grand jury of the county or corporation in which the offence is charged to have been committed, and in a court of competent jurisdiction to try the offence. If the Legislature had so intended, they would not have left so very important a matter to be vaguely inferred from language which, I think, admits, much more plausibly and reasonably, of a different construction; but would have expressly declared such intention, as they did in the former law in regard to examining courts. The law in regard to those courts, as it stood in the Code when the act of 1866-7 was passed, declared that, "before a white person, charged with a felony—, is tried before a Circuit court, he shall be examined as hereinafter provided, unless, by his assent, entered of record in such court, such examination be dispensed with." Code of 1860, ch. 205, § 1, p. 827. And it further declared, that "if the court, in which a person is examined as aforesaid, discharge him, he shall not thereafter be questioned or tried for the same offence." *Id.* § 11, p. 828. Thus, in substance, the law had been for a great many years. Is it credible that the Legislature of 1866-7, with the Code of criminal procedure, containing these two important

provisions, before their eyes, and engaged in the work of revising and amending it, would have repealed the whole chapter containing these provisions, without expressly declaring, if they had so intended, that, before a person charged with a felony is tried therefor, he shall be examined before a justice of the peace, &c.? Not only would they have so declared, but they would also, no doubt, have further declared what should be the effect of a discharge by such justice, and whether it should be, as was the case in regard to an examining court, that the accused should "not thereafter be questioned or tried for the same offence." Instead of so expressly declaring their intention, if

761 it, *with great difficulty, in regard to the necessity of an examination before a justice; and they have left us in total darkness, as to what would be the effect of a discharge by such justice; and whether or not it would be necessary, in case the accused was committed or recognized for trial, to have a new indictment found by the grand jury, even though one may already have been found against him in the court which has to try the offence.

The construction for which I contend, is expressly maintained by the decision of the late "Military Court of Appeals," in the case of Shelly v. The Commonwealth, 19 Gratt. 652; and I entirely concur in the opinion of the court in that case. It is also strongly maintained by the decisions in Clore's case, 8 Gratt. 606; and Wormeley's case, 10 Ib. 658. In Clore's case, there was a motion to quash, and a plea in abatement, on the ground of alleged irregularities in the proceedings before the justice who committed the accused for examination by the County court, without any previous enquiry or examination into the truth of the offence by the justice himself. On this subject, Judge Lomax, in delivering the opinion of the court, said: "No precedent has been referred to for sustaining either a plea in abatement, or a motion to quash, upon the ground of such irregularities in the initiatory proceedings of the justice, which are designed merely to ascertain that there is a degree of suspicion against the accused, requiring that he should be held in custody until a more solemn examination can be had as to the probabilities of the charge, and a trial had of his guilt or innocence. Whatever inconveniences he may complain of, as to the examination or want of examination before the justice, they can have no relevancy as objections to the indictment, which has given the sanction of the grand inquest of the county to the charge for which the justice committed him. At

762 that stage of the proceedings, *after the finding of the grand jury upon the examinations and proofs before them, charging him with the murder, what defence, in reason or in law, can or ought it to be to the prisoner, that the justice who committed him for the crime, did not, in his prior examination, examine the case according to legal rules of evidence?" The

court then refers to the case of the Commonwealth v. Murray, 2 Va. Cases, 504, as giving a decisive answer to the question, and thus proceeds: "The principle of that decision is not at all varied, because of any subsequent amendments of the law in ch. 204, Code of 1849, relating to arrest, commitment and bail." These views are fully sustained by this court in Wormeley's case, cited supra. See the opinion of the court, delivered by Judge Daniel, pp. 666-670. These cases clearly show, that a preliminary examination by a justice was never regarded in Virginia as a necessity in a criminal case, further than as a means of summoning or authorizing a court of examination in a case of felony; and that the act of 1847-8 produced no change of the law in that respect. The act of 1866-7 has given no greater effect to the examination by a justice than it formerly had. And, as it owed its necessity at any time only to the existence of examining courts, it seems to follow, as a matter of course, that such necessity, if it can be so called, ceased to exist when the examining courts ceased to exist.

I owe an explanation for having said so much upon this question. I have done so, because, 1st, the question is a most important one; 2dly, it was argued at very great length by the learned counsel of the plaintiff in error, who much relied on the assignment of error on which it arises; and, 3dly, there is a diversity of opinion upon it among the judges of this court, now in session.

Since writing the foregoing opinion, I have heard read, in conference, the 763 opinion about to be delivered *by my brother Staples; which, though certainly able and ingenious, has yet produced no change of the views I have presented. But I have already said so much on the subject, that I would be inexcusable in prolonging this opinion to much, if any extent, for the purpose of further enforcing the views I have already presented, or of presenting other views suggested by his opinion. I will venture, however, to say this much at least, that his construction requires us to strike out of the 16th section the important words: Such process, "if the prosecution be for a felony;" not because they are unmeaning, and mere surplusage, but because they are in direct conflict with what goes before in the same section, according to his construction of it? That construction also requires us to confine the words "presentment" and "indictment," wherever they occur in the previous part of the section, to a case of misdemeanor, although "misdemeanor" is not once mentioned in that part of the section, and although the word "indictment" at least, if not "presentment" also, applies as well, in its ordinary and proper signification, to felony as to misdemeanor. But a more serious, and to me an insuperable obstacle in the way of that construction is, that it requires us to believe that the Legislature, while abolishing examining courts, intended to

make an examination by a single justice, a matter of necessity, before a person can be tried for a felony, though indicted therefor in solemn form by a grand jury of the county in which the offence is charged to have been committed; and that the Legislature conveyed so important an intention, not in express and apt language, which was plainly called for, but by leaving it to be inferred from equivocal words, which may have no such meaning. On the other hand, my construction leaves the 16th section unchanged and in full force, according to its literal, and, as I think, true meaning, except that the word "like,"

764 *where it occurs has, I think, no material meaning; and it is only necessary to supply the words, "in a court not having jurisdiction to try it," after the word "felony," in the second line of the 15th section (which words, indeed, seem to be implied by the rest of the section), to express plainly the meaning of the Legislature, in my view of it. And then I get rid of the insuperable difficulty before referred to. But, whether it was intended to confine the 15th section to courts not having jurisdiction of the offence, or to extend it also to courts having such jurisdiction; still, I think, it was not intended thereby to give a person accused of felony a right to be examined by a justice before he can be tried for the offence; but its only object was, to insure the arrest of the accused, in order that he may be tried for the offence: It is directory, not mandatory. Upon a presentment, indictment or information of a felony, some legal means must at once be used to have the accused arrested, in order that he may be tried for the offence. The best means, according to the circumstances of each particular case, which the law affords for that purpose, ought to be used by the court. If the court in which the presentment, &c., is made, has no jurisdiction to try the offence, then the best means would generally be a warrant, as directed by the 15th section. But, if an indictment for a felony is found in a court having jurisdiction to try the offence, then generally, if not always the best means, would be a *capias*, which is the proper process to compel an answer to an indictment of felony, as well by the common law as by the statute, which, in this respect, is only declaratory of the common law.

I am of opinion that the Hustings court did not err in refusing to remand the accused for examination before a justice of the peace, when he was arraigned to answer the indictment found against him.

765 *STAPLES, J. No one entertains a higher respect than myself for the opinions of the president of this court. His enlarged and varied experience as a judge, and as one of the revisors of the Code of 1849, and his thorough knowledge of the Virginia statutes, entitle his views, touching the construction of these statutes, to peculiar consideration and respect. It is, therefore, with real regret, and no little

distrust, that I venture to express my dissent from the opinion he has delivered.

I think it was the duty of the judge of the Hustings court, after indictment found, to issue a warrant against the accused, under which he ought to have been arrested and taken before a justice, with a view to the preliminary examination prescribed by the statute; and that the accused could not, against his consent, be put upon his trial without such preliminary examination.

I propose to state at length the reasons which have conducted me to this conclusion. The 15th section of chap. 207, Acts of 1866-'67, provides that "upon a presentment, indictment or information of a felony, for which the party charged has not been arrested, the presiding judge or justice shall issue a warrant to any sheriff, sergeant or constable, commanding him to arrest such party and carry him before a justice of the county or corporation in which he ought to be tried; and to summon the witnesses on whose information the presentment, indictment or information was made, to appear and testify before the justice." The justice to whom such warrant is returnable shall proceed in the case as if the warrant had been issued by himself."

The 16th section provides: "When a presentment is made, or indictment found, in a case other than that provided for in the preceding section, if it be in a Circuit court, a copy of such presentment or indictment, and of all papers relating to the case, shall be certified by *the clerk to the court of the county or corporation in which the offence is charged to have been committed. Upon such presentment or indictment, and upon any like presentment, indictment or information, filed in such County or Corporation court, process shall be awarded by the court, or be issued by the clerk thereof in vacation. Such process, if the prosecution be for a felony, shall be a *capias*. If it be for a misdemeanor for which an infamous or corporal punishment may be inflicted, it may be a *capias* or a summons, at the discretion of the court; in all other cases it shall be in the first instance a summons."

The action of the court below, in awarding the *capias*, and in refusing to send the accused to a justice for examination, was doubtless based upon the provisions of the 16th section. That there is an apparent conflict between the two sections is universally conceded. The 15th section is positive, in terms requiring the presiding judge or justice, upon presentment made or indictment found of a felony, for which the accused has not been arrested, to issue his warrant for the apprehension of the accused. The 16th seems to be equally positive that the process in a prosecution for a felony shall be a *capias*. How are these conflicting provisions to be reconciled, one with the other? When an indictment is found, what is to be done by the presiding judge? Is he to issue a warrant or *capias*? Shall the accused be arrested and put upon his

trial, or taken before a justice for examination?

It is well settled that when a doubt arises upon the construction of a statute, all acts on the same subject matter are to be taken together and examined, in order to arrive at the legislative intent. In *The Earl of Ailesberry v. Patterson*, Douglas R. 20, Lord Mansfield said, "Where there are different statutes, in *pari materia*, though made at different times, or even expired and not referring to each other, they shall be taken and *construed together as one system, and as explanatory of each other." And in *Bassey v. Storey*, 4 Barn. & Ad. 98-108, Parke, J., said, "The provisions of a repealed act of Parliament were important as aiding in the construction of the enactments of existing statutes." An examination of the earlier legislation of the State, regulating criminal proceedings, will tend to remove some of the difficulties in the way of construing and harmonizing the sections cited, in order to give effect to each.

In the year 1792, jurisdiction in cases of treason and felony was conferred upon the District court. Previous to that time it was vested exclusively in the General court. When a free person was charged before a justice with treason or other felony, a warrant was issued for his arrest; if, in the opinion of the justice, the charge deserved investigation, the accused was committed to jail to await an examination before the County court. If, upon such examination, the justices of said court thought the evidence sufficient to convict the prisoner of treason or felony, they remanded him to the jail of the county, and thence he was removed by mittimus to the public jail, or he was bailed for his appearance before the District court having jurisdiction; where he was tried upon indictment found by a grand jury empanelled in that court. If the accused was already in custody at the time of finding the indictment, no other process was necessary, and he was immediately arraigned and tried. If he was on bail and did not appear, or if, being in custody, he escaped and did not appear in answer to the indictment, some process was necessary to enforce his appearance. It was therefore provided, by the various enactments of 1786 and 1792—after any person shall be indicted of treason or felony or other crime, to which by law an infamous punishment is affixed, if he or she be not already in custody, the sheriff shall be commanded to attach his or her body by written precept, which is *called a *capias*; with provision, if the accused should not be found, for other process against the body and goods.

This, however, was not the only mode of instituting prosecutions for felony. They could be, and indeed were often, commenced by indictment in the District court under which a *capias* was issued, the accused arrested and tried on the indictment. In such case there was no statute requiring a warrant to be issued, or a preliminary exami-

nation before a justice. It was so held by the General court in *Commonwealth v. Blakely*, 1 Va. Cas. 129, upon a plea in abatement, that the defendant had not been examined by the justices of the county court, as required by the act of 1786.

This decision probably led to the act of 1804, which provided that before any person should be tried in a District court for a felony, he should be tried by an examining court. After this act the course of proceeding was materially changed. Whether the prosecution was commenced by warrant emanating from a justice, or by presentment or indictment, the accused was nevertheless entitled to the examining court. If an indictment or presentment was the foundation of the prosecution, it was the invariable rule to issue a warrant for the apprehension of the accused, under which, if arrested, he was taken before a justice of the peace. In such case, however, the justice had no authority to enquire into the offence; his duty was purely ministerial, to summon the examining court, which enquired into the fact, and discharged the accused from further prosecution, or remanded him for trial before the Circuit court. Thus stood the law until the revision of 1847 and '8, when important changes were made in the mode of procedure. Under that law, when complaint was made before a justice, of the commission of an offence, it was his duty to issue a warrant for the arrest of the offender.

The arrest *being made, the justice examined the complaint, the witnesses for the prosecution and for the accused, who had the right to be assisted by counsel. If it appeared, upon the whole examination, that no offence had been committed, or there was not probable cause for charging the accused with the offence, he was discharged. If, on the other hand, it appeared that a felony had been committed, and there was probable cause to believe the accused guilty, he was committed or bailed for examination before the next County court.

The 16th section, chapter 20, of the same act, provided that "when a presentment shall be made by a grand jury of any felony for which the party charged shall not have been arrested, it shall be the duty of the court to issue a warrant commanding the proper officer to arrest the accused and take him before a justice, and to summon the necessary witnesses to appear before such justice; and the latter was directed thereupon to proceed with the case in the same manner as if the arrest had been made by virtue of a warrant originally issued by him."

The 17th section provided, that upon any presentment being found or information filed, if the accused be not already in custody, the court shall order the clerk to issue the proper process against such party, to answer such presentment or information on the first day of the next term, or at such other time as may be prescribed by law or directed by the court.

The 18th section provided, that "if the prosecution be for a felony the process to answer shall be a *capias*. If the prosecution be for a misdemeanor, to which an infamous or corporal punishment is annexed, the process may be a *capias* or a summons. In all other cases the process shall, in the first instance, be a summons. These sections are substantially re-enactments of provisions contained in the Code of 1819, 770 with the single *exception of that relating to the examination before a justice of the peace upon presentment made."

It is obvious the 16th section applied to presentment of felonies; the 17th section to misdemeanors; and the 18th was intended to be a general provision, applicable alike to misdemeanors and to felonies; and in cases of felony prescribing the process to be issued where the accused, having had his examination before the County court, did not make his appearance to answer the indictment subsequently found against him. The language is, "if the prosecution be for a felony, the process to answer shall be a *capias*."

It will be observed there is an apparent conflict between the 16th and 17th sections, which is alluded to in the report of the revisors of 1849. They suggested an amendment of the 17th section, so that it would read: "When a presentment is made or information filed in a case, other than a case of felony, the court shall award process. The Legislature did not adopt the precise phraseology suggested by the revisors; but the amendment had substantially the same effect. The 17th section, as amended by the Legislature, reads: "When a presentment is made or information filed in a case other than that provided for in the preceding section." I repeat, the effect of this amendment was substantially the same as that indicted by the revisors.

That section (17th, 1847 and '8) could not, by any reasonable intendment, be construed to embrace felonies. In the preceding section it was plainly declared that upon a presentment of a felony for which the accused has not been already arrested, the court shall issue a warrant, under which the party charged, being arrested, shall be taken before a justice for examination.

The Legislature could not mean to say, in the very next section, that upon the 771 presentment of a felony, a *warrant shall not issue, and the accused shall not be taken before a justice; but that a *capias* shall be awarded by the clerk, the accused arrested and brought before the court to answer such presentment. In case of a presentment of a felony, suppose a *capias* issued; the accused is arrested and brought before the court; I beg to ask, what could be done with the prisoner: put him upon his trial? In the first place, no man could ever be tried in Virginia for a felony upon a presentment. An indictment was always indispensable. In the next

place, as the law stood when these provisions were in force, the accused could not be tried by a jury upon a charge of felony until he had been examined before the County court.

It is clear, then, the court could not try the accused under such circumstances, and nothing could have been done with him, except to send him to a justice of the peace, for the preliminary examination prescribed by the 16th section of that statute. For such an object the *capias* was wholly unnecessary and irregular. It is a process emanating from a court to bring the accused before it, to answer the accusation, to plead and be tried; and as such is utterly inapplicable to a presentment of a felony.

The error of so construing the 17th section as to embrace cases of felony, is the more apparent when it is considered that the Circuit courts met but twice a year; that a *capias* issued at one term would not be returnable or acted on until the next; that, in the meantime, the accused would be committed to prison and kept in close confinement; and, after the lapse of six months, would be sent to a justice to have the examination he would have had if the judge had issued a warrant in the first instance.

It is said, however, the 17th section was intended to apply to cases of felony in which the accused had been arrested, had his examination before the County 772 court, *had been admitted to bail, or committed to prison and made his escape, and was not then in custody. My answer is, in such case, an indictment would be found and not a presentment, and the process to answer would be a *capias*, under the 18th section.

Where the accused has had the examining court, the presentment would be worse than useless; it would be an absurdity; as no steps could be taken under it whatever. The accused, having had his examination, might be put on his trial, but not upon a presentment. The Commonwealth, after the useless and unnecessary delay of such a proceeding, would be compelled to abandon it, and resort at last to an indictment. By considering the 16th section as applicable to felonies, the 17th to misdemeanors, and the 18th a general provision, prescribing the mode of procedure where the prosecution had been so far proceeded in that process to bring the accused in to answer was necessary, all the difficulties in the way of construing these sections are removed.

This construction is so obviously in accordance with previous enactments, and the spirit and reason of this entire system of legislation in regard to criminal proceedings, I must confess my surprise it should be seriously contended the 16th section embraced any other than cases of felony.

Thus stood the law until the revision of 1847-'48, with these three sections separate and distinct; when the Legislature, in the Code of 1849, unfortunately united and blended the 17th and 18th sections into one; and this mistake was repeated in the Re-

vised Code of 1860, and in the acts of 1866 and 7.

These two sections, thus blended, constitute the 16th section in the Code of 1860, and also in the Acts of 1866-'67, chap. 207. All the difficulties arising in construing these provisions in the last mentioned acts,

may be removed by applying the 15th section to *felonies, the 16th to misdemeanors, and by considering the provision therein contained, relating to process, as the subject of a separate and distinct section, as in the act of 1792, the Revised Code of 1819, and the acts of 1847 and 8.

Indeed, I understand it is conceded, that so much of section 16, as directs that a copy of the presentment or indictment, if found in the Circuit court, shall be certified to the County court, does refer, exclusively, to presentments or indictments of misdemeanors, and not of felonies. But it is insisted that the next clause in the same section applies both to felonies and misdemeanors. That clause reads: "Upon such presentment or indictment (that is, an indictment or presentment certified from the Circuit court), and upon any like presentment made or indictment found, or information filed in such County or Corporation court, process shall be awarded by the court, or be issued by the clerk thereof in vacation."

Now, if the Legislature intended, by the words, "such presentment or indictment," to embrace misdemeanors alone, as is admitted; and, by the words immediately succeeding, "upon any like presentment or indictment," to embrace both felonies and misdemeanors, I submit, with all possible deference, they have used extraordinary language to effect the object in view. The effect of this construction is, that not only the judge in term, but the clerk in vacation, will be authorized, if not absolutely required, upon a mere presentment or information of a felony, to issue a *capias* for the apprehension of the accused.

It is said that presentment is a generic term, and is sufficiently comprehensive to include an indictment, and the clause in question must be construed as directing the process appropriate to each finding. Under our statutes these terms have never been indiscriminately employed; but have
774 been always kept separate *and distinct, each having its appropriate meaning and function. If the particular clause in question refers to felonies, it is difficult to understand what process other than a *capias* the court or clerk could issue upon a presentment of felony. It cannot refer to a warrant, as that is fully provided for in the preceding section.

It seems to me the true meaning of the section is this: When a presentment is made or indictment found of a misdemeanor in a Circuit court, it is to be certified to the County court, and that court is required to award the proper process. And upon any like presentment or indictment or informa-

tion (that is, for a misdemeanor), filed in the County court, the same course is to be pursued. As by the 15th section the mode of procedure is prescribed upon presentments or indictments of felony; so, by the 16th section, the mode of procedure is directed in cases of misdemeanor.

It has been argued that the 15th section applies to cases in which the presentment or indictment of a felony is made or found in a court having no jurisdiction to try the offence. That it does apply to such cases is very clear; but it is sufficiently comprehensive to embrace every case of a presentment or indictment where the accused has not been already arrested. Such has been the construction given to it for forty years; and I think the Legislature, merely by the insertion of the word "indictment" in that section, could not have intended to change the whole course of criminal proceeding in this State.

If a presentment or information of a felony is made or filed in a County or Corporation court having complete jurisdiction, from what source, except the provisions of the 15th section, will the court derive its authority to issue a warrant, or the officer to arrest the accused and take him before the justice? It seems to me to be impossible, without the greatest confusion

775 *and embarrassment, to confine that section to presentments and indictments made or found in a court which has no jurisdiction to try the case; but it must be construed to embrace every case of a prosecution for a felony where the accused has not been already arrested. My construction, then, of these sections is, that in all cases of an indictment or presentment of a felony, for which the party charged has not been arrested, it is the duty of the court to issue a warrant directed to the proper officer, commanding him to arrest the accused and take him before a justice, to be examined, as prescribed by the statute. If the accused has been already arrested under such warrant, or that of a justice, has had his examination before a justice, and been thereupon bailed, or committed and escaped from prison, or from any other cause does not appear, the proper process against him is a *capias*.

It is said these views are in conflict with the 2d section, chap. 208, act of 1866-'67. That section provides that when an indictment or other accusation is filed against a person for a felony in a court wherein he may be tried, the accused, if in custody, or if he appear according to his recognizance, shall be arraigned and tried at the same term. The answer is simple and obvious. The accused, if in custody or on bail at the time of finding the indictment, must have been arrested under the warrant of a justice, upon complaint to him, or the warrant of a judge upon a presentment or indictment under the 15th section; and thereupon had his preliminary examination and trial before a justice. If we suppose the plain provisions of the law complied with, there is no other mode by which a

party charged with a felony can be arrested and held in custody or released on bail.

This is no new enactment. The very same provision, substantially, is found in the Code of 1819; and in the Code of 1860,

the phraseology is precisely the same
776 *with that under consideration. If

the construction now sought to be given to that section be the proper one, its effect under previous laws would necessarily have been to deprive the accused of the benefit of the examining court when the prosecution was commenced by indictment. But the General court, in *Hurd v. Commonwealth*, 5 Leigh 715, decided that although the prosecution be commenced by indictment, the accused was still entitled to the examining court; and there must be a new indictment after such examination, before the accused could be put upon his trial for the offence.

It has been argued, that if the Legislature intended that the accused, in all cases of felony, should have the examination before a justice, it would have so provided, as was the case in regard to the examining courts. Under our present statutes no such provision is necessary to secure to the accused the benefit of such examination, in as much as there are but two modes of instituting prosecutions for felonies in Virginia: in the one by warrant emanating from a justice, and in the other by indictment, presentment or information, and a warrant thereupon issued by a judge. Therefore, as in either case, the accused is entitled to the preliminary examination, the Legislature has as clearly expressed its pleasure that the accused shall have this examination as though it had so declared in express terms.

These views are not in conflict with *Clore's case*, 8 Gratt. 606, or *Wormeley's case*, 10 Gratt. 658. When these cases were decided there was no law in force in this State requiring a judge or presiding justice, after indictment, to issue a warrant for the apprehension of the accused, under which, if arrested, he was to be taken before a justice for examination. That provision was first incorporated into our statutes by the acts of 1866 and 1867.

The examination before the County
777 court, to which *the accused was entitled before that time, gave the accused all the information, every advantage, he could in any manner derive from the examination before a single justice. And I understand the court, in the two cases cited, merely as saying, that after such examination before the County court, the accused could not, in any way, be prejudiced by irregularities occurring in the course of his examination before a justice of the peace or coroner. The case of *Shelly v. Commonwealth*, 19 Gratt. 653, has been cited and relied on. Whether that decision be sound law or not, whether made by a tribunal whose opinions are binding authority or not, it is unnecessary now to consider; it is sufficient to say that decision was based expressly upon the ground that

at the time the indictment was found the accused had been already arrested, and was then in the custody of the court; and therefore the 15th section of the act did not apply to his case. In *Kemp's case*, 18 Gratt. 969, the court merely held that an indictment for a felony will not be quashed because the clerk of the examining court failed to insert the warrant of commitment in the record; and after indictment found, the only question open upon the previous proceedings is, whether the accused has been examined for the offence before the County court. In this case there is no objection for irregularities occurring before indictment. The question for our consideration is, what are the rights of the accused after indictment found.

The statute declares, that the judge shall issue his warrant for the apprehension of the accused, and the latter shall thereupon be taken before some justice. Has not the accused a right to insist upon a strict compliance with every provision of the statute applying to his case? Upon what principle is it the court may disregard the plain letter of a law obviously intended for the benefit

of the party charged with a criminal
778 offence? *If we may thus judicially repeal one important section, there is no limitation of the power of the courts. The most important and sacred rights of the accused may be destroyed by this species of judicial legislation. Even in civil cases an error in the process is fatal if the objection is made at the proper stage of the proceedings. If the defendant is sued in debt when the process should be assumpsit, the action will fail.

If the property of the citizen is taken for the dues of the government, every step in the proceedings of the officer must be in strict compliance with the mandates of the law. And yet in a case involving life or liberty, the court is permitted to disregard one plain section of a statute because another section is involved in doubt and obscurity.

Whatever the 16th section may mean, by its very terms it does not and cannot apply to cases provided for in the 15th section. That is clear. And if the accused is within the terms of the 15th section, if he has been indicted of a felony and has not been arrested, he has no concern with the 16th, and the 16th has no concern with him.

It is said, however, that these provisions relied upon are merely directory, and a failure to comply with them will not vitiate the proceedings. It is a novel doctrine, to me, at least, that statutes affecting the liberty of the citizen, and intended for his benefit, may be disregarded by the courts upon the notion they are merely directory. It is said by an eminent writer, that this mode of getting rid of a statutory provision is not only unsatisfactory, but it is the exercise of a dispensing power by the courts, which approaches so near legislative discretion that it ought to be resorted to with reluctance, and only in extraordinary cases, where great public mischief will ensue, or

important private interests demand the application of the rule. A whole
 779 *statute may be thus disposed of when in the way of the caprice or will of the judge. And in *Mayhew v. Davis*, 4 McLean R. 213, the doctrine is thus expressed: It may be safely affirmed that a statute can never be deemed directory where the act or the omission of the act can, by any possibility, work advantage or injury, however slight, to any one affected by it.

If this statute be merely directory, to be disregarded at the pleasure of the court, or if the construction now sought to be given to it be erroneous, we have this partial and incongruous system of criminal proceedings in Virginia. Should it be the good fortune of the party charged with a crime to be arrested under the warrant of a justice, he is entitled to an immediate examination; he is assisted by counsel; his witnesses are heard; he is confronted with his accusers; he is informed of the nature and details of the accusation; and he is often able to make a successful defence against a false and frivolous charge, or a malignant and dangerous one. If, on the other hand, he is sent on for trial, he may be successful in obtaining bail; he is fully informed of the nature of the offence with which he is charged, and the character, position and temper of the witnesses by whom he is impeached; and, when placed on his trial, no accusation is to be met, concocted in the recesses of the grand jury room, of the nature of which he can know nothing beyond the technical averments of an indictment, or the voice of rumor, reaching him through the bars of his prison. The same results would follow, the same advantages accrue, to the accused, should the prosecution be commenced by presentment or information.

But, should the prosecuting attorney, as a matter of fancy, whim or prejudice, conclude to send to the grand jury an indictment, the whole course of proceeding is changed. The accused is arrested under a
 780 *capias*; he is deprived of the preliminary examination; *he can make no application for bail; he is committed to jail; and finally put on his trial, without accurate knowledge of the nature of the accusation, the character of the prosecutor and witnesses, whose breath is to sweep away his liberty, if not his life. And this is the system of criminal procedure it is supposed the Legislature intended to establish in Virginia, and this the power it has placed in the hands of the prosecuting attorneys throughout the State. There has not been a day in sixty-six years, in Virginia, that a citizen has not been entitled to this examination, in some form, either before a single justice or an examining court.

The accused may waive the examination; but, unless he does so, the law says he shall have it; and the courts cannot refuse it. So long as the examining court was in existence, this preliminary examination before a justice was of little importance or

value to the accused; but, now that one is taken away, there is greater reason for preserving the other. The very constitution of a grand jury often leads to frivolous, vexatious and malignant prosecutions; by which the peaceful and unoffending citizen is dragged from his home to a distant court, confined in prison, and only released after the loss of health and reputation, and the utter ruin of his pecuniary affairs. Fortunately, this has not often happened in the State of Virginia, as it could not well occur under a system of criminal jurisprudence so beneficent and humane as that which has heretofore guided the action of our courts. But, in other courts and other States, grand juries have been made the instruments of private vengeance and political persecution, and a wise and prudent foresight will provide against the contingency of such occurrence here in the future. Judge King, of Pennsylvania, in the year 1845, in an able and luminous discussion of this very topic, uses the following language: "A warrant

of arrest, founded on probable cause,
 781 *supported by oath or affirmation, is first issued against the accused by some magistrate having competent jurisdiction. On his arrest, he hears the nature and cause of the accusation against him; listens to the testimony of the witnesses face to face; has a right to cross-examine them, and may resort to the aid of counsel to assist him. It is not until the primary magistrate is satisfied, by proof, that there is probable cause that the accused has committed some offence known to the law, that he is further called to respond to the accusation. He is then either bailed or committed to answer before the appropriate tribunal to whom the initiatory proceedings are returned for further action. By the opportunity thus given to the accused of hearing and examining the prosecutor and his witnesses, he ascertains the time, place and circumstances of the crime charged against him, and thus is enabled, if he is an innocent man, to prepare his defence; a thing of the hardest practicability if a preliminary hearing is not afforded him. It is not true that a bill of indictment, found without a preliminary hearing, furnishes him with the proper information. It practically neither describes the time, place nor circumstances of the offence charged. Hence the inestimable value of a preliminary public investigation, by which the accused can be truly informed, before he comes to trial, what is the offence he is called upon to respond to. It is by this system that criminal proceedings are ordinarily originated. Were it otherwise, and a system introduced in its place by which the first intimation to an accused of the pendency of proceedings against him, involving life or liberty, should be given, when arraigned for trial under an indictment, the keen sense of equal justice, and the innate detestation of official oppression which characterize the American people, would make it of brief existence."

It may be, the Legislature, having

782 abolished the examining *court as a useless incumbrance, but influenced by considerations of the character mentioned, adopted the provision allowing the accused the benefit of a preliminary examination in all cases of felony. Whatever may have been the motive, or whatever may be the consequences, the courts must declare the law as it is written. If I am wrong, the Legislature, now in session, can correct the error. At any rate, it is an error in favor of life and liberty; an error which tends to throw around the accused those safeguards prized by all people jealous of power and tenacious of human rights; which may be of little importance to the strong and powerful, but to the weak and defenceless is of inestimable value.

The history of the last few years, and the circumstances by which we are surrounded, admonish all of us, that it is only by a strict adherence to all the forms and requirements of law that the peace and tranquility of society are preserved, and the liberty of the citizen made secure.

ANDERSON, J. There seems to be some obscurity and defect in the law, since the repeal of the act requiring an examining court. I can see nothing in the action of the Legislature, however, which indicates a purpose to substitute an examination before a justice of the peace for that of the examining court. Whilst the law requiring an examination before the County court has been totally repealed, that providing for a preliminary examination before a single justice, or committing magistrate, is left precisely as it was. And what are the rights of the accused, under that provision which remains unchanged, has been judicially settled by repeated decisions of the General court and of this court.

In Blakely's case, 1 Va. Cas. 129, the prisoner was indicted in the District
783 court of Staunton for a felony. *The court awarded a *capias* against him, which was executed; and he was brought into court the next day and pleaded not guilty. The trial was postponed to the seventh day of the court. On the day to which the cause was continued the defendant appeared, and was allowed to withdraw his former plea, and to put in a plea that, by the laws and usages of the Commonwealth, he was entitled to an enquiry before a court of examination, before he can be indicted and arraigned before the District court. The question was adjourned to the General court, consisting of Tucker, Tyler, Nelson, White and Carrington, who unanimously held that the new plea pleaded by the accused should "be overruled by the District court, and that the said court ought to proceed in the trial of the defendant upon the presentment and indictment." This decision was made before the law providing for examining courts was amended by the act of January 24th, 1804, which gave the accused the right to be examined, in the manner prescribed by law, by the court of the county or corporation, before he could

be tried upon a charge of felony or treason before the District court. And this provision was retained in the criminal code of the State until the examining court was abolished by the act of April 27th, 1867, repealing chap. 205 of the Code. When Blakely's case was decided, the law providing for an examining court was in force substantially as it has been since, until the repeal in 1867, except that there was no provision expressly entitling the accused to an examining court, before he could be arraigned and tried upon an indictment in the District court.

If it was not error to arraign and try the accused, upon an indictment before the District court, prior to the act of 1804, before he was tried by an examining court, a fortiori, it would not be error to try him now upon an indictment, before he had an examination by a single justice, there

784 being no such provision in the *law of arrest and commitment (and never has been) as that which was first engrafted in the act in relation to examining courts in 1804. If, before that act, it was competent for the District court to arraign and try upon an indictment, it would now be competent for the Circuit court to arraign and try upon an indictment before a preliminary examination by a single justice.

But, as I have said, we are not without judicial construction of the law of arrest and commitment, as it affects this question. In Clore's case, 8 Gratt. 606, the prisoner offered two pleas in abatement. In the first plea he alleged that he was committed by a justice of the peace, without any inquiry or examination into the truth of the charge for which he was committed. In the second he alleged that the offence wherewith he stood charged was never examined into by a justice of the peace in his presence. The court rejected both pleas, and its judgment was affirmed by the General court. Judge Lomax, in delivering the opinion of the court, says: "Whatever inconveniences he may complain of, as to the examination or want of examination, before the justice, they can have no relevancy as objections to the indictment, which has given the sanction of the grand inquest of the county to the charge for which the justice committed him. In Wormeley's case, 10 Gratt. 658, 670, Judge Daniel, in delivering the opinion of the court, cites this case with approval, and says: "It was decided in Clore's case that the principles of the decisions just above mentioned, is not at all varied because of the subsequent amendments of the law in the Code, relating to arrest and commitment; that after the finding of the grand jury, upon the examination and proofs before them, charging the accused with the murder, it was no defence in reason or in law to the prisoner, that there had been irregularities in his commitment." In Kemp's case, 18 Gratt. 969, J. Joynes reviews the cases on this subject, and
785 concludes *in these words: "If the prisoners could not, on a motion to quash, be allowed to show that the original

commitment was by an illegal warrant, or without investigation, or by a person without authority, they cannot be allowed to show that the commitment was not duly certified to the clerk, however essential that may be to the regularity or legality of the commitment. The essential thing into which alone, of all the proceedings before indictment, the court inquires, is, whether the prisoners were duly examined and committed by the examining court for the same offence for which they were indicted." And this, as we have seen, the court could only inquire into by virtue of the provision made in the act of 1804, and retained in the law of examining courts until the whole was struck down by the act of 1867. Since this repealing law went into operation it would be no defence to an indictment, that the accused had not been examined by an examining court. And we have seen that it never has been a ground of defence, that he had not been examined by the committing justice.

Does the repeal of the law providing an examining court change the law with regard to arrest and commitment? The Legislature has not thought proper to change it. Can the courts, by judicial construction, give it a meaning and force which, before the repeal of the examining court, they held did not pertain to it. The only change that has been made, and that as the result of the abolition of the examining court, is, that the commitment is now for trial; whereas before it was for examination. Rives, J., in Jeter Philips's case, 19 Gratt. 485, 522.

Under this judicial interpretation and construction of the law of arrest and commitment, which must be presumed to have been known to the Legislature, they abolished the examining court, and left the other precisely as it was. Did they intend to substitute the examination
786 *before a justice for the examining court? Did they intend to clothe a single justice with powers, after the accused had been solemnly indicted in one of the superior courts of law, by the grand inquest of the county, for a grave criminal offence, to arrest the criminal proceeding and discharge the accused? Such could hardly have been the intention of the Legislature. And with the judicial interpretation of the clause as it stands, it could not have that effect. And if they had intended it they would, it seems to me, have changed the phraseology and enlarged the provision, so as to obviate the judicial construction and give it the proposed effect. I think, on the contrary, in the revision, in retaining the provision unchanged, they intended to retain it with the judicial construction given to it, and did not intend the absurdity of clothing the single justice with the power claimed for him. And, moreover, if they had intended that the preliminary examination before the committing magistrate should take the place of the examining court, they would have said so, and would have declared what should be the effect of

his discharge: whether it should be final as in the case of the examining court. And if they had intended that it should take the place of the examining court, in amending the 34th section of chapter 208 of the Code, which provides that the prisoner shall be forever discharged, if there be three regular terms without trial "after his examination," they would have merely inserted the words "by a justice of the peace:" So as to read, "if there be three regular terms of such court after his examination by a justice of the peace, without a trial, &c. Instead of that they struck out the words "his examination," and substituted the words "he is so held." So that it reads, "if there be three regular terms of such court after he is so held without a trial," evidently contemplating *that he would be committed as before, but directly for trial, instead of examination.

I deem it unnecessary to go into an analysis of these statutes. That has been so well done, so much better than I could, in the lucid opinion just delivered by my brother Moncure, that it would be a work of supererogation in me to travel over the same ground. The argument which has been made as to the importance to the prisoner, that he should have a preliminary examination, would be better addressed to the Legislature than to this forum. It might be addressed with effect, perhaps, to that body, in a proposition to restore the examining court, or to provide some suitable substitute for it, which I am prepared to recommend. But, if it be meant to invest a single justice of the peace with power to arrest the proceedings of the Circuit court against a person accused of crime, after an indictment found against him by the grand inquest of the county, and to discharge him, I certainly could not unite in an application to the Legislature for such a purpose.

It is, indeed, important that the laws should be so framed and administered that the sacred rights of person—life, liberty, and property—should be secure. To this end, it is important that every safeguard to liberty should be sacredly preserved. And one of these safeguards is, that the guilty should not go unpunished. Whilst it is a part of our humanity to commiserate the fallen, no false sympathy should prevent the faithful enforcement of the law against the guilty. This is indispensable, if we would give security to the rights of person, and preserve the safety and purity of society.

It is not the province of this court to decide upon the guilt or innocence of the accused. And nothing that has fallen from me is intended to give any intimation of an opinion on that subject. It is my wish that he should have every right and privilege upon his trial to which he is entitled by the law of the land. *(And I am gratified to know that the defect of the law, in taking away the right to an examining court, without providing a substitute, will in his case be compensated

under the decision of this court: as, upon a second trial, he will have the benefit of the previous examination which he has had in the first.)

I had not intended saying a word upon this question beyond the announcement of my opinion, as the very full, able and lucid opinion of the President, I think, fully sustains that opinion. But, after hearing the very elaborate opinion of my brother Staples last night for the first time, which gives such prominence to this question, I felt that something more might be required of me than the simple announcement of my opinion. I concur in the opinion of the President.

CHRISTIAN, J., concurred in the opinion of Staples, J.

MONCURE, P. This day came as well the plaintiff in error, by his counsel, as the Attorney-General, on behalf of the Commonwealth, and the court, having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion that, the court being equally divided in opinion upon the question presented by the first bill of exceptions, whether the accused was entitled to be examined before a justice of the peace for the offence with which he was charged in the indictment, which he had been recognized to answer, before he could be required to answer the same; the ruling of the said Hustings court in refusing to grant his motion to be taken before a justice of the peace, in order to his examination for the said offence, as mentioned in the said bill of exceptions, is therefore affirmed. The court is of opinion that the said Hustings court did not err in overruling the motion of the accused to quash the indictment, because the grand jury

789 that found the same *were required to be freeholders, because the officer who summoned them summoned none but freeholders, and the clerk, before they were sworn, demanded to know of each of them whether they were freeholders, as mentioned in the second bill of exceptions: nor in excluding the plea in abatement tendered by the accused "that the supposed grand jury by which the indictment was alleged to be found, was not summoned or empaneled according to law, in this, that the entire panel were summoned by the proper officer of the said court, under the second and third sections of chapter 206 of the Acts of Assembly of 1866-'7, relating to grand juries, and were required to be freeholders, and not disqualified under the terms of the said third section; and were not summoned according to the provisions of the third article of the constitution of Virginia;" as mentioned in the third bill of exceptions. It did not appear, and was not alleged, that any of the grand jury were disqualified. All of them may have been good and lawful men, qualified to serve as grand jurors not only under the said act of assembly, but under the constitution. That

they were freeholders did not disqualify them under either. They may also have been, if that were necessary, and it is to be presumed they were, entitled to vote and hold office, according to the requirements of the constitution. The accused, therefore, would have no good cause to complain that he was indicted by a disqualified grand jury, even if the third section of the third article of the constitution, which declares that "all persons entitled to vote and hold office, and none others, shall be eligible to sit as jurors," operated proprio vigore, and without any legislation on the subject, to repeal all existing laws apparently in conflict therewith. But the court is of opinion that it had no such effect; that legislation is proper and necessary to put it in operation; and that until such legislation takes place, the existing laws in regard to grand juries will continue in force.

790 But when such legislation shall take place, the existing law in regard to grand juries, so far as it may be repealed or altered by the new law, will cease to exist.

The court is further of opinion that the Hustings court erred in overruling the motion of the accused to quash the venire facias "because the same is not in conformity to law, and for errors apparent upon the face thereof," as mentioned in the fourth bill of exceptions. The second section of the schedule annexed to the constitution provides that all indictments which shall have been found, or which may hereafter be found, for any crime or offence committed before the adoption of this constitution, may be proceeded upon as if no change had taken place." The "crime or offence," in this case, if committed at all, was committed before the adoption of the said constitution. The fourth section of the said schedule provides "that all crimes and misdemeanors and penal actions shall be tried, punished and prosecuted as though no change had taken place, until otherwise provided by law." The court is of opinion that, according to this provision, the act passed April 27th, 1867, entitled "An act to revise and amend the criminal procedure," which was in force at the time of the adoption of the constitution, was continued in force until otherwise provided by law; and as it has not yet been otherwise provided by law, the said act has ever since continued, and yet continues, in force. The venire facias in this case, therefore, instead of being issued in the form set forth in the said fourth bill of exceptions, ought to have been issued in pursuance of the directions of chapter 208 of the Code, as amended by the said act. See Acts of Assembly 1866-'67, pp. 932, 933; and for this error the said judgment must be reversed.

The court might here conclude this opinion without taking any notice of any other questions presented by the record. But as these questions have been fully argued before this court, and as all or most of them may again arise in the future trial of this case in the court below, this court has considered them, and will

now proceed to express an opinion upon such of them as are likely again so to arise.

The court deems it unnecessary to express any opinion upon the questions presented by the 5th and 6th bills of exceptions in regard to the witness, Oscar Cranz, as it is not likely that any such questions will arise in any future trial of this case. But the court is of opinion that the Hustings court did not err in overruling the objection made by the accused to the question proposed by the Commonwealth to be put to the witness, John H. Gibbon, as mentioned in the ninth bill of exceptions; nor in overruling the motion of the accused to exclude from the jury, and to instruct them to disregard, as evidence, the answer of the said witness to the said question, as mentioned in the 10th bill of exceptions.

The court is further of opinion, that the said Hustings court did not err in overruling the objection of the accused, to the question propounded to the witness Emanuel Francis, and permitting the witness to answer the same, as mentioned in the seventh bill of exceptions; nor in overruling the motion of the accused to reject and to direct the jury to disregard the questions propounded to, and the answers of the said witness, as mentioned in the eighth bill of exceptions.

As to the eleventh bill of exceptions taken to the refusal of the Hustings court to permit the witness, William Folkes, clerk of the County court of Henrico, when the action brought on the writing mentioned in the indictment was pending in said court, to answer the question propounded by the accused to the said witness, whether any reason had been given to him by J. H.

Sands, as counsel for the defendant 792 in said action, *for not filing a plea in the case; and as to the twelfth bill of exceptions taken to the refusal of the said court to permit the question of the accused, Whether Sanxay, the defendant in the said action, was present with his counsel in the clerk's office, and what was said by Sanxay as to why he would not defend the suit, but let the judgment go by default, to be put to the said witness. The court is of opinion that the admissibility of the declarations sought to be elicited by the question propounded to the said witness as aforesaid, depends upon whether they were made in connection and concomitance with the fact to which the said witness had just before testified, that no plea was pleaded by the counsel for defendant, and that judgment went by default. The said bills of exceptions do not sufficiently show such connection and concomitance to enable the court to determine the question of admissibility. They do not show whether the said declarations were made at a time when a plea could be pleaded in the said action, and in reference to the question whether such plea should be put in or not; or were made at some other time and unconnected with that question. In the former case, they were admissible evidence as part of the *res gestæ*, and as being explanatory of

the fact of not putting in such plea; in the latter they were inadmissible, because unaccompanied by any fact which was in evidence in the case, and which they could tend to explain.

In regard to the opinion of the Hustings court in refusing to give the instructions asked for by the accused, and in giving others in their stead: which is the subject of the thirteenth bill of exceptions: all the testimony, oral and written, before the jury on the trial of the cause, and, when instructions were asked for, and refused or given as aforesaid, is set forth in the said bill of exceptions; and it tended to prove

that Solomon Haunstein, a foreigner, 793 died in the city of *Richmond, in the year 1861, intestate, and without heirs, having lived in the city several years before his death, and accumulated quite a large estate, consisting partly of personal property, but chiefly of houses and lots, in or near the city; that Richard D. Sanxay was curator of the said Haunstein's estate; that a writing, purporting to be the writing obligatory of the said Haunstein, for the sum of seven thousand dollars, payable on demand to John W. Thompson or order, and an endorsement thereon purporting to be the endorsement of said John W. Thompson, being the writing and endorsement in the indictment mentioned, were forged; that an attempt was made by the accused, professing to act as counsel or attorney at law for William Gleason, assignee of said John W. Thompson, to collect the sum of money mentioned in said writing, and to enforce its payment out of the estate of the said Haunstein; that, in the prosecution of that attempt, he first demanded payment of the said sum of the said curator; secondly, brought an action at law upon the said writing, and obtained judgment in said action; thirdly, brought a suit in chancery to enforce the said judgment against the real estate of said Haunstein, and obtained a decree for the sale thereof; and, fourthly, executed a receipt as "attorney for Wm. Gleason, assignee of John W. Thompson," to R. D. Sanxay, special commissioner, for the sum of forty-nine hundred and ninety-six 94-100 dollars, in part satisfaction and discharge of the said judgment; the said sum being composed of \$4,079 38, net proceeds of the sale of the real estate, and \$917 56, balance due by the said curator on account of the personal estate of said Haunstein; and that, in making the said attempt, the accused knew the said writing and endorsement to be forged and intended to defraud.

The court deems it hardly necessary to disclaim any intention, in making the 794 foregoing statement, to intimate *any opinion upon the weight of the testimony, which belongs exclusively to the consideration and determination of the jury. The statement of what the testimony tends to prove, is made merely to show the application of the instructions, and to explain the opinion of the court thereupon. The court is of opinion, that everything said or

done by the accused in the prosecution of the said attempt, with the knowledge and intent aforesaid, for the purpose of obtaining the money mentioned in said writing, was "an attempt to employ as true such forged writing, knowing it to be forged," within the meaning of the Code, ch. 193, § 5, p. 797.

As to the first instruction asked for by the accused, the court of Hustings did not err in giving, in lieu thereof, the first of the instructions given by the court.

As to the second instruction asked for, the said court did not err in giving the same, with an addition thereto. But the court is of opinion, that, to make the proper meaning more plain, the following words, or other words to the same effect, ought to have been inserted at the end of said addition, viz: "If such assertion or declaration was made in the prosecution of the purpose of obtaining the money mentioned in the said writing," so as to make the addition read thus: "But any assertion or declaration, by word or act, that the forged writing or endorsement is good, with such knowledge or intent, is an uttering or attempting to employ as true the said writing or endorsement, if such assertion or declaration was made in the prosecution of the purpose of obtaining the money mentioned in the said writing."

As to the third instruction asked for, which is in these words, "that, to convict the accused, upon the said last mentioned counts," to wit, the second and fourth, "the jury must be satisfied that, at the time

the said forged writing and said endorsement were filed by *the accused in the clerk's office of the County court of Henrico, he knew that the same were forged," the court is of opinion, that the said court of Hustings did not err in refusing to give it. The said instruction assumed that the attempt to employ the said forged writing and endorsement as true, could consist only, according to the evidence, in filing the same in the said clerk's office; whereas the evidence tended to prove other acts of the accused which constituted such an attempt.

As to the fourth instruction asked for by the accused, and the third instruction given by the said court in lieu thereof, the court is of opinion that the Hustings court did not err in refusing to give the former. The position assumed by the said instruction asked for was, that the bringing of a suit upon a forged paper, as counsel, does not amount to an uttering or attempting to employ the same as true, within the meaning of the law on which the prosecution is founded, even though the accused, at the time of bringing such suit, knew that the paper was a forgery. The court is of opinion, that this is not a sound position; and that the bringing of a suit upon a forged paper, as counsel, for the purpose of recovering the money purporting to be due by such paper, does amount in law to an uttering or attempting to employ the same as true; and if the act be done with knowledge

of the forgery and intent to defraud, it constitutes an offence within the meaning of the Code, p. 797, ch. 193, sec. 5. It would have been sufficient for the court merely to have refused to give the fourth instruction asked for, without giving any other in its place. But, if it was deemed proper to give another, it ought to have been to the above effect, instead of the third instruction given by the court.

As to the fifth instruction asked for by the accused, and the fourth instruction 796 given by the said court in *lieu thereof,

the court is of opinion that there was no error in that respect. The said instruction asked for was vague in its meaning, embraced an abstract proposition, and was calculated to mislead the jury. Any fact which is a necessary ingredient of an offence, as guilty knowledge is, of the offence charged in the second and fourth counts of the indictment, must be proved on a trial for such offence, by the evidence in the cause, or by fair inference therefrom. To say that such guilty knowledge must be proved as a "substantive fact," seems to imply that stronger or other evidence is required of this fact than of other material facts of a case. "That the law does not presume guilty knowledge from any state of the proof against the accused," was a general and abstract proposition, upon which the said court could not properly be called on to express an opinion. The Commonwealth had not asked for an instruction that the law presumed guilty knowledge from any particular facts which the evidence tended to prove, if the jury believed them to be true. Had such been the case, the accused might well have asked for an instruction to the contrary. But such was not the case. And the Hustings court properly instructed the jury, "that, to convict the accused under the second and fourth counts of the indictment, the guilty knowledge therein imputed to him must be proved by the evidence in the cause, or by fair inference therefrom."

As to the sixth instruction asked for by the accused, and the fifth instruction given by the said court in lieu thereof; the instruction asked for was, "that to convict the accused the jury must be governed entirely by the testimony before them and the fair inferences therefrom; and that they must not presume or assume the guilt of the accused by reason of his failure or neglect to produce evidence in his own behalf." The instruction given was pre-

cisely the same with the instruction 797 *asked for, with this addition, "but

that is a fact which, if it appears, may be considered by the jury in connection with the other facts proved in the case." The proposition embodied in the instruction asked for was certainly true, but laid down without explanation, it was calculated to mislead the jury, and induce them to believe that, no matter how strongly the evidence of the Commonwealth might tend to prove the guilt of the accused, and no matter how plainly it might appear that the accused

had it in his power to produce evidence in elucidation of the subject matter of the charge against him, yet his failure or neglect to do so was not a circumstance which could be weighed by the jury in connection with the other facts proved in the case. This is certainly not true. The conduct of a party in omitting to produce that evidence in elucidation of the subject matter in dispute, which is within his power, and which rests peculiarly within his knowledge, frequently affords occasion for strong presumption against him; since it raises a strong suspicion that such evidence, if adduced, would operate to his prejudice. 1 Starkie on Evidence, p. 34, part 1, sec. 16; 2 Russell on Crimes, p. 729, library edition. The Hustings court was, therefore, right in making an explanatory addition to the instruction asked for; but, instead of the words used by the said court for that purpose, the addition ought to have been in the words or to the effect following, to wit: "But, if the jury believe that it is in the power of the accused to produce evidence in elucidation of the subject matter of the charge against him, then his failure or neglect to produce such evidence may be considered by the jury in connection with the other facts proved in the case."

As to the seventh instruction asked for by the accused, and the sixth instruction given by the said court in lieu thereof, the court is of opinion that there is no error in that respect.

798 *The court is further of opinion that the said court of Hustings did not err in overruling the motion of the accused to set aside the verdict on the following grounds alleged by him, viz:

1st. "That there was no evidence of an intention on the part of the accused to defraud the United States, or any State, or any county, corporation, officer or person."

2dly. "That there was no evidence to show that the writing in the indictment mentioned was uttered, or attempted to be employed as true to any person, but was filed with a declaration in a suit at law, in the clerk's office of Henrico county court."

And

3dly. "That the alleged uttering and attempting to employ as true occurred in the county court of Henrico, and within the jurisdiction of that court; and not within the jurisdiction of the Hustings court of the city of Richmond."

In regard to the first of these grounds: there was evidence tending to show an intention on the part of the accused to defraud the personal representative of Solomon Haunstein, who was the legal owner of the personal estate of said Haunstein, and also to defraud the heirs at law of the said Haunstein, if he had any, or the State of Virginia, if he had none.

In regard to the second ground: there was evidence tending to show that the writing in the indictment mentioned was uttered or attempted to be employed as true to a person, to wit: to R. D. Sanxay, curator of the estate of said Haunstein. But whether

there was such evidence or not, there certainly was evidence tending to show the attempt, by action at law and suit in equity to enforce payment of the money mentioned in the said writing, out of the estate of said Haunstein; which said attempt was an attempt to employ said writing as true, within the meaning of the law.

In regard to the third ground: the 799 alleged uttering *and attempting to employ as true occurred within the jurisdiction of the Hustings court of the city of Richmond. The demand of the money of the personal representative of Haunstein was made in the city. The Circuit court of Henrico, in which the suit in equity was brought, was held in the city. And though the action at law was brought in the County court of Henrico, yet the court-house and clerk's office of said county are situated within the territorial limits of said city. And the court of Hustings has jurisdiction, not only within the said limits, but also for the space of one mile on the north side of James river, without and around said city. Acts of Assembly 1852, chap. 365, § 3, p. 259; Code of 1860, chap. 157, § 4, p. 661; Id. ch. 158, § 53, p. 676.

Wherefore, for the error of the said court of Hustings, in overruling the motion of the accused to quash the venire facias as aforesaid, it seemeth to the court here that the judgment aforesaid is erroneous. Therefore it is considered that the same be reversed and annulled; and it is ordered that the verdict rendered by the jury be set aside, and that the cause be remanded to the said court of Hustings, with directions to proceed, in the manner prescribed by law, to cause another jury, duly qualified, to come and to say whether the said George Chahoon be guilty of the felony wherewith he stands accused, and in the said indictment mentioned, or not guilty, and further to proceed as the law requires. Which is ordered to be certified to the said court of Hustings of the city of Richmond.

Judgment reversed.

JURIES.

- I. In General.
- II. Composition.
- III. Right to Trial by Jury. (See *post*, "Issue Out of Chancery.")
- IV Issue Out of Chancery. (See monographic *note* on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 478.)
- V. Waiver and Loss of Right to Trial by Jury.
- VI. Selection and Drawing.
- VII. Procuring Attendance of Jurors at Trial Court.
- VIII. Service of Jury List or Panel. (See *ante*, "Procuring Attendance of Jurors at Trial Court.")
- IX. Formation of Trial Jury.
 - A. In General.
 - B. Competency of Jurors.
 - C. Challenges.
 - D. Oath.
- X. Province of Jury.
 - A. In General.
 - B. In Criminal Cases.
 - C. In Actions.

XI. Instructions to and Charging of the Jury. (See monographic *note* on "Instructions" appended to *Womack v. Circle*, 29 Gratt. 192.)

- A. Principles Regulating the Allowance or Refusal of Instructions in General.
- B. Charging and Instructing in Criminal Cases.
- C. Civil Cases.

XII. Verdict. (See monographic *note* on "Verdict." See also, *post*, "New Trial.")

- A. In General.
- B. Sufficiency of Verdict.
- C. Special Verdict.
- D. Amending Verdict.
- E. Retrial and Examination after Verdict.
- F. Impeachment of Verdict by Jurors.
- G. Setting Aside the Verdict.

XIII. New Trial. (See monographic *note* on "New Trial." See also, *ante*, "Verdict.")

- A. Where Granting Depends on Some Question Affecting Evidence.
- B. Objections to Jurors as a Ground for Granting a New Trial.

XIV. Custody and Conduct of Jury.

- A. Who Is the Custodian of the Jury.
- B. Acts Constituting Misconduct.
- C. Conversations Held by Jurors.
- D. Viewing Premises, and the Scene of Homicide.
- E. Carrying Papers to the Jury Room.
- F. Drinking of Spirituous Liquors.

XV. Discharge of Jury.

- A. Court's Authority to Discharge, and Proper Exercise of Same.

I. IN GENERAL.

Definition.—A common-law jury, *ex vi termini*, is a body of twelve competent men, selected in the mode prescribed by law to determine, on oath and in a legal tribunal, the facts in a case from the evidence presented to them. *Barlow v. Daniels*, 25 W. Va. 512.

Nature of the Right to Jury Trial—Freedom from Influence.—Trial by jury is a sacred right and should be sedulously guarded. The jury should not only be kept from all extraneous influences in reaching their verdict, but the court itself should be careful not to trench upon their province. They should not be coerced, by threat or otherwise, into finding a verdict; for a verdict resulting from coercion could not be allowed to stand. The verdict should be the untrammelled expression of the concurrence of individual judgments. But a reasonable time, to be determined by the circumstances of the case, should be allowed the jury for the performance of their duty, and they should be kept together until the trial court is satisfied that they have made an honest effort to agree, and cannot, from a conscientious difference of judgment. Great latitude is allowed the trial court as to the length of time the jury shall be kept together, and, unless it is a clear case of abuse of such discretion, the verdict will not be disturbed on the ground of coercion. But it is a safer and better practice for the trial court to refrain from any expression of opinion, which may be claimed to savor of threat or coercion, as to the time the jury will be kept together if a verdict is not sooner rendered. *Buntin v. Danville*, 93 Va. 200, 24 S. E. Rep. 830.

Constructive Presence of Jury in Court Room.—A jury, while in their room in the courthouse consulting of their verdict, are still constructively in the presence of the court. *Gilligan v. Com.*, VII Va. Law Reg. July 1901 (Supreme Court of Appeals, at Richmond, January 1901).

Exclusion from Jury Service on Account of Race.—The constitution and laws of Virginia do not exclude colored citizens from service on juries. *Ex parte Virginia*, 100 U. S. 313 (1880).

Argument before Jury—Restriction.—While it is the court's province to give the jury the law, and the jury's to deal with the facts, it is an unwarrantable restriction upon the legitimate scope of argument, if not a flagrant usurpation, for a trial court to prohibit counsel in this state, at least, from referring to and reading from recognized authorities, and especially from decisions in similar cases by courts of the last resort. *N. & W. R. Co. v. Harman*, 83 Va. 553, 8 S. E. Rep. 251.

And where an indictment is found upon the evidence of many witnesses, though it does not appear how many testified at the trial, the ruling of the court restricting the argument to thirty minutes, against the objection of the prisoner, is an undue abridgment of his rights, and reversible error. *Jones' Case*, 87 Va. 63, 12 S. E. Rep. 226.

Same—Opening and Conclusion.—And in all criminal trials in this state, the attorney for the commonwealth is entitled to open and conclude before the jury; and this is true regardless of the nature of the defense. Even though the accused offers no evidence, as the affirmative of the issue is on the commonwealth, the attorney for the commonwealth is entitled to open and conclude the argument before the jury. *Doss v. Com.*, 1 Gratt. 557; *State v. Schnelle*, 24 W. Va. 767; *State v. Hudkins*, 35 W. Va. 247, 13 S. E. Rep. 367.

Compensation of Jurors.—Va. Code 1887, §§ 3169, 4049, give to every juror sitting in a criminal case compensation at one dollar for each day he attends on such jury. See *Souther v. Com.*, 7 Gratt. 672.

Granting of a Venire Facias De Novo.—A *venire facias de novo* can only be granted in two cases. 1. If it appear upon the face of the verdict, that it is so imperfect that no judgment can be given upon it. 2. Where it appears that the jury ought to have found other facts differently. *Brown v. Ralston*, 4 Rand. 504.

II. COMPOSITION.

A common-law jury is, *ex vi termini*, a jury composed of twelve persons. Yet it is clearly within the power of the people, by a constitutional provision, to make the number less, or, if they choose, to qualify in any other manner, or abolish the trial by jury altogether. *Barlow v. Daniels*, 25 W. Va. 512.

And where in a criminal trial the record shows that the prisoner was tried by a jury of 13 jurymen instead of 12, the verdict should be set aside and a new trial awarded. *State v. Hudkins*, 35 W. Va. 247, 13 S. E. Rep. 367. But prior to the act of 1794, upon an inquest of office, respecting property escheated or forfeited to the commonwealth, the jury might have been composed of 12 jurors, or of a greater or smaller number. *Bennet v. Com.*, 2 Wash. 154.

And in *Curtis v. Com.*, 87 Va. 580, 13 S. E. Rep. 72, it was held, that of the twenty persons directed to be summoned from the list furnished by the judge to serve as jurors the appearance of sixteen is sufficient in felony cases. Additional persons may be summoned from the bystanders.

Qualifications—Age, Sex and Citizenship.—Regarding the qualifications of those who shall compose the juries of this state, the statute, Va. Code 1887, § 3139, declares that all male citizens, twenty-one years of age, and not over sixty, who are entitled to vote and hold office, under the constitution and laws

of this state, shall be liable to serve as jurors, except as otherwise specially provided. For similar provision in West Virginia, see W. Va. Code, 1899, ch. 116, § 1.

And although persons be over the age of sixty, and therefore exempt, if they chose, from service, yet they are not *ipso facto*, disqualified. Booth's Case, 16 Gratt. 519.

III. RIGHT TO TRIAL BY JURY.

Constitutional Provisions Guaranteeing Right of Jury Trial—Construction.—A constitutional provision which guarantees the right of a trial by jury must be read in the light of the circumstances under which it is adopted. If the right did not then exist, the Constitution does not confer it, unless it be expressly so provided, or necessarily implied. *Pillow v. Southwest, etc., Imp. Co.*, 93 Va. 144, 23 S. E. Rep. 32.

Preservation of Trial by Jury.—By the United States constitution, in suits at common law where the value in controversy exceeds \$20, the right of trial by jury is preserved. By the Virginia Constitution, in controversies respecting property, such mode of trial is declared preferable and sacred. And though by the law in this state the jurisdiction of justices has at various times been enlarged, yet experience has taught the wisdom of adhering to fundamental principles and of returning to the old limits. *James v. Stokes*, 77 Va. 225. In the same spirit the West Virginia Constitution, § 18, Art. III, as amended in 1880, declares that, "No fact tried by a jury shall be otherwise re-examined in any case, than according to the rules of the common law." And this is held to apply to cases tried by a jury of six before a justice, and prohibits the retrial of such cases by the circuit court under the provisions of chap. 8, Acts 1881. *Barlow v. Daniels*, 25 W. Va. 512.

And while on the question of the appropriation of land a jury is not required by the statute, yet § 5, ch. 181, W. Va. Code, in force in 1881, authorized the court to direct that the issues be tried by a jury. *B. & O. R. Co. v. P., etc., R. Co.*, 17 W. Va. 812. Furthermore, as held in *Cecil v. Clark*, 44 W. Va. 650, 30 S. E. Rep. 216, in matters of such nature as give the right to a jury trial under the constitution, the legislature cannot extend equity jurisdiction over them, and thus deprive the party of a jury trial against his will.

When a Demand for a Jury Trial is Proper—Mixed Jury.—On motion, in Virginia, when an issue of fact is joined, and either party desires it, or, when in the opinion of the court, it is proper, a jury shall be impaneled, unless the case be one in which the recovery is limited to an amount not greater than \$20, exclusive of interest. Va. Code 1887, sec. 3213; *Claffin v. Steenbock*, 18 Gratt. 842; *Burke v. Levy*, 1 Rand. 1; *McKinster v. Garrott*, 3 Rand. 554. However, in a proceeding by motion to recover money under section 3211 of the Va. Code 1887, in order that the defendant may be entitled to a trial by jury, as provided by section 3212 of the Va. Code 1887, an issue must be made up. This issue may be tendered by a plea, or by an informal statement in writing of the grounds of defense. *Preston v. Salem Imp. Co.*, 91 Va. 583, 22 S. E. Rep. 486. But where an insurance company is properly before the court, in a chancery suit in which its policy is the subject of litigation, any issue or issues raised by the pleadings as to its liability on the policy must be tried according to the rules of equity in such cases, it is not entitled to a jury trial as a matter of right,

but only in the event that the case made shows that the jury trial is proper. *N. Y. Life Ins. Co. v. Davis*, 94 Va. 427, 26 S. E. Rep. 941. However, in *Ex parte Va.*, 100 U. S. 318 (1880), where the construction of the Virginia laws relative to race discrimination in composing juries, presented itself to the Supreme Court of the United States, the plaintiff in the case being a negro, who had demanded in the state court that he be tried by a jury composed of one-third or other portion of his own color, which was refused, JUSTICE STRONG, rendering the opinion of the court, declared that the denial of the motion for a mixed jury, was not a denial of a right secured to the defendant by any law providing for equal civil rights of the citizens of the United States, or by any statute, or by the fourteenth amendment; a mixed jury in a case not being essential to the equal protection of the laws. And, while it is a right to which any colored man is entitled, in the selection of jurors to pass upon his life, liberty or property, that there shall be no exclusion of his race, or discrimination against them because of their color, yet such right is a different thing from the right claimed, and denied in the state court, viz.: a right to have the jury composed in part of colored men. Thus declaring, in the opinion of the Supreme Court of the United States, that the constitution and laws of Virginia neither discriminate against nor exclude colored men from service on juries,—and that the right to demand a jury trial does not also include the absolute right to demand a mixed jury. *Lawrence v. Com.*, 81 Va. 484; *Mitchell's Case*, 23 Gratt. 845.

Same—Special Jury.—And the allowance or refusal of a special jury is a matter resting in the sound discretion of the court. *Atlantic & Danville Ry. Co. v. Peake*, 87 Va. 180, 12 S. E. Rep. 348.

Demand Made for Jury—When Venire Facias Should Issue.—And when either party, demands a jury, it is error for the justice, without consent of the parties, to issue a *venire facias* for such jury before the summons to commence the suit has been served and returned, and the time fixed for the appearance of defendant has arrived.

But where the defendant appears and has the case continued, and the jury thus summoned is adjourned to the time thus set for trial, he will be held to have waived such irregularity in the writ of *venire facias*, it appearing that he was not injured thereby. *Greer v. Wilson*, 38 W. Va. 100, 18 S. E. Rep. 380.

IV. ISSUES OUT OF CHANCERY.

(See monographic note on "Issue Out of Chancery" appended to *Lavel v. Gold*, 25 Gratt. 473.)

Directing an Issue is Discretionary with the Court.—A court of chancery may in its discretion, when the evidence in regard to any material fact properly in issue in the cause, is conflicting, and the weight of the testimony is so nearly balanced that it is unable to determine on which side it preponderates, direct an issue, as to such facts, to be tried by jury. But this is a legal, and not a mere arbitrary discretion, and therefore if the court in a case where the evidence clearly preponderates in favor of, or against any material fact at issue in the cause, improperly directs an issue as to such facts, to be tried by a jury, the decree directing such issue will be reversed, although the evidence in regard to such facts may have been conflicting; yet the question, whether it was proper, or improper in any particular case to direct an issue of fact therein, to

be tried by a jury, must be determined by the proofs in the cause at the time such issue was directed. *Mahnke v. Neale*, 23 W. Va. 58.

And in furtherance of this discretionary power vested in a court of equity, it is held in West Virginia that where, already, at the time of the adoption of the constitution, equity exercised jurisdiction in certain matters, the clause of the constitution guarantying jury trial does not relate to such matters or deprive equity of jurisdiction therein to act without a jury. *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. Rep. 216.

Issue Wrongly Directed—Effect.—However, even after a verdict is rendered by a jury on an issue out of chancery, if upon the proofs, as they stood at the hearing, an issue ought not to have been ordered, it is the duty of the chancellor, notwithstanding the verdict, to set aside the order directing the issue, and enter a decree on the merits, as disclosed by the proofs on the hearing when the issue was ordered. Consequently, if the chancellor fails in this duty, the appellate court in reviewing a decree founded on such verdict, should look to the state of the proofs at the time the issue was ordered, and if satisfied that the chancellor has improperly exercised his discretion a decree ought to be rendered notwithstanding the verdict, according to the merits as disclosed by the proofs on the hearing when the issue was ordered. *Anderson v. Cranmer*, 11 W. Va. 568; *Henry v. Davis*, 18 W. Va. 230; *Marshall v. Marshall*, 18 W. Va. 305; *Setzer v. Beale*, 19 W. Va. 280; *Vangilder v. Hoffman*, 22 W. Va. 1; *Mahnke v. Neale*, 23 W. Va. 57; *Pickens v. McCoy*, 24 W. Va. 344; *Sands v. Beardsley*, 32 W. Va. 594, 9 S. E. Rep. 925; *Ohio River R. Co. v. Schon*, 33 W. Va. 559, 11 S. E. Rep. 18; *Jarrett v. Jarrett*, 11 W. Va. 584; *McFarland v. Douglass*, 11 W. Va. 637.

And where a bill is filed to set aside a written contract for the purchase of land or to obtain an abatement of the purchase money on account of deceit and false and fraudulent representations by the vendor, when the answer positively denies the allegations of fraud and deceit, and the testimony greatly preponderates in favor of the defendant, it is error to direct an issue out of chancery to a jury to determine whether or not there was such deceit, and fraudulent representations. *De Vaughn v. Hustead*, 27 W. Va. 778.

Issue of Quantum Damificatus—Contents of Order.—So when an order is made by the chancellor directing an issue of *quantum damificatus* in a suit between the owner of property and an internal improvement company, the order should state that the issue is to be tried by a jury of 12 freeholders, if either party desires it. *Ohio River R. Co. v. Ward*, 35 W. Va. 481, 14 S. E. Rep. 142.

Defendant Irregularly Given Affirmative of Issue—Effect.—And if a court of equity in ordering an issue of fact to be tried by a jury, irregularly give the defendant the affirmative of the issue, and the issue is found by the jury in favor of the plaintiff, the appellate court will not, on appeal by the defendant, reverse the decree directing the issue and subsequent decrees rendered in the cause, based upon the verdict of the jury; for such irregularity in the decree directing the issue, when it plainly sees that the appellant could not have been prejudiced thereby. *Ogle v. Adams*, 12 W. Va. 213.

V. WAIVER AND LOSS OF RIGHT TO TRIAL BY JURY.

A. CRIMINAL CASES.

Prisoner Cannot Waive Jury.—In the absence of a

statute authorizing it, the defendant in a criminal prosecution cannot waive trial by jury. Va. Const. Art. I, § 10; *Mays v. Com.*, 11 Va. Law J. 88 (Supreme Court of Appeals, 1886); *Ford v. Com.*, 83 Va. 552.

However, in *State v. Griggs*, 34 W. Va. 78, 11 S. E. Rep. 740, the court declares constitutional sec. 29, ch. 116, W. Va. 1887, so far as it provides for the trial of misdemeanors by the court in lieu of a jury, with the consent of the defendant. See, in this connection, *State v. Cottrill*, 31 W. Va. 162, 6 S. E. Rep. 428; *State v. Miller*, 26 W. Va. 106; *State v. Denoon*, 34 W. Va. 189, 11 S. E. Rep. 1003.

Same—When Right to Strike Off Jurors Not Waived.—Where a prisoner charged with murder is arraigned, and it is announced that he is ready for trial, whereupon the court expresses the opinion that the prisoner might be legally tried by a special jury; and informs him that unless he asks to be tried by such a jury the case will be continued; and thereupon the prisoner, stating that he does not wish to waive his right,—but in order to get a new trial,—does ask for a special jury, such speech and ruling of the court is erroneous. It is erroneous because it influences the prisoner to ask for a special jury, and so to waive his right to strike eight jurors from the panel, and acquiesce in the wrong of the prosecuting attorney's striking off two without cause. And by reason of this the accused shall not be precluded to question the legality of the proceeding, as if he had not asked for the special jury, but had at the proper time objected; or had moved to strike eight from the panel; or had objected to the prosecutor's striking off any. *State v. Miller*, 6 W. Va. 600.

B. CIVIL CASES.

Court Substituted in Lieu of Jury—Proceedings.—Under the Va. Code 1887, § 3166 (1849, § 9), in an action at law, the parties can waive a trial by jury and submit the whole matter of law and fact to the judgment of the court. And if an exception is taken to the judgment of the court it must state the facts proved, and not the evidence. In such case it is treated as governed by the principles applicable to exceptions taken to the opinion of a court overruling a motion for a new trial, on the ground that the verdict is contrary to the evidence. *Pryor v. Kuhn*, 12 Gratt. 615.

And where, as held in West Virginia, the record shows, "that neither party required a jury, and the court is substituted in lieu of a jury to try the case," and the case is tried by the court, this is "consent entered of record" within the meaning of section 35, ch. 47, of the W. Va. Acts of 1872-3. *King v. Burdett*, 12 W. Va. 688. Moreover where a case is tried by the court in lieu of a jury, it is not error in the court to hear illegal testimony, as the court is fully competent to discard the illegal evidence. *Nutter v. Sydenstricker*, 11 W. Va. 535. And whether the record of the judgment recites the fact or not, where a case is submitted to the court, upon its merits, it is presumed that the prerequisites necessary to the making of the judgment were complied with by the court. *Phelps v. Smith*, 16 W. Va. 522. But if the intervention of a jury is waived and the evidence is heard by the court and judgment is rendered, without issue having been joined, it is as equally erroneous as though the case had been tried by a jury. *B. & O. R. Co. v. Faulkner*, 4 W. Va. 180.

If, however, issue is joined, and the whole matter of law and fact is heard and determined, and judgment is given by the court, and the entire evidence

is certified in the bill of exceptions, the bill must be regarded on appeal as a demurrer to evidence by the plaintiff in error. *Backhouse v. Selden*, 20 Gratt. 581; *Va. Min. & Imp. Co. v. Hoover*, 82 Va. 449; *Board of Education v. Parsons*, 24 W. Va. 552; *Nutter v. Sydenstricker*, 11 W. Va. 535; *Abrahams v. Swann*, 18 W. Va. 274. But an appellate court will not reverse the judgment of a lower court, in such case, unless all the evidence which was before the lower court on the trial thereof appears in the record, and unless it further clearly appears thereby that the judgment was not warranted by the evidence. *Snodderly v. Fairmont*, 23 W. Va. 472.

Same—Practice When Judgment Is Unsatisfactory.—And while it is the usual practice in cases, where a jury is waived and the case is submitted to the court in lieu of a jury, if the party against whom the judgment is rendered is dissatisfied therewith, to except to the judgment and have the court certify the facts proved; yet it is not necessary for the record to show that the judgment was excepted to; it is sufficient if the facts appear upon the record by a certificate of the court or otherwise. *Board of Education v. Parsons*, 24 W. Va. 551.

Loss of Right to Demand a New Jury—Separate Questions Involved.—If the same jury which tried the case on its merits is allowed, without objection from either side, to fix the value of land involved in the dispute, the rents and profits thereof, and the value of the improvements claimed by the defendant, it will be too late after verdict to object to this action of the court. *Corr v. Porter*, 33 Gratt. 278.

VI. SELECTION AND DRAWING.

A. MODE OF CHOOSING JURY IN CRIMINAL CASES.—In cases where death may be the punishment, the writ shall be required to summon twenty persons of the county or corporation, residing remote from the place where the offence is charged to have been committed and shall be in other respects qualified to serve as jurors. From these shall be selected a panel of sixteen, free from exception, and from this panel the accused may strike four, and the remaining twelve shall constitute the jury. See Acts 1877-78, p. 340, § 4; *Richards' Case*, 81 Va. 110; *Bristow v. Com.*, 15 Gratt. 634; *Hall v. Com.*, 80 Va. 555.

And where there is any objection to the mode of selecting the jury it must be made at the time the jury is chosen, and the prisoner cannot avail himself of it afterwards. *Bristow v. Com.*, 15 Gratt. 634. As is held in *Short v. Com.*, 90 Va. 96, 17 S. E. Rep. 786, the prisoner cannot for the first time object in an appellate court that a person served on the jury without being selected by the court or summoned by the sheriff.

Court Furnishes List from Which Jurors Are Selected—Number of Names to Be Contained in It.—Under Va. Code of 1887, sec. 4018, providing that the writ of *venire facias* in felony cases shall command the officer to summon twenty persons "to be taken from the list to be furnished by the court," it is not improper for the number of persons contained in such list to exceed twenty. *Hall v. Com.*, 80 Va. 555; *Richards' Case*, 81 Va. 110; *Drier v. Com.*, 89 Va. 529, 16 S. E. Rep. 672; *Sands' Case*, 21 Gratt. 871; *Mitchell's Case*, 83 Gratt. 845. In the case of *Drier v. Com.*, 89 Va. 529, 16 S. E. Rep. 672, the court distinguished the case of *Vawter v. Com.*, 87 Va. 245, 12 S. E. Rep. 339, in which latter case, § 4018, Va. Code of 1887 was construed. And the court declared in *Drier v. Com.*, 89 Va. 529, 16 S. E. Rep. 672, that the language used in *Vawter's*

Case warranted the inference that, in the opinion of the court it was irregular for the list to contain more than the specific number designated by the statute, yet this language was used unguardedly; and, besides, it was not necessary to the decision of the case. Therefore the court declined to be bound by the decision in *Vawter's Case*, 87 Va. 245, 12 S. E. Rep. 339. See also, *Snodgrass v. Com.*, 89 Va. 679, 17 S. E. Rep. 238.

Yet, in the construction of this section, 4018, in *Spurgeon v. Com.*, 86 Va. 652, 10 S. E. Rep. 979, *LEWIS, J.*, held, that if the writ of *venire facias* commands the sheriff to summon sixteen instead of twenty-four jurors, or if the record does not show by whom the list was furnished, or that the writ was directed by the court, it is invalid.

But a court may cause to be summoned so many persons from the bystanders as are necessary to complete the panel, or may have a *venire facias* directed to the sheriff of another county to summon a jury, without a list being furnished. Va. Code 1887, § 4024; Va. Code 1887, § 4019; *Clark v. Com.*, 90 Va. 360, 18 S. E. Rep. 440; *Robinson v. Com.*, 88 Va. 900, 14 S. E. Rep. 627.

B. CIVIL CASES.

Jury Commissioners—Mingling Ballots.—However, the W. Va. Code of 1890, ch. 116, sec. 3, prescribes that jury commissioners shall be appointed by the circuit court, or a judge thereof in vacation, whose duty it shall be to prepare a list of qualified jurors, and present list to the clerk of the circuit court. Their term of office shall be four years and shall commence on the first day of June next after their appointment. If the appointment is made by a circuit judge under this law on the first day of June, as prescribed, the term of office commences on that day. *State v. Mounts*, 36 W. Va. 179 (1892), 14 S. E. Rep. 407; *State v. Scott*, 36 W. Va. 704 (1892), 15 S. E. Rep. 405. But in *State v. Hall*, 31 W. Va. 505, 7 S. E. Rep. 423 (1888), it was held that when a jury is to be impaneled in a felony case, it is not necessary to put the names of those summoned into a box and draw from such box the names of jurors. The law is satisfied if the sheriff selects them. (Yet the record in a felony case must show when and how the jury was selected, tried and sworn.) *Younger v. State*, 2 W. Va. 579.

Regarding these jury lists, it is held in West Virginia that the list of persons for jury services, and the ballots of the names thereon, prepared by the jury commissioners annually, at the levy term of the county court, pursuant to W. Va. Code of 1891, ch. 116, take the place of and supplant lists and ballots made prior thereto, and ballots belonging to a former list are not to be mingled in the box used for keeping jury ballots, from which jurors are drawn with ballots belonging to the latter lists. Hence, the jury made up of jurors drawn from such boxes, containing exclusively ballots belonging to the last annual list is proper and valid. (This does not refer to a list made subsequently to the making of such annual list in any year under order of court.) *State v. Welch*, 36 W. Va. 690, 15 S. E. Rep. 419. And relative to the preparation of annual lists out of which jurors are to be selected in civil cases, see general provisions. Va. Code 1887, §§ 3142-3150.

C. RACE DISCRIMINATION IN SELECTION.—The West Virginia act of 1872-73, p. 102, provides as follows: "All white male persons who are twenty-one years of age and who are citizens of this state

shall be liable to serve as jurors, except as herein provided." In construing this statute, JUSTICE STRONG of the U. S. Supreme Court said: "The statute of West Virginia, which, in effect, singles out and denies to colored citizens the right and privilege of participating in the administration of the law as jurors, because of color, though qualified in all other respects, is, practically, a brand upon them affixed by the law, and is a discrimination against that race, forbidden by the 14th amendment of the U. S. Constitution. It is a denial of the protection of the law to the race thus excluded, since the constitution of juries is a very essential part of the protection which the trial by jury is intended to secure. The very idea of the jury is a body of men composed of the peers or equals of the persons whose rights it is selected or summoned to determine; that is, of persons having the same legal status in society as that which he holds." *Strauder v. State of West Virginia*, 100 U. S. 303. See also, *Ex parte Virginia*, 100 U. S. 313.

VII. PROCURING ATTENDANCE OF JURORS AT TRIAL COURT.

A. SUMMONS OF JURY.

Process of Summons—Number of Names Inserted—When Not Invalid.—A *venire facias* is an indispensable process to authorize the sheriff to summons a jury in a felony case, though the writ itself is not a part of the record unless made so by bill of exceptions or otherwise; nor does failure to object in the trial court to the want of such process waive the right of objection in this court. *Myers v. Com.*, 90 Va. 785, 20 S. E. Rep. 152.

And the Virginia Sess. Acts 1866-67, ch. 208, § 4, p. 932, directs that the writ of *venire facias* shall command the officers charged with its execution, "to summon twenty-four (now twenty, Va. Code 1887, § 4018,) persons selected from a list to be furnished by the court, who are to be freeholders of his county or corporation" and "residing remote from the place where the offence is charged to have been committed." This direction is mandatory, and the writ is defective and should be quashed if it is omitted. And it is not in violation of the bill of rights. *Whitehead v. Com.*, 19 Gratt. 640; Acts 1877-78, p. 340, § 4; *Hall v. Com.*, 80 Va. 555; *Richards' Case*, 81 Va. 110. But by Va. Code 1887, § 3189, it is not necessary that jurors should be freeholders or own personal property; and this applies to jurors in felony as well as misdemeanor cases. And if the writ of *venire facias* requires the officers to summon jurors with this qualification it will be quashed on motion of the prisoner. *Wash v. Com.*, 16 Gratt. 530.

In this connection it is held that, where on a trial for murder a writ of *venire facias* is issued by the county court for the summoning of the jury, returnable to the circuit court, and the 20 men selected by the county court are summoned to the circuit court and on the motion of the prisoner this *venire* is quashed by the circuit court, and that court directs another *venire* of 20 to be summoned, and names the 20 summoned, on the first *venire*, the directing the same 20 men to be summoned is not error. *Mitchell's Case*, 33 Gratt. 845.

But, if a jury is not obtained from the twenty persons summoned under the first *venire facias*, and a *tales* is issued directing the persons named by the judge to be summoned, "who reside remote from the place where the felony was committed," the introduction of these words into the *tales*, if not required by the statute, is in accordance with the

law, and does not invalidate the *venire*. And in a *venire facias* sent to a distant city, the insertion of these words is immaterial. *Poindexter v. Com.*, 33 Gratt. 766. Likewise the *venire* is not invalidated, where, upon the indictment of a person for the murder of another, and before the jury is called, the prisoner moves the court to quash the *venire facias* and return thereon, when the only error assigned is that the act requires the jurors to be summoned, etc., "remote from the place where the offence is charged to have been committed"; and the language of the *venire facias* is: "where the felony was committed."—as the use of such language in the *venire facias* is not an error. *Poindexter v. Com.*, 33 Gratt. 766; *Puryear v. Com.*, 83 Va. 51, 1 S. E. Rep. 512.

And the record conclusively shows that the persons were summoned from a list furnished by the county judge, when a writ of *venire facias* commands the sheriff to summon twenty persons from a list to be furnished by the county judge, and to have "there this writ, and the judge's list of said jurors"; and is followed in the record by the list of *venire* referred to above, and signed, and is endorsed "executed by summoning the within-mentioned parties," and signed by the sheriff. *Coleman v. Com.*, 84 Va. 1, 3 S. E. Rep. 878. But the list does not have to be signed by the judge. *Williams v. Com.*, 85 Va. 607, 8 S. E. Rep. 470.

1. MODE OF SELECTING JURIES.

a. West Virginia.—There are two modes in West Virginia of obtaining juries for the trial of felonies—one under sec. 8, ch. 47, Acts 1872-3; the other under the 6th and succeeding sections of the said act. If the record shows that the jury was summoned in the second of these modes, the appellate court will not reverse a judgment of the lower court refusing to quash the *venire facias* or the panel of the jury, because it does not appear that all provisions of the statute, other than those to be performed by the circuit court or its officers, have been complied with; it not appearing affirmatively that any of the provisions of the act have not been complied with. *State v. Strauder*, 11 W. Va. 745.

b. Virginia—Adjudications in Virginia and West Virginia.—The provision in Virginia for obtaining the original panel is that the *venire facias* shall issue for the summons of twenty persons selected from a list to be furnished by the court. Va. Code 1887, § 4018.

And in *Prince v. Com.*, 89 Va. 330, 15 S. E. Rep. 862, it was held a sufficient compliance with § 4018, where a *venire facias* was issued for a jury for the trial, during the term, of each of three felony cases, including that of the defendant, and defendant was tried by a jury composed of persons thus summoned. In the construction of this statute in *Spurgeon v. Com.*, 86 Va. 652, 10 S. E. Rep. 979, LEWIS, J., held, that if the writ of *venire facias* commands the sheriff to summon sixteen instead of twenty-four jurors, or if the record does not show by whom the list was furnished, or that the writ was directed by the court it is invalid. See *Drier v. Com.*, 89 Va. 529, 16 S. E. Rep. 672; *Sands' Case*, 21 Gratt. 871; *Mitchell's Case*, 33 Gratt. 845, for converse proposition where more than twenty are named in the writ. Also, see *Vawter's Case*, 87 Va. 245, 12 S. E. Rep. 839, holding contrary to this line of cases, and which is declared to be dictum in *Drier v. Com.*, 89 Va. 529, 16 S. E. Rep. 672.

But if the prisoner objects to a juror, on the ground that the *venire facias* was illegally executed, and the court sustains the objection, it is proper to set aside

the whole return, and direct another *venire facias*. *Epes' Case*, 5 Gratt. 676.

Provision Relating to Issuance of Venire Facias—Irregularities in Form and Summons.—By § 4020, Va. Code 1887, any court wherein a person accused of felony is to be tried, may cause a *venire facias* to issue for his trial; and this section is the law of the case, no matter when the offense was committed. *Wilson v. Com.*, 86 Va. 666, 10 S. E. Rep. 1007.

But in *Vawter's Case*, 87 Va. 245, 12 S. E. Rep. 839, it was declared that irregularities in any writ of *venire facias* whereby the defendant is not injured, are not grounds of arresting the judgment, where no objection was made before the jury was sworn. Yet ordering persons to be summoned without a writ of *venire facias* is good ground for motion in arrest of judgment, though the objection was not made before the jury was sworn.

However, where on the calling of a case for trial, the court below sustains the motion made by the defendant to quash the panel or array of jurors because they were not summoned according to law, and orders the sheriff to forthwith summon a sufficient number of qualified jurors for the trial of the case, and instructs him that, in summoning such jurors he is not bound to exclude any juror upon the ground that he had been one of the panel or array quashed, if there are no other objections to him as a juror, there is no error in such directions of the court to the sheriff, nor in summoning jurors who have been previously summoned on a panel or array for the term, which, on motion of the defendant, has been quashed. *Caperton v. Nickel*, 4 W. Va. 178.

And the mere fact that the trial judge quashed the writ of *venire facias* issued by another judge incompetent to try the case, but used the same names in the new writ issued by himself, could not render them unsuitable, or the *venire facias* invalid. *Waller v. Com.*, 84 Va. 492, 5 S. E. Rep. 864.

So, if a jury cannot be formed from the original panel, nor from the bystanders, in consequence of the prisoner's challenges, the court may award a *venire facias* commanding the sheriff to summon a specified number to attend the court then in session; and upon the return of the process the prisoner may be compelled to elect a jury, saving his right of challenge. Such process may be awarded on the report of the sheriff that there are no other bystanders, nor will the court at a subsequent term hear proof that there were other qualified bystanders who had not been called. *Gibson v. Com.*, 2 Va. Cas. 70, 111.

So, if the original *venire* be exhausted, without completing the panel, the court may order any number of persons to be summoned from the bystanders it may think necessary; and if the sheriff for want of time or other cause, fails to summon the whole number, his return is valid for as many as are summoned. *Wormeley v. Com.*, 10 Gratt. 658; *State v. Mills*, 33 W. Va. 455, 10 S. E. Rep. 808; *Robinson v. Com.*, 88 Va. 900, 14 S. E. Rep. 637; *Com. v. Jones*, 1 Leigh 598.

What Constitutes Attendance in Statutory Sense, Where Bystanders Are Summoned.—However, a person summoned as one of a panel of sixteen free from exception, who at the time of selecting the jury is serving on the grand jury, is not "in attendance," in the sense of Va. Code 1887, § 4019, providing for the summoning of a certain number from the bystanders, necessary to complete the panel, and it is not error to refuse to place him on the panel,

or examine him on his *voir dire*. *Short v. Com.*, 90 Va. 96, 17 S. E. Rep. 786.

2. OBTAINING JURIES FROM A JURISDICTION FOREIGN TO THAT IN WHICH THE TRIAL OCCURS.—And a court, before which the prisoner is arraigned for trial, if qualified jurors not exempt from serving cannot be conveniently found in the county or corporation, may send to another county or corporation for such jurors. In directing jurors to be summoned from another county, the court may make an order directing its officer to summon them, or may direct the clerk to issue a *venire facias*, requiring the officer to summon them. In the sense of the law all parts of the adjoining county, outside of the limits of the corporation, is remote from the place where the offence is alleged to have been committed, if it is alleged to have been committed within the limits of a corporation. *Craft v. Com.*, 24 Gratt. 602. And under Va. Code of 1873, ch. 202, sec. 10, the court may direct jurors to be summoned from another county or corporation for the trial of the prisoner upon the issue of the plea of *autrefois acquit*, as well as on a general issue. *Page v. Com.*, 27 Gratt. 955. Upon acting in such cases the court must have large discretion. *Chahoon v. Com.*, 31 Gratt. 822. And the question as to whether a jury should be summoned from abroad, is for the trial court to determine; and the appellate court will presume that the court of trial acted rightly in the matter, unless the contrary plainly appears. *Page v. Com.*, 27 Gratt. 955.

But a court may properly refuse to summon a jury from another county because of local prejudice, until an effort to obtain an impartial jury has failed. *Puryear v. Com.*, 83 Va. 51, 1 S. E. Rep. 512.

And in making a motion to obtain a jury from another county it should always precede a motion for a change of *venire*. *Waller v. Com.*, 84 Va. 492, 5 S. E. Rep. 864.

3. CHANGE OF VENUE.—Upon an application for a change of venue on the ground that an impartial jury cannot be had in that county, or brought thereto from another county or corporation, the prisoner should first ask for a jury from another county. If he does not do so, and an impartial jury is in fact obtained, the conclusive presumption is that the application for a change of venue is unfounded. *Joyce v. Com.*, 78 Va. 287.

And in an action against a railroad company to recover damages for a personal injury, the fact that a prejudice exists against the company, in the city in which the action is pending, because the company has removed its shop from the city and abandoned the city as a terminal, in violation of a contract with the city, is not sufficient to justify a change of venue of the action, especially when the witnesses by whom the feeling against the company is shown express the opinion that a perfectly fair and impartial jury to try the case can be gotten in the city. *Atlantic & Danville Ry. Co. v. Reiger*, 95 Va. 418, 28 S. E. Rep. 590.

4. PROCEEDINGS AGAINST SEVERAL PERSONS JOINTLY—SEPARATE VENIRES.—Where several persons are proceeded against jointly for a felony before an Examining Court, and are sent on to the Superior Court for trial, the clerk for the County Court should issue a separate *venire facias* for summoning a *venire* for the trial of each of them separately. *M'Whirt's Case*, 3 Gratt. 594.

5. MEMBERS OF VOLUNTARY MILITARY COMPANIES EXEMPT FROM SUMMONS.—Where under § 16 of the Act approved March 17th, 1884, to provide for the government of Virginia volunteers, Acts 1883-84, p.

615, a roll of a volunteer military company is filed with the clerk of the court, the members thereof are exempt from summons for jury duty, and, if summoned, need not attend to make their excuses. *Miller v. Com.*, 80 Va. 83.

VIII. SERVICE OF JURY LIST OR PANEL.

If a prisoner receives a copy of the indictment and of the list of jurors, at any time before the trial is commenced, though not until the case is called, it would be proper to give the prisoner a reasonable time to examine the indictment and the list of jurors, if he asks it; but it is not a ground for continuing the cause until the next term of the court. *Craft v. Com.*, 24 Gratt. 602.

IX. FORMATION OF TRIAL JURY.

A. IN GENERAL.

Making up Jury—Statutory Provisions.—The statutory provisions under §§ 8 and 4, ch. 17, of Va. Acts 1877-78, in respect to impaneling juries, are imperative and essential, and the accused is entitled to demand strict compliance with them. Omission of such compliance is error. *Hall v. Com.*, 80 Va. 555.

Same—Of Whom Composed—Irregularities.—And the object of the law is, in all cases in which juries are impaneled to try the issue, to secure men for that responsible duty whose minds are wholly free from bias or prejudice either for or against the accused, or for or against either party in civil cases. *State v. Hatfield (W. Va.)*, 87 S. E. Rep. 626. And it is the right of each party in any suit or prosecution to have the jury composed of persons not related to either party or the accused, who have neither formed nor expressed any opinion, who are free from bias or prejudice and stand indifferent in the cause. *Ingersoll v. Wilson*, 2 W. Va. 59. But courts have a discretionary power to direct juries *de medietate lingue*, or not to do so, in cases where aliens are parties; however, in a prosecution for murder, the mere circumstance of the prisoner being an alien and ignorant of the language is not sufficient to require the court, in the exercise of a sound discretion, to direct such a jury. *Brown v. Com.*, 11 Leigh 711. And though by the 14th amendment of the Constitution of the United States discrimination against colored persons on account of race is forbidden, yet a colored man indicted for a felony is not entitled to demand that the jury be made up of both white and colored persons. *Lawrence v. Com.*, 81 Va. 484; *Mitchell's Case*, 33 Gratt. 845; *Ex parte Virginia*, 100 U. S. 813; *Strauder v. West Virginia*, 100 U. S. 303. If there is any irregularity in forming a jury it must be objected to before the jury is sworn, unless the party is shown to have been injured by it. *Parsons v. Harper*, 16 Gratt. 64; *Town of Suffolk v. Parker*, 79 Va. 660. But it is not an irregularity, but proper, where a person is indicted for a violation of the Sabbath day under § 16, ch. 149, W. Va. Code 1899, for the jury to try such cause, to be formed in the manner in which juries in civil suits are formed. *State v. B. & O. R. Co.*, 15 W. Va. 362.

Same—Objections to Jurors—When They Should Be Made.—And an objection to a venireman, that he is not qualified according to law, comes too late after he is sworn to try the issue. *Thompsons' Case*, 8 Gratt. 637; *Ohio River R. Co. v. Blake*, 38 W. Va. 718, 18 S. E. Rep. 957.

But if the prisoner does not know, or might not with due diligence have known, that one of the

jury was a member of the grand jury which found the indictment against him, until after the jury is impaneled and sworn, he may make the objection to the juror, if made before any of the evidence is introduced. *Dilworth v. Com.*, 12 Gratt. 689.

However, if the prisoner objects to a juror, and his objection is overruled; and he excepts, and after the panel is made up, but before the prisoner has exercised his right of challenge, the court, on the motion of the attorney for the commonwealth, out of abundant caution, sets aside the juror, it is not error. *Wormeley v. Com.*, 10 Gratt. 658.

Nevertheless, an objection that jurors summoned in a criminal case were not free from exception cannot be made in the appellate court, where it does not appear that the objection was made in the trial court, or that the accused was injured thereby. Acts 1893-4, ch. 43; *Barnes v. Com.*, 92 Va. 794, 23 S. E. Rep. 784.

Same—Examination of Jurors—Voir Dire.—A circuit court has the right and power, on the trial of an indictment for felony, to compel a venireman or bystander called to serve as a juror on the trial, to be sworn on his *voir dire*, and to answer proper questions touching his fitness as a juror in the particular case. *Com. v. Stockley*, 10 Leigh 678. But in an action against a corporation a juror cannot be asked on his *voir dire* whether he is prejudiced against corporations. *Atlantic & Danville Ry. Co. v. Reiger*, 95 Va. 418, 28 S. E. Rep. 590.

And the proceeding and decisions of a court are erroneous, where, upon a person being called as a juror in a trial for a felony, and is sworn to answer questions touching his competency, and having deposed that he has formed no opinion, nor come to any conclusion on the case, the prisoner's counsel desires to further interrogate him, and asks him if he has conversed much about the case? The court arrests the examination, and decides that no further question shall be put to the juror by prisoner's counsel, as he is a competent juror. *Heath v. Com.*, 1 Rob. 785.

Nevertheless, if, upon examination on his *voir dire*, a question is asked a juror which he is not permitted to answer, the action of the trial court will not be reviewed in the appellate court, unless the bill of exceptions shows what answer was expected, or what the party proposed to prove by the juror. *Atlantic & Danville Ry. Co. v. Reiger*, 95 Va. 418, 28 S. E. Rep. 590.

B. COMPETENCY OF JURORS.

1. **A COURT'S POWER TO EXCUSE FROM SERVICE.**—A court cannot of its own motion, where no challenge is made, without good cause, set aside a juror, except where he is disabled physically or mentally from properly performing the duties of a juror, or is disqualified by statute. And though in all cases great weight is justly due to the opinion of a court before whom the jurors are questioned and examined, yet, upon exception taken, the appellate court must judge from the facts therein stated, whether the reasons for setting aside a juror are good and sufficient, or the contrary. *Jackson v. Com.*, 23 Gratt. 920; *Montague v. Com.*, 10 Gratt. 767.

Nevertheless, on a trial for a felonious offence, the court of its own motion, without the suggestion of either party, may examine upon oath all who have been summoned to serve on the jury, touching any disability created by statute, such as infancy, want of freehold or property qualifications, or in a capital case regarding conscientious scruples on the subject of capital punishment; and upon any such

disability being thus made to appear, or if it be shown that any one summoned has been convicted of perjury, the court may and should set aside any such juror of its own action, without objection made by either party. *Montague v. Com.*, 10 Gratt. 767.

So where a juror who has not heard the evidence in a criminal cause on a legal investigation, or from witnesses, but who has read in newspapers a report of the evidence given on a former trial, states that from this report he has formed a decided opinion as to the guilt or innocence of the accused, which it would require stronger evidence than he had read to remove; and who states upon his *voir dire* that he has no prejudice or bias against the prisoner, and that he would regard it a duty, as a juror, under his oath, to discard the opinion thus formed; and that he thought he could discard it, and have his mind as a blank, ready to receive the testimony that should be given on the trial; and that, while he would as a citizen entertain this opinion, yet as a juror he would not, but could and would hear and consider the evidence, and render a fair and impartial verdict according to the evidence, uninfluenced by such opinion, he is a competent juror, if his statements satisfy the court of his fairness. *State v. Baker*, 38 W. Va. 319, 10 S. E. Rep. 639; *Smith v. Com.*, 7 Gratt. 593.

Likewise, where, upon his *voir dire*, a juror states that when the alleged offence was committed he had heard some talk about it and might have then had some opinion about it, but did not recollect; and has no opinion at the time, that he is impartial, and could give the prisoner a fair trial, there is no objection to him. *Lyles v. Com.*, 88 Va. 396, 18 S. E. Rep. 802.

Thus on a trial for felony, if a juror, upon being examined on his *voir dire*, states that he was not present at the examining court, but has heard a report of some of the circumstances of the case; that he does not know that the report came from any one who heard the evidence at the examining court, nor does he believe it to be a full detail of all the circumstances, but he believes it to be true, and upon that belief has formed and expressed a decided opinion, which is still abiding in his mind; but he believes, that notwithstanding what he has heard, his mind is open to conviction, and he has no doubt that if the facts should turn out to be different from what they have been represented to him, his opinion would be changed, he is nevertheless a competent juror. *Maile v. Com.*, 9 Leigh 661.

Consequently, a previously formed and expressed opinion of the guilt or innocence of the accused is not of itself sufficient to disqualify a proposed juror. If such a proposed juror shows to the satisfaction of the court in his examination on his *voir dire*, that notwithstanding a previously formed and expressed opinion of the guilt or innocence of the accused his mind is free from bias and prejudice, and the contrary is not shown, he is a competent juror, and ought not to be rejected. *State v. Schnelle*, 24 W. Va. 768.

2. DISQUALIFICATIONS FORMING GROUNDS FOR EXCUSING SERVICE.

a. In General.—A juror is not competent to sit in a case if he has any interest in the case, or is related to either party, or has formed or expressed any opinion, or is sensible of any bias or prejudice. *Richardson v. Planters' Bank*, 94 Va. 131, 26 S. E. Rep. 413. And though competent in all other respects, the court may of its own motion, excuse or set aside a juror, who is disabled physically or

mentally, by disease, domestic affliction, ignorance of the vernacular tongue, loss of hearing or other like cause, which will render him unfit to perform the duties of a juror properly. *Montague v. Com.*, 10 Gratt. 767. And although a juror may suppose, after an opinion formed and expressed, that he will be regulated by the testimony, yet the law suspects him. *Spruce v. Com.*, 2 Va. Cas. 375.

b. Specific Disqualifications.

(a) Opinions Formed and Expressed—Effect When Its Influence on Verdict Doubtful.—If a proposed juror on his *voir dire* admits that he has formed and expressed an opinion as to the guilt or innocence of the accused, and halts and hesitates as to his then condition of mind, and cannot say, that his mind is free from prejudice, and cannot say, that the previously formed opinion will not influence his verdict, he is an incompetent juror, and ought to be rejected. *State v. Schnelle*, 24 W. Va. 768.

Same—Opinion Based on Rumor, Newspaper Accounts or Conversation.—And if a juror has made up and expressed a decided opinion as to the guilt or innocence of the accused, he is incompetent, whether the opinion be founded on conversation with the witnesses or upon mere hearsay or rumor. It is sufficient if the opinion is decided and has been expressed. *Wright v. Com.*, 32 Gratt. 941.

So a juror may be excused for incompetency who says that a talk he has had about the case made an impression on his mind as to the guilt or innocence of the prisoner; and that he is still of the same opinion as to such guilt or innocence; and when asked, "Do you feel that you could sit here as a sworn juror and decide the case according to the evidence adduced in open court, absolutely disregarding what you may have heard?" answers, "I possibly might, if the evidence proves entirely different from what I have heard." *State v. Hatfield* (W. Va.), 37 S. E. Rep. 626.

Likewise a juror is incompetent who, upon his *voir dire*, says that he has formed and expressed an opinion as to the defendant's guilt, such opinion being based on rumor and newspaper accounts; and that his opinion is "right positive" and evidence would be required to remove it, but that he could give the the defendant a fair trial. *Washington v. Com.*, 86 Va. 405, 10 S. E. Rep. 419; *Smith v. Com.*, 7 Gratt. 593.

However, if a venireman has formed an opinion of the guilt or innocence of the accused from mere rumor, the presumption, in the absence of evidence to the contrary, is, that such opinion is merely hypothetical; and will be so considered even though he speaks of it as a decided or substantial opinion, if he says he has no prejudice against the accused, and thinks he can give him a fair and impartial trial. Yet, if the court be satisfied, either from a venireman's statement or otherwise, that the opinion is in fact decided or substantial, he will be an incompetent juror. *Jackson v. Com.*, 23 Gratt. 920.

Same—Based on Evidence Heard upon Former Trial.—And where a venireman has formed an opinion as to the guilt or innocence of the accused from having heard the evidence on a former trial or examination of the case, it would be difficult if not impossible to regard such opinion otherwise than as decided or substantial, within the meaning of the rule; and he would generally, if not always, be considered an incompetent juror, even though he might think and say that he could give the accused an impartial trial. Nevertheless, if his opinion is

merely hypothetical, he is not incompetent on that ground. *Jackson v. Com.*, 23 Gratt. 919. See, in this general connection, *Lithgow v. Com.*, 2 Va. Cas. 297; *Armistead v. Com.*, 11 Leigh 657; *Dejarnette v. Com.*, 75 Va. 867.

(b) **Relationship.**—Relationship also, whether by blood or marriage, between a juror in a felony case and the prisoner, renders such juror incompetent. *State v. Hatfield (W. Va.)*, 87 S. E. Rep. 626. Thus, on a trial for arson, the nephew of the deceased wife of a person whose house has been burned, if she left children, is an incompetent juror. *Jaques v. Com.*, 10 Gratt. 690.

(c) **Grand Juror Who Found Indictment.**—And on a trial for a felony a member of the grand jury which found the indictment against the prisoner, is not a competent juror to try him. *Dilworth v. Com.*, 12 Gratt. 689; *Bristow v. Com.*, 15 Gratt. 634.

(d) **Conscientious Scruples against Inflicting Death Penalty.**—And where in empanelling a jury in a capital case, a proposed juror when being examined on his *voir dire*, replies in answer to a question propounded by the court, that he has conscientious scruples against inflicting the death penalty, he is incompetent and is properly rejected by the court, although he says that he will be governed by the law and the evidence. Va. Code 1887, § 4023; *Clore's Case*, 8 Gratt. 606; *State v. Greer*, 22 W. Va. 800.

(e) **Person Called Not Possessed of a Freehold.**—And prior to the Va. Code 1860, one of the qualifications prescribed for a juror was that he be a freeholder. See Va. Code 1849, § 1, ch. 49, p. 628. And it was a good objection in a case of felony that the juror was not a freeholder. *Dowdy v. Com.*, 9 Gratt. 727 (1852). Under this provision it was necessary that the party called as a juror in a criminal case be a freeholder residing in the same county with the officer to whom the *venire facias* was directed. See Acts February 24th 1846; *Day v. Com.*, 3 Gratt. 629; *Dowdy v. Com.*, 9 Gratt. 727. Nevertheless, in the trial of a capital felony, it was not necessary that it should be expressly stated in the record that the petty jurors were freeholders. *Com. v. Stephen*, 4 Leigh 679. And where there is a proceeding under W. Va. Code 1891, ch. 42, § 17, to take land or material therefrom for public use, the record need not show in terms that the jury in such proceeding was composed of freeholders. Because if the record in such proceeding showed that the jurors were "drawn, elected, tried and sworn in the manner required by law," it will be presumed that they were freeholders. *Ohio River R. Co. v. Blake*, 38 W. Va. 718, 18 S. E. Rep. 957.

But neither the statutes of Virginia nor West Virginia now prescribe the holding of property, real or personal, a requisite for qualification as a juror. Va. Code 1887, § 8189; W. Va. Code 1899, § 1, ch. 116, p. 822.

8. MATTERS WHICH DO NOT RENDER A PERSON INCOMPETENT.

a. **Opinions—In General.**—But a person is not rendered incompetent as a juror in a criminal case, by the formation of a legal opinion upon facts previously presented to his mind, as he would be by the formation of previous convictions in respect to the facts themselves. *Heath v. Com.*, 1 Rob. 735. And when an opinion is formed on common rumor, the presumption is that it is merely hypothetical, and it will be so considered in the absence of proof to the contrary. Yet the prisoner must be free from prejudice against the accused, whether his opinion be hypothetical or decided, whether founded

upon rumor or upon evidence heard at the trial. Upon this point nothing should be left to inference, or in doubt. *Wright v. Com.*, 32 Gratt. 941.

So, where the issue on the plea of *autrefois acquit* having been found against the prisoner, he being on his trial on the plea of "not guilty,"—eight of the jurors who tried the first issue are called and examined on their *voir dire*, and state that, during that trial, they had heard witness, in his testimony while speaking of the burning of the house, say, that the prisoner had confessed; but as the prisoner used the last word he was interrupted, and told to say nothing about the confession; but that they believed they could give the prisoner a fair and impartial trial on the evidence, notwithstanding anything they had heard, having no impression on their minds on the question as to the guilt or innocence of the prisoner, which it would require evidence to remove,—they are competent to serve as jurors. *Page v. Com.*, 27 Gratt. 955.

Thus where persons who are called to serve as jurors in a criminal case, upon being examined on their *voir dire*, say, that they have heard part of the evidence on a former investigation, and have formed some opinion thereon, yet the opinion so formed would in nowise incline their minds, as jurors, for or against the prisoner, but that they could pass upon the prisoner's case, on the whole evidence, as impartially as if they had never heard of it, they are good and impartial jurors. *Hendrick v. Com.*, 5 Leigh 707.

Same—Based on Evidence Heard.—Moreover, a juror is competent, who testifies that he had read the evidence on the trial of the prisoner's associate, and formed an opinion, but not a positive one, and could give the prisoner a fair trial on the evidence. *Williams v. Com.*, 85 Va. 607, 8 S. E. Rep. 470.

And it may be well to state that an appellate court will not enquire whether injury has been done to the prisoner by improperly setting aside a competent juror, but the law will intend prejudice to the prisoner. *Montague v. Com.*, 10 Gratt. 768.

See in this connection the following cases: *Clore's Case*, 8 Gratt. 606; *McCune v. Com.*, 2 Rob. 771; *Hall v. Com.*, 89 Va. 171, 15 S. E. Rep. 517; *Little v. Com.*, 25 Gratt. 921; *Brown v. Com.*, 2 Leigh 769; *Smith v. Com.*, 6 Gratt. 696; *Sprouce v. Com.*, 2 Va. Cas. 375; *Moran's Case*, 9 Leigh 651; *Smith v. Com.*, 2 Va. Cas. 6; *Thompson v. Updegraff*, 3 W. Va. 629.

b. **Relations and Conditions Which Do Not Affect Competency.**—And the person who has the constitutional qualifications of a voter, though he has not been registered and has not voted, is a qualified juror. *Craft v. Com.*, 24 Gratt. 603; neither does it disqualify one from being a juror in a criminal case in a hustings court that he is treasurer or councilman of the city. *Thompson v. Com.*, 88 Va. 45, 13 S. E. Rep. 304. Nor the fact that a juror is indebted to one of the parties does not render him incompetent. *Richardson v. Plan. Bank*, 94 Va. 131, 26 S. E. Rep. 418. So a juror, in a condemnation proceeding, is not incompetent, because he is a citizen of the county, in which the land is, and is liable to the county levies,—even though the county may be interested in the suit. *B. & O. R. Co. v. P. W. & Ky. R. Co.*, 17 W. Va. 813.

And in *Puryear v. Com.*, 83 Va. 51, 1 S. E. Rep. 513 (1887), it was held not to be such an utter disqualification, that a motion in arrest of judgment would lie, where a juror, who had been convicted of felony, had served, being pardoned before the time of service.

And where a person is called to serve as a juror in a criminal case and upon being examined on his *voir dire*, first says that he is not a freeholder, but soon after the panel is complete, returns into court and says that he is mistaken, and that he has been reminded of his mistake by a friend, and that he is a freeholder, it is right for the court to permit such correction of the first mistaken statement, and to hold that the juror is a good and lawful one. *Hendrick v. Com.*, 5 Leigh 707 (1834).

Moreover, a juror, summoned for the trial of a prisoner, who fails to appear on the day to which he is summoned, but appears at another day under a rule to show cause why he shall not be fined for failing to appear, if in other respects qualified, may be put upon the panel; that not having been completed when he appears. *Wormeley v. Com.*, 10 Gratt. 658; *Hendrick v. Com.*, 5 Leigh 707.

And a person who signs a memorial to the legislature for the establishment of a ferry is not thereby rendered incompetent to act on the jury, in a case involving rights under the ferry franchise. *Somerville v. Wimbish*, 7 Gratt. 205.

C. CHALLENGES.

1. IN GENERAL.—As no challenge of a juror is allowed to the commonwealth except for cause, when such challenge is made, the cause should be shown and should be a good and legal cause for the accusation of the juror. *Montague v. Com.*, 10 Gratt. 767; *Clore's Case*, 8 Gratt. 606 (1851); Va. Code 1887, § 4022. And the decision of the court, allowing a challenge on the part of the commonwealth, or disallowing a challenge on the part of the accused, is a matter of exception on the part of the accused, which he has the right to have reviewed in the appellate court. *Montague v. Com.*, 10 Gratt. 767. So the accused person has the right to challenge a juror for cause before he is sworn, and the court is bound to judge whether the cause is sufficient or not to sustain the objection. *Com. v. Jones*, 1 Leigh 508. And, lest it may prejudice the challenge of the accused, if the indictment for felony contains different counts, which are in fact for special and distinct offences, and this appears on the face of the indictment, or on the opening of the cause, or at any time before the jury is sworn for the trial thereof, the court may quash the same. *State v. Shores*, 31 W. Va. 491, 7 S. E. Rep. 413.

And should a prisoner's objection to a juror be improperly overruled, the error is not cured by the juror's name being stricken off from the panel by the prisoner, or his not being drawn as one of the twelve who are to try the prisoner. *Dowdy v. Com.*, 9 Gratt. 727 (1852).

But to constitute a good cause of challenge to a juror, on the ground of preconceived opinion of the case formed by him, it must appear, that such preconceived opinion was a decided one. *Oslander v. Com.*, 3 Leigh 780.

And where the objection to a juror appears in the form of a principal challenge, the prisoner must prove his allegations by testimony; if it is a challenge to the favor, the prisoner appeals to the conscience of the juror on his *voir dire*. *Sprouce v. Com.*, 2 Va. Cas. 375.

2. TO THE ARRAY.—A challenge to the array of the jury must be based on some irregularity affecting the whole panel, such as a failure to select or summon them as required by the statute, or where there is partiality, relationship or default in the officer

who makes the return. *State v. Cartright*, 20 W. Va. 82.

Thus, a juror's residing at the place of the alleged commission of the offense charged, cannot be availed of by challenge to the array, but by objection to the individual juror. *Prince v. Com.*, 30 Va. 330, 15 S. E. Rep. 868; *Craft's Case*, 24 Gratt. 602; *Lawrence v. Com.*, 31 Va. 484.

So, where jurors are directed to be summoned from an adjoining county, and it appears that one of the panel has been summoned by mistake or misapprehension of the law or otherwise, from a place near to instead of remote from the vicinage, the objection, if valid, instead of being made to the array of jurors, should be made to the individual juror so summoned. *Craft v. Com.*, 24 Gratt. 603.

3. TO THE POLL.

a. For Cause.

(a) To the Favor—Juror's Privilege in Answering Questions.—In challenges to the favor, the juror is not obliged to answer any questions tending to fix infamy, or disgrace, on him; and it has been said in England, that he is not compelled to answer whether or not he has formed and delivered an opinion, because the disclosure tends to his disgrace. And it is questionable whether or not that is still the law in Virginia. But if the venireman refuses to answer that question, it is his privilege, and not the commonwealth's; and if he does not claim it, but answers it on his *voir dire*, then the rights of the prisoner are exactly the same, as if he had proved the same fact on a principal challenge. *Sprouce v. Com.*, 2 Va. Cas. 375.

Same—Challenge Erroneously Overruled.—If the court erroneously overrule a prisoner's challenge to a juror for favor, and then the prisoner peremptorily challenge the juror, the error of the court is not cured by the subsequent exclusion of the juror, although the prisoner has not exhausted his peremptory challenges, even to the last. *Lithgow v. Com.*, 2 Va. Cas. 298.

Same—Relationship Being a Cause.—And where a juror is called, who is a nephew of a person whose house was burned, though his name does not appear of record in the prosecution, such relationship is a ground of challenge to the favor. *Jaques v. Com.*, 10 Gratt. 690.

(b) Principal Challenge.

(i) When Proper—Capital Punishment—Juror's Scruples.—Where upon a trial for murder a venireman when called, states that he has conscientious scruples about the propriety of capital punishment, and is opposed to it; and being asked by the commonwealth's attorney, whether if the testimony in the cause proved the prisoner to be guilty of murder in the first degree, he would convict him of it, replies, I do not know,—he is properly challenged for cause by the attorney, and set aside by the court. *Clore's Case*, 8 Gratt. 606.

Same—Juror Was on Grand Jury Which Found Indictment.—It is also a principal cause of challenge to a juror that he was one of the grand jury which found the indictment. But if the objection is not taken until after the verdict, it will not be set aside on this ground, unless it appears from the whole case that the juror was biased against the prisoner; who therefore has not a fair and impartial trial. *Bristow v. Com.*, 15 Gratt. 634; *State v. McDonald*, 9 W. Va. 456.

So where a person whose house is burned, is a party on the record, in the prosecution of the offender, and the nephew of such person is called as

a juror, such relationship is a cause of principal challenge. *Jaques v. Com.*, 10 Gratt. 690.

Same—Determination of Juror's Fitness.—And upon a question, whether one who is called a juror in a case of felony and challenged for cause, stands indifferent or not, the general rule is, "that one who has formed a decided opinion that the prisoner is guilty or innocent, whether that opinion be formed on the evidence of witnesses whose testimony he has heard on a former trial, or conversation with witnesses, or common report, is an indifferent juror. And it is immaterial whether such opinion has been expressed or not. And if the person called as a juror has been so inconsiderate and unjust as, upon no evidence, to have prejudiced the prisoner's cause, much more is he unfit to be trusted with it as a juror." *Armistead v. Com.*, 11 Leigh 657.

Same—Right to Challenge after Juror's Election and Oath Taken.—After a juror has been elected and sworn, the court may, in its discretion, allow the prisoner to challenge him for cause, and strike him from the panel. *Tooel v. Com.*, 11 Leigh 714; *State v. Williams*, 14 W. Va. 851; *State v. Howes*, 26 W. Va. 110.

(a) **When Improper—Formation and Expression of Opinion.**—But where a venireman, when called, states "that he has not heard any of the evidence, nor has he heard any report of it from those who had heard it; but from the rumor of the neighborhood he has formed an opinion which is at the time existing on his mind, and which he would stick to, unless the evidence should turn out to be different from what rumor had reported it to be; that he has no prejudice nor partiality for or against the prisoner, and believes he could give him a fair and impartial trial according to the evidence that should be given in, "he is a competent juror, and a challenge of him for cause by the prisoner, should be overruled. *Clore's Case*, 8 Gratt. 606.

So where a person, who is called as a juror in a case of felony, says, on his *voir dire*, "that he has expressed an opinion on the circumstances as he has heard them narrated in the country; but that he has not heard any of the evidence given on the examination of the prisoner, or conversed with any of the witnesses or parties; and that he does not think the opinion so formed would have any influence on his mind in trying the case," he is an indifferent juror and his challenge for cause should be overruled. *Brown v. Com.*, 2 Leigh 769; *Oslander v. Com.*, 3 Leigh 780.

4. PEREMPTORY CHALLENGES—EFFECT OF DENYING RIGHT.—Where an accused person has the right to challenge peremptorily jurors, and this right is denied, the judgment and verdict will be set aside, and a new trial awarded. *State v. Pearis*, 35 W. Va. 320, 13 S. E. Rep. 1006. Thus it was error, where a person is called to serve as a juror in a criminal case, and is elected by the prisoner, but before he is sworn the prisoner retracts his election and asks that he may be permitted to challenge him peremptorily, for the court to refuse to permit such challenge, as the prisoner has an absolute right to challenge a juror peremptorily, at any time before he is sworn. *Hendrick v. Com.*, 5 Leigh 707.

But upon an enquiry, in pursuance of the statute, 1 Rev. (Va.) Code, ch. 171, § 16, whether a convict received into the penitentiary be the same person mentioned in the record of a former conviction, the prisoner has no right to challenge peremptorily any person called as a juror. *Brooks v. Com.*, 2 Rob. 845.

And a peremptory challenge is properly overruled which is made to a person, who being called to serve as a juror in a criminal case, first states, when being examined upon his *voir dire*, that he is not a freeholder; but soon afterwards, before the panel is completed, returns into court, and says that he is mistaken; that he has been reminded by a friend of his mistake, and that he is a freeholder. The court should permit the correction and hold him a good and lawful juror. *Hendrick v. Com.*, 5 Leigh 707.

D. OATH.—A record which shows that the jury "were sworn the truth of and upon the premises to speak," sufficiently shows that the jury were sworn in due form. *Crump v. Com.*, 98 Va. 833, 23 S. E. Rep. 760; *Brown v. Com.*, 86 Va. 466, 10 S. E. Rep. 745; *Fisher v. Duncan*, 1 H. & M. 563.

And it is not necessary, that the form of the oath administered to the jury in a felony case should be entered on the record; it is sufficient, if the record shows that the jury were duly sworn. *State v. Sutton*, 22 W. Va. 771.

Moreover, where it appears by the record in a felony case that the jury were elected, impaneled, tried and sworn as required by law, it will be presumed that the proper oath was administered to them, and especially is this the case where the prisoner and his counsel were present in court, and made no objection at the time the oath was administered. *State v. Ice*, 34 W. Va. 244, 12 S. E. Rep. 695.

And where several pleas are filed, and several issues made on them, and the record states, that the jury was sworn to try the issue joined and find a verdict, which is responsive to all the issues; and judgment is entered thereon, this court will not reverse such judgment, because of the manner, in which the record states the jury was sworn. *Sweeney v. Baker*, 13 W. Va. 160. Neither will a verdict be set aside, where the oath taken by a jury in a condemnation proceeding was not administered in exact form, if it be apparent that the jury had before them the proper matters for their consideration, and the plaintiff could have suffered no damage because of any informality in the oath. *Railroad Co. v. Foreman*, 24 W. Va. 663.

Same—Examination of a Juror after the Jury Has Been Sworn.—After a jury has been sworn in a felony case, it is not error, at the instance of the state, for the court to examine a juror on oath to ascertain whether he is a citizen of the state. *State v. Henderson*, 29 W. Va. 147, 1 S. E. Rep. 225.

X. PROVINCE OF JURY.

A. IN GENERAL.—It is the court's province to give the jury the law, and the jury's to deal with the facts. *N. & W. R. Co. v. Harman*, 83 Va. 553, 8 S. E. Rep. 251, also the court's to decide on the admissibility of testimony, and of the jury to decide on its weight. *Bogle v. Sullivan*, 1 Call 561; and even though it be contradictory, if legally admissible, it is proper to be left to the consideration of the jury. *Shanks v. Fenwick*, 2 Munf. 478. And this power of the jury to judge of the weight of the evidence, is exclusive and uncontrollable. *Ross v. Gill*, 1 Wash. 87; *Blincoe v. Berkeley*, 1 Call 405; *Whitacre v. M'Ilhaney*, 4 Munf. 310; *Moore v. Chapman*, 3 H. & M. 260; *Fisher v. Duncan*, 1 H. & M. 563; *Keel v. Herbert*, 1 Wash. 203; *Whitelaw v. Whitelaw*, 83 Va. 43, 1 S. E. Rep. 407; *Cornett v. Rhudy*, 80 Va. 710; *Richmond & Danville Ry. Co. v. Noell*, 86 Va. 19, 9 S. E. Rep. 473.

But where the jury endeavor to determine what

facts are proved, when the evidence is conflicting and the trial court concurs with the jury and refuses a new trial, the court of appeals will not disturb the verdict. *Michle v. Cochran*, 93 Va. 641, 25 S. E. Rep. 884. However, if the facts are unambiguous, and there is no room for two honest and apparently reasonable conclusions, the court should not be compelled to submit the question to the jury as one in dispute. *Johnson v. B. & O. R. Co.*, 25 W. Va. 571.

Any illegal, improper or irrelevant evidence, however unimportant to the cause, should never be confided to the jury. *Lee v. Tapscott*, 2 Wash. 276; *Brown v. May*, 1 Munf. 288; *Wheeling Bridge Co. v. W. & B. B. Co.*, 84 W. Va. 155, 11 S. E. Rep. 1009.

B. IN CRIMINAL CASES.

Jury's Power—In General.—In the trial of criminal cases, especially, the court should leave to the jury, exclusively, the consideration of the facts, and no remarks which have a tendency to intimate the bias of the court, or the character or weight of the testimony should be indulged in by it. *Dejarnette v. Com.*, 75 Va. 867; *McWhirt's Case*, 3 Gratt. 594. But in no criminal case is the jury the judge of the law. *Brown v. Com.*, 86 Va. 466, 10 S. E. Rep. 745.

Thus the question whether a particular homicide is murder in the first or second degree is one of fact for the jury; and where a jury has found the case to be one of murder in the first degree, as in other cases, the court should not disturb the verdict, unless the finding of murder in the first degree be plainly and manifestly contrary to or without sufficient evidence. *State v. Welch*, 86 W. Va. 690, 15 S. E. Rep. 419.

So the legislature has given to the jury the power of fixing the time for which the prisoner is to be confined in the penitentiary. And any exercise of power by the courts to control or disturb the verdict of jurors in this respect, would be one of great responsibility; and which a court can never be disposed to usurp. *McWhirt's Case*, 3 Gratt. 594.

Same—Exclusion of Evidence—Insanity Cases.—And it is error to exclude from the jury evidence of the prisoner's insanity at the time of the commission of the offense, on the plea of not guilty. *Gruber v. State*, 3 W. Va. 699.

Same—Indictment—Idem Sonans.—So the question whether a name in an indictment for rape is *idem sonans* with the true name of the person upon whom the offense was committed, is a question for the jury, and not for the court. *Taylor v. Com.*, 20 Gratt. 825.

Same—Question of Recent Possession.—And what is such a recent possession as will raise a presumption against a prisoner, in the meaning of the rule, is a question for the jury, and depends upon the nature of the property, and other circumstances of the particular case. *Price v. Com.*, 21 Gratt. 846.

Same—Inducement for Shooting—Whether Previous Grudge or Immediate Provocation.—Likewise, it is for the jury to determine, where there has been a previous grudge and immediate provocation, whether the shooting was induced by the previous grudge or the immediate provocation; and it is not for the appellate court to reverse their judgment, when the judge who tried the case declines to set it aside. *Read v. Com.*, 22 Gratt. 924.

Same—Question of Presence at Scene of Crime.—And where several persons murder a merchant and rob his store, at night and in the country, and it is proved that the prisoner went with them a short distance from the store, where he remained while

the murder and robbery were committed, and that the goods taken were brought to where he was; and some of them were afterwards found in the possession of his wife; it is for the jury to decide upon the evidence whether the prisoner was strictly present, aiding and abetting in the murder committed. And if they find the prisoner guilty, the appellate court will not set aside the verdict, and grant him a new trial. *Trim v. Com.*, 18 Gratt. 983.

C. IN ACTIONS.

Principles Affecting the Province of a Jury—In General.—The parties cannot be supposed to come to trial, prepared to give evidence as to any matter, except that put in issue; and no evidence not tending to prove the very matter in issue, can be properly allowed to go to the jury. *Garrard v. Henry*, 6 Rand. 114; and upon a motion for a new trial in a condemnation case, as in any other case, evidence that is not relevant to any issue before the jury will not be considered by the court. *B. & O. R. Co. v. P. W. & Ky. R. Co.*, 17 W. Va. 813.

And although a jury may find, upon the trial of the general issue, or any other, against an estoppel operating in respect to a matter involved in the issue, yet it is perfectly well settled, that they can in no case find, to any effectual purpose any matter, not within the issue which they are charged to try. *Garrard v. Henry*, 6 Rand. 114.

But it is for the jury to ascertain the true intention of the parties as embraced in a contract. And for that purpose they are to consider the whole contract; not any one provision only, but all its provisions; not the words merely in which they are expressed, but their object and purpose, as disclosed by the language, by the subject-matter, and the condition and relation of the parties; and thus to determine the intention of the parties. *Millan v. Kephart*, 18 Gratt. 1.

So negligence being in most cases a mixed question of law and fact, it is generally a question for the determination of the jury upon all the evidence before it bearing on the subject, what particular facts constitute negligence, rather than a question of law for the determination of the court. *Johnson v. B. & O. R. Co.*, 25 W. Va. 571.

Same—Allowance of Damages—Interest on Damages.—A jury may assess damages in a writ of right. *Shaw v. Clements*, 1 Call 429.

And in estimating permanent damages relative to property, the jury may inquire into the value of the property, and, as a guide or assistance in so doing, it is not improper to hear evidence of its rental value or of an offer to purchase, which the plaintiff has refused. *Fox v. B. & O. R. Co.*, 84 W. Va. 466, 12 S. E. Rep. 757.

And if on an inquiry of damages the jury find that a certain number of acres of land will be overflowed, "together with all other damages to the value of a specified sum," it is special enough, and will not bar an action for any damages not foreseen and estimated by them. *Coleman v. Moody*, 4 H. & M. 1.

And where upon the trial of an issue to ascertain the amount of damages sustained by a ferry franchise by the erection and operation of a bridge, the jury are to regard the franchise as permanent, and in estimating the damage will not take into consideration the fact that the legislature may repeal the law creating the exclusive privilege of transporting persons and things across the river within half a mile of the ferry. *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 224.

So the question of the amount of damages is one

for the jury. *Farish v. Reigle*, 11 Gratt. 697; *Peshine v. Shepperson*, 17 Gratt. 472; *Benn v. Hatcher*, 81 Va. 25; *Va. Mid. R. Co. v. White*, 84 Va. 498, 5 S. E. Rep. 573; *Ward v. White*, 86 Va. 212, 9 S. E. Rep. 1021; *Bertha Zinc Co. v. Black*, 88 Va. 308, 13 S. E. Rep. 452; *N. & W. R. Co. v. Anderson*, 90 Va. 1, 17 S. E. Rep. 757; *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. Rep. 890; *Richmond Ry. & E. Co. v. Garthright*, 92 Va. 637, 24 S. E. Rep. 267.

And in allowing damages in an action for assault and battery, the jury may allow not only such damages as they think necessary to compensate the plaintiff, but also such as will operate as a punishment to the defendant, and tend to deter him, and others from similar outrages. *Borland v. Barrett*, 76 Va. 128.

And the supreme court of appeals will not reverse the judgment of a circuit court, refusing to grant a new trial in a libel suit, because the damages are excessive, unless they are so enormous, as to furnish evidence of partiality, passion, corruption or prejudice on the part of the jury. *Sweeney v. Baker*, 13 W. Va. 160.

But it is error for a jury to give interest on the damages; and for this cause the judgment should be reversed, and judgment entered for the damages assessed without interest. *Brugh v. Shanks*, 5 Leigh 598.

Same—Question of Fraud—Alteration—And it is as competent for a jury to investigate fraud as a chancellor; but the evidence to sustain actual fraud must be the same, in substance and effect, in one form that it is in the other. *B. & O. R. Co. v. Laferty*, 2 W. Va. 105.

Thus, in an action of ejectment, where a deed alleged to be voluntary and fraudulent forms a part of the plaintiff's chain of title, it is the province of the jury to determine, under proper instructions from the court, whether the deed is voluntary and fraudulent or not. *Taylor v. Mallory*, 96 Va. 18, 30 S. E. Rep. 472.

Also, where there is any suspicion of unfairness upon the face of an instrument, the time when the alteration was made, by whom, and with what intent, is a question of fact to be decided by a jury, and consequently cannot be inferred by the court upon a statement of facts agreed. *Ramsey v. McCue*, 21 Gratt. 349.

Same—Interest—Remittance and Allowance.—Delivering the opinion in *Crenshaw v. Seigfried*, 24 Gratt. 272, JUDGE BROOKS declared that, "in contracts for the payment of a certain sum of money, interest on the principal sum is a legal incident of the debt, and the right to it is founded on the presumed intentions of the parties; and wherever there is a contract, express or implied, for the payment of legal interest, the obligation of the contract extends, as well to the payment of the interest as it does to the payment of the principal sum, and neither the courts nor the juries ever had the arbitrary power to dispense with the performance of such contract, either in whole or in part."

However, prior to the Code of 1849, ch. 177, § 14, interest could not be allowed by a jury in an ejectment upon the profits; and the jury having allowed such interest it was mere surplusage, and judgment would only be given for the principal sum and interest from the date of the verdict. *Hepburn v. Dundas*, 13 Gratt. 219. But see Va. Code 1887, § 3390, leaving the allowance of interest in actions founded on contract to the discretion of the jury.

Nevertheless, the act of the general assembly

approved April 2, 1873, entitled "An act to amend and re-enact § 14, ch. 187, of the Va. Code of 1860, in relation to interest," so far as it confers upon courts and juries, in the suits therein mentioned, power to remit interest, as therein provided on contracts entered into prior to April 10, 1865, which said courts and juries did not have under the laws in force at the time such contracts were entered into, is repugnant to the constitution of the United States, and of this state, and is, so far, null and void. *Roberts v. Cocke*, 28 Gratt. 207.

Same—Time.—And what is a reasonable time is a question for the jury. *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. Rep. 1015. And time being an element for the jury's consideration in determining the competency of a grantor to make a deed, the point of time to be looked at by the jury, is the time at which the deed was executed. *Anderson v. Cranmer*, 11 W. Va. 562.

Same—Condemnation Proceedings.—So in a condemnation proceeding the jury (or court) may find, that a portion of the land sought to be condemned may be taken, and the residue may not. *B. & O. R. Co. v. P. W. & Ky. R. Co.*, 17 W. Va. 813.

Same—Civil Actions against Officers—Arrest.—But in civil actions against judicial officers, acting within their jurisdiction, it is not for the jury to decide upon the question of the reasonableness of the grounds of the arrest. *Johnston v. Moorman*, 80 Va. 131.

Same—Violation of Sunday Law—West Virginia Statute—Question of "Necessity".—Under W. Va. Code 1899, § 16, ch. 149, relating to the violation of the Sabbath day, it is within the province of the jury, in a prosecution for the violation of the statute, to determine upon the facts and circumstances of the case, whether the work charged to have been done on Sunday, is or is not, a work of "necessity," and when the jury has found that it is not, the appellate court will not disturb the verdict, unless the facts proven do not warrant such finding. *State v. Knight*, 29 W. Va. 340, 1 S. E. Rep. 569.

XI. INSTRUCTIONS TO AND CHARGING OF THE JURY.

(See monographic *note* on "Instructions" appended to *Womack v. Circle*, 29 Gratt. 192.)

A. PRINCIPLES REGULATING THE ALLOWANCE OR REFUSAL OF INSTRUCTIONS IN GENERAL.—A court, though asked, is not bound to instruct a jury generally as to the law of the case. Instructions as to specific law points ought to be asked. Yet a court may, without request, if it thinks the interest of justice and a fair trial call for it, instruct a jury in a matter of law, the instruction being sound in law and relevant to the evidence; but it is not bound to do so unless asked; but, if asked, to give such proper specific instructions, it must do so. *State v. Cobbs*, 40 W. Va. 718, 23 S. E. Rep. 310. Neither is it necessary for the court, after correctly instructing a jury as to how witnesses may be impeached, to say to the jury, that "it is neglect of a juror's duty to arbitrarily disregard the evidence of a witness." *State v. Sutfin*, 23 W. Va. 771. And where an instruction is asked which is equivocal in its meaning,—which upon one construction is correct, but upon another incorrect, it should not be refused if by so doing the jury may be misled; but it should be given with an explanation giving it the meaning which will make it proper. *B. & O. R. Co. v. Polly*, 14 Gratt. 448. But where an instruction is calcu-

lated to mislead it should not be given. *State v. Greer*, 23 W. Va. 800; *State v. Sutfin*, 23 W. Va. 771; *State v. Cain*, 20 W. Va. 681.

Neither should an instruction be given that refers to the facts, upon which it is predicated, as "under the circumstances shown in evidence." It leaves the jury to ascertain what the circumstances are, and they may understand the circumstances in such a way as that the law propounded in the instruction would not be applicable. *State v. Greer*, 23 W. Va. 801; nor should one be given which does not correctly expound the law. *Borland v. Barrett*, 76 Va. 128; nor those which are inconsistent. *McKelvey v. C. & O. Ry. Co.*, 35 W. Va. 500, 14 S. E. Rep. 261. And it is manifestly improper to instruct a jury as to the weight or credibility of the evidence. *State v. Greer*, 22 W. Va. 800; *State v. Sutfin*, 23 W. Va. 771. Moreover, where an instruction is given which is bad, it is not cured by a good one, though they be given on the motion of the adverse party. The bad instruction should properly be withdrawn. *McKelvey v. C. & O. Ry. Co.*, 35 W. Va. 500, 14 S. E. Rep. 261.

But it is not error for the court to refuse at the trial to instruct the jury that "testimony concerning oral declarations of a party, whether threats, admissions or otherwise, is regarded by the law as unreliable and unsatisfactory; and the jury should be cautious how they give credence to such testimony." *Snodgrass v. Com.*, 89 Va. 679, 17 S. E. Rep. 238; *McKelvey v. C. & O. Ry. Co.*, 35 W. Va. 500, 14 S. E. Rep. 261.

Yet the court cannot be called on to instruct the jury to find a verdict for the defendants, although some of the evidence is written testimony. *Martin v. Stover*, 2 Call 514.

However, an instruction, which assumes an important and material fact as true, which is not considered in the case, should not be given to the jury. *State v. Robinson*, 20 W. Va. 713.

So an instruction to the jury, based upon a state of facts wholly unsupported by the evidence adduced upon the trial is properly rejected, although it may correctly propound the law upon the assumed statement of facts. *State v. Poindexter*, 23 W. Va. 806.

But where there is sufficient evidence to support the hypothesis of an instruction, and it correctly propounds the law, and is otherwise unobjectionable, it is error to refuse it; but, if the court sees plainly from the record that the party offering the instruction has not been injured by its rejection the verdict of the jury will not be disturbed on account of the court's refusal to grant it. *Wheeling Bridge Co. v. Wheeling & Belmont Bridge Co.*, 34 W. Va. 155, 11 S. E. Rep. 1009; *Richardson v. Com.*, 76 Va. 1007.

And, if a party intends to ask the court to instruct the jury that the evidence is wholly insufficient, and to direct them to find a verdict accordingly, such instruction must be drawn with that end in view, and such ground must be explicitly stated. *Peninsular Land Transp. & Manfg. Co. v. Franklin Ins. Co.*, 35 W. Va. 666, 14 S. E. Rep. 238.

But a party ought not to be heard to complain, that the court would not stultify itself by giving, at his instance, instructions which contradict each other, and thus confuse rather than enlighten the jury. *B. & O. R. Co. v. Lafferty*, 2 W. Va. 104.

B. CHARGING AND INSTRUCTING IN CRIMINAL CASES.

1. IN GENERAL—CHARGING.—The charge to the jury should be given by the clerk under the direction of

the court, but if it appears that they were fully informed of their duties, and no injury resulted to the accused, the verdict will not be set aside merely because a part of the charge was given by the clerk, part by the court, and part by the attorney for the commonwealth. *Porterfield v. Com.*, 91 Va. 801, 22 S. E. Rep. 352. But it is not error, that the clerk in charging the jury, fails to include in his enumeration of the various species of homicide, involuntary manslaughter. *M'Whirt's Case*, 3 Gratt. 594.

Same—Instructing.—A court will not consider an exception to the action of a trial court in giving instructions of its own in lieu of those offered by a party, unless the exception points out the error in the action of the trial court. *Hite v. Com.*, 96 Va. 489, 31 S. E. Rep. 895.

2. ERRONEOUS INSTRUCTIONS—ASSAULT AND BATTERY—VINDICTIVE DAMAGES.—An instruction which asserts that if defendant, in assaulting plaintiff, had neither malice nor deliberate purpose to injure, the measure of damages is compensatory, and not vindictive, is erroneous. *Borland v. Barrett*, 76 Va. 128.

Same—Unlawful Shooting with Intent to Kill.—So it is error, on the trial of an accused, upon an indictment for maliciously or unlawfully shooting a person "with intent to disfigure, disable and kill" him, to instruct the jury, that if they believe the shooting was done "with intent to maim, disfigure, disable or kill him, or to cause him bodily injury," they must find a verdict of guilty; but, it is not error for the court to instruct the jury on such an indictment, that under § 22, ch. 159, of the Code of 1881, they can acquit of the felony and find the prisoner guilty of the attempt to commit such felony. *State v. Meadows*, 18 W. Va. 659.

3. INSTRUCTIONS PROPERLY ALLOWED.—But upon the trial of the issue on the plea of *autrefois acquit*, an instruction to the jury, that if they believe, etc., that the house named in the indictment for the burning of which the prisoner was arraigned and tried at a previous term of the court, is not the same house, nor the same burning charged in the indictment upon which he now stands arraigned, then they must find against the prisoner on the issue joined, is correct. *Page v. Com.*, 27 Gratt. 954.

So an instruction is correct, which informs the jury that the prisoner cannot shield himself under the plea of self-defence, if he had reason to believe and did believe, that the assaulting party only intended to commit a trespass, and did not intend to take life or inflict great bodily harm. *State v. Greer*, 22 W. Va. 802.

Moreover, it is not error for a court to omit to instruct a jury that it may punish murder in the first degree with either death or confinement in the penitentiary, unless asked to do so, and it is error to refuse to do so when asked, though not asked until after the jury has announced its verdict, but before its discharge, as the law does not fix any time for instructions. The court may fix it by rule. *State v. Cobbs*, 40 W. Va. 718, 22 S. E. Rep. 310.

And it was held in *Honesty v. Com.*, 81 Va. 296, not to be error to give an instruction to the jury that "to render provocation a defence of murder in the first degree, it must be shown that the prisoner at the time of the fatal blow was deprived of the power of self-control by provocation he had received, and that in deciding whether this was the case, all the circumstances must be considered." *Poindexter v. Com.*, 33 Gratt. 766.

Furthermore, it is not error for the court to refuse to instruct the jury that, if they believe

from the evidence that the prisoner intended to commit a felony, but before committing it, voluntarily abandoned it, they must find him not guilty; and to instruct them that, on an indictment for felony, the prisoner might be found guilty of an attempt to commit a felony. *Glover v. Com.*, 86 Va. 382, 10 S. E. Rep. 420.

C. CIVIL CASES.

1. **IN GENERAL.**—An instruction is not considered as abstract where the pleadings show that it might apply to the case. *Shelton v. Cocke*, 3 Munf. 191; *Johnson v. Moorman*, 80 Va. 131.

2. **INSTRUCTIONS WHICH ARE ERRONEOUS—RECOVERY FOR ITEMS OMITTED IN A SETTLEMENT—FRAUD.**—An instruction is erroneous which tells the jury, that, in order to recover for items omitted in a settlement, the plaintiff must not only prove that there was such omission, but that it was fraudulently procured, or made unintentionally and through mistake, and that in the absence of any evidence of the circumstances attending the settlement, the jury cannot infer the existence of such fraud or mistake; and especially is it so, when there is evidence in the case tending to show that such omission was caused by the suppression of facts on the part of the defendant which it was his duty to disclose. *Wheeling v. Black*, 26 W. Va. 268.

Same—Presumption When Erroneous Instruction Is Given.—And where an erroneous instruction has been given to the jury, the presumption is that the exceptor was prejudiced thereby; and the judgment will be reversed for this cause, unless it clearly appears from the record of the case, that the exceptor could not have been prejudiced by the giving of such erroneous instruction, in which case the judgment will not be reversed for such cause. *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 224.

3. **INSTRUCTIONS PROPERLY ALLOWED—JURY TOLD THAT THEY MUST NOT ASSESS DAMAGES.**—Where after a demurrer to evidence by a defendant, the trial court instructs the jury that they are not to enquire whether or not the plaintiff is entitled to any damages; that the demurrer withdraws that question from them; that they can only conditionally assess the damages sustained by the plaintiff, and in so doing they should consider the evidence only as bearing on the measure of damages; and that defendant's counsel will be permitted to argue before them upon all the evidence in mitigation, but not in bar, of damages, is strictly in accordance with the practice in Virginia, and therefore correct. *N. & W. R. Co. v. Harman*, 83 Va. 558, 8 S. E. Rep. 251.

Same—Possession under Statute—Adverse User.—And an instruction to the jury that the possession which would avail the defendant under the statute of limitations must be an actual and continued adversary possession of the land in controversy, or some part thereof, is strictly correct, and there is no ground for objection. *Kolner v. Rankin*, 11 Gratt. 420.

Same—Recovery for Damages to Franchise—Showing Ownership.—So, upon the trial of an issue *quantum damnificatus*, to ascertain the damage to a ferry-franchise by the construction and operation of a bridge, for the purpose of ascertaining such damage, it is proper for the jury to consider the revenues derived from the exercise of a ferry-franchise, while the ferry proprietor was landing his boat on the land of another, rather than on his own landings, even though he was a trespasser, while so landing his ferry-boats; and it is not error for the court to refuse to instruct the jury, that the plaintiff is

bound to show his ownership of the property damaged at the time of the trial, when upon a former appeal his ownership of the ferry-franchise was settled in his favor. *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223.

Same—Viewing of Premises by Jury—Impressions to Be Considered.—Neither, when the jury have been properly permitted to view the premises in dispute, is it improper to refuse a request which requires the court to instruct the jury that "they are not to take into consideration any thing or any impression they saw at the view of the premises, in determining the rights of the parties to the suit." *Fox v. B. & O. R. Co.*, 34 W. Va. 466, 12 S. E. Rep. 758.

XII. VERDICT.

(See monographic note on "Verdict." See also, *post*, "New Trial.")

A. IN GENERAL.

Trial before Eleven Jurors—Consent of Parties.—A verdict is lawful where the record shows that in open court the parties consented to a trial by eleven instead of twelve jurors. *Roach v. Blakey*, 89 Va. 767, 17 S. E. Rep. 228.

Same—Inquiry as to Insanity of Accused.—If, in a prosecution, the jury finds the accused to be insane at the time of the trial, it shall then inquire as to his sanity at the time of committing the offence. *Gruber v. State*, 3 W. Va. 699.

B. SUFFICIENCY OF VERDICT.

Issue in Plea of "Fully Administered"—Finding.—Upon issue joined on the plea of "fully administered," a verdict finding, in general terms, "the issue for the plaintiff, and that assets equal to the claim of the plaintiff came to the hands of the defendant," is uncertain and insufficient. It should set forth, with sufficient certainty, what portion of the assets, which came to the defendant's hands, was unadministered at the time of suing out the plaintiff's writ. *Rogers v. Chandler*, 3 Munf. 65. And the verdict should also ascertain the amount of the assets in the hands of the defendant, at the commencement of the suit, and at the time of the plea pleaded; and if the verdict merely finds that assets sufficient to pay the plaintiff's demand, "have come" to the defendant's hands, without saying when, it is erroneous. *Gardner v. Vidal*, 6 Rand. 106.

Thus, where in an action of debt on bond against an administrator, issues are joined on pleas of "payment" and "fully administered," and there is a verdict for the plaintiff on the first issue, and on the last, "that assets more than sufficient to pay the debt, etc., came to defendant's hands to be administered," the verdict on the last issue is insufficient to found judgment *de bonis testatoris*. *Sturdivant v. Raines*, 1 Leigh 481.

Same—Verdict Not Responsive to Issues.—Where issues are joined on the plea of payment, and fully administered, if the jury find "for the defendant, he having fully administered all the assets which came to his hands," the verdict is defective in not being responsive to the issue joined on the plea of payment. And in such case the judgment will be reversed by the appellate court, although the objection is not taken in the court below; and a *renove facias de novo* will be directed as to both the issues. *Brown v. Hendersons*, 4 Munf. 492.

But if the jury be sworn to try the issue, and several issues have been joined, and the verdict of the jury is responsive to them all, the appellate

court will disregard such irregularity, and will consider all the issues as decided by the verdict. *First Nat. Bank v. Kimberlands*, 16 W. Va. 555.

However, if in a declaration for several articles of chattel property laying separate values, the jury find a joint value, it is error; and as to that, a *venire facias de novo* will be awarded under the act of assembly, in order to ascertain the separate values. *Higgenbotham v. Rucker*, 2 Call 814; *Cornwell v. Truss*, 2 Munf. 195.

Same—Surplusage in Verdict.—And where upon an indictment under the act concerning malicious and unlawful shooting, etc. (W. Va. Code 1869, ch. 144, § 9), which charges that the prisoner, "with a certain pistol or a revolver, etc., feloniously and with his malice aforethought did shoot one Lewis Dempsey, Jr., with intent," etc., the jury finds the prisoner "guilty of unlawful shooting, with intent," etc., without saying whom he shot, and fixes the term of his imprisonment in the penitentiary at one year, it is not error for the court to overrule a motion to quash; and to overrule a demurrer to the indictment, because, although it alleges the weapon in the alternative, as a "pistol or a revolver," the expression "or revolver" is mere surplusage, and should be rejected, and therefore does not have to be proved. *State v. Newsom*, 18 W. Va. 859. And though the jury have no authority to fix the term of imprisonment, yet such fixing of the term by the jury is mere surplusage; and the verdict of guilty is good, and the imprisonment is the act of the court. *State v. Greer*, 22 W. Va. 808.

Same—Indictment for Forgery—Two Counts—Verdict Uncertain.—And where an indictment charges in one count the forgery of a note, and in another count the forgery of an endorsement upon the note, and the jury find the prisoner not guilty on the first count; and then say, "On the second count, viz.: that of uttering a negotiable note knowing it to be forged, we find the prisoner guilty, and affix the term of his imprisonment for the term of two years," the verdict upon the second count is too uncertain to authorize any judgment upon it; and a *venire facias de novo* on that count should be awarded. *Cocke v. Com.*, 13 Gratt. 750.

Same—Certainty of Description.—The verdict of a jury ascertaining that a certain sum will be a sufficient compensation for "so much of the real estate of the owner, mentioned and described in the within application as is proposed to be taken," describes the land with sufficient certainty. *Ohio River R. Co. v. Harness*, 24 W. Va. 511.

Same—When Verdict Should Assess a Fine.—An information for retailing merchandise without a license, concludes by claiming a penalty imposed by a statute. Upon the trial, if the jury find the defendant guilty, they should assess the fine. And if they merely find the defendant guilty, no judgment can be entered on the verdict; but it should be set aside by the court, and a new trial awarded. *Com. v. Scott*, 5 Gratt. 608.

Verdict Rendered in Absence of Judge—Effect.—Parties cannot by their consent authorize a jury to render their verdict to the clerk in the absence of the judge, and be discharged. And if a verdict is thus rendered, and the jury discharged, it is no verdict. *B. & O. R. Co. v. Polly*, 14 Gratt. 449.

C. SPECIAL VERDICT.—A special verdict may be found in a writ of right. *Shaw v. Clements*, 1 Call 429.

But where the court refuses to compel the attorney for the commonwealth to join in a demurrer

to evidence tendered by the defendant, it is not required *ex officio* to direct the jury to find a special verdict. *Doss v. Com.*, 1 Gratt. 557.

And a special verdict is defective and insufficient,—upon the information for intrusion on land of the commonwealth, where defendant sets up title in himself,—in not finding that the inquisition of escheat under which the commonwealth claims, was duly returned, in not finding that the possession was vacant at the time of the inquisition, or documents by which the facts could be ascertained. And in not finding the title set up by the defendant with certainty and precision, it is too imperfect to enable the court to give judgment for either party; and therefore, the verdict must be set aside and a *venire de novo* directed. *Com. v. Hite*, 6 Leigh 588, 29 Am. Dec. 226.

D. AMENDING VERDICT.—A court may, for good reason, return a jury to its room to further consider and amend or alter its verdict, at any time before a verdict is received by the court and the jury discharged. *State v. Cobbs*, 40 W. Va. 718, 22 S. E. Rep. 810.

Thus at a trial upon an indictment it is proper to allow the jury to retire and amend their verdict. *Fry's Case*, 83 Va. 334.

E. RE-TRIAL AND EXAMINATION AFTER VERDICT.—According to the constitution of West Virginia, the judgment of a justice, rendered upon the verdict of a jury in an action in tort or for damages, whether defense was made thereto or not, cannot be tried *de novo* by the circuit court, and an appeal allowed in such case will be dismissed as improvidently awarded. *Barker v. Walton*, 31 W. Va. 468, 7 S. E. Rep. 452.

Thus it was held in *Hall v. Wadsworth*, 30 W. Va. 55, 3 S. E. Rep. 29, that, "No fact tried in a civil action by a juror of six persons, before a justice can be re-tried *de novo* by the circuit court, or otherwise, than according to the rules of the common law." *Ensign Mfg. Co. v. McGinnis*, 30 W. Va. 532, 4 S. E. Rep. 782. But under the provisions of ch. 110, W. Va. Code 1897, the circuit court has jurisdiction to review the judgment of a justice rendered upon the verdict of a jury by writ of *certiorari*. *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. Rep. 298.

However, where the accounts of a guardian are, under the provisions of ch. 234, Acts 1872-73, settled before a commissioner of the county court, who reports the balance due from the guardian to his ward, and the guardian excepts to the report, and the questions are submitted by the court to a jury, which finds against the exceptor; and the court approves the finding, confirms the report, and orders the same to be recorded by its clerk, the verdict of the jury in such proceedings does not come within the purview and protection of § 18, art. 8, of the Constitution of W. Va., providing relative to the re-examination of facts found by a jury. *Haught v. Parks*, 30 W. Va. 243, 4 S. E. Rep. 276.

F. IMPEACHMENT OF VERDICT BY JURORS.—As a general rule the testimony of jurors is inadmissible to impeach their verdict, especially on the ground of their own misconduct. *Bull's Case*, 14 Gratt. 618; *Read's Case*, 22 Gratt. 924; *State v. Cobbs*, 40 W. Va. 718, 22 S. E. Rep. 810. The exceptions to this general rule are, and should be, rare. *Moses v. Cromwell*, 78 Va. 671; *Howard v. McCall*, 21 Gratt. 205. And in *Steptoe v. Flood*, 31 Gratt. 323, it is said that the restriction upon exceptions to the general rule applies especially in an issue out of chancery.

Thus as held in *Harnsbarger v. Kinney*, 6 Gratt. 287, a verdict which is fair in all respects and in the judgment of the court which tried the cause, in conformity with the evidence, will not be set aside upon the evidence of a few jurors that they had been induced to agree to the verdict under a misapprehension of an instruction given by the court. And this especially where, under the circumstances, there may be reason to question its accuracy.

And in *Kolner v. Rankin*, 11 Gratt. 481, JUDGE LEE states the law thus: "I will remark that while affidavits of jurors will generally be received in support of their verdict, they will not readily be received to invalidate it. The cases in the books upon this subject are numerous; and it is true in the multitude of decisions there will appear to be some contrariety; and quite a number of cases are to be found in which such affidavits have been received for the purpose of impeaching verdicts, and new trials have been sometimes granted. But the leaning of the courts of most approved authority is against the practice of grounding such motions upon them; and a disposition has been manifested lately to restrict the class of cases in which, upon such affidavits, new trials will be allowed." The law was declared even more strongly in *Elam v. Com'l Bank*, 86 Va. 92, 9 S. E. Rep. 498, where the court said that it is an established doctrine that jurors are inadmissible to impeach their verdict.

However, there are different combinations of circumstances, under which the testimony of jurors may be received to prove that they rendered their verdict under a mistake as to its legal effect. *Moffett v. Bowman*, 6 Gratt. 219.

But the affidavits or declarations of jurors showing that they acted on evidence other than that adduced before them at the trial, cannot be used to impeach the verdict. *Taylor v. Com.*, 90 Va. 109, 17 S. E. Rep. 812.

Neither will the affidavit of jurors be received to the effect that they were ignorant of the law that it is with a jury to say whether murder in the first degree shall be punished with death or confinement in the penitentiary. *State v. Cobbs*, 40 W. Va. 718, 22 S. E. Rep. 810.

G. SETTING ASIDE THE VERDICT.

1. GROUNDS SUFFICIENT TO SET ASIDE THE VERDICT.

a. In General—Statutory Provisions.—The Va. Code 1887, § 8156, provides that in civil cases no irregularity in any writ of *venire facias* shall be sufficient to set aside a verdict unless the party making the objection was injured thereby, or unless the objection was made before the swearing of the jury. By Acts Jan. 1888, this provision is made to apply to felony cases; but this does not, however, apply where the record fails to show any *venire* in a felony case, and the omission of the writ is a fatal error. *Lewis v. Com. (Va.)*, 12 S. E. Rep. 1050 (1891).

Felony Cases—Evidence Read in Prisoner's Absence.—So upon the trial for felony it is the right of the prisoner, a right which he cannot waive, to be present from the arraignment to the verdict. And if the evidence of a witness on the trial, which has been reduced to writing, or any part of it, is read to the jury in the absence of the prisoner, it is error, for which the verdict will be set aside. *Jackson v. Com.*, 19 Gratt. 656; *State v. Greer*, 22 W. Va. 801.

Issue Quantum Damnicatus—Motion to Set Verdict Aside—Rule Applicable.—And upon the trial of an issue *quantum damnicatus*, as to a motion to set aside the verdict and grant a new trial the same rule

applies, as in an issue out of chancery, or in an issue *devisavit vel non*; and that rule is, that where the evidence is certified and not the facts proven, the appellate court will not reverse the decree, set aside the verdict and grant a new trial of the issue, unless by rejecting all the parol evidence of the exceptor in conflict with the evidence of the other party, and giving full faith and credit to that of the adverse party the judgment of the court in overruling the motion for a new trial still appears to be wrong. *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 234.

And when in any case, a verdict is set aside, as to one issue, it must be set aside *in toto*. *Gardner v. Vidal*, 6 Rand. 106.

b. Setting Aside Verdict When Contrary to the Evidence.—Only in the case of a plain deviation from right and justice, should the verdict be set aside, and a new trial granted, when asked on the ground that the verdict is contrary to the evidence. *State v. Maier*, 36 W. Va. 757, 15 S. E. Rep. 991.

But where a verdict is not only plainly contrary to the evidence, but is without evidence, it must be set aside. *Hite's Case*, 88 Va. 882, 14 S. E. Rep. 696.

c. Previous Opinion Formed by Juror—Conduct—Effect.—But to set aside a verdict because of an opinion entertained by a juror before he was sworn, it ought to appear that such opinion was not merely unsubstantial and hypothetical, but such as would have excluded him from the jury had it been known before he was sworn. *State v. Harrison*, 36 W. Va. 729, 15 S. E. Rep. 982.

However, if after the jury has been sworn, facts are established which show that improper influences were brought to bear upon it, or that its members, or any of them, were guilty of improper conduct, such as might have resulted prejudicially to the losing party, a presumption arises against the purity of the verdict; and unless there is testimony which shows the verdict was not affected by such influences or conduct, it will be set aside; and the burden of producing such testimony is upon the party claiming the right to keep the verdict. *Flesher v. Hale*, 23 W. Va. 44.

Nevertheless, if some of the jury are persuaded by others, that if a majority agree to the verdict, it must prevail, and they do not object; and this is proved by many of the jurors, a new trial ought to be granted; and a court of equity may set the verdict aside, and award a new trial, where the objection to the verdict comes to the knowledge of the party too late to enable him to move for a new trial. *Cochran v. Street*, 1 Wash. 79.

d. Verdict Fails to Prescribe Term of Imprisonment—Jury Discharged and Recalled—Effect.—And if on a trial for grand larceny, the jury find the prisoner guilty but the verdict ascertains no term of imprisonment and the court tells the jurors that they are discharged; but they are called back instantly and before any of them leave the courthouse, except one, who goes a short distance accompanied by a deputy sheriff, and they then ascertain the term of imprisonment, the verdict must be set aside, and a new trial awarded. *Mills v. Com.*, 7 Leigh 751.

e. Suit on Bond Jointly Executed—Abatement—Verdict against Survivor.—Also, if a suit is brought against two persons, on a bond executed by both, and it abates as to one by his death, a verdict finding only that the surviving defendant has not paid the debt, is bad, and will be set aside. *Triplett v. Micou*, 1 Rand. 269.

2. GROUNDS INSUFFICIENT FOR SETTING THE VERDICT ASIDE.

a. In General—Verdict Contrary to the Evidence—Evidence Conflicting.—But a court will not set aside a verdict on the ground that it is contrary to the evidence, unless the evidence be plainly insufficient to warrant the verdict; and the court will only set aside a verdict as contrary to the evidence where the jury has plainly decided against the evidence, or without evidence. *State v. Smith*, 24 W. Va. 815.

And where the evidence is conflicting, the verdict of the jury and the judgment of the court thereon will not be disturbed. *Burch v. Hylton*, 89 Va. 441, 16 S. E. Rep. 842.

Questions Propounded by the Court—Counsel's Right to Be Apprised—Effect of Denial.—And though counsel who are engaged in a case should, according to the better practice, be apprised of any question propounded by the jury to the court that may affect the case before an answer is returned by the court, yet a failure to apprise them will not vitiate the verdict if the answer is correct. *Buntin v. Danville*, 93 Va. 200, 24 S. E. Rep. 830.

Failure to Make up Issue on Plea of Set Off.—So, if a case is tried by a jury on issues joined, and a plea of set-off, not in writing, has been entered on the record as filed, in which there does not appear to be any replication, and no bill of particulars was filed with the plea of set-off at any time before the trial, the failure to make up the issue on the plea of set-off would be no ground for setting aside the verdict, as no evidence could have been offered on such plea in the absence of a bill of particulars. *First National Bank of Wellsburg v. Kimberlands*, 16 W. Va. 558.

b. Conduct of Sheriff—Betting on Verdict.—Neither will a verdict in a misdemeanor case be set aside, because the sheriff of the county had, after the jury was sworn, made a bet that the jury would find the defendant guilty. *State v. Howes*, 26 W. Va. 110.

c. Objections to Jurors.

(a) In General.—It is the settled law of this state, in both criminal and civil trials, that the verdict of a jury will not be set aside for objections to jurors, on grounds which existed before they were sworn, unless it appears that by reason of the existence of such grounds the party objecting had suffered wrong or injustice; and the ignorance of the parties of the existence of such grounds until after verdict is immaterial. *Flesher v. Hale*, 22 W. Va. 44.

So it is not error in the circuit court to refuse to set aside a verdict in a felony case, because it appears by the record that during the trial the court on a certain day before its adjournment administered such oath to the deputies of the sheriff, and that on the next day the jury appeared in court "in charge of the sheriff," pursuant to their adjournment. *State v. Poindexter*, 23 W. Va. 806.

And a mere business conversation by a juror with another person, entirely foreign to the case on trial, in the presence and hearing of the sheriff and the other jurors, will not be grounds for setting aside the verdict. *State v. Harrison*, 26 W. Va. 729, 15 S. E. Rep. 982.

(b) When Objection to Competency Insufficient.

Tampering with Jury.—The bare possibility of tampering with the jury, is no sufficient reason for setting aside the verdict. *Thomas v. Com.*, 2 Va. Cas. 479.

Passion and Prejudice.—And where a party had opportunity to question jurors before they were

sworn, and raised no objections to their competency, the verdict will not be set aside on the ground that one of them was employed in the same shop with plaintiff but in a different department; and another's sons worked in the department of which plaintiff was foreman; unless it is apparent that the verdict was wrong in principle or the result of passion or prejudice. *Simmons v. McConnell*, 86 Va. 494, 10 S. E. Rep. 888.

Likewise, the fact that a juror, who was a carpenter, was, at the time he was summoned, engaged on a temporary job for the defendant, which he thought was terminated by the summons, and failed to disclose the same on his *voir dire*, is not sufficient to set aside the verdict, when it appears that the plaintiff knew the facts before the case was submitted to the jury, but did not object on that account, and it further appears that the plaintiff has suffered no injustice by the service of such juror. *Reynolds v. Richmond and Manchester Railway Co.*, 92 Va. 400, 23 S. E. Rep. 770.

And on the trial of an indictment for passing a counterfeit bank note, the jury on retiring and being enclosed, found a placard stuck against the wall of their room, charging one of the jurors with being himself a counterfeiter, and insinuating that he had attended the court for the purpose of getting on the jury. The paper was read by the whole jury. But it was held that the fact of this placard being so put up and read by the jury, was no ground for setting aside a verdict, unless it appeared that the mind of the juror impugned, was prevented from deliberate exercise of judgment, or that the placard had the effect of a menace upon him, or influenced the deliberations and verdict of the jury. *Hall v. Com.*, 6 Leigh 615.

And where bystanders are called as jurors in a capital case, and, at the instance of the accused, sworn and examined touching their indifference; and then elected by the prisoner and sworn of the jury, upon objections to the indifference of these jurors, discovered after the trial, not directly inconsistent with what was disclosed by the jurors themselves on their examination touching their indifference, the court ought not to set aside a verdict of guilty, just in itself, though the objections be such, that if known and disclosed before the jurors were elected and sworn, they might have been a good cause of challenge to the jurors; much less, if the objections be such as would not have been a good cause of challenge. *Com. v. Jones*, 1 Leigh 598.

Juror's Failure to Pay Capitation Tax—When Objection Comes Too Late.—And the objection to a juror that he is not a competent juror, because he has not paid his capitation tax of the previous year, comes too late after the verdict of conviction in a criminal trial; and is not good ground for setting aside the verdict and granting a new trial to the prisoner. *Poindexter v. Com.*, 33 Gratt. 766.

Opinions and Declarations by Jurors.—Where there is ground to believe that jurors have not formed such decided opinions as disqualify them from giving the prisoner a fair trial, the verdict will not be set aside on the ground that they are incompetent jurors. *Shinn v. Com.*, 33 Gratt. 899.

Thus, where a juror expresses himself, before the jury is impanelled, as determined to punish a prisoner if taken on the jury, not from any malice towards him, but from an opinion of his conduct, it is no ground for setting aside the verdict and granting a new trial. *Curran's Case*, 7 Gratt. 619.

So, after a verdict against a prisoner charged with an atrocious offence, proof that one of the jurors, (before he was summoned, and who probably did not expect to be on the jury), said, that the prisoner "was doomed to the penitentiary; that he would go, if he had even attempted to commit the crime," is not sufficient to show that the juror had formed a deliberate opinion touching the prisoner's guilt, or had prejudged the case. The verdict should not be set aside on such proof. *Kennedy v. Com.*, 2 Va. Cas. 510; *Hodges v. Com.*, 89 Va. 265, 15 S. E. Rep. 513.

XIII. NEW TRIAL.

(See monographic note on "New Trial." See also, *ante*, "Verdict.")

A. WHERE GRANTING DEPENDS ON SOME QUESTION AFFECTING EVIDENCE.—A new trial ought not to be granted, to enable the party against whom the verdict is rendered, to impeach the credit of a witness examined at the trial. *Brugh v. Shanks*, 5 Leigh 598. And it is not error for the court in the presence of the jury, to hear evidence to lay the foundation for admitting the dying declaration of the deceased, especially where the court admonishes the jury, that the evidence is not for them but for the court alone. *State v. Cain*, 20 W. Va. 679.

Neither should the testimony of witnesses examined before a jury of inquest, and committed to writing, be used to impeach the evidence given on the trial of the prisoner, unless their attention has been called to it and to any discrepancies between that and their evidence. *Jackson v. Com.*, 23 Gratt. 920.

And where there is conflicting testimony, and the jury has to decide on the credit of witnesses, the power of the court to grant a new trial ought to be very cautiously exercised. *Brugh v. Shanks*, 5 Leigh 598.

So a new trial asked on the ground that the verdict is contrary to the evidence, ought to be granted only in the case of a plain deviation from right and justice, not in a doubtful case, merely because the court, if of the jury, would have given a different verdict. *Brugh v. Shanks*, 5 Leigh 598.

But the jury, in the trial of an indictment for murder, are the judges of the evidence, and as to what degree of murder, if any, it proves, and not the court. Still the court may, under certain circumstances, grant the defendant a new trial, at his instance, upon the ground that the verdict is contrary to the law and evidence. *State v. Abbott*, 8 W. Va. 742.

B. OBJECTIONS TO JURORS AS A GROUND FOR GRANTING NEW TRIAL.

1. CONDUCT, OPINIONS AND DECLARATIONS.—A hypothetical declaration made by a juror before he is impanelled that "if he (the prisoner) killed the man, he ought to be hanged" is not a sufficient ground on which to grant a new trial, as such declaration is not an opinion as to the prisoner's guilt. *Com. v. Hughes*, 5 Rand. 655. Neither should a new trial be granted on the affidavit of two of the jurors, that they were influenced in their verdict by information given by one of their own body in the jury room. *Price v. Warren*, 1 H. & M. 385; *Shobe v. Bell*, 1 Rand. 39. But where a new trial cannot be obtained in such case at law, equity may give relief by awarding a new trial upon the ground of fraud or accident. *Price v. Fuqua*, 4 Munf. 68.

And a new trial will not be granted, because a

juror is alleged to have made up his mind on the merits of the case, before he was called on the jury; unless it appears from the whole case, that the party seeking the new trial suffered injustice from the fact that such juror served. *Sweeney v. Baker*, 13 W. Va. 160.

So, if a person who is called as a juror on a trial for a felony, says, upon his *voir dire*, that he has not formed an opinion as to the prisoner's guilt or innocence; and he is challenged peremptorily by the prisoner; and after such challenge he goes out of the courthouse, and remarks in a rather warm and excited manner: "It is well I was rejected, for if I were on the jury I would send her to the other side of Boston," and after this, the prisoner to make up the jury, elects this person as a juror, not being informed at the time of his remark, it is not ground for a new trial. *Com. v. Hallstock*, 3 Gratt. 561; *Poore v. Com.*, 2 Va. Cas. 474; *Brown v. Com.*, 2 Va. Cas. 516.

But in a court of admiralty, a new trial will be granted if one of the jurors declares that he misunderstood the testimony, and its application to the law. *Hague v. Stratton*, 4 Call 84.

Yet, it seems that it is no ground for a new trial, as for after-discovered testimony, that a witness, who had been introduced and examined before the jury by the party making the motion, made certain statements to one of the jurors after they were discharged, which, had they been before the jury, would have induced them to render a different verdict. *Carr v. Magruder*, 2 P. & H. 107.

And where a juror, after he is sworn in an action of slander, expresses a wish to withdraw, because he himself had a similar suit depending in the same court, in which the slander was the same, but the counsel do not consent to withdraw him, and the trial proceeds and a verdict is rendered, the court ought not to grant a new trial. *Shobe v. Bell*, 1 Rand. 39; *Beck v. Thomson*, 31 W. Va. 459, 7 S. E. Rep. 447.

If, however, a new trial is asked on account of improper influences or misconduct of the jury, it must appear that the party so asking called the attention of the court to the same at the time it was first discovered or as soon thereafter as the course of the proceedings would permit; and if he fail to do so, he will be held to have waived all objections thereto, unless it be a matter which he can not waive, or which can not be obviated by attention being promptly called to it at the time it is discovered. *Flesher v. Hale*, 22 W. Va. 44.

2. MATTER FURNISHING A PRINCIPAL CAUSE OF CHALLENGE, BUT WHICH WAS NOT TAKEN ADVANTAGE OF.—And a new trial will not be granted in a criminal case for matter that is a principal cause of challenge to a juror, which existed before he was elected and sworn as a juror, but which was unknown to the prisoner until after the verdict; and which could not have been discovered by the exercise of ordinary diligence, unless it appear from the whole case that the prisoner suffered injustice from the fact that such juror served in the case. In determining this the court should look only to the evidence touching such cause of challenge; not to the evidence on the trial as to the prisoner's guilt. *State v. Harrison*, 36 W. Va. 729, 15 S. E. Rep. 982; *State v. McDonald*, 9 W. Va. 456; *State v. Greer*, 22 W. Va. 802; *Beck v. Thompson*, 31 W. Va. 459, 7 S. E. Rep. 447; *Zickefoose v. Kuykendall*, 12 W. Va. 23.

3. MISCONDUCT OF JUROR—HEARING STATEMENTS OUT OF COURT.—Likewise, a motion for a new trial

on the ground of the misconduct of the jury will not be granted where it appears that the misconduct consisted in hearing a statement of a witness out of court in the presence of the accused, but without objection on his part, and that, after the jury returned into court, the matter was called to the attention of the court, in the presence of the accused and his counsel, and an opportunity afforded them of cross-examining the witness, of which they refused to avail themselves, and no objection was made or exception taken till after the jury had rendered their verdict, and then for the first time on a motion for a new trial. *Williams v. Com.*, 98 Va. 769, 25 S. E. Rep. 659.

XIV. CUSTODY AND CONDUCT OF JURY.

A. WHO IS THE CUSTODIAN OF THE JURY—OATH.—In a prosecution for a felony, where the punishment may be death or confinement in the penitentiary for more than ten years, the jury must be kept in the custody of the sheriff or other proper officer when not in the presence of the court, and that they were so kept must affirmatively appear from the record, or the verdict and judgment will be set aside. *Barnes v. Com.*, 92 Va. 794, 23 S. E. Rep. 784.

But the authority of a judge who presides at a criminal trial, also extends over the jury, not only during the day whilst they are in court, but after the adjournment for the day; and it is not illegal or improper for the judge to take charge of a jury in the temporary absence of the sheriffs to whom the jury has been committed. *Philips v. Com.*, 19 Gratt. 485.

And the sheriff is *ex officio* bound to keep the jury when adjourned in a criminal cause; but it is not indispensably necessary that he should be sworn; if it were necessary to swear him, it would be presumed that he was sworn, in a case where the record does not show the contrary. *Bennett v. Com.*, 8 Leigh 745.

Thus, where the record shows that, at the beginning of the trial of a criminal case, all the officers in charge of the jury were only sworn with the usual oath to keep the jury during the trial, when in the absence of the court, it is sufficient. It is unnecessary to show that such oath was administered upon each adjournment of the court. *Reed's Case*, 98 Va. 817, 26 S. E. Rep. 399; *State v. Ice*, 34 W. Va. 244, 12 S. E. Rep. 695.

And a jury impaneled and sworn in a felony case is, while not present in court, by the law committed to the custody of the sheriff or other officer, until it is discharged, without any special order of the court committing it to his care. *State v. Poindexter*, 23 W. Va. 805.

But in impaneling a jury for trial of an indictment for felony, there is no necessity to keep jurymen who have been elected and sworn together and separate from other persons, under the charge of the sheriff, until the whole number shall have been elected and sworn. *Tooe v. Com.*, 11 Leigh 714; *Epes' Case*, 5 Gratt. 676.

B. ACTS CONSTITUTING MISCONDUCT.

1. SEPARATION OF JURY.—Where the offence tried is not punishable with death, or ten years' confinement in the penitentiary, an objection that the jury were allowed to separate has no merit, though the court may have ordered that they be boarded at a hotel during the trial; but the objection has merit, if the offence tried is punishable with death or con-

finement for ten years in the penitentiary. *Jones v. Com.*, 79 Va. 213; *Overbee v. Com.*, 1 Rob. 756.

And the jury must be kept in the custody of the sheriff or other proper officer when not in the presence of the court, and that they were so kept must affirmatively appear from the record, or the verdict and judgment will be set aside. *Barnes v. Com.*, 92 Va. 795, 23 S. E. Rep. 784.

And the separation of a juror out of the custody and control of the officers having charge of the jury, is *prima facie* sufficient to vitiate the verdict; and it is incumbent on the commonwealth to refute that presumption, by disproving all probabilities or suspicions of tampering. *Philips v. Com.*, 19 Gratt. 485.

But if the court can see that the officers who had the jury in charge have kept them together within the practical meaning of the rule, and have not spoken to them themselves, nor suffered any other person to speak to them, touching any matter relative to the trial, until they have returned again into court, that is sufficient, although it may be that in leaving the courthouse and returning they were separated somewhat more than is usual, and passed within hearing of persons talking on other subjects. *State v. Belknap*, 39 W. Va. 427, 19 S. E. Rep. 508.

Thus in a criminal case, the separation of one or more of the jurymen from the rest, for innocent purposes (such as going to see a horse taken care of,—to procure great coats, cushions, &c., from the bar of the tavern to wear or rest on in the jury room—to wash at the tavern porch, &c.) is no ground for setting aside the verdict, provided, the separation is with the authority of, and the juror is accompanied by, one of the officers who has charge of the jury; and provided also, there is no actual improper communication between the jurors and other persons during the said authorized separation. *Thomas v. Com.*, 2 Va. Cas. 479; *McCarter v. Com.*, 11 Leigh 633.

Likewise, if the jury, on their retirement for the night, are placed upstairs in a tavern, in five lodging rooms, which are separated from each other by a common passage, into which they all open, the doors of the lodging rooms being generally open; the doors to the common passage kept constantly shut, so as to exclude other persons, this disposition of the jury is a strict compliance with the law, which requires that the jury should be kept together. *Kennedy v. Com.*, 2 Va. Cas. 510.

And in *Martin v. Com.*, 2 Leigh 745, it is declared that, where a jury is impanelled and sworn, and before any evidence is given, some of them separate from their fellows for a brief space of time, such separation being before any evidence has been given, it does not furnish a cause for setting aside a verdict of conviction. Especially is this so, where the separation is so momentary, that any tampering with the jurors is hardly possible.

Nevertheless, where in an action of assumption against an administrator, issues are joined upon pleas of non-assumpsit and fully administered and the jury, after retiring from the bar, without leave of court or consent of parties, separate and disperse and afterwards render a verdict for defendant, it is not such misconduct on the part of the jury as to justify the verdict being set aside. *Howle v. Dunn*, 1 Leigh 455. And where on a trial for murder, during a recess, the jury is committed to the keeping of the high sheriff, who is sworn to keep them; but his deputy is not sworn, the high sheriff goes out with a part of the jury, leaving the

others in the jury room with the deputy, and with the door locked or closed, this is not such misconduct of the jury which will entitle the prisoner to a new trial. *Trim v. Com.*, 18 Gratt. 983.

So it is not error in the circuit court to refuse to set aside a verdict in a felony case, because it appears by the record that during the trial the court on a certain day before its adjournment administered the oath to the deputies of the sheriff, and that on the next day the jury appeared in court "in charge of the sheriff," pursuant to their adjournment. *State v. Poindexter*, 23 W. Va. 806.

Yet, where a sheriff, to whom a jury is committed in the progress of a criminal trial, walks with them to a neighboring house, and while there withdraws from the room where they are, leaving them in the company of other persons, though there is no allusion by them to the trial during the absence of the sheriff, yet the verdict should be set aside, and a new trial directed. *Com. v. Wormley*, 8 Gratt. 712.

And it is highly reprehensible for the parties to converse with the jurors, and however innocent, it is calculated to impair confidence in the impartiality of verdicts, and should be frowned upon by the courts. But casual conversations between parties and jurors during a recess of the court have never been considered sufficient of themselves to set aside a verdict. *Borland v. Barrett*, 76 Va. 123.

But if, after the retirement of a jury in a criminal case (they being kept together, under the care of the sheriff, in a room separate from all others), one of the jurors calls to a friend from the window, desiring him to inform his family of the cause of his absence, and requesting him to procure his watch, and deliver it to the sheriff for him, this conversation is not sufficient to set aside the verdict, although the sheriff happens not to hear it. *Kennedy v. Com.*, 2 Va. Cas. 510.

C. CONVERSATIONS HELD BY JURORS.—A jurymen should not be allowed to discuss with outside parties the manner of witnesses who have testified before them, or the weight and character of the evidence during the progress of the trial. *Vanmeter v. Kitzmiller*, 5 W. Va. 380; *Dower v. Church*, 21 W. Va. 23.

But, it is no cause for setting aside a verdict, where a jury agrees on its verdict, and it is sent in by the foreman, and the justices not being on the bench at the time, two of the jurors separate from their fellows and converse with others, though not on the subject of the case, after which the justices resume their seats and the verdict is rendered. *Ragland v. Wills*, 6 Leigh 1 (1835).

However, it is misconduct on the part of a juror, after the case has been submitted to the jury and they have retired, to consult of their verdict, to ask one of the witnesses whether he had not made certain statements on the witness stand. *Vanmeter v. Kitzmiller*, 5 W. Va. 380.

D. VIEWING THE PREMISES OR THE SCENE OF HOMICIDE—EXAMINATION OF ARTICLES FROM SAME.—By sec. 30, ch. 116, W. Va. Code 1891, "the jury may in any case, at the request of either party be taken to view the premises or the place in question, or any property, matter, or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision. If a motion under this section is made it is peculiarly within the discretion of the trial court, and, before a ruling thereon will be dis-

turbed, it must be made clearly manifest that such view is necessary to a just decision, that it is practicable, and that request therefor was denied, to the probable injury of the party applying. *Gunn v. Ohio R. R. Co.*, 36 W. Va. 165, 14 S. E. Rep. 465; *Gunn v. Ohio R. R. Co.*, 37 W. Va. 421, 16 S. E. Rep. 633.

And in *Com. v. Brown*, 90 Va. 671, 19 S. E. Rep. 447, it was held that a mere casual visit to the scene of homicide by the jury, during recess, whilst taking exercise under custody of an officer in charge, in prisoner's absence, when there is no proof of prejudice or conversation regarding the scene, or of any influence on the jury thereby, was not such misconduct as to furnish grounds for setting aside the verdict.

Similarly, where upon a trial for murder, cartridge hulls found at the scene of the homicide are introduced by the prosecution, and the prisoner's Winchester rifle, with shells fired from it during the trial are introduced by him to show that the plunger struck the shells differently from those introduced by the prosecution; and the jury are permitted, without objection, to take the rifle and shells to their room; it is not misconduct in the jury to take it apart and examine the plunger and ascertain that it has been recently tampered with and fixed so as to explode the cartridges differently from those put in evidence by the prosecution. *Taylor v. Com.*, 90 Va. 109, 17 S. E. Rep. 812.

But, whenever the trying court has a reasonable doubt as to whether a juror can give the accused a fair and impartial trial, that doubt should be resolved in favor of the prisoner. *Dejarnette v. Com.*, 75 Va. 867.

E. CARRYING PAPERS TO THE JURY ROOM.—But in criminal cases, it is improper to permit the jury to take depositions in behalf of the accused to its room, on retiring; however, the court should, on its request, have any portion of such depositions re-read to it. *State v. Lowry*, 42 W. Va. 205, 24 S. E. Rep. 561.

Yet in *Hansbrough v. Stinnett*, 26 Gratt. 495,—an action for slander,—it was held, that a deposition which has been read to the jury may be taken with them in their retirement, if what is objectionable in it has been erased. And this case further holds that papers read in evidence, though not under seal, may be carried from the bar by the jury. Va. Code 1887, § 3388. However, in *Welch v. Ins. Co.*, 23 W. Va. 288, an action of assumpsit based on a policy of insurance against fire, it was held that depositions read before a jury ought not, against the protest of one of the parties to a suit, to be permitted to be taken to the jury room on their retirement.

Nevertheless, it is not error on a trial for rape, after the jury are directed to consider of their verdict, for the clerk to call their attention to the charge which has been given to them as to the punishment, and, at his suggestion, to take such charge with them to their room. *Mitchell v. Com.*, 89 Va. 826, 17 S. E. Rep. 408.

F. DRINKING OF SPIRITUOUS LIQUORS.—Moreover, it is not misbehavior in a juror, between the adjournment of the court in the evening and its meeting next morning, to drink spirituous liquors in moderation. *Thompson's Case*, 8 Gratt. 637.

Nevertheless, where the deputy sheriff having the jury in charge admits that liquor in sufficient quantities to make the jury or some of them intoxicated was taken by him to the jury room on the day the verdict was rendered, the presumption arising

therefrom that the prisoner was injured thereby is not rebutted by the affidavit of the guilty deputy, that none of the jury were intoxicated. *State v. Greer*, 23 W. Va. 803.

XV. DISCHARGE OF JURY.

A. COURT'S AUTHORITY TO DISCHARGE, AND PROPER EXERCISE OF SAME.

1. **JURY AS A WHOLE.**—Under sec. 12 of ch. 202, Code Va. 1873 (Va. Code 1887, sec. 4026), the court may discharge a jury in any criminal case, *felony* or *misdemeanor*, whenever, in its opinion, they cannot agree on a verdict, or there is a manifest necessity for such discharge, whether the prisoner consents or not. But the discretion exercised in such cases by the trying court may be reviewed by the appellate court. *Wright v. Com.*, 75 Va. 914; *Crookham v. State*, 5 W. Va. 510 and in *Dye v. Com.*, 7 Gratt. 662, this authority is held to be rightly exercised in misdemeanor cases, without, or even against the consent of the defendant. Nevertheless, there must be a necessity for the discharge of a jury to authorize it. *Williams v. Com.*, 2 Gratt. 567.

Thus, on a trial for felony, the court has no authority to discharge the jury without the consent of the prisoner, merely because the court is of opinion that the court will not be able to agree. *Williams v. Com.*, 2 Gratt. 567.

But the practice of finally adjourning the court, without noticing the jury, whereby it is discharged by operation of law; or of discharging them simultaneously with the final adjournment of the court, is proper. *Williams v. Com.*, 2 Gratt. 567.

And the power to discharge is properly exercised, in a capital case, where the jury has been kept together for nine days without agreeing on a verdict, and the health of one of the jurors is suffering from confinement, while the personal attentions of another juror are required by the situation of his wife. *Com. v. Fells*, 9 Leigh 613.

But the fact that a small red dress, belonging to, and worn by the deceased when injured, is placed by the sheriff on the railroad track at the point where the accident occurred, while the jury are viewing the place and its surroundings, and while they are looking down the track from the point the engine first came in sight of the deceased, is not sufficient misconduct to require the discharge of the jury; nor, after a cautioning instruction, is it sufficient error to justify the setting aside of their verdict; it being merely the illustration or demonstration of a physical fact, about which the defendant can introduce contradictory evidence or can examine the plaintiff's witnesses. *Bias v. C. & O. Ry. Co.*, 46 W. Va. 349, 33 S. E. Rep. 240.

And where a prisoner is on trial for felony, and the court discharges the jury, on the ground that they are unable to agree, and the prisoner is afterwards tried and convicted, and the record fails to show that he made any objection to the discharge of the jury, or made any motion in the court below for his discharge, in the appellate court he will be deemed to have waived all objections to the discharge of the jury; or it will be presumed that the court below discharged the jury impanelled and sworn in the case for sufficient cause, and with the consent or acquiescence of the defendant. *State v. Sutfin*, 22 W. Va. 771; *Dye v. Com.*, 7 Gratt. 662.

Moreover, if on a trial for robbery, the court, without prisoner's consent, discharges a jury which is unable to agree, these facts will not sustain a plea of "former jeopardy," on a subsequent trial. *Jones' Case*, 86 Va. 740, 10 S. E. Rep. 1004.

2. **INDIVIDUAL JUROR.**—So it is not error in a trial court to discharge a venireman, who has previously expressed opinions repugnant to inflicting capital punishment, on circumstantial evidence; or who has made a bet on the result of the trial. *Cluverius v. Com.*, 81 Va. 787.

Likewise, it is within the sound discretion of the court, in the trial of a felony case, if a juror, at any time after he was sworn, and before verdict, becomes, from any cause, unable to discharge his duties as such juror, to discharge such juror and substitute another qualified juror in his place; and when such substitution is made, the trial shall proceed just as if it had been commenced before a new jury. And if after the greater part of the evidence has been heard in a felony case, the information is imparted to one of the jurors that his son has just died, and the court certified that it "appeared to the satisfaction of the court that the juror by reason of his affliction, is unable to discharge his duties as a juror," and discharges the juror at his request, such discharge is proper, as a necessity for the discharge of the juror exists. And if, after such discharge, another qualified juror is substituted and the trial proceeds *de novo*, and the prisoner is convicted, and moves for his discharge on that ground, which motion is overruled, and the prisoner is sentenced, this also is no ground for a new trial, as there is no error in the ruling. *State v. Davis*, 81 W. Va. 890, 7 S. E. Rep. 24.

3. **EFFECT OF DISCHARGE.**—If a court improperly discharge the jury without the consent of the prisoner, he is entitled also to be discharged from the prosecution. *Williams v. Com.*, 2 Gratt. 567.

But the discharge of a jury, after they have rendered a verdict against a prisoner, which verdict is adjudged to be a nullity because it was not duly perfected, and therefore set aside as insufficient, is no bar to a prosecution under the same, or a new indictment. *Gibson v. Com.*, 2 Va. Cas. 111; *Stuart v. Com.*, 28 Gratt. 950.

And it is not sufficient ground for a discharge of a prisoner from further prosecution, under an indictment, that a jury had been impanelled, been charged with his case, had retired to consult of their verdict, and, not agreeing, were confined the full legal term of the said court, and did not render any verdict in the case, but separated on the adjournment of the court at the end of the term without an order discharging them. *Com. v. Thompson*, 1 Va. Cas. 318.

However, if it is not suggested that the accused is insane at the time of the trial, and the jury which is impanelled for the trial of the cause is discharged, the prisoner is thereby wronged from making his proper defense before the jury, and is entitled upon his motion to be discharged from further prosecution of the indictment. *Gruber v. State*, 3 W. Va. 699.

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*Sands v. The Commonwealth.

January Term, 1871, Richmond.

JOYNES, J., absent, sick.

1. **Statute—Interpretation—"Three Terms."**—The three terms spoken of in the act, ch. 208, § 34, Sess. Acts 1866-67, are three terms after that at which the prisoner is first held for trial. And though a prisoner has been arrested and committed to jail, or gives bail to appear and does appear, or is

brought into court, on the first day of a term of a court, that term is not to be counted as one of the three terms aforesaid.

2. **Constitution—Effect on Existing Laws in Conflict Therewith.**—The third section of the third article of the constitution, in relation to the qualification of jurors, does not operate *proprio vigore*, and without any legislation on the subject, to repeal all existing laws in conflict therewith; but until such legislation is had the existing law continues in force.

3. **Same—Statute—Venire Facias Should Conform to the Statute.***—Under the second and fourth sections of the schedule of the constitution, the act in force at the time of the adoption of the constitution regulating juries in criminal cases, not having been since altered, the *venire facias* for the trial of a prisoner for felony should be conformed to that act.

4. **Forgery—Evidence—Pecuniary Condition of Obligor.**—On a trial for the forgery of a note of H., who is dead, the Commonwealth may prove that H. was prompt in the payment of his debts, and that he owned a large property—real and personal—and was doing a good business.

5. **Same—Evidence—Record of Former Proceedings.†**—An action at law was brought upon the note alleged to be forged, against the curator of H., and judgment rendered without any defence. A suit in equity was then brought to subject the real estate of H. to the payment of the judgment; and there was a decree for sale, and sale; in both which suits the prisoner was counsel for the estate; and he purchased a part of the property. The records of these cases, with the testimony of the clerks of the respective courts, were admissible evidence with other evidence, to show the uttering of the forged paper, and the complicity of the prisoner in the uttering of it.

801 *6. **Uttering Forged Paper—Sciencer.**—To convict a prisoner of uttering, or attempting to employ as true, a forged writing, it must be shown that the accused, himself, uttered or attempted to employ as true the said forged writing, or was present at the time such forged writing was uttered or attempted to be employed as true, by some other person, aiding and assisting such person to utter or employ the same as true; and it must be further shown that the accused knew at the time that the said writing was in fact forged; and that such uttering or attempting to employ as true, was made or done by him with the intent to defraud. But any assertion or declaration, by word or act, directly or indirectly, that the forged writing is good, with such knowledge and intent, is an uttering or attempting to employ as true the said writing: provided that such assertion or declaration was made in the prosecution of the purpose of obtaining the money mentioned in the said writing.

7. **Jurisdiction of Hustings Court of Richmond.**—The County court and Circuit court of Henrico, being held within the limits of the city of Richmond, an offence committed by proceedings in these courts, is committed within the jurisdiction of the Hus-

*As to the propositions laid down in the second, fourth, and seventh headnotes, see *foot-notes* to the preceding case.

†Evidence—Record of Former Proceedings.—See principal case cited in *State v. Henderson*, 29 W. Va. 157, 1 S. E. Rep. 232.

tings court of the city, and may be prosecuted in that court.

8. **Corroboration of Witnesses—Inadmissible Evidence.**—The *ex parte* settlement of a personal representative, by a commissioner of the court, though it has been confirmed, is not competent evidence to show that a witness not connected with the estate had the means to pay for real estate which he purchased, at a sale made by the person who was personal representative, as commissioner of the court, in order to sustain the veracity of the witness.

This is an indictment in the Hustings court of the city of Richmond, against Johnson H. Sands, for forgery. It is founded on the same writing on which the indictment against Chahoon was based; and is in totidem verbis, except the substitution of the name of Sands for that of Chahoon. The indictment was found on the 4th of June, 1870, the last day of the May term of the court, and Sands not being in custody, a *capias* was awarded to bring him into court on the first day of the next term. He was, accordingly, brought into court on the first day of the June term; and during the term the trial, on the motion of the attorney for the Commonwealth, was continued until the September term of the court; and at the September term the trial was continued until the third day of the October term.

802 *At the October term of the court, the prisoner having been arraigned, he moved the court to discharge him from custody, and forever from further prosecution for the offence charged in the indictment, on the ground that there had been three regular terms of the court, after and since he had been held upon the said indictment, without a trial of him upon the same. But the court overruled the motion, and he excepted. It appeared that, by law, the Hustings court holds a term every month, except August; and has jurisdiction to try felonies at all its terms. The June term commenced on the 6th day of the month, and the court continued in session until the 2d of July. On the 6th of June, the first day of the court, the prisoner was brought into court; and the first entry on the record of the court of that term, is, that the prisoner, with his sureties, entered into a recognizance for his appearance on the next day. The July term commenced on the 5th day of July, and the court continued its sessions until the 30th of the month, when it adjourned to its September term; and it commenced its September term on the 5th of that month, and continued its session every day until the 30th of that month; on which day the court adjourned until the first day of the October term.

The prisoner then pleaded, and moved the court to quash the *venire facias*; which motion the court sustained: and directed another *venire facias*, commanding the sergeant to summon twenty-four men of the corporation, who were qualified to vote and hold office under the constitution of Virginia, &c. Upon the return of this

venire facias, the prisoner moved the court to quash it, for errors apparent on its face: but the court overruled the motion; and the prisoner excepted. This is his second exception. The third exception is to the qualification of a juror; but it was not considered by this court. The fourth
803 exception is to the *refusal of the court to quash another venire facias; and raises the same question raised in the second.

In the progress of the trial, the Commonwealth introduced Emanuel Francis as a witness, who said he knew Haunstein well for several years before his death; they were intimate friends, and he knew his handwriting very well, having often seen him write, and had papers in his handwriting in his possession until a very recent date. Being shewn the bond alleged to be forged, he says he thinks Haunstein never wrote it; and he gave his reasons for it. He was then asked by the attorney for the Commonwealth whether Haunstein was in good pecuniary circumstances at the time of the date of the bond, April 1st, 1861. To which question and to any answer thereto the prisoner objected; but the court overruled the objection; and permitted the witness to answer it; and he said that Haunstein had plenty of money always, and money in bank; was doing a first rate business, and owned six houses and lots in the county of Henrico, in the suburbs of the city; four of the tenements were small, one a large house, and another a good sized house and store, with large lot attached. To this opinion of the court the prisoner excepted. This is his fifth exception.

After some further statements as to the habits of Haunstein, he was asked by the court the following question: You have said that you knew Solomon Haunstein intimately for a number of years; that he made you his confidante; and that you were familiar with his business and habits; did you ever know Haunstein to borrow money? To this question the prisoner objected; but the court overruled the objection; and directed the witness to answer the question: and the prisoner again excepted. This is his sixth exception.

The seventh and eighth exceptions
804 are the same as *the ninth and tenth in Chahoon's case. The attorney for the Commonwealth then offered to introduce in evidence the record of the suit in the County court of Henrico, referred to in the eleventh exception in Chahoon's case. To the reception of this record as evidence the prisoner objected; and the attorney for the Commonwealth stated that he expected to follow up this record with evidence shewing that the prisoner was representing the estate of Haunstein, and permitted the judgment to go by default. That afterwards, when a bill was filed in the Circuit court to subject the lands of Haunstein to the payment of said judgment, the prisoner, still representing himself as the counsel for said estate, aided the counsel for the plaintiff to procure a decree for the sale of the

land, and to subject the same to the payment of said judgment; and did have the same sold under said decree; and received for his assistance, in allowing said judgment upon said bond to go by default, and for his further assistance in procuring said decree and the sale of said land, a large proportion of said land. And the prisoner thereupon repeated his objection to said record with said accompanying statement. But the court overruled the objection, and admitted the record: and the prisoner excepted. This is his ninth exception.

The Commonwealth then proved by the clerk of the County court, Folkes, the bringing of the suit by Chahoon, as stated in the eleventh exception in Chahoon's case: that the witness marked the prisoner's name to the case, as counsel for the defendant, before he made out his docket for the March term, 1867: Does not remember whether this was done by order of Sanxay, the defendant, or the prisoner. That, after this was done, Sanxay and the prisoner were in the clerk's office together, and the prisoner stated that the proper mode to defend the suit was to put in a plea of non est factum, and make affidavit to it;
805 that this was *the only mode of defence to the suit. Sanxay replied that he could not do it, because he could not swear that the signature to the bond was not Haunstein's handwriting. After this conversation Sands did nothing further in the case. After other details, he said the County court at that time held its sessions in the clerk's office of the court. And thereupon the prisoner moved the court to exclude all the evidence of the said Folkes, along with the said record, from the jury, upon the ground that the said testimony does not tend to prove any utterance of said bond elsewhere than at the county courthouse of Henrico, and at the clerk's office of that court; both of which places, as he insisted, are, by the law of the land, not within the jurisdiction of the Hustings court; though situated within the corporate limits of the city of Richmond; and because said evidence does not legally tend to shew any uttering or attempting to employ the said bond as true by the prisoner, or any forgery thereof by him. But the court overruled the motion; and the prisoner excepted. This is his tenth exception.

The Commonwealth then introduced another witness—Temple Ellett—who stated that he was the clerk of the Circuit court of Henrico county; and the Commonwealth then introduced and proved by the witness, as evidence in the cause, the record of a suit in chancery, brought in that court in the name of Gleason, assignee of Thompson, against Sanxay, curator of Haunstein, to have the land of Haunstein sold for the payment of the judgment which had been recovered against Sanxay, as stated in the last exception. In this suit there was a decree for the sale of the land, and for the settlement of Sanxay's account as curator. This account was taken, and Sanxay was reported debtor to the estate in the sum of

\$917 56, as of the 16th of May, 1867. Sanxay, who had been appointed commissioner to sell the real estate, and out of the 806 proceeds *to pay Gleason, or his counsel Chahoon, the amount of his judgment, made his report, by which it appeared that Mary J. Wilkinson was the purchaser of one house and lot at \$800, R. S. Sanxay was purchaser of another lot and house at \$1,060, William D. Porter was a purchaser of two tenements at \$1,275; and J. H. Sands was a purchaser of two tenements and lots at \$1,200; the nett amount of said sale being \$4,079 38. And Sanxay files with his report the receipt of George Chahoon, attorney of Gleason, dated June 15th, 1867, for \$4,996 94—the amount due on his account as curator, and the nett amount of the sales of the real estate, in part satisfaction of the judgment of Gleason, assignee of Thompson, against Richard D. Sanxay, curator of Haunstein. These reports were confirmed by a decree of the 29th of October, 1867. To the reception of this evidence the prisoner objected; and thereupon the attorney for the Commonwealth stated that he intended to follow up this record with proof, as set forth in his statement, filed and made part of the bill of exceptions No. 9; and the court overruled the objections of the prisoner, which were repeated after said statement was made; and permitted the record to go to the jury as evidence; and the prisoner again excepted. This is his eleventh exception.

The Commonwealth then proved by the witness that the bill in said case is in the handwriting of George Chahoon; that he never saw Chahoon in connection with the case; that the papers were given him either by Sands or the judge; he thinks by the judge. That there were interlineations in the bill made by Sands; which the witness pointed out. He further stated that the answer of the curator and the two decrees are in the handwriting of the prisoner, as is also the receipt by Chahoon to Sanxay.

The Commonwealth then introduced Alfred Shield, clerk of the Circuit court 807 of the city of Richmond, *and tendered in evidence a record of said court in a case pending therein, under the style of Sands v. Page, escheator. This was a petition filed in said court by the prisoner, in July, 1869, to restrain Page, the escheator, from proceeding to have the real estate of Haunstein escheated to the Commonwealth. The petitioner claimed that he had purchased two of the tenements and lots at the sale by Sanxay, and had afterwards purchased from Mrs. Wilkinson the tenement purchased by her at that sale; that the said tenements and lots had been conveyed to him, and he was in possession of them; and he filed copies of the deeds; and he asked that the escheator and the register of the State might be restrained from proceeding to escheat the same. In this case the court, before any answer by the escheator or register was filed, entered a decree on the 17th of July, 1869, perpetually enjoining them from all further pro-

ceedings to have the said property escheated. In January, 1870, Page, as escheator, filed a bill of review in this case; and it is still pending in the Circuit court of the city of Richmond.

To the reception of this evidence, the prisoner objected. And thereupon, the attorney for the Commonwealth stated that he expected to prove by the record that the portion of the real estate of Haunstein which the commissioner reported that he had sold to Mrs. Mary Wilkinson was conveyed by her to the prisoner, and that the deed was in his handwriting; and further to prove that Mrs. Wilkinson never purchased any part of Haunstein's real estate, nor ever authorized any one to purchase it for her; and that she never paid or received any money for the same. And thereupon the prisoner renewed his objection to the said record and accompanying statement of the attorney for the Commonwealth. But the court overruled the objection; and the prisoner excepted. This is his twelfth exception.

808 *The record having been read, the Commonwealth proved by Shield that the deed from Mrs. Wilkinson to Sands was written by the said Sands. And the Commonwealth then introduced another witness, Richard S. Sanxay, who testified that he was present at the sale of Haunstein's property, made by his father as commissioner; that he bought two lots himself, and that another was bought by him in the name of Mary J. Wilkinson, his mother-in-law, by her permission; that he paid his father, as commissioner, for the said lot, \$800 in cash; that he afterwards sold it to Sands, and Mrs. Wilkinson, at his request, executed the deed for it; that Sands paid him for it, paying four hundred dollars in money, and giving for the residue the notes of persons he mentions, amounting to between six and seven hundred dollars; on one of which he sued, but failed to make anything; and on the other he did not realize more than one hundred dollars. He thought he was present when Sands paid the money on his purchases at the sale to his father, but is not certain of it; thinks it was paid at the office of Mr. Wellington Goddin in this city.

And then the attorney for the Commonwealth asked the witness why he had bought the said lot in the name of Mrs. Wilkinson. To which question the prisoner objected, on the ground that the said enquiry could not properly be brought in as evidence against the prisoner in this prosecution. And the attorney for the Commonwealth stated that the witness was one of the parties implicated in the matter of defrauding the estate of Haunstein; had been indicted for conspiracy; and he was obliged to enter a nolle prosequi in his case, to examine him; that he was a reluctant witness, and the attorney was obliged to examine him as if upon a cross-examination; and that he desired to shew by the witness that this was an arrangement between himself and Sands. And the court being of opin-

809 ion that the *witness was reluctantly testifying in the case, permitted the attorney for the Commonwealth to proceed with his interrogation of the witness; and overruled the objection of the prisoner, and permitted the question to be asked: and the prisoner again excepted. This is his thirteenth exception.

The attorney for the Commonwealth further asked this witness whether he had bought one lot in his own name at said sale; and being answered in the affirmative, he produced and shewed to the witness a writing, as follows: "Received of R. S. Sanxay, the sum of one thousand and sixty dollars, in full of the purchase money of the house bought by him, on the 16th instant, at the sale made by me of the real estate of which Solomon Haunstein died possessed, as special commissioner in the chancery suit of Gleason, assignee, &c. v. Haunstein's curator, depending in the Circuit court of Henrico. Richard D. Sanxay, special commissioner;" and asked the witness why he had not embraced the money he said he paid for the lot bought in the name of Mrs. Wilkinson in the said receipt. To which question and to this receipt, as evidence against him, the prisoner objected: but the court overruled the objection, and permitted the receipt to be shewn to the witness, and the attorney for the Commonwealth to examine him about it; and directed the witness to answer the question: and the prisoner again excepted. This is his fourteenth exception.

In the further examination of this witness, after interrogating him as to his business and employment as a soldier during the war, and as a clerk after the war, up to the time of the purchase; and after proving by him that the body of said receipt was in the handwriting of the prisoner; the attorney for the Commonwealth stating that he proposed to prove that the witness had no money, and the receipt was a sham,

810 asked the witness the following question: From what source *did you acquire the money to pay for the lot purchased by you in your name, and in that of Mrs. Wilkinson? To which question and any answer thereto the prisoner objected; but the court overruled the objection: and the prisoner excepted. This is his fifteenth exception.

After the witness had stated in his direct examination, in answer to the question of the attorney for the Commonwealth, that he got a part of the money from his father, for the board of the child of the witness' sister, who was a lunatic; that his father recovered a pension due from the government of the United States to the husband of his said sister, whose name was Eliza M. Keith; and that the witness so received about four years' board of said child; and he produced a paper purporting to be a copy of an account of the settlement of his father, as committee of said lunatic; and in the examination of said witness by the counsel for the prisoner, he asked to be permitted to shew this account to the jury. This was

the copy of a report by a commissioner of the Hustings court of the city, dated February 28th, 1867, of the settlement of Richard D. Sanxay's account, as committee of Eliza M. Keith, a lunatic. The account commenced April 3d, 1866, and came down to January 1st, 1867, and had been filed in the court and confirmed. The witness stated that the original was of record in the clerk's office of the chancery court of the city of Richmond, where he had seen it recorded that morning; and it appeared that said office was closed for the night, it being then 11 o'clock: The counsel for the prisoner stating that he desired to shew by said account that the sum of \$787 50 was paid by said Sanxay, as committee, for said board; and to shew by the witness that that was the sum paid to him. But the court refused to permit the said report, or any item of it, to go to the jury, and refused to permit the witness to be examined

811 *touching said paper: and the prisoner again excepted. This is his sixteenth exception.

The Commonwealth introduced another witness—Thomas R. Bowden—who stated that he came to Richmond in May or June, 1865. The attorney for the Commonwealth then asked said witness: Did you ever see R. D. Sanxay at any time in connection with a claim against the estate of Solomon Haunstein? To which question the prisoner objected: and thereupon the attorney for the Commonwealth stated that he expected to prove by the witness that, before the institution of the suit upon the alleged forged paper, the witness presented this claim to Sanxay, the curator, and claimed payment of it; that the curator pronounced the claim false and a swindle, and denied that the estate owed any money to any one; and thereupon the witness returned the claim to Chahoon, who brought the suit upon it heretofore set forth. But the prisoner still insisted upon his objection to the question, upon the ground that it was not stated by the attorney for the Commonwealth, that he expected to shew that the prisoner was informed at any time of the purport of the declarations of Sanxay to the witness; and if he did claim that he could bring home to, or in any manner connect the prisoner with this conversation, that connection ought to be shewn before putting said conversation in evidence before the jury. But the court overruled the objection: and the prisoner excepted.

This is his seventeenth exception.

The witness, Bowden, stated that he presented a claim which he obtained from George Chahoon to Richard D. Sanxay, curator of Solomon Haunstein, for six or seven thousand dollars, in favor of Gleason against the estate of Haunstein. This was in the latter part of the year 1866. Sanxay was very much excited at the presentation of the claim; said the estate of Haunstein owed nothing of any consequence, and

812 *that the claim was a fraudulent one and a swindle. He never saw the bond which is alleged to be forged, in

Chahoon's or anybody else's possession, until he saw it in the clerk's office of Henrico county court after the sale of the property had taken place. He had only a memorandum of the claim when he had the conversation with Sanxay, and did not then know how the claim was evidenced, or that there was a bond for it; and did not state to Sanxay its nature further than the amount, and the name of the party who held it. After the interview he returned the memorandum of the claim to Chahoon. He never communicated the conversation with Sanxay to the prisoner, or had any conversation with him at any time about the claim. And then the prisoner moved the court to exclude the whole of the testimony of this witness from the jury, as not competent against him. But the court overruled the motion; and the prisoner excepted. This is his eighteenth exception.

All the testimony for the Commonwealth having been introduced, the prisoner moved the court to exclude from the jury the record of the Circuit court of Henrico in the chancery suit of Gleason, assignee, &c., v. Haunstein's curator, and all the evidence of Ellett, touching the connection of the prisoner with the said record; and also the record of the injunction suit of Sands v. Page, escheator, &c., and the testimony of Shield in connection therewith; and to direct the jury to disregard the same, so far as they are relied upon by the Commonwealth as evidence to establish any act on the part of the prisoner, of uttering or attempting to employ as true the bond described in the indictment; the prisoner insisting that the said testimony does not tend to show any acts or act of the prisoner amounting in law to an uttering or attempting to employ as true the said bond or endorsement alleged to have been forged.

But the court overruled the motion; 813 and the *plaintiff excepted. The whole evidence of the Commonwealth is set out in the bill of exception; but the statements made, in connection with the previous exceptions, is sufficient to show the bearing of the motion. This is his nineteenth exception.

When all the evidence, both for the Commonwealth and the prisoner, had been introduced, the prisoner moved the court to give to the jury six instructions; all but the third of which the court gave. The third instruction asked is as follows:

3. That before the jury can convict the accused upon the second and fourth counts in the indictment, the jury must be satisfied, from the evidence, that the accused himself uttered or attempted to employ as true the said forged writing or forged endorsement respectively, or was present at the time such forged writing or forged endorsement respectively were uttered or attempted to be employed as true by some other person, aiding and assisting such other person to utter and employ the same as true; and in either case that the jury must be further satisfied, from the evidence, that the accused knew at the time that the

said forged writing, or the said forged endorsement respectively, were in fact forged; and that such uttering or attempting to employ as true, in either case, were made or done by the accused with the intent charged in the indictment.

This instruction the court refused to give, and in lieu thereof gave the following:

3. That in order to convict the accused upon the second and fourth counts of the indictment, the jury must be satisfied, from the evidence, that the accused uttered or attempted to employ as true the forged writing, or the endorsement thereon respectively mentioned, with the knowledge, at the time of said uttering or attempting to employ as true, that the same were forged, and with the intent therein charged; but any assertion or declaration, by word or act, directly or indirectly, 814 *that the forged writing or endorsement is good, with such knowledge and intent, is an uttering and attempting to employ as true of the said writing or endorsement.

To the refusal of the court to give the third instruction as asked, and to the instruction given in lieu thereof, the prisoner excepted. This is his twentieth exception.

The jury found the prisoner not guilty on the first and third counts in the indictment; but found him guilty on the second and fourth counts; and fixed the term of his imprisonment in the penitentiary at five years. And the prisoner moved the court for a new trial on various grounds; but it is unnecessary to state them. The court overruled the motion; and the prisoner excepted. The court certified the facts proved: which were such as are stated in Chahoon's case, or may be gathered from the previous exceptions.

The prisoner applied to this court for a writ of error to the judgment, which was allowed.

Young, and Henry A. Wise, for the prisoner.

The Attorney-General, for the Commonwealth.

CHRISTIAN, J., delivered the judgment of the court.

This day came as well the plaintiff in error, by his counsel, as the attorney-general in behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion that there was no error in the judgment of the Hustings court of the city of Richmond in refusing to discharge the prisoner from further prosecution upon the ground that three regular terms of said court had passed without his trial.

The 34th section of chapter 208, of Sess.

Acts, 1866-7, is in these words: "Every 815 person charged *with felony, and held in any court for trial, shall be forever discharged from prosecution for the offence, if there be three regular terms of such court, after he is so held, without a trial; unless

the failure to try him was caused by his insanity, or by the witnesses for the Commonwealth being enticed or kept away, or prevented from attending by sickness or inevitable accident, or by a continuance granted on the motion of the accused, or by reason of his escaping from jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict."

It is provided by law, that "there shall be a term of the Hustings court for the city of Richmond for each month in the year, except the month of August, commencing on the first Monday in the month, and continuing so long as the business before the court may require."

The record shows that the accused was indicted at the May term, 1870, to wit: on the fourth day of June, that being the last day of the May term. A capias to answer the indictment was at once issued. The record does not show when the capias was executed; but it appears that on the first day of the June term, to wit: on Monday, the 6th day of June, the accused was brought into court in custody of the sergeant of the city of Richmond, under the capias awarded against him on the 4th day of June.

Upon the motion of the attorney for the Commonwealth, the case was continued from time to time until the October term. On the 31st day of October, the accused, being arraigned upon the indictment found against him on the last day of the May term, moved the court to discharge him from further prosecution, upon the ground that three regular terms of the court had passed since he had been held for trial under said indictment. The court overruled this motion; and the prisoner excepted,

816 and brings before this court the *question, What is the true construction of the 34th section of the act above referred to?

It is insisted by the counsel for the accused, that the June term of the said Hustings court must be counted as one of the terms after which the accused was held for trial, because the record shews that, on the first day of that term, the accused was brought into court, under the capias issued on the last day of the May term, and that the first entry made upon the records of the court on that day (to wit: the first day of the June term), was an entry recognizing the accused to appear on the next day; and that the whole of the June term remained, at which he might have been tried; and that, therefore, the June term ought to be taken into the computation, to make up the three regular terms.

The court is of opinion that the accused, in this case, was held for trial, in the Hustings court for the city of Richmond, on the first day of the June term, and not before. He was held for trial in that court, from the moment he was delivered by the officer, charged with the execution of the capias, into the custody of the court; and not before. While in custody of the officer, under the capias, he was held by that officer,

to be brought into court to answer the indictment, and could not be said to be held in court for trial, until actually delivered into its custody. So that, no matter when he was arrested by the officer, he was held in court for trial for the first time on the day he was brought into court in charge of the officer who executed the capias. The law makes it the duty of an officer, who under a capias from a court arrests a person, accused of an offence not bailable, or for which bail is not given, to deliver the accused to the court, if sitting, or to the jailor thereof, who shall receive and imprison him. Sess. Acts, '66-7, § 20, p. 930.

If the court be in session, he can be said to be held in court for trial, only from 817 the time he is delivered *into the custody of the court. If the court be not in session, and the accused is committed to jail, he cannot be said to be held in court for trial until after the session of the court begins; for, during the vacation of a court a party cannot be said to be held in court for trial. So, where a party has been committed by a justice of the peace, and sent on to answer an indictment, such party can only be said to be held in court for trial from the time he appears to answer the indictment, if on bail, and if in jail, from the time the court meets in which he may be tried. In any case, the term of the court in which he is first held for trial is not to be computed to make up the three regular terms; but there must be three regular terms after that term, without a trial, before he can claim his discharge. Now, the section under consideration provides that every person charged with felony and held in any court for trial, shall be forever discharged from prosecution for the offence, if there be three regular terms of such court after he is so held without a trial. Each term of a court has a fixed period at which it begins and ends. The term of the Hustings court of the city of Richmond (as prescribed by law) begins on the first Monday in each month, except the month of August, and ends whenever the court adjourns to the next term. The term may consist of thirty days, or ten days, or one day, depending upon how long the court may sit. If the court should adjourn on the first Monday (sitting only one day), to the first day of the next term, that one day is as much a term of the court as if it sat for thirty days. Before a prisoner is entitled to his discharge, under this section, there must be three regular terms—that is, plainly, whole terms; not parts or fractions of three terms, but three entire terms, of such court after he is so held, without a trial; or, in other words, there must be three periods of a session of such court, having a begin- 818 ning and ending after that term *when he is first held for trial. If the term has commenced (no matter how soon after its commencement the prisoner has been delivered into the custody of the court), that term cannot be counted as one of the three regular terms, after he is held for trial, because a part of that term has already ex-

pired and there is but a part of it left; it may be a large part or a small part, depending upon how long the court may sit; still it is not an entire term. And it cannot be said that in such a case a term of the court has passed when only a part of a term has expired: for that would be to hold that a term of a court means a part of a term.

Nor is there any force in the position that, in this case, the June term must be computed as one of the three regular terms after the accused was in custody, because there was sufficient time left, of that term, in which he might have been tried. To adopt this view would be to put the decision in every case upon evidence aliunde, instead of having a uniform rule of interpretation to be applied to all cases. In the language of Judge Lomax in Bell's case, 7 Gratt. 646, "It seems much better to take some fixed and uniform rule from the language and meaning of the statute, than a rule to be derived from what the court may be supposed, in a presumed state of its business, to have had the capacity to do." The court is therefore of opinion that the said Hustings court was not in error in refusing to discharge the prisoner.

II. But the court is further of opinion that the said Hustings court was in error in refusing to quash the venire facias, which directed the sergeant of the city of Richmond "to cause to come before the Hustings court twenty-four good and lawful men, qualified to vote and hold office under the constitution of the State of Virginia, each one of whom is twenty-one years of age, to recognize, on their oaths, 819 whether the said Johnson H. *Sands be guilty of the felony with which he stands indicted or not."

The court is of opinion that the provisions of the constitution, contained in the third section of the fourth article, which declares that "all persons entitled to vote and hold office, and none others, shall be eligible to sit as jurors," does not execute itself proprio vigore; but that legislative action is necessary to put it into operation and give it effect. This would be so, independent of the schedule. But the schedule, which is a part of the constitution, and which limits its operation, contains the following provisions, which, in its own language, were adopted in order that no inconvenience might arise from changes in that constitution. Sec. 2: "All indictments which shall have been found, or which may hereafter be found, for any crime or offence committed before the adoption of this constitution, may be proceeded upon as if no change had taken place." Sec. 4: "All crimes and misdemeanors and penal actions shall be tried, punished and prosecuted as though no change had taken place, until otherwise provided by law." The second section refers exclusively to crimes and offences committed before the adoption of the constitution. It was not intended, however, as a limitation on the power of the Legislature to adopt a mode of criminal

procedure in all cases of crimes and misdemeanors (whether committed before or after the adoption of the constitution); but was intended simply to provide that proceedings in the cases therein mentioned might be had, according to the existing law, in the absence of such legislation. The fourth section is a broader and more comprehensive provision, embracing all crimes and misdemeanors and penal actions; and is an emphatic and positive declaration, that they shall be tried, prosecuted and punished, as though no change had taken place, until otherwise provided by law.

820 *The issuing and execution of a writ of venire facias, is certainly a part, and a most important part, of every criminal trial. It is a necessary incident to every trial, and provisions concerning it are always contained in the Criminal Code, under the head, "Trial and its incidents." It is manifest, that everything relating to the trial of a criminal offence, must, by the very terms of the schedule, be proceeded with under the forms of existing laws, until the Legislature shall make the change. The courts cannot make the change by seeking to conform the writ to a provision of the constitution, which is inoperative without legislative action; for that would be for the courts to assume legislative functions, and perform a legislative act. Whenever the Legislature shall provide a different mode of criminal procedure, in accordance with the provisions of the constitution, in respect to jurors, then, of course, the proceedings in all cases will be had in conformity to such laws; but, until such change is made, the existing laws remain in full force and effect. The court is, therefore, of opinion, that the venire facias in this case, instead of being issued in the form set forth in the second bill of exceptions, ought to have been issued in pursuance of the directions of chap. 208 of the Code, as amended by the act of 1866-7, pp. 932, 933; and for this error the said judgment must be reversed.

The court might here conclude this opinion, without taking any notice of the other questions presented by the record. But, as these questions have been fully argued before this court, and as many of them may arise in the future trial of this case in the court below, this court has considered them, and will now proceed to express an opinion upon such of them as are likely again so to arise.

III. It is not necessary that the court should express any opinion upon the 821 third assignment of error, as to *the acceptance of the juror Cunningham, inasmuch as in the new trial to be had this question cannot again arise.

IV. As to the fourth assignment of error, to wit, as to the admissibility of evidence offered by the Commonwealth to show the pecuniary condition and habits of Solomon Haunstein, the court is of opinion that the Hustings court was not in error in admitting such evidence, and in refusing to exclude the same from the jury.

V. The court is further of opinion that the Hustings court was not in error, in admitting in evidence to the jury, the record of the proceedings of the County court of Henrico, in a suit upon the alleged forged bond, together with the testimony of Wm. Folkes, the clerk of the said court.

VI. Nor did the Hustings court err, in admitting as evidence, the record of the proceedings of the Circuit court of Henrico, the object of which last named suit was to enforce the judgment which had been obtained on the alleged forged bond, together with evidence of Temple Ellett, the clerk of the said court; the court being of opinion that every act of the prisoner, tending to shew an attempt to employ as true the bond of Solomon Haunstein, alleged to be forged, by seeking in any way, through the courts or otherwise, to subject the estate of said Haunstein to the payment of the alleged forged bond, was legitimate evidence to go to the jury, to be considered and weighed by them, along with the other facts of the case.

VII. The court is further of opinion that the Hustings court was in error in admitting in evidence the record of the chancery suit of "Sands v. Page, escheator," and that the same ought to have been excluded from the jury as irrelevant to the issue they were sworn to try.

VIII. and IX. The court is further 822 of opinion that *the Hustings court did not err in refusing to exclude from the jury the questions asked the witness, R. S. Sanxay, and his replies thereto, which form the subject of the 13th, 14th and 15th bills of exceptions, in reference to the sale of the real estate of Solomon Haunstein, and his purchase at said sale. Nor was there any error in excluding the paper offered during his examination by the prisoner's counsel; that paper being an ex parte settlement, by a commissioner in chancery, of the transactions of Richard D. Sanxay, the father of the witness, as curator of a lunatic, one Eliza Keith; and was not only wholly irrelevant to the issue, but was not evidence for the purpose for which it was offered, to wit: to sustain the veracity of the witness, R. S. Sanxay.

X. Upon the 10th error assigned, which presents the question, whether the conversations between the witness, Thomas R. Bowden, and Richard D. Sanxay, who was the curator of Haunstein's estate (which conversation, it is shown, was not communicated to the prisoner), were proper evidence to go to the jury, the court is equally divided, two of the judges (Moncure and Anderson) being of opinion that such conversation is admissible as evidence, while two (Christian and Staples) are of opinion that it ought to have been excluded; the result being, by the decision of a divided court, that there was no error in the Hustings court in refusing to exclude such evidence.

XI. The eleventh assignment of error, as to the motion to exclude the two chancery records, after the close of the Common-

wealth's evidence, raises in another form the same questions which have already substantially been disposed of, and there only remains to be considered

XII. The twelfth error assigned, which is the refusal of the court to give the third instruction asked for by the prisoner's counsel, and the giving another in lieu 823 *thereof. The court is of opinion

that the Hustings court did not err in refusing to give the instructions asked for, without explanation or modification. But the court is of opinion that the Hustings court should have given the said instruction entire, in the language in which it was asked, or language of like import, with the following or like modifications added: "But any assertion or declaration, by word or act, directly or indirectly, that the forged writing or endorsement is good, with such knowledge or intent, is an uttering or attempting to employ as true said writing or endorsement; provided that such assertion or declaration was made in the prosecution of the purpose of obtaining the money mentioned in said writing;" so that the instruction would then read as follows: That before the jury can convict the accused upon the second or fourth counts of the indictment, the jury must be satisfied, from the evidence, that the accused himself uttered or attempted to employ as true the said forged writing, or the forged endorsement respectively, or was present at the time such forged writing or forged endorsement, respectively, were uttered or attempted to be employed as true, by some other person, aiding and assisting such other person to utter and employ the same as true; and in either case, that the jury must be further satisfied, from the evidence, that the accused knew at the time that the said forged writing, or the said forged endorsement, respectively, were in fact forged; and that such uttering or attempting to employ as true in either case, were made or done by the accused with the intent charged in the indictment. But any assertion or declaration, by word or act, directly or indirectly, that the forged writing or endorsement is good, with such knowledge and intent, is an uttering or attempting to employ as true the said writing or endorsement; provided that such assertion or declaration was made in the prosecution 824 of the purpose *of obtaining the money mentioned in the said writing.

XIII. The court is further of opinion, for reasons given in the opinion of the court in the case of Chahoon v. The Commonwealth, that the offence with which the accused stands indicted was committed, if committed at all, within the jurisdiction of the Hustings court of the city of Richmond.

Wherefore, for the error of the said court of Hustings in overruling the motion of the accused to quash the venire facias, as aforesaid, it seemeth to the court here that the judgment aforesaid is erroneous. Therefore it is considered that the same be reversed and annulled; and it is ordered that the verdict rendered by the jury be set

aside, and that the cause be remanded to the said court of Hustings, with directions to proceed in the manner prescribed by law, to cause another jury, duly qualified, to come and say whether the said Johnson H. Sands be guilty of the felony wherewith he stands accused in the said indictment mentioned, or not guilty; and further to proceed as the law requires.

Which is ordered to be certified to the said court of Hustings for the city of Richmond.

Judgment reversed.

825 *Taylor v. The Commonwealth.

March Term, 1871, Richmond.

JOYNES, J., absent, sick.

1. Indictment—Rape—Omission of the Word Female.*—

An indictment for rape does not charge that it was committed on a female, but the name given is a woman's name, and the indictment uses the pronouns "she" and "her," in speaking of the person upon whom the rape was committed. HELD: Though it would have been better to use the word female, as it is the word used in the statute, yet the language used sufficiently shows that the rape was committed on a female, and is therefore good.

2. Same—"Idem Sonans"—Question for Jury.—The question whether the name in the indictment is *idem sonans* with the true name of the person upon whom the offence was committed, is a question for the jury, and not for the court.

3. Same—Immaterial Error as to Name.—The indictment charges that the rape was committed upon Helen Frances Davis, and the true name is Helen Francis Davids; but the proof is, she was as frequently called the first, in the community, as the last. The proof of the rape upon Helen Frances Davids is admissible under the indictment.

This was an indictment in the County court of Norfolk, against John W. Taylor, for rape. The indictment charged that the prisoner, on the 5th of May, 1870, in the county of Norfolk, in and upon one Ellen Frances Davis, she being then over twelve years of age, with force, &c., and her, the

*Indictment under Statute.—See foot-note to Cousins v. Com., 19 Gratt. 807.

In Randall v. Com., 24 Gratt. 646, the court, citing the principal case, said: "There are certain technical terms of description required to be used in the indictment for certain offences which are absolutely necessary to determine the judgment. Thus the word 'feloniously' must be used in every indictment for felony."

In Benton's Case, 91 Va. 793, 21 S. E. Rep. 495, it was said: "And while it is better, as has frequently been said by this court, to describe an offence in the very words of the statute, yet it will be sufficient to do so in any other words that are synonymous, and which plainly bring the case within the statute, except where certain technical words are necessary to be used in an indictment in charging particular offences. Howel's Case, 5 Gratt. 664; Young's Case, 15 Gratt. 664; Taylor's Case, 20 Gratt. 825; and Dull's Case, 25 Gratt. 965. The demurrer to the indictment was therefore properly overruled."

said Ellen Frances Davis, then and there, &c., feloniously did ravish and carnally know, against her will and by force; against the peace and dignity of the Commonwealth.

The prisoner, when arraigned, elected to be tried in the Circuit court. In that court he demurred to the indictment; but the demurrer was overruled. He then pleaded not guilty. Upon the trial, after all the evidence was introduced, the prisoner moved the court to instruct the jury, as follows:

1st. The court instructs the jury, that no evidence shewing, or tending to shew, that the prisoner committed a rape on the person of Helen Frances Davids, can be entertained by the jury; the indictment charging the offence as having been committed on one Ellen Frances Davis. And that, although they may be satisfied, from the evidence, that the prisoner committed rape upon the person of the witness Helen Frances Davids, they must find for the prisoner.

2. The court instructs the jury, that any evidence tending to shew the commission, or attempt to commit, a rape upon the person of Helen Frances Davids, will not support the indictment.

The court refused to give the instructions; and the prisoner excepted. It appeared from the bill of exceptions, that the name of the prosecutrix was given by her as Helen Frances Davids; and it was proved by other witnesses that the prisoner committed a rape upon her. It was also proved by the Commonwealth that the said prosecutrix was as frequently called Ellen Frances Davis in the community as Helen Frances Davids.

The jury found the prisoner guilty, and fixed the term of his imprisonment in the penitentiary at fifteen years. And he then moved an arrest of judgment on the grounds:

1st. That there is a defect in the indictment, in this, that it fails to allege that the party, upon whom the offence was charged to have been committed, is a female.

2d. That the Commonwealth failed to sustain the allegation that the offence was committed upon one Ellen Frances Davis.

But the court refused to arrest the judgment; and sentenced the prisoner in accordance with the verdict. And thereupon, upon the application of the prisoner, a writ of error was awarded by this court.

Godwin and John Howard, for the prisoner.

The Attorney-General, for the Commonwealth.

MONCURE, P. This is a writ of error to a judgment of conviction for rape. There are three questions in the case. First, whether the indictment is defective in not stating that the person on whom the offence is charged to have been committed is a female. Secondly, whether Ellen Frances Davis, the name given to such person in

the indictment, and Helen Frances Davids, the true name of said person, are the same names or of the same sound. And, thirdly, whether, according to the evidence, the said person is so known by the name of Ellen Frances Davis, as that a description of her by that name in the indictment is a sufficient description.

1. As to the first question. The statute on which the indictment is founded is in these words: "If any person carnally know a female of the age of twelve years or more, against her will, by force, he shall be, at the discretion of the jury, punished by death, or confined in the penitentiary for not less than ten nor more than twenty years." Acts of Assembly, 1865-6, p. 82, chap. 14. According to the authorities cited by the counsel for the plaintiff in error, it is generally proper and safest to follow in the indictment the description given of the offence in the statute which creates it. And, as the word "female" is here used in the statute, it would have been better to have used it also in the indictment. There are certain technical words of description of an offence which cannot be substituted by the use of other words in an indictment; such as the words "feloniously," "burglariously,"

828 "carnally know," &c. But descriptive words, which are not of such technical character, though they generally better express their own meaning than any other words that can be used, may be substituted by the use of synonymous words, or words which plainly bring the case within the meaning of the statute. The word "female" here is certainly not of that technical character.

Then is there enough in the indictment plainly to show that the person on whom the offence is charged to have been committed is a female? I think there is. Both of the names, "Ellen" and "Frances," are names universally applied to females only, and the personal pronoun of the female gender, "her," is twice used in the indictment in relation to the person therein described as "Ellen Frances Davis;" and there is not a word in the indictment tending to show that such person is not a female.

But the cases cited by the attorney-general on this subject are directly in point, are founded on good reason, and place the matter beyond all controversy. They are *The State v. Goings*, 4 Dev. & Bat. R. 152; *The State v. Farmer*, 4 Ired. R. 224; and *The State v. Hussey*, 7 Clarke Iowa R. 409. They all show (to use the language of Wright, Ch. J., in the last named case) that, "while it would be better in such cases to charge expressly the sex, yet the omission of such averment will not vitiate, if the same thing appears from all that is stated by the pleader." And in all of them the name of the person injured, and the gender of the pronoun used in reference to such person, were held sufficient to show that the person was a female, upon whom alone the offence could be committed, ac-

cording to the express language of the statute in each case.

2. As to the second question, to wit: that in reference to the identity or of the sound.

There has been much contrariety of 829 decision on this subject; that is, "as to what is 'idem sonans;'" and cases might no doubt be referred to, strongly tending to maintain each side of the question in this case. See 1 Am. Cr. Law, by Wharton, §§ 258, 597. But the question is one for the jury, and not for the court, which cannot instruct the jury, as matter of law, that any two names are or are not of the same sound. Id. § 258; *Regina v. Davis*, 2 Denn. 231; 6 Brit. Cr. Cas. 233. The plaintiff in error, in the two instructions asked for by him, proceeded upon the erroneous ground, that what is idem sonans, is a question of law for the court. And the court was, therefore right in refusing to give them. Perhaps, if there had been nothing else in the case to identify the person but the similarity of the names, it might have been proper for the court, in refusing the instructions asked for, to have gone further, and referred the question of sameness of sound to the jury. *Attorney-General v. Hawkes*, 1 Crompton & Jervis' Exch. R. 120. But there was something else in the case which rendered it unnecessary if not improper to refer that question to the jury. And this brings us to the enquiry.

3. As to the third and last question in the case, to wit: Whether, according to the evidence, the person charged to have been injured is so known by the name of Ellen Frances Davis, as that a description of her by that name is a sufficient description? The bill of exceptions shows that it was "proved by the Commonwealth that the said prosecutrix was as frequently called Ellen Frances Davis, in the community, as Helen Francis Davids;" and there is not a particle of evidence in the record to the contrary. It may therefore be taken as a fact in the cause, and the question is, What is the law arising upon that fact, as applied to this case? Is it sufficient to describe her in the indictment as "Ellen Frances Davis?" I think it is, and that this is manifest from all the authorities.

In the case before cited, of the At- 830 torney-General v. *Hawkes, which was an information for offering a bribe to Thomas Dabbs, a custom-house officer, there was evidence that his name of baptism was Thomas Tyrrel Dabbs, in which name his commission was made out, but that he was as well, or better, known at the custom-house and in the trade by the name of Thomas Dabbs, which name he himself generally used. It was held to be no variance. "It has been stated," says the Lord Chief Baron Alexander, "that one reason for requiring precision is, that, in the event of an acquittal, the defendant may be able to avail himself of that acquittal by pleading *antre foi acquit*, which, in this case he could not do, because a new information might charge him with an at-

tempt to bribe Thomas Tyrrel Dabbs, and to such an information he could not plead the acquittal on a charge of attempting to bribe Thomas Dabbs. To this I answer that he might defend himself in that way with the aid of an averment, which it would be competent to him to introduce, that Thomas Dabbs and Thomas Tyrrel Dabbs were the same person. I am of opinion, then, that this is no material variance." "I agree," says Baron Vaughan, "if the proof had stood nakedly on the answer to the question, upon cross-examination as to the name, that the name was Thomas Tyrrel Dabbs, without further explanation, that the variance would have been fatal; because Thomas Tyrrel Dabbs is not Thomas Dabbs. But when, upon further enquiry, it appeared that the witness was as well, or better known, by the name of Thomas Dabbs than by the name of Thomas Tyrrel Dabbs; I should say that that fact being undisputed, or, if disputed, being found by the jury, there was no longer any variance; and the name answering the description in the information, it became a sufficient designatio personæ." There are other portions of this case which are very instructive, but I will not take time to make further quotations from it.

831 *In Roscoe's criminal evidence, library edition, pp. 81, 82, the writer says: "If the name be that by which a person is usually called or known, it is sufficient." And he cites and states, in support of this position, the case of *Rex v. Norton*, Russ. & Ry. 510; *Anon.* 6 Car. & Payne R. 408, 25 Eng. C. L. R. 460; and *Rex v. Williams*, 7 Car. & Payne 298, 32 Eng. C. L. R. And in note to p. 81, he cites the case of *The State v. France*, 1 Overton R. 434 (Tenn.), in which it was held that where the name alleged was Harris, the true name Harrison, though he was sometimes called by the former, it was no variance.

See also 1 Wharton, § 257, and the case cited in note (k) of *State v. Gardiner*, Wright's Ohio R. 392.

The counsel for the plaintiff in error do not deny these authorities; but seek to restrict their application to cases in which the party is generally known by the name mentioned in the indictment, they construing the word generally to mean better than by the true name. I do not think there is any warrant in the law for such a restriction, especially connected with such a construction, and I think the cases I have cited, and the reasons on which they are founded, show that I am right. They show that it is sufficient if the party be as well known by the name mentioned in the indictment, as by the true name. Wherever that is the case it may properly be said that the party is generally known by both names. A person may universally be known—that is, by all who know him at all—by two names; and then, of course, he is generally known by each. The prosecutor cannot be expected to know, in all cases, what is the true name. He is compelled, in most cases, to describe

the party by the name he bears by reputation; and no evil can result by describing him by that name, as has already been shown. In this case the proof was that the party "was as frequently called Ellen Frances Davis, in the community, as 832 Helen Frances *Davids;" not called so by one, or two, or three, or any definite or circumscribed number of persons, but as frequently by one name as the other, and in the community. Could there be stronger evidence that that was a name by which she was generally known, and was not the prosecutor plainly warranted in describing her by that name in the indictment? I have already answered the question, and my opinion is that there is no error in the judgment, and that it ought to be affirmed.

The other judges concurred in the opinion of the President.

Judgment affirmed.

833 *Harris v. The Commonwealth.

March Term, 1871, Richmond.

JOYNES, J., absent, sick.

1. Common-Law Dedications—Intention Necessary.*—

In order to constitute a dedication of property to the public, there must be an intention to appropriate the land for the use and benefit of the public. The acts and declarations of the owner, indicating such an intention, must be unmistakable in their purpose, and decisive in their character, to have that effect.

2. Same—Same—Evidence of Intention.—This intent may be presumed from circumstances connected with a long and uninterrupted user by the public. And this presumption may be rebutted by circumstances showing that an appropriation of the property to the use of the public was not intended.

3. Same—Streets—Acceptance.—In this State there

*Common-Law Dedications—How Made.—In *Buntin v. Danville*, 98 Va. 204, 24 S. E. Rep. 830, RIELY, J., delivering the opinion of the court, said: "The principle of dedication by the act of the owner of land," said JUDGE STAPLES, in *Harris' Case*, 20 Gratt. 833, "is now almost universally recognized as a part of the common law in this country." Dedication is an appropriation of land by its owner for the public use. It may be express or implied. It may be implied from long use by the public of the land claimed to have been dedicated. Dedication is not required to be made by a deed or other writing, but may be effectually and validly done by verbal declarations. The intent is its vital principle, and the dedication may be made in every conceivable way that such intention may be manifested. It must, however, be manifested by some unequivocal act, and is not effectual and binding until accepted. When the intention of the owner to make the dedication has been unequivocally manifested, and there has been acceptance by competent authority, or such long use by the public as to render its reclamation unjust and improper, the dedication is complete."

If the intention and acceptance are once established no length of user is essential to an irrevocable dedication. But dedication, whether express or

may be a valid acceptance of an easement in a town, without any distinct act of recognition by the corporate authorities of such town. The mere user, however, by the public, of the *locus in quo*, will not of itself constitute an acceptance, without regard to the character of the use, and the circumstances and length of time under which it was claimed and enjoyed.

4. **Same — Same — Presumption — Estoppel.** — Where property in a town is set apart for public use, and is enjoyed as such, and private and public rights are required with reference to it and to its enjoyment, the law presumes an acceptance on the part of the public as will operate an estoppel *in pais*, and preclude the owner from revoking the dedication.

5. **Same — Same — User Regarded as License.** — Where no public or private interests have been acquired upon the faith of the dedication, the mere user, by the public, of the supposed street or alley, although long continued, should be regarded as a mere license, revocable at the pleasure of the owner; unless there be evidence of an express dedication; or unless, in connection with such long-continued user, the way has been, by the proper town authority, recognized as a street, so as to give notice that a claim to it as an easement was asserted.

6. **Evidence — Map — Inadmissible.** — A map of a city, though made by a former city surveyor, and found in the office of the register of the city, in a
834 book labelled "plans *and charts," not appearing to have been made by the authority of the city government, or adopted by it, is not competent evidence for the Commonwealth, in a prosecution for obstructing what is claimed to be a street of the city.

This was an indictment in the court of Hustings of Norfolk, at its February term for 1870, against Charles Harris, for obstructing Plume street, in said city. The case came on for trial in April, 1870, when the jury found the defendant guilty.

The defendant took several exceptions to rulings of the court. The first was to the admission of a lithographic map, purporting to be a map of the borough of Norfolk, made by John Ridley, surveyor of the borough. This map was proved to have been found in the office of the register of the said city, in a book labelled "plans and

implied may be revoked before it has been accepted by competent authority, or others have, upon the faith of it, been induced so to act as to render its revocation unjust. See, as authority for the above laid down propositions, *City of Richmond v. Stokes*, 31 Gratt. 713; *Taylor v. Com.*, 29 Gratt. 780; *Talbott v. R. & D. R. R. Co.*, 31 Gratt. 685; *Gate City v. Richmond*, 97 Va. 337, 33 S. E. Rep. 615; *Smith v. Cornelius*, 41 W. Va. 67, 23 S. E. Rep. 600; *City of Norfolk v. Nottingham*, 96 Va. 34, 30 S. E. Rep. 444; *Pierpoint v. Harrisville*, 9 W. Va. 215; *Skeen v. Lynch*, 1 Rob. 186; *Colbert v. Shepherd*, 89 Va. 404, 16 S. E. Rep. 246; *Boughner v. Clarksburg*, 15 W. Va. 394; *Miller v. Aracoma*, 30 W. Va. 606, 5 S. E. Rep. 148; *Yates v. West Grafton*, 33 W. Va. 507, 11 S. E. Rep. 9.

Same — Evidence of. — See *City of Richmond v. Poe*, 24 Gratt. 149, and *foot-note*.

See monographic note on "Municipal Corporations" appended to *Danville v. Pace*, 25 Gratt. 1.

charts," by the register incumbent when he took charge of the office; and that Ridley was surveyor of the borough in 1834 and 1835. The defendant objected to its introduction, because—1st. It was not a public document; 2d. That it did not appear on its face to be an official map; and, 3d. That its accuracy as a map of the city of Norfolk had not been established. But the court overruled the objection, and admitted the map as evidence.

After all the evidence had been introduced, the defendant moved the court to give several instructions; one of which is as follows: That if the jury believe, from the evidence, that the land upon which the alleged obstructions exist, was not used continuously and uninterruptedly, for any considerable period of time, they must find the defendant not guilty, unless they also believe, from the evidence, that the land was expressly dedicated to the public use, as a street, by some one of its owners, and accepted by competent authority as a public street, or unless it was condemned as a public street by due course of law.

The court refused to give any of the
835 instructions *asked for by the defendant, and instructed the jury that—If they believe, from the evidence, that the present owner of the land, upon which the present obstructions exist, or some one through whom he claims, or some one in whom the title in fee at the time resided, has dedicated the said land to the use of the public as a street, and that such dedication had been followed by acceptance on the part of the public, their verdict must be for the Commonwealth; and such dedication and acceptance may be presumed from facts and circumstances proved, clearly indicating an intention on the part of the proprietors to surrender, and on the part of the public to adopt, the premises as a street; and such acceptance on the part of the public need not necessarily be shewn to have been by or through the acts of the municipal authorities. To the refusal to give the instructions asked, and the giving the said instruction, the defendant excepted. This exception contained a statement of all the facts proved on the trial.

After the verdict, the defendant moved the court for a new trial, on the ground that the court erred in refusing the instructions asked, and in giving the instruction; and also because the verdict was contrary to the evidence. But the court overruled the motion; and the defendant excepted, referring to the facts stated in the previous exception.

It appeared that the title to the ground on which the obstruction was placed had been in the plaintiff and the persons under whom he claimed for many years; and that an official map of the borough of Norfolk, made in 1802, by the then surveyor of the borough, and accepted and made official by the court of the corporation, was the only official map of the borough made by the order of the corporation; and that no such street as that set out in the indictment was designated

on said map. That no such street
836 was designated on the *map made by John Ridley, by order of the corporation, but not accepted by the court. But the Commonwealth proved, that for several years prior to 1831, the said land, on which the alleged obstructions exist, with other adjoining lands, was unenclosed and without any buildings thereon; that in the year 1835 the land was unenclosed, and such was the case in 1862; and that, whenever the said land was unenclosed, the persons living in the neighborhood and others, and from as far back as 1824, had made use of the said land as a passage way for persons, horses and vehicles; that a large number of citizens, including older citizens not now living, believed the said land was a street; that, in 1849, the city of Norfolk directed all its streets to be labelled with their respective names, and that, in 1849 and 1850, a person appointed to superintend the said labelling, without any special instructions as to the said land, or as to Plume street, placed upon the houses on the adjoining lots on each side of said land, labels bearing the name of Plume street; which signs or labels remained until or about the time of the erection of the alleged obstructions; that said superintendent had no guide or instruction besides general report, except the map of Ridley, referred to in the first exception; but that the work was approved and paid for by the councils; that the report of the superintendent did not indicate the streets or the points at which the labels had been affixed; and that the defendant had built houses on and had enclosed the said land in 1851 and 1852, and had enclosed the said land on the line of Addington's lane in 1870.

On the other hand, the defendant proved that the land was enclosed in the years 1831 and 1832, by the then owner; and that it was enclosed by a tenant thereof, and kept enclosed by him from 1840 to 1850; and that the defendant had kept it enclosed until the year 1862, when he left the city; and
837 that the defendant, *and the other owners of the said land, had been continuously assessed with taxes thereon, from the year 1819 till, and inclusive of, the present year, and had paid the same.

The court rendered a judgment on the verdict, that the defendant, Charles Harris, do proceed forthwith, at his own proper cost, to remove the nuisance complained of in the indictment, to wit: two brick houses and divers large pieces of timber and other material put and placed, and caused to be put and placed, in and upon the public street and common highway leading from Talbot street to Arcade or Metcalf's lane, and called Plume street; and gave costs to the Commonwealth. Harris thereupon obtained a writ of error to the judgment, from a judge of this court.

Scarburgh, Duffield and Sharpe, for the appellant.

The Attorney-General, for the Commonwealth.

STAPLES, J. The principle of dedication by the act of the owner of land is now almost universally recognized as a part of the common law in this country. It is defined to be "the act of devoting or giving property for some proper object, and in such manner as to conclude the owner." To constitute a dedication there must be an intention to appropriate the land for the use and benefit of the public. The intention, the animus dedicandi, is the vital principle of the doctrine of dedication. The acts and declarations of the land-owner indicating such intention, must be unmistakable in their purpose, and decisive in their character, to have that effect. Washburn on Easements and Servitudes, 134; Irwin v. Dixon, 9 How. U. S. R. 10, 30. In Barraclough v. Johnson, 35 Eng. C. L. R. 337, it was said, "The very term dedication shews that the intent is material. There cannot be such a thing as turning
838 land into a road without an intention on the *owner's part." This intent may be presumed from circumstances connected with a long and uninterrupted user by the public. But such user is only important as indicating a purpose to make the donation. And this presumption may be rebutted by circumstances shewing that an appropriation of the property to the use of the public was not intended.

In Poole v. Huskinson, 11 Mees. & Welsb. R. 827, it was held that the user of a way by the public is at best only evidence of intention on the part of the owner of land to dedicate it, and that a single act of interruption by the owner is of much more weight upon the question of intention, than many acts of enjoyment on the part of the public: the use, without the intention to dedicate as a public way, not being a dedication.

In Roberts v. Karr, 1 Camp. R. 262 note b, it appearing that a bar had been placed across a street to prevent the passage of carriages, but was soon torn down, and thereafter the street used as a thoroughfare, the court decided that putting up the bar rebutted the presumption of dedication. And so where a gate had been originally across the way, but for twelve years had not been there, the jury, under the direction of the judge, found that there was no dedication, and the court of King's Bench refused to disturb the verdict. Lethridge v. Winter, 1 Camp. R. 263 note.

In Irwin v. Dixon, the court held that the presumption arising from thirty years' use of the property by the public was rebutted by the fact that the owner repaired the property, paid the taxes assessed, and exercised other acts of ownership over it.

In Kelly's case, 8 Gratt. 632, Judge Leigh said—"A permission to pass over land may prove an intention to dedicate, or a mere license, revocable at the will of the owner; and we think that the mere permission to
839 pass over land ought in this State to be regarded as a *license. For why shall we infer that an individual makes a gift of his property to the public

from an equivocal act, which equally proves an intention to grant a mere license?"

These, and other cases which might be mentioned, establish the proposition, that to bind the land-owner the dedication must be openly made, and with deliberate purpose; and that the presumption arising from a long-continued and uninterrupted enjoyment of the easement by the public, will be negated by the exercise of acts of ownership over the property, or other circumstances inconsistent with the supposition that a dedication was intended.

It is well settled, there must be not only a dedication by the owner, but an acceptance by the public. Whether some act on the part of the authorities charged with the control or repair of the highway, is necessary to constitute an acceptance, or whether it may be effected by a mere user of the property, is a question upon which the authorities are not agreed.

In Kelly's case, it was held, with regard to county roads, there must be an acceptance by the County court upon its records; but it was said this principle did not apply to streets and alleys in town. As to them, the acts of the corporation officers may have the same effect as the acts of the County court.

It may be safely assumed, that in this State there may be a valid acceptance of an easement in a town without any distinct act of recognition by the corporate authorities of such town. The mere user, however, by the public of the locus in quo, will not of itself constitute an acceptance, without regard to the character of the use, and the circumstances and length of time under which it was claimed and enjoyed. Where property in a town is set apart for public use, and is enjoyed as such, and private and public rights acquired with reference

to it and to its enjoyment, the law
840 presumes *such acceptance on the part of the public as will operate an estoppel in pais, and preclude the owner from revoking the dedication. The case of Sken v. Lynch, 1 Rob. R. 186, substantially affirms this doctrine. There, a right in a strip of ground along the margin of Jackson's river, was claimed by the citizens of Covington as resulting from express dedication; but no act of acceptance on the part of the officers of the town was shewn or pretended. Judge Allen said, if the easement was granted, it was for the benefit of the public, and in such case the owner is precluded from re-asserting any right over the land, so long as it remains in public use, although there may be no grantee in existence capable of taking. "The use of property by the public, with the consent of the owner, will, under peculiar circumstances, justify the presumption of dedication to the public, provided the use has continued so long that private rights and public convenience might be materially affected by an interruption of the enjoyment."

Numerous other cases maintain the principle that the owner is estopped to assert

there has been no formal acceptance, where the public, relying upon the manifest intent of the party to dedicate the property, have entered into the occupation of it in such manner as renders it unjust and improper to reclaim it. *State v. Nash*, 6 Verm. R. 355; *Badeau v. Mead & al.*, 14 Barb. R. 328; *Cincinnati v. White's lessee*, 6 Peters' U. S. R. 431.

Where no public or private interests have been acquired upon the faith of the supposed dedication, the mere user, by the public, of the supposed street or alley, although long continued, should be regarded as a mere license, revocable at the pleasure of the owner; unless, indeed, there be evidence of an express dedication; or unless, in connection with such long-continued user, the way has been, by the proper town
841 authority, *recognized as a street, so as to give notice that a claim to it as an easement was asserted.

In the case under consideration, the indictment charges the defendant with placing obstructions in and upon Plume street. The pretension of the prosecution was based upon the idea of a dedication of the locus in quo to the public. To establish this, the Commonwealth proved that, for several years prior to 1831, the lot in question, with other adjoining lots, was vacant and unenclosed; that it was in the same condition in 1835 and in 1862; and whenever unenclosed, as far back as 1824, it was used as a way for persons, horses and carriages; and a number of persons, living and dead, believed the lot to be a street. This is the Commonwealth's evidence to establish the dedication.

To what extent the lot was used by the public, does not appear. Nor is it shown that property was purchased, or other rights acquired by individuals, or money expended by the city of Norfolk, upon the faith of the presumed dedication.

On the other hand, the defendant proved that the lot was under enclosure in 1830 and 1832, and from 1840 to the year 1862, continuously; that the taxes assessed thereon have been regularly paid since 1819 by the defendant and those under whom he claims.

In the year 1862 he left the State; but when he returned does not appear, except that, in the year 1870, he placed the posts and rails across the lot, as set forth in the second count in the indictment. During all this time, from 1840 to 1862, a period of twenty-two years, no complaint was made by the city of Norfolk, or any of its citizens, that the defendant, or those under whom he claimed, by these enclosures was violating the rights of the corporation or any individual whatever. In 1849, at the time Plume street was labelled along with the other streets, as is claimed, this lot was

enclosed, and was so enclosed when
842 purchased by the defendant; *and in 1851 and 1852 he erected buildings thereon, without a word of opposition from any quarter. The defendant ascertaining, by an examination of the records, that the lot had passed by deeds of conveyance and

under decrees of the court from owner to owner, and had been regularly assessed with taxes, as private property; that it was enclosed as private property, and had been for many years; might justly and reasonably conclude, when he made the purchase, that no claim was asserted to a right of way over it; or if there ever had been such claim, it was then abandoned. If there ever had been, originally, a dedication of the property, it is a question worthy of consideration, whether the public, under the circumstances, would not be precluded from asserting it against the defendant. Having acquiesced, without objection, in the enclosures of the lot and the exercise of other acts of ownership on the part of those claiming title, and thus apparently abandoned all claim to the easement, and thereby induced the defendant to expend money upon the faith of such supposed abandonment, it would be gross injustice for the city of Norfolk, or its inhabitants, now to attempt to enforce such demand.

The record states that, whenever unenclosed, the lot was used as a passage way for persons, horses and vehicles. "Whenever unenclosed." This fact alone clearly shews that the user was a mere license to pass over the land, and was so regarded by the public.

The absence of the defendant in 1862, the existence of war, the occupation of Norfolk by Federal troops, and the unsettled condition of the country ever since, are circumstances sufficient of themselves to explain the reason of the failure to enclose the lot since that year, without resorting to the violent and unjustifiable presumption that the defendant thereby intended to dedicate it to the city of Norfolk.

In this view, it becomes unnecessary to discuss the *question of acceptance, or that of the identity of Plume street, or how far it has been recognized as a public street, as described in the indictment. The facts proved are wholly incompatible with the supposition that the lot in question has been dedicated to the public. On the contrary, they clearly show that no such dedication was ever made, or in the contemplation of the owners; and the court below should have so instructed the jury. The instruction given to the jury was a plain intimation that they might presume a dedication from the facts and circumstances proved; and, as such, was clearly erroneous.

During the trial, the Commonwealth offered in evidence a "paper" purporting to be a map of the borough of Norfolk, made by John Ridley, the city surveyor in 1834 and '5, and which was found in the office of the register of said city, in a book labelled "plans and charts." To the introduction of this map the defendant objected; but the court overruled the objection, and admitted the evidence; and the defendant excepted.

I think the court erred in overruling the objection. It does not appear that this map was made by direction of the city author-

ities; or that it was ever, in any manner, recognized by them as an official document; or that it was generally recognized and used by the inhabitants of said city in the surveys of streets or lots of the town. Upon its face it purports to be a mere "plan of the city of Norfolk;" probably of streets thereafter to be established; but never acted on or approved by the corporate authorities. On the other hand, it was in proof that another "map," made in 1802 by the surveyor of the borough of Norfolk, is the only official map made by order of the corporation court, and accepted and made official by such court. This would seem to be conclusive of the proposition, that the court erred in overruling the objection, and 844 *admitting the map in question to go as evidence before the jury.

For these errors the judgment must be reversed, the verdict set aside, and the case remanded to the court below, that a new trial may be had, upon which the map, if again offered in evidence, is to be excluded; and the court, if required, shall instruct the jury in accordance with the views herein expressed.

The other judges concurred in the opinion of Staples, J.

Judgment reversed.

845 *Marshall v. The Commonwealth.

March Term, 1871, Richmond.

1. **Indictment in County Court—Jurisdiction of Corporation Court.**—An indictment for a felony was found, in July, 1870, against M. in the County court of Alexandria, and it was removed to the Corporation court of Alexandria. The Corporation court has no jurisdiction to try it.
2. **Same.***—Though M. must be discharged from trial on this indictment, he may be again indicted and tried for the same offence.

In July, 1870, John Marshall was indicted in the County court of Alexandria for an assault, with intent to kill Andrew Rowles. At the August term, 1870, of the court, the case was removed to the Corporation court of the city of Alexandria. In that court the case was continued from time to time, for the defendant, until January, 1871, when he was arraigned, and pleaded a special plea to the jurisdiction; which was disallowed; and he then pleaded the general issue. Upon the trial the jury found the defendant guilty of unlawfully, but not maliciously, wounding with intent to disable, and fixed the term of his imprisonment in the county jail at six months, and assessed his fine at fifty dollars. The defendant then moved in arrest of judgment; but the court overruled the motion, and sentenced him in accordance with the verdict. Whereupon he applied to this court for a writ of error to the judgment; which was awarded.

Several questions were raised by the defendant on the trial; but this court only considered the question of jurisdiction.

*See monographic note on "Indictments."

846 *Lawrence B. Taylor, for the appellant.

The Attorney-General, for the Commonwealth.

MONCURE, P., delivered the opinion of the court.

The court is of opinion, that as, by the fourth section of chapter 38, of the act approved April 2, 1870, entitled "An act to prescribe and define the jurisdiction of the county and corporation courts of the Commonwealth, and the times and places of holding the same" (Acts of Assembly 1869-'70, pp. 35, 36), the County courts "have exclusive original jurisdiction for the trial of all presentments, informations and indictments, for offences committed within their respective counties," except as therein mentioned; and as, by the seventh section of the same act, the several Corporation courts of this State, "within their respective limits, have the same jurisdiction as the Circuit courts, and the same jurisdiction as County courts, over all offences committed within their limits;" the Corporation court of the city of Alexandria had no jurisdiction to try the indictment upon which the said judgment was rendered; the said indictment having been found in the County court of the county of Alexandria, and removed from thence, without any warrant of law, to the said Corporation court. And the court is therefore of opinion (without deciding any other question in the case) that the said Corporation court erred in not arresting the said judgment for the reason aforesaid.

Wherefore, it is considered by the court, that the said judgment be reversed and annulled. And this court, proceeding to give such judgment as the said Corporation court ought to have rendered, it is further considered by the court that the said judgment be arrested, and that the said plaintiff go quit of the same, and be discharged from execution thereon. But nothing herein contained shall have the effect of preventing *or barring any new prosecution against him except upon the indictment aforesaid.

Which is ordered to be forthwith certified to the said Corporation court.

Judgment reversed.

848 *Jones v. Commonwealth.

March Term, 1871, Richmond.

1. Criminal Procedure—Verdict Ascertains a Term of Imprisonment Shorter Than the Law Prescribes.*—

On a trial for a felony, for which the shortest term of imprisonment is five years, the jury find the prisoner guilty, and fix the term of his imprisonment in the penitentiary at three years; and the judgment is according to the verdict. Upon a writ of error to the judgment, on the appli-

*Criminal Procedure—Verdict.—See principal case cited in *Richards v. Com.*, 81 Va. 116; *Ex parte Marx*, 86 Va. 46, 9 S. E. Rep. 475.

cation of the prisoner, the judgment will be reversed: but the prisoner will not be discharged, but will be remanded for another trial.

2. Same—Habeas Corpus.*—The prisoner being in the penitentiary, he will be brought before the appellate court by writ of *habeas corpus*, and committed to the sheriff of the county of Henrico, to be taken back to the county from whence he was sent.

At the March term, 1869, of the County court of Rockingham, Charles Jones and John Reins were jointly indicted for stealing, in December, 1868, two horses, the property of Erasmus W. Hester. When arraigned, they refused to plead, and demanded to be tried in the Circuit court; which was accordingly ordered.

At the October term of the Circuit court, Jones was tried, without, so far as appeared from the record, having pleaded or had a plea entered for him, and without having elected to be tried separately. The jury found him guilty, and fixed the term of his imprisonment in the penitentiary at three years; and the court sentenced him according to the verdict. After the prisoner had been sent to the penitentiary, he applied to this court for a writ of error, which was awarded. In the petition for the writ, the prisoner stated five grounds of 849 *error; but in this court he abandoned all but the fifth. That is, that the verdict fixes the term of imprisonment at three years; whilst the statute provides that the punishment for the offence for which he was tried shall be death, or not be less than five nor more than eighteen years. This the attorney-general admitted was error. And the only question in this court was, whether the prisoner should be discharged or remanded for another trial before the Circuit court.

The Attorney-General, for the Commonwealth, submitted the question.

Roller, for the prisoner.

The prisoner is entitled to be discharged under the fifth amendment of the constitution of the United States, which says: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb." This is a capital case, and it is the first in this State in which the full effect of this constitutional provision has come up for consideration. I cannot find that the question has ever been distinctly presented, except, perhaps, in *Williams' case*, 2 Gratt. 568.

It is true that the Court of Appeals has in several instances, upon the reversal of the judgment below, awarded a new trial, or directed a venire de novo; but these cases were either, 1. Cases in which the prisoner was not indicted and tried for a capital offence, or if so tried, was acquitted of the capital offence, and convicted of the lesser, so that the verdict of the jury relieved him forever from any danger of a capital conviction; or 2. Cases in which

*Same—Habeas Corpus.—The principal case was cited and approved in *Stuart's Case*, 28 Gratt. 968.

the question was adjourned to the General court for its decision as to what should be done by the court below.

There can be no doubt of the proposition that when a prisoner is put upon his trial, he is entitled to such a verdict of acquittal or conviction as could be pleaded
850 *in bar of any further proceeding against him for the same offence; and that thereafter he should not be subject to the hazard of a second trial. This doctrine seems, at common law, to have had a more extensive application than it has at present in our courts, and seems to have warranted a refusal of a new trial, even upon the application of the prisoner. This seems to be admitted in Virginia to have been the case in cases of treason and felony. Fry, J., in Ball's case, 8 Leigh 726. And Judge Story elaborately maintains this as the proper construction of the constitutional provision in Gilbert's case, 2 Sumn. R. 19, 38-43. But his views have been generally disapproved: Fry, J., in Ball's case, holding that this is not a part of the common law with us, and that our courts are not bound by it. He says: "We have a more varied scale of crimes, with more appropriate punishments, than that found in the British code: at the time the principle was established that code was simple and bloody: it was death or nothing for most offences. It is believed that this difference in our criminal laws, as well as that in the exercise of the pardoning power, and the spirit of our institutions, together with a due regard to justice and humanity, fully justify a departure from the English rule." Justice and humanity to the prisoner, of course unite to grant him a new trial upon his own application. In Gilbert's case, 2 Sumn. R. 19, 38, Davis, J., held that the privilege intended to be secured by the prohibition in the constitution, might be waived by the prisoner. And it is entirely upon the consent of the prisoner that the courts proceed in granting a new trial in a case of felony. *United States v. Harding*, 6 Penn. Law Jour. 215; 1 Wall. Jr. R. 127, 7 N. Hamp. R. 287; 7 Blackf. R. 186; 6 Alab. R. 676; 17 Id. 190; Ball's case, 8 Leigh, 726; 3 Wharton's Cr. Law, 3060-3078.

In an appellate court this reason
851 cannot apply. It *is no longer an application for a new trial, no judgment having been rendered, and the conviction not complete; but the question is, whether in the teeth of the constitutional provision, the prisoner not only having been once put in jeopardy of life and limb—of the penalties of the law—but having felt in his own person such penalties, he shall be tried for the same offence.

Whether we consider this as a question under the constitution or the common law, the authorities, English and American, are overwhelmingly in our favor. The counsel referred to, and commented on, the following English cases: *Rex v. Huggins*, Barnardiston's R. 398, 2 Strange's R. 882; *Rex v. Ellis*, 5 Barn. & Cres. R. 395; *King v.*

Bourne, 7 Adol. & Ell. R. 58; 1 Lead. Cr. Cas. 372 and 376. And these cases have been lately affirmed in England. 1 Lead. Cr. Cas. 383 note.

In America, regarding the principle as a constitutional provision, Cooley on Const. Lim. 327, says—"A person is once in jeopardy when he is put upon trial before a court of competent jurisdiction, upon an indictment or information so far valid as to be sufficient to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been empanelled and sworn." The decisions under this constitutional provision have been numerous. And the counsel referred to Story's opinion, 2 Sumn. R. 38, 43, 48, 49. In New York, *People v. Barrett*, 2 Caines R. 304; *People v. Goodwin*, 18 John. R. 187, 202; *Shepherd v. People*, 25 New York R. 407; *Hartungs' case*, 26 Id. 167, 183; 27 Id. 344; *Taylor's case*, 3 Denio's R. 91.

It may be objected that the reasoning in these cases does not apply to the case at bar; the error being, as may be supposed, in the verdict. But the error is in the judgment.

The court should not have rendered
852 *judgment upon an illegal verdict, but should have arrested the judgment, or might have sent the jury back with instructions. It certainly had no right to discharge the jury without the prisoner's consent, until it had rendered such a verdict either of acquittal or conviction, as would have barred any other proceedings against the prisoner for the same offence. Who knows but that an acquittal might have been secured to the prisoner if this had been done?

The same principle has been sustained in Massachusetts. *The Commonwealth v. Tuck*, 20 Pick. R. 356; *Shepherd's case*, 2 Metc. R. 419; *Christian's case*, 5 Id. 530. So in Indiana, 7 Blackf. R. 186; 5 Ind. R. 290; 7 Id. 324; 13 Id. 215. So in North Carolina, *State v. Ephraim*, 2 Dev. & Bat. R. 162; 1 Dev. R. 491; 2 Hayw. R. 241. So in Alabama, 7 Porter's R. 187. So in Pennsylvania, *Cook's case*, 6 Serg. & Raw. R. 577; *McFadden v. Commonwealth*, 23 Penn. St. R. 12. In Virginia, *Williams' case*, 2 Gratt. 568. In Ohio, *Mount's case*, 14 Ohio R. 295.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the Circuit court of Rockingham county, convicting the plaintiff in error of the larceny of two horses, and sentencing him therefor to confinement in the penitentiary for the term of three years, the period ascertained by the verdict of the jury. Several errors in the judgment are assigned in the petition for a writ of error in the case, but all of them were abandoned as unsustainable, by the counsel of the plaintiff in error, on the argument of the case in this court, with the exception of the 5th, which is, that "the verdict fixes the term

of imprisonment at three years. This is in direct contravention of law. The act of the General Assembly of Virginia, Acts of 1865-'6, page 88, provides "that any person who shall be guilty of the larceny of
853 a horse, mule or *jackass, shall be punished with death, or, in the discretion of the jury, by confinement in the penitentiary for a period of not less than five nor more than eighteen years."

The offence, in this case, is charged in the indictment to have been committed on the 20th day of December, 1868. It is therefore punishable under the act above referred to, which was passed on the 12th day of February, 1866, and has ever since been, and yet is, in full force. And as that act prescribes five years as the shortest term of confinement in the penitentiary with which the said offence can be punished, and as the term of such confinement, as fixed by the verdict and judgment in this case, is three years only, it follows that in that respect the said judgment is erroneous; and for that cause it must be reversed, though the error is in favor of the accused. And this is admitted by the Attorney-General.

But what is to be done in the case after reversing the judgment? The counsel for the plaintiff in error contends that a judgment of discharge from further prosecution must be entered; while the Attorney-General contends that the verdict of the jury must be set aside and the cause remanded to the Circuit court for a venire facias de novo, and further proceedings to be had therein.

The ground on which the view of the counsel for the plaintiff in error rests, is a provision of the constitution of the United States, which is in these words: "Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb;" and which has been considered to be nothing more than a solemn re-assertion of one of the maxims of the common law, that the life of a man shall not be twice in jeopardy for one and the same offence.

This provision of the federal constitution applies, as such, only to the courts
854 of the United States, and not *to the courts of the several States; though it has been repeated, in effect if not in words, in some of the State constitutions—but not in that of Virginia. The common law maxim, however, on which this constitutional provision is supposed to be founded, does exist in Virginia, and seems to go even farther than that provision. For while that is confined, in terms, to cases involving "life or limb," the maxim extends to all criminal cases.

The only question, therefore, is, not as to the existence of the principle contended for, but as to its application to this case. Does it require the accused to be discharged from further prosecution, or will it authorize the award of a venire facias de novo to try him again, his former trial having turned out to be abortive?

The counsel for the plaintiff in error has cited many authorities in support of his

view, which show very clearly that in England, and some of the States of this Union, there would be a judgment of discharge from further prosecution in such a case as this; at least, there would have been, so long as the rule of the common law prevailed; which, however, seems to have been recently changed in England. The cases of *Rex v. Ellis*, 5 Barn. & Cress. R. 395; and *King v. Bourne, &c.*, 7 Ad. & El. R. 58; reported in 1 *Leading Criminal Cases*, pp. 372, 376, referred to by the counsel, are cases directly in point; and the American cases, tending in the same direction, are collected in the notes appended to that report. See also *Whitehead v. The Queen*, 7 Ad. & El. N. S.; 53 Eng. C. L. R. 582.

But, in this State, the law was expressly held to be otherwise in *Nemo's case*, 2 Gratt. 558. There the verdict of the jury found the accused guilty of voluntary manslaughter, and fixed his term of imprisonment at three years; and upon this verdict the Circuit court sentenced him to imprisonment for five years, that

855 *being the shortest term prescribed by law for the offence. The judgment, thus varying from the verdict, the General court reversed it for this reason; and the verdict being illegal in ascertaining a term of imprisonment shorter than that prescribed by law, the court set aside that verdict, and awarded a venire de novo. See Report of the Revisors, 1849, p. 1027, note to §7. This decision is sustained by other cases decided in this State; among which are the following: *Gibson v. The Commonwealth*, 2 Va. Cas. 111; *Commonwealth v. Smith*, Id. 327; *Commonwealth v. Percival*, 4 Leigh 686; *Mills v. Commonwealth*, 7 Id. 751; *Commonwealth v. Hatton*, 3 Gratt. 623; *Marshall v. Commonwealth*, 5 Id. 663; S. C. Id. 693; *Commonwealth v. Scott*, Id. 697. The practice in England and in this State, in regard to new trials in cases of felony, is materially different. In neither country will a new trial be granted when the verdict is in favor of the accused. Nor will a new trial be granted in England, when the verdict is against the accused, and where the proceedings have been regular. If the conviction is improper, the prisoner is respited until a pardon is applied for. In this State, the practice has always been otherwise, and new trials in cases of conviction have frequently been granted on account of irregularity of the jury, misdirection by the court, informality in the verdict, and other causes. 3 Rob. Pr. old ed. p. 271. And such is generally the practice in the other States of the Union: though the supposed wisdom and authority of the common law rule has been strongly commended by one or two of our ablest American jurists, and especially by Mr. Justice Story in *United States v. Gilbert*, 2 Sumn. R. 19. See Wharton's *American Criminal Law*, book 6, ch. 4. But in this State there can now be no doubt on the subject. It was fully considered in *Ball's case*, 8 Leigh 726, and the doctrine which had so long prevailed was firmly

established by the whole court.
 856 Speaking of the English *rule, the court say: "Is this principle a part of the common law with us, and are the courts of this State bound by it? We are all of opinion that it is not, and that our courts are not bound to follow it. It is believed that a contrary practice has long prevailed in this State. Many new trials are remembered by some of the judges, and we think that this practice is suitable to our constitution and laws, and agreeable to justice and humanity. To grant a new trial on the application of the prisoner, cannot be said to be against the maxim that no one shall be twice put in jeopardy of his life for the same offence. As was said by the solicitor-general in the case of the Commonwealth v. Green, 17 Mass. R. 515, it is really granting him a privilege, which may operate to save his life by standing a second trial for it." Since this decision in Ball's case, there have been many cases of conviction of the highest crimes in this State in which new trials have been awarded. If the prisoner succeeds in having the judgment against him reversed and annulled, on account of an irregularity in the trial, or a defect in the verdict, he cannot justly complain that he will be twice put in jeopardy for the same offence, if he be required to be tried over again. It is no more than a fair price which he pays for the relief which is afforded him. And it is better that he should pay it than that he should be forever discharged from further prosecution of the crime, not because he is not guilty, but merely because there happens to be some defect in the former proceedings against him, which enables him to have the judgment annulled. In this case, if the court had discovered, before the jury was discharged, that the term of imprisonment ascertained by the verdict was shorter than the law allowed, the jury would have been sent back to their room to reconsider and correct that matter. But the discovery was not made, and the judgment conformed to the verdict. The error

857 is one *of mere inadvertence. And, though the judgment must be reversed therefor, we are of opinion that there must be a venire facias de novo.

But, it appearing that the plaintiff is now in the penitentiary, in execution of the said judgment against him, it will be necessary to have him brought before this court by a habeas corpus, and committed to the custody of the sheriff of Henrico county, to be by him conveyed to the jail of the county of Rockingham, for the purpose of being tried again for the offence aforesaid; in conformity with the course which was pursued in Barker's case, 2 Va. Cas. 122. A writ of habeas corpus is therefore awarded accordingly, directed to the superintendent of the penitentiary, commanding him to bring the prisoner before this court at 12 o'clock to-morrow morning.

The judgment was as follows:

It seems to the court here, that there is error in the said judgment. in this, that the verdict of the jury on which it is

founded, fixes the term of the plaintiff's imprisonment in the penitentiary, for the felony of which he was convicted as aforesaid, at three years, to which term of imprisonment he was accordingly sentenced by the said judgment: whereas the shortest term of imprisonment for which he can be sent to the penitentiary under the law which applies to this case (Acts of Assembly 1865-66, page 88, chapter 22), is five years. Wherefore, without deciding anything in regard to the other errors assigned in the petition (which the plaintiff by counsel admitted not to be well assigned, and therefore waived his assignment thereof), it is considered by the court that the said judgment be reversed and annulled. And for reasons stated in writing, and filed with the record, it is ordered that the said verdict of the jury be set aside, and the cause remanded to the said Circuit court of Rockingham *county, for a new trial to be had therein, on a plea of not guilty to be entered by the said court; the plaintiff on his arraignment having refused to plead, and the said court not having had the said plea entered before the former trial, as required by law: which is ordered to be certified to the said Circuit court.

But it appearing to the court that the plaintiff is now in the penitentiary, in execution of the said judgment against him, it will be necessary to have him brought before this court by a habeas corpus, and committed to the custody of the sheriff of Henrico county, to be by him conveyed to the jail of Rockingham county for the purpose of being tried again for the offence aforesaid; in conformity with the course which was pursued in Barker's case, 2 Va. Cas. 122. Therefore, it is ordered that a writ of habeas corpus be awarded accordingly, directed to the superintendent of the penitentiary, commanding him to bring the plaintiff before this court to-morrow at 12 o'clock, M. to do and submit to what may then be ordered by the court in the premises according to law.

The order was as follows:

This day the said Charles Jones was brought into court by the superintendent of the penitentiary, in obedience to the writ of habeas corpus awarded in this case on yesterday, directed to the said superintendent. Whereupon it is ordered that the said Charles Jones be committed to the jail of Henrico county, to be from thence conveyed by the sheriff of Henrico to the jail of the said county of Rockingham, to be tried again in the said Circuit court of the said county of Rockingham, for the felony in the said indictment mentioned. And it is further ordered that a copy of this order be forthwith given to the said sheriff, who is required as soon as may be, to execute the same, and to employ the necessary assistance for that purpose; which said 859 *sheriff, and the person so employed to assist him, are to be compensated out of the treasury according to law.

Judgment reversed, and prisoner remanded.

860 *Boswell v. The Commonwealth.*

March Term, 1871. Richmond.

1. **Indictment in Corporation Court—Right to Trial in Circuit Court.**†—A prisoner indicted in a Corporation court for murder, is not entitled to elect to be tried in the Circuit court. In this respect the act of April 27, 1867, Sess. Acts 1866-'67, p. 931, is altered by the act of April 2, 1870. Sess. Acts 1869-'70, p. 35.
2. **Trial for Felony—Presence of Prisoner—Before Arraignment.**‡—The act, Code ch. 208, § 3, which provides that a person tried for felony shall be personally present during the trial, does not apply before his arraignment; but before his arraignment an order may be made in his absence.
3. **Drunkenness—Voluntary—Liability for Acts.**—A person, whether he be an habitual drinker or not, cannot voluntarily make himself so drunk as to become, on that account, irresponsible for his conduct during such drunkenness. He may be perfectly unconscious of what he does, and yet he is responsible. He may be incapable of express malice, but the law implies malice in such a case, from the nature of the instrument used, the absence of provocation, and other circumstances under which it is done.
4. **Insanity from Drunkenness—Liability for Acts.**—If permanent insanity is produced by habitual drunkenness, then, like any other insanity, it excuses an act which would be otherwise criminal.
5. **Criminal Law—Insanity—Burden of Proof.**§—Insanity, when it is relied on as a defence to a charge of crime, must be proved to the satisfaction of the jury to entitle the accused to an acquittal on that

*For monographic note on insanity, see end of case.

†**Jurisdiction of Corporation Courts.**—In Chahoon's Case, 21 Gratt. 825 (a case of felony), the point was made by counsel that, under the constitution in force at that time, the hustings court of Richmond could not be given jurisdiction to try cases of felony. But the court said that, since the principal case, Bird's Case, 21 Gratt. 800 and Smith's Case, 21 Gratt. 809, all proceeded upon the tacit admission of the existence of the jurisdiction of the corporation courts to try such cases, the court was of opinion that the hustings court of the city of Richmond had jurisdiction over the case.

‡**Trial for Felony—Presence of the Prisoner.**—See *foot-note* to Jackson v. Com., 19 Gratt. 656.

§**Same—Continuance—Before Arraignment.**—Before arraignment, the prisoner may move to have his case continued.

In Anderson v. Com., 84 Va. 78, 3 S. E. Rep. 803, the court said: "In Boswell's Case, 20 Gratt. 860, it appears from the report of the case, that the case was thrice continued, on the motion of the prisoner, before his arraignment; and in Shifflet's Case, 14 Gratt. 652, a motion to change the venue was made and granted before the prisoner was arraigned." See also, cases collected in *foot-note* to Jackson v. Com., 19 Gratt. 656.

See also, monographic note on "Continuances" appended to Harman v. Howe, 27 Gratt. 676.

§**Criminal Law—Insanity—Burden of Proof.**—The view adopted by the principal case that when insanity is relied on as defense to a charge of crime, it must be proved to the satisfaction of the jury, to entitle the accused to be acquitted on that ground, has been approved by many cases, which cite the principal case as authority, so that now it seems to be the established doctrine in Virginia. See Bac-

ground. If, upon the whole evidence, the jury believe he was insane when he committed the act, they will acquit him on that ground. But not upon any fanciful ground, that though they believe he was then sane, yet, as there may be a rational doubt of such sanity, he is therefore entitled to acquittal.

6. **Homicide—Intoxication—Degree of Murder.**||—If a person kills another without provocation and through reckless wickedness of heart, but, at the time of doing so, his condition, from intoxication, was such as to render him incapable of doing a willful, deliberate and premeditated act, he is guilty of murder in the second degree.

7. **Criminal Law—Instructions—Misleading.**¶—An instruction which assumes an important fact as true or is calculated to mislead the jury, should not be given.

cigalupo v. Com., 33 Gratt. 817, and *foot-note*: Dejar-nette v. Com., 75 Va. 881; State v. Strauder, 11 W. Va. 823; State v. Robinson, 20 W. Va. 729; State v. Jones, 20 W. Va. 769; State v. Douglass, 28 W. Va. 801. In State v. Strauder, 11 W. Va. 823, this view is said to be supported by the weight of authority, English and American; but in 16 Am. & Eng. Enc. Law (2d Ed.) page 617, it is said that perhaps the weight of authority and reason sustains the view—which is daily growing in favor—that the prosecution must prove sanity beyond reasonable doubt, after the accused has raised a doubt as to his sanity.

The rule laid down in the principal case that it is not even incumbent on the prosecution to satisfy the jury of the person's sanity beyond a reasonable doubt was approved in Dejar-nette v. Com., 75 Va. 881 and Baccigalupo's Case, 33 Gratt. 818.

As to the three distinct views on this subject, see 16 Am. & Eng. Enc. Law (2d Ed.) 615.

||**Homicide—Intoxication—Degree of Murder.**—In Willis v. Commonwealth, 32 Gratt. 936, the court said: "Voluntary immediate drunkenness is not admissible to disprove malice, or to reduce the offence to manslaughter. But where, by reason of it, there is wanting that deliberation and premeditation which are necessary to elevate the offence to murder in the first degree, it is properly ranked as murder in the second degree; as the courts have repeatedly decided. Com. v. Jones, 1 Leigh 598; Pirtle v. State, 9 Humph. 663; Swan v. State, 4 Humph. 136; Boswell v. Com., 20 Gratt. 860."

See also, in accord, Honesty v. Commonwealth, 81 Va. 299, 301; State v. Welch, 36 W. Va. 702, 15 S. E. Rep. 423.

See also, *foot-note* to Willis v. Com., 32 Gratt. 929.

¶**Instructions—Misleading.**—The rule laid down in the principal case, that an instruction which assumes an important fact as true, or which is calculated to mislead the jury, should not be given, has been approved by several subsequent cases. See Shenandoah R. R. Co. v. Moose, 83 Va. 880, 3 S. E. Rep. 796 (instruction misleading); N. & W. R. R. Co. v. Irvine, 85 Va. 219, 7 S. E. Rep. 233 (instruction misleading); Houston v. Com., 87 Va. 268, 12 S. E. Rep. 385 (assumption of facts in instruction); Gas Co. v. Wheeling, 8 W. Va. 371 (instruction misleading and vague).

See also, Wiley v. Givens, 6 Gratt. 277; Pasley v. English, 10 Gratt. 236 (instruction misleading); Priest v. Whitacre, 78 Va. 151 (instruction irrelevant).

See generally, monographic note on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

861 *This was a writ of error to the Corporation court of Alexandria. James Boswell was indicted in that court, at the July term, 1870, for the murder of Martha French, a small colored girl about seven years old. He was tried at the December term of the court, and was found guilty by the jury of murder in the second degree; and they fixed the term of his imprisonment in the penitentiary at eleven years: and the court sentenced him accordingly. The prisoner thereupon applied to this court for a writ of error, which was awarded. The case is fully stated by Judge Moncure, in his opinion.

F. L. Smith, and Neale, for the prisoner.

The Attorney-General, for the Commonwealth.

MONCURE, P. This is a writ of error to a judgment of the Corporation court of the city of Alexandria, whereby the plaintiff in error was convicted of murder in the second degree. The accused having been indicted for the said murder in the said court, on the 12th of July, 1870, on the next day moved the court to remove the cause to the Circuit court of the said city for trial, which motion was sustained, and the cause was ordered to be certified to the said Circuit court. Afterwards, on the same day, and before the signing of the minutes, the said order was rescinded; the accused, by his counsel, excepting to the order of rescission, as is therein stated; though no bill of exceptions to that effect appears in the record. It does not appear that the accused was personally present when the order of rescission was made, but it may be fairly inferred that he was not. On the next day, to wit: the 14th of July, 1870, the accused being personally present, again moved the court to remove the cause to the said Circuit court for trial, which motion was then overruled; and a bill of exceptions to the said ruling of the *court was tendered by the accused and signed and sealed by the court. The cause was then continued to the next quarterly term of the court, on the motion of the accused.

862 At the next quarterly term, to wit: on the 10th of October, 1870, the accused presented several affidavits of himself and others, tending to show that, by reason of the prejudice against him, he could not get a fair trial in the said city, and moved the court for a change of venue; which motion was overruled. Whereupon he moved for and obtained a continuance of the cause until the November term, 1870, of the court. The affidavits on which the said motion for a change of venue was founded, are copied in the record, but no further notice need be taken of them, as no exception was taken to the opinion of the court overruling that motion. At November term, the cause was again continued on the motion of the accused. At December term, 1870, the accused, being arraigned on the said indictment, refused to plead thereto, when the plea of not guilty was entered for him by order of

the court, according to law, and the trial proceeded.

In the progress of the trial, two instructions were asked for by the accused; but the court refused to give them, and gave several instructions of its own. The accused excepted to the action of the court in refusing and giving instructions as aforesaid, and the facts proved on the trial are set out in the bill of exceptions. The jury found the accused guilty of murder in the second degree, and fixed the term of his imprisonment in the penitentiary at eleven years. The accused then moved for a new trial, and in arrest of judgment; but both motions were overruled by the court. No exception was taken, however, to those rulings of the court, and they need be noticed again.

The court having rendered judgment 863 according to the verdict, this *writ of error brings up that judgment for review before this court.

The first error assigned is, that the corporation court erred in refusing to allow the case to be removed to the Circuit court of the city of Alexandria.

Undoubtedly, this would have been error if the Code, chap. 208, § 1, as amended by the act to revise and amend the criminal procedure, passed April 27, 1867, Acts of Assembly 1866-67, p. 931, had remained unchanged when the motion was made for the removal of the case as aforesaid. By that section, as so amended, it was declared that "trials for felony shall be in a County or Corporation court, and may be at any term thereof; except that a person to be tried for rape," &c. (naming certain other specific offences, including murder), "may, upon his arraignment in the County or Corporation court, demand to be tried in the Circuit court having jurisdiction of the said county or corporation," &c. But that provision of the Code was changed in regard to Corporation courts by the act approved April 2, 1870, entitled "an act to prescribe and define the jurisdiction of the County and Corporation courts of the Commonwealth, and the times and places of holding the same." Acts of Assembly 1869-70, p. 35. Indeed, the change may be said to have been made by the Constitution, article 6, sec. 14, which provides that "for each city or town in the State, containing a population of five thousand, shall be elected on the joint vote of the two houses of the general assembly, one city judge, who shall hold a Corporation or Hustings court of said city or town as often and as many days in each month as may be prescribed by law, with similar jurisdiction which may be given by law to the Circuit courts of this State," &c. The sixth section of the act of April 2, 1870, aforesaid, in conformity with the provision of the constitution just referred to, enacts that "for each town or 864 city of the *State containing a population of five thousand, there shall be a court called a Corporation court, to be held by a judge with like qualifications and elected in the same manner as judges of the County court." And the 7th section enacts,

that "the several Corporation courts of this State shall, within their respective limits, have the same jurisdiction as the Circuit courts, and the same jurisdiction as County courts, over all offences committed within their limits," &c. The effect of these provisions of the constitution and act aforesaid, is to take away from persons accused of certain felonies in Corporation courts, the right they would otherwise have, to demand to be tried in the Circuit court having jurisdiction of the said corporation. That this is so, appears conclusively from the fact that the 4th section of the act aforesaid prescribing the criminal jurisdiction of County courts, expressly authorizes a person about to be tried for arson, or any felony for which he may be punished with death, upon his arraignment in the county court, to demand to be tried in the Circuit court of the county. Whereas the 7th section of the same act, prescribing the jurisdiction of the corporation courts, gives no such authority; but on the contrary, the 8th section declares, that "all persons who have heretofore elected to be tried in the Circuit court, shall be tried in said court, anything in this act to the contrary notwithstanding:" thus showing that it was not intended to give any such right of election thereafter to a person charged with an offence in a corporation court.

I therefore think the corporation court did not err in refusing to allow the case to be removed to the Circuit court.

An objection is taken in the brief of the plaintiff's counsel, though not assigned as error in the petition, that the order of rescission aforesaid was not made in the personal presence of the accused. *Sperry's case*, 9 *Leigh 623; *Hooker's case*, 13 Gratt. 763. The Code, ch. 208, § 3, provides, that "any person tried for felony shall be personally present during the trial." The said order of rescission was made before the commencement of the trial. The accused was not in fact arraigned until after that order was made, as the record shows, though it erroneously states that he was arraigned when the rescinded order was made. His personal presence was, therefore, not necessary when the order of rescission was made. He was present by his counsel, who excepted, that is objected, to the order. No bill of exceptions on the subject was signed. The order of removal was void, the Circuit court having no jurisdiction of the case. On the day after the rescission of that order, the accused, being personally present in court, made another motion for the removal of the cause, which was overruled, and a bill of exceptions was tendered and signed. This would have cured the irregularity, if there had been any, in making the order of rescission without his personal presence. I therefore think this objection is untenable. A like objection was taken in the brief, though not in the petition, that the case was continued at November term, 1870, on the motion of the counsel of the accused, when the latter was not personally present. This was be-

fore the arraignment, and the objection is, therefore, untenable, for reasons already given.

The next assignment of error, and that which is mainly relied on, is the refusal of the court to give the instructions asked for by the accused, and the giving of others in their stead.

The facts proved on the trial, and on which the said instructions were founded, are in substance as follows: On the evening of the 4th of July, 1870, Boswell (the accused), being drunk and staggering, came up King street (in Alexandria) to West street, and upset a barrel in front of a store

on King street, as he went by;

866 *that he turned down West street, going in a northerly direction, and

keeping on the east side of the latter street; that, as he walked along, he exclaimed, in violent tones, "I will blow his damn brains

out; will kill the damn little sons of bithces;" that there was at the time two

little negroes girls passing along the west side of West street, going in a southerly direction and towards King street, a number of

ducks in the street about ten feet from him, and still further on, a cart, both the ducks

and the cart being between prisoner and the other side of the street, though it did

not appear that the cart was between prisoner and the little girls; that, when about

midway of the square, Boswell picked up a brick, and, casting it across the street,

struck one of the little girls on the right side of the head, above the ear; that the

girl fell in a dying condition, and expired at 10 o'clock in the night of that day; that

the girl so struck was named Martha French, and was about six years and nine

months old; that, after throwing the brick, Boswell turned and walked to the corner of

King and West streets, took off his coat or jacket, put it on the curbstone, and sat

down; while there he was told by a witness not to go away, and replied, "If I have

done anything wrong, you can take out your penknife and cut my throat. I give

myself up—If I killed the child, I did not intend to do it;" that Boswell had been

grossly intoxicated for a week, except on the day preceding the day on which the

alleged crime was committed, and had no previous acquaintance with the deceased;

that Boswell, the day before the killing of the child, when asked by Thos. Huntington

why he did not reform and behave himself, said he wanted to die, but did not know

why; that, one day in the latter part of June, 1870, he threw himself into a small

stream near Alexandria, called Hooff's run, at a place where the water is about eight

inches deep, and Lucien Hooff and

867 another *man, who was passing by, found him lying on his face in the

water, out of which they pulled him, and laid him on the grass; if he had been left

in the water, he would have drowned; that they went away, and Hooff, on looking

back, saw Boswell again throw himself into the water, and Hooff and a man named Cun-

ningham pulled him out, and left him lying

on the bank in an insensible condition; he would have been drowned in two minutes, had he not been rescued; that, in June, 1870, some two weeks prior to the killing of the child, Boswell came to the depot of the Orange, Alexandria and Manassas railroad, excessively drunk, and staggering and throwing himself about, and threw himself across the cow-catcher of an engine in motion, which dragged him some distance; that the engineer stopped, and two men took him off the cow-catcher, and threw him on a pile of manure; that about an hour afterwards, as the southern-bound train was leaving the depot, Boswell was discovered lying on one or both rails of the track, near the culvert, a short distance from the depot; that the engineer stopped the train, and the same two men dragged him off the track, and threw him down the embankment; that each month, about the change of the moon, John Boswell, the prisoner's younger brother, would go home, refuse to work, and, when approached with directions to go to work, would be listless, indifferent, and seem not to understand.

After the evidence was heard by the jury, the accused, by counsel, moved the court to give them the following instructions:

1st. If the jury shall believe, from the evidence, that the prisoner was drunk at the time of the killing, in the indictment mentioned, and that such drunkenness was brought on by sensual or social gratification, with no criminal intent, then

868 they are justified in finding a *verdict of voluntary manslaughter; provided they also believe, from the evidence, that there was no malice.

2d. If the jury believe, from the evidence, that the drunkenness aforesaid was the result of long-continued and habitual drinking, without any purpose to commit crime, and that the drunkenness produced insanity, whether temporary or permanent, and that the prisoner was in such condition at the time of the killing aforesaid, then the jury may find a verdict of not guilty; and further, that where the jury, from the evidence, should entertain a rational doubt on the question of insanity, they should find in favor of insanity; or if they should entertain, from the evidence, reasonable doubt of any material portion of the charge, the prisoner shall have the benefit of that doubt.

And the court refused to give the said instructions, and gave the following to the jury:

1st. That every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction; that if, from the evidence, the jury believe that, at the time of throwing the brick, the blow from which caused the death of the deceased, the prisoner was laboring under such a defect of reason from disease of the mind (remotely produced by previous habits of gross intemperance), as not to know the nature and possible consequences of his act, or if he did know, then

that he did not know he was doing what was wrong, they will find the prisoner not guilty.

2d. That if the jury shall believe beyond reasonable doubt, from the evidence, that the prisoner threw the brick at the deceased without provocation and through reckless wickedness of heart, but that, at the time of doing so, his condition, from intoxication or other causes, was such as to render him incapable of doing a willful, deliberate and premeditated act, then they will find the prisoner guilty of murder in the second degree.

869 *3d. That if the jury believe, from the evidence, beyond reasonable doubt, that the prisoner, though intoxicated at the time of throwing the brick which caused the death of the deceased, was capable of knowing the nature and consequence of his act, and if he did know, then that he knew he was doing wrong, and that, so knowing, he threw the brick at the deceased with the willful, deliberate and premeditated purpose of killing her, then they will find the prisoner guilty of murder in the first degree.

4th. That if the jury believe, from the evidence, that the prisoner, at the time of throwing the brick at the deceased, was in such a condition as to render him incapable of a willful, deliberate and premeditated purpose, and that he did not so throw it out of any reckless wickedness of heart or purpose, then they will find the prisoner guilty of voluntary manslaughter.

5th. If the jury should acquit the prisoner, by reason of their believing him insane, that they will so state in their verdict.

The law in regard to the extent to which intoxication affects responsibility for crime, seems to be now well settled; and the only difficulty is in the application of the law to the facts of a particular case.

In 1 Hale's P. C. page 32, he says: "The third sort of madness is that which is dementia affectata; namely, drunkenness. This vice doth deprive a man of his reason, and puts many men into a perfect, but temporary frenzy; but by the laws of England, such a person shall have no privilege by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses." See also 1 Russell on Crimes, p. 7; and 4 Bl. Com. 26. Blackstone says, in regard to the excuse of drunkenness: "The law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is,

870 though real, will not suffer any man thus to privilege one crime by *another." In Rex v. Thomas, 7 Car. & Payne R. 817, 820, Parke, B., said to the jury: "I must also tell you, that if a man makes himself voluntarily drunk, it is no excuse for any crime he may commit whilst he is so; he must take the consequences of his own voluntary act, or most crimes would go unpunished." And in John Burrow's case, 1 Crim. C. C. 238, Holroyd, J., told the jury: "Drunkenness is not insanity, nor

does it answer to what is termed an unsound mind, unless the derangement which it causes becomes fixed and continued by the drunkenness being habitual, and thereby rendering the party incapable of distinguishing between right and wrong."

The American cases establish the same doctrine with the English on this subject. In *Pirtle v. The State*, 9 Humph. R. 663, the court, in explaining the decision in *Swan v. The State*, 4 Humph. R. 136, say: "This reasoning is alone applicable to cases of murder under our act of 1829, ch. 23, which provides 'that all murder committed by means of poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing,' &c. 'shall be deemed murder in the first degree, and all other kinds of murder shall be deemed murder in the second degree.' Now, this is drawing a distinction unknown to the common law, solely with a view to the punishment; murder in the first degree being punishable with death, and murder in the second degree by confinement in the penitentiary. In order to conflict the punishment of death, the murder must have been committed wilfully, deliberately, maliciously and premeditatedly. This state of mind is conclusively proven when the death has been inflicted by poison or by lying in wait for that purpose; but if neither of these concomitants attended the killing, then the state of mind necessary to constitute murder in the first degree, by the willfulness, the deliberation, the maliciousness, the premeditation, if it
871 *exist, must be otherwise proven."

In all such cases, whatever fact is calculated to cast light upon the mental status of the offender, is legitimate proof; and among others the fact that he was at the time drunk; not that this will excuse or mitigate the offence if it were done wilfully, deliberately, maliciously and premeditatedly; (which it might well be, though the perpetrator was drunk at the time), but to shew that the killing did not spring from a premeditated purpose." "This distinction can never exist except between murder in the first degree and murder in the second degree under our statute." "As between the two offences of murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of enquiry; the killing being voluntary, the offence is necessarily murder in the second degree, unless the provocation were of such a character as would at common law constitute it manslaughter, and for which latter offence a drunken man is equally responsible as a sober one." I have quoted thus largely from this case, because it lays down the law very correctly, and is specially applicable in this State, in which there is a law very much, if not precisely, like that of Tennessee, distinguishing between murder in the first and second degree. The most material cases, English and American, bearing upon this whole subject, are collected in a note to the case of *United States v. Drew*, 5 Mason R.

28, in 1 Lead. Crim. Cas. pp. 113-124. See also 1 Wharton's Am. C. L. §§ 32-44.

With this general view of the law on the subject, I will now take some notice of the instructions in detail; and first, of those asked for by the accused.

The first instruction asked for was properly refused. It states a case of murder, and asks the court to instruct the jury that it was a case of voluntary manslaughter.

The words at the conclusion, "provided *they also believe, from the evidence, that there was no malice," do not alter the case. The law implies malice, from the facts stated in the former part of the instruction. The word "malice," in the proviso, can mean only express malice, which is unnecessary to constitute murder; malice, express or implied, being sufficient. Or if it mean malice generally, then the proviso is in conflict with the body of the instruction, which is therefore faulty, and it was proper on that ground, if no other, to refuse to give it.

The second instruction asked for was also properly refused. Drunkenness is no excuse for crime, although such drunkenness may be "the result of long-continued and habitual drinking, without any purpose to commit crime," and may have produced temporary insanity, during the existence of which the criminal act is committed. In other words, a person, whether he be an habitual drinker or not, cannot, voluntarily, make himself so drunk as to become, on that account, irresponsible for his conduct during such drunkenness. He may be perfectly unconscious of what he does, and yet he is responsible. He may be incapable of express malice, but the law implies malice in such a case, from the nature of the instrument used, the absence of provocation, and other circumstances under which the act is done. Public policy and public safety imperatively require that such should be the law. If permanent insanity be produced by habitual drunkenness, then, like any other insanity, it excuses an act which would be otherwise criminal. The law looks at proximate, and not remote, causes in this matter. Finding the accused to be permanently insane, it enquires not into the cause of his insanity. In the leading case of *United States v. Drew*, before referred to, which was a case of murder, Mr. Justice Story held the accused not responsible, the act having been done under an insane delusion, produced by a disease, brought on by intemperance,
873 *called delirium tremens.

"In general," said the judge, "insanity is an excuse for the commission of every crime, because the party has not the possession of that reason which includes responsibility. An exception is, when the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. But the crime must take place and be the immediate result of the fit of intoxi-

cation, and while it lasts; and not, as in this case, a remote consequence, superinduced by the antecedent exhaustion of the party, arising from gross and habitual drunkenness." Had the crime been committed while Drew was in a fit of intoxication, he would have been liable to be convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offence. The law looks to the immediate, not to the remote, cause; to the actual state of the party, and not to the causes which remotely produced it." That is the first case in which it has been held that an act otherwise criminal, done by a person laboring under the disease of delirium tremens, might be excusable on the ground of insanity. Without meaning to question the authority of that case, and conceding it to be good law, as it may be, still it does not apply to this case; for it expressly admits that "had the crime been committed while Drew as in a fit of intoxication, he would have been liable to be convicted of murder." In this case, it is not pretended that the accused had delirium tremens, or anything like it, when he committed the act, and the instruction asked for expressly admits that the act was done by the accused while he was drunk. So that, according to the law, as it was admitted to be in the case of the United States v. Drew, such drunkenness is no excuse. This is a sufficient

874 *reason for refusing to give the second instruction asked for. The latter part of that instruction embraces another proposition, which will be noticed presently.

As to the instructions which were given by the court, the first, I think, is unexceptionable. To the greater part, and all but the first two or three lines, no objection has been, or properly can, be taken. To the first part of it, which is in these words: "That every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction," the accused objects. Of course he does not, and cannot, object to so much even of that part as says "that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes." He only objects to the concluding words of the sentence, "until the contrary is proved to their satisfaction." Indeed, the objection only goes to the three concluding words, "to their satisfaction;" which he seems to think is an excessive measure of the proof required by law to repel the presumption of sanity. He seems to think (and that is the thought which is embodied in the latter part of the second instruction asked for) that all the proof required by law, to repel the said presumption, was only so much as would raise a rational doubt of his sanity at the time of committing the act charged against him. Now, I think this is not law; and that the law is correctly expounded in the first instruction

given by the court. There are, certainly, several American cases which seem to sustain the view of the accused, and are referred to by his counsel. But I think the decided weight of authority, English and American, is the other way, as the cases referred to by the attorney-general will show. In 1 Wharton's Am. Cr. L. § 711, the writer says: "At common law, the preponderance of authority is, that if the defence be insanity, it must be substantially *proved as an independent fact;" and for this he cites *Rex v. Stokes*, 3 C. & K. 138; *Rex v. Taylor*, 4 Cox C. C. 155; *State v. Bringer*, 5 Alab. R. 244; *State v. Starke*, 1 Strobb. R. 479; *State v. Hunting*, 6 Bennett's R. 474; *State v. Starling*, 6 Jones' N. C. R. 471; *State v. Spencer*, 1 Zab. R. 202; *State v. Bonfant*, 3 Minne. R. 123; *State v. Brandon*, 8 Jones' N. C. R. 463; *People v. Myers*, 20 Calif. R. 518. "On the other hand," he proceeds, "it has been ruled in Massachusetts, in 1856, that the defence is made out if the prisoner satisfied the jury, by a preponderance of evidence, that he is insane." And for this he cites *Com. v. Eddy*, 7 Gray R. 583; *Com. v. Rogers*, 7 Metc. R. 500. "And in other courts it has been held, that in this, as in all other constituents of guilt, the burden is on the prosecution." And for this he cites *People v. McCann*, 2 E. P. Smith (16 N. Y.) 58; *Ogleton v. State*, 28 Alab. R. 692; *U. S. v. McClure*, 7 Law R. n. s. 439; *State v. Bartlett*, 43 N. Hamp. R. 224; *Polk v. State*, 19 Ind. R. 170; *Hopps v. State*, 31 Ill. R. 385; see also *Chase v. The People*, 40 Ill. R. 358, in which *Hopps v. The State* is explained. Now, here we have a reference to nearly all the authorities on either side bearing upon this question. And I think the fair result of them is to show that insanity, when it is relied on as a defence to a charge of crime, must be proved to the satisfaction of the jury, to entitle the accused to be acquitted on that ground; though such proof may be furnished by evidence introduced by the Commonwealth to sustain the charge, as well as by evidence introduced by the accused to sustain the defence. This result consists with reason and principle. The law presumes every person sane till the contrary is proved. The Commonwealth having proved the corpus delicti, and that the act was done by the accused, has made out her case. If he relies on the defence of insanity, he must prove it to the satisfaction of the jury. If, upon the whole evi-

876 dence, *they believed he was insane when he committed the act, they will acquit him on that ground. But not upon any fanciful ground, that, though they believe he was then sane, yet, as there may be a rational doubt of such sanity, he is therefore entitled to an acquittal. Insanity is easily feigned, and hard to be disproved, and public safety requires that it should not be established by less than satisfactory evidence. Some of the cases have gone so far as to place the presumption of sanity on the same ground with the presumption

of innocence, and to require the same degree of evidence to repel it. But I do not think it is necessary or proper to go to that extent. See, also, Roscoe's Cr. Ev., library edition, pp. 905-909; opinions of the judges on questions propounded by the House of Lords, 47 Eng. C. L. R. p. 129; State v. Willis, 63 N. C. R. 26; Graham v. Commonwealth, 16 B. Mon. R. 587; Commonwealth v. York, 9 Metc. R. 93.

As to the second instruction given by the court, it seems to be free from any just ground of objection, except that I think the words "other causes" ought to have been omitted. If a person be incapable from other causes than intoxication, of doing a willful, deliberate and premeditated act, he would seem to be incapable of murder in the second degree, or any other crime. To be sure, the words "through reckless wickedness of heart," in the former part of the instruction, imply malice; but it is difficult to see how a person guilty of doing an act through reckless wickedness of heart, could, at the same time, be in such condition from other causes than intoxication, as to render him incapable of doing a willful, deliberate and premeditated act. There is, therefore, an apparent conflict between the different parts of the instruction, and, at all events, it was calculated to mislead the jury.

The third instruction given by the court is unobjectionable and unobjected to.

877 *The fourth instruction given by the court is objectionable on the ground taken by the counsel of the accused, that it assumes the fact that the accused threw the brick at the deceased, which ought to have been referred to the jury. The instruction ought to have stated the fact hypothetically, thus: "That if the jury believe, from the evidence, that the prisoner threw a brick at the deceased, which caused her death, and that, at the time of so doing, he was in such a condition of drunkenness as to render him incapable of a willful, deliberate and premeditated purpose, and that he did not so throw it out of any reckless wickedness of heart or purpose, then they will find the prisoner guilty of voluntary manslaughter."

Whether the accused threw the brick at the deceased or not, was a fair question of controversy before the jury upon the evidence. He might have thrown it at her, or he might have thrown it at the ducks in the street, or he might have thrown it at random. In either case, he did an unlawful act, likely to do mischief, considering the time and place and circumstances under which it was done, and he was therefore responsible for the consequences of the act as a crime. But the degree of such crime depended upon the intention with which the brick was thrown. Such intention was, therefore, a material fact to be determined by the jury, and the court invaded their province in assuming it.

The fifth instruction given by the court is, of course, unobjectionable.

The result of my opinion is, that there is no other error in the judgment than those in the second and fourth instructions given by the court as aforesaid; but for those errors the said judgment ought to be reversed, the verdict set aside, and the cause remanded for a new trial to be had therein.

878 *JOYNES, J., concurred in the opinion of Moncure, P., except as to what is said therein upon the burden of proof on the question of insanity. He was of opinion that the burden was on the Commonwealth to prove the sanity of the prisoner.

The other judges concurred in the opinion of Moncure, P.

Judgment reversed.

INSANITY.

- I. Definitions.
- II. Jurisdiction in Lunacy.
- III. The Inquisition.
- IV. Appointment of Committee.
- V. Management of Estate, Committee's Rights, Duties and Liabilities.
 1. Control by the Court.
 2. Sales, Leases and Mortgages.
 3. Accounting.
 4. Compensation of Committee.
 5. Bequest in Trust to a Lunatic.
 6. Committee a Fiduciary.
 7. Committee Appointed by the Chancellor.
- VI. Termination of Committee's Office.
- VII. Restraint of Insane Persons, Remedies.
- VIII. Actions by and against Lunatics and Their Committees.
 1. Before Inquisition.
 2. After Inquisition.
 3. Compromise of Suits by Committee.
 4. Suits against Committee's Sureties.
 5. Judicial Sales of Lunatic's Land.
- IX. Questions of Law and Fact.
 1. The Existence of Insanity a Question for the Jury.
 2. When an Issue Out of Chancery Is to Be Directed.
- X. Presumptions.
- XI. Evidence of Insanity.
- XII. Liability for Crimes.
- XIII. Liability on Contracts.
- XIV. Liability for Torts.
- XV. Liability on Judgments.
- XVI. Competency as a Witness.

Cross-References.—See monographic note on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 478. See also, monographic note on "Judicial Sales" and "Official Bonds."

I. DEFINITION.

Lunacy.—A lunatic is one who has had understanding, but by disease, grief, or other accident has lost the use of his reason, which yet the law presumes that he may recover. 1 Min. Inst. (4th Ed.) 102.

Idiocy.—An idiot is one that hath no understanding from his nativity and who is therefore by law presumed never likely to attain any. 1 Min. Inst. (4th Ed.) 101.

Senile Dementia.—*Senile dementia* is that form of insanity in the old marked by slowness and weakness, indicating the breaking down of the mental powers in advance of bodily decay. Hiett v. Shull, 36 W. Va. 563, 15 S. E. Rep. 146.

Moral Insanity, Irresistible Impulse.—As laid down by the judge of the lower court and approved: "An irresistible inclination to kill or commit some other offence, some unseen pressure on the mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, it is incapable of resisting. A diseased state of the mind, the tendency of which is to break out in a sudden paroxysm of violence venting itself in homicide or other dangerous and violent acts upon friend and foe indiscriminately." Dejarnette v. Com., 75 Va. 867. See also, State v. Harrison, 36 W. Va. 729, 15 S. E. Rep. 982.

II. JURISDICTION IN LUNACY.

Not Inherent in Courts of Equity in United States.—It cannot be said that jurisdiction of this suit (to enjoin the exercise of powers under a void appointment as committee) can be maintained on the theory that courts of equity have jurisdiction over the persons and property of lunatics as a special jurisdiction; for such courts in America do not possess it, except in a few states where statutes confer it. Lance v. McCoy, 34 W. Va. 416, 12 S. E. Rep. 728.

Jurisdiction of Circuit Courts.—The circuit court has no jurisdiction to declare a person insane; it has only concurrent jurisdiction with the county and corporation courts in appointing a committee after the party has been duly declared insane by three justices or by the county or corporation court. Va. Code, secs. 1677, 1698, 1700; Harrison v. Garnett, 36 Va. 763, 11 S. E. Rep. 123.

III. THE INQUISITION.

Notice to Lunatic.—Before a county court can appoint a committee for an insane person who has not been found insane by a justice on examination for lunacy or in a court where he is charged with crime, five days' notice must be given to the person suspected to be insane as required by section 38, ch. 58, Code 1887; Code W. Va., ch. 58, sec. 34; Lance v. McCoy, 34 W. Va. 416, 12 S. E. Rep. 728. See, in accord, Evans v. Johnson, 39 W. Va. 299, 19 S. E. Rep. 623. DENT, J., dissenting, 45 Am. St. Rep. 912; South Penn. Oil Co. v. McIntyre, 44 W. Va. 296, 28 S. E. Rep. 923.

IV. APPOINTMENT OF COMMITTEE.

Who May Be Appointed.

Husband as Committee.—Where a man's lunatic wife had been put under the care of a committee, by the county court, it was ordered that she be restored to her husband, upon his entering into bond and security according to law for that purpose. Coleman's Case, 4 H. & M. 506.

Equitable Relief against Void Appointment.—Though an appointment be made without notice to suspected lunatic, and it be void, yet an injunction will not lie to restrain the exercise of powers under such appointment as there is adequate remedy at law under sec. 10, ch. 87, Code W. Va.; Lance v. McCoy, 34 W. Va. 416, 12 S. E. Rep. 728.

Collateral Attack.—The appointment of a committee which is void for lack of jurisdiction is subject to collateral attack. Evans v. Johnson, 39 W. Va. 299, 19 S. E. Rep. 623, 45 Am. St. Rep. 912.

But if the court has jurisdiction, the regularity of the appointment cannot be inquired into by any other court, except on appeal. Edmunds v. Venable, 1 Pat. & H. 121; Pannill v. Calloway, 78 Va. 367.

V. MANAGEMENT OF ESTATE, COMMITTEE'S RIGHTS, DUTIES AND LIABILITIES.

1. **CONTROL BY THE COURT.**—The conduct and acts of a committee in relation to the estate of a lunatic are subject to the direction, rescission, approval or disapproval of the court having jurisdiction of the subject. Hinchman v. Ballard, 7 W. Va. 152.

2. **SALES, LEASES AND MORTGAGES.**—A committee has no authority to sell, lease or mortgage lunatic's land without authority of court. Hinchman v. Ballard, 7 W. Va. 152. See also, Snavelly v. Hart-rader, 29 Gratt. 112.

Of Real Estate.

Power to Sell.—As to what constitutes a valid sale of land under Code 1873, ch. 124, see Palmer v. Garland, 81 Va. 444.

Oil and Gas.—Oil and gas being part of the realty, in and under which they exist, the committee of an insane person having an interest therein, can only sell or lease such interest by decree of court, as provided by statute. S. Penn. Oil Co. v. McIntyre, 44 W. Va. 296, 28 S. E. Rep. 923.

Real Estate of Insane Married Woman.—The real estate of an insane married woman during her coverture and insanity can be charged with indebtedness only to the same extent as if she was not insane, and if committee sell her real estate according to sec. 44, ch. 58, Code 1868, all such proceedings are void, and a purchaser under such circumstances will be held as a trustee for lunatic. Dickel v. Smith, 38 W. Va. 635, 18 S. E. Rep. 731.

Nor can the husband bind her separate estate to the payment of improvements put thereon unless such improvements are in fraud of his creditors. Hanley v. Nat. L. & Inv. Co., 44 W. Va. 450, 29 S. E. Rep. 1002.

After Lunatic's Death.—The provision of Code 1873, ch. 82, secs. 49, 50 and 51 relating to the sale of lunatic's real estate for the payment of his debts, etc., does not apply where real estate is sought to be subjected to the payment of debts after the death of the lunatic. Carter v. Edmonds, 30 Va. 58.

Insane Stockholder in Corporation.—The provisions of the Code W. Va. 1868, ch. 83, as to sale or lease of lunatic's lands do not apply to a bill brought to dissolve a corporation in which a lunatic is a stockholder. Hurst v. Coe, 30 W. Va. 158, 3 S. E. Rep. 564.

Extinguishment of Dower.—A husband cannot deprive his insane wife of her contingent right of dower, without notice, in an *ex parte* proceeding. The proceedings under section 2625 of the Va. Code 1887 must be *inter partes* and the wife must have notice and is entitled to be heard in defence of her right, otherwise the proceeding is void. Hess v. Gale, 93 Va. 467, 25 S. E. Rep. 533.

Sale by Decree of a Foreign Court, Ratification.—A deed executed by the committee of a lunatic residing in New York by order of a New York court, is ineffectual to convey lands in Virginia, and even if not void, cannot be ratified by the lunatic's heirs, without knowledge by them of the existence of the deed and the circumstances attending its execution.

Hotchkiss v. Middlekauf, 96 Va. 649, 32 S. E. Rep. 36.

Redemption by Committee of Land Sold for Taxes.—The committee of a lunatic may, during the continuance of the disability, redeem the lands of such lunatic by complying with the requirements of the statute, and the statute extending the time of redemption for one under disability merely confers a personal privilege on lunatic and does not take away committee's right to redeem. **Powell v. Smallwood** (W. Va.), 37 S. E. Rep. 551.

Effect upon Character of Property.—A judicial sale of land, as a general rule, converts it into personalty, but if land is sold under c. 83, W. Va. Code 1891, the sale does not at once convert into personalty, but the proceeds remain realty until the lunatic becomes capable of making a will and in such cases the money goes on the lunatic's death as the land would have gone if never sold. **Findley v. Findley**, 42 W. Va. 372, 26 S. E. Rep. 433.

3. ACCOUNTING.

The Accounts Prima Facie Correct.—The confirmed *ex parte* accounts of a committee are *prima facie* correct, subject only to be surcharged and falsified by suit in due time. Code 1873, ch. 128, sec. 29; (1887), sec. 2699; Code W. Va. ch. 87, sec. 22; **Carter v. Edmonds**, 80 Va. 58.

Interest.—As a general rule, the committee of a lunatic is only to be charged simple interest upon the balances found against him on a settlement of his account, except under very peculiar circumstances as where there is an express trust for accumulating and the trustee instead of investing, retains the funds in his own hands, or where he employs the money in his own business and refuses to account for the profits, when he may be charged compound interest. **Crigler v. Alexander**, 33 Gratt. 674; **Bird v. Bird**, 21 Gratt. 712.

Disbursements in Confederate Money—Scaling.—When committee receives trustee's money and retains it without investing it and then pays lunatic's expenses in confederate money, such payments must be scaled as of date of payment. **Bird v. Bird**, 21 Gratt. 712.

Responsibility for Safety of Investment.

In Confederate Bonds by Order of Court.—Where a committee of a lunatic by the order of the circuit court invested money of his ward in confederate bonds, he was held to account for the amount since the order of the judge was not authorized by statute. **Cole v. Cole**, 28 Gratt. 365.

In Solvent Bank.—Where a committee deposits lunatic's money in a bank in his own name, where he has no money of his own, using due care in the selection of the bank, and not using the fund except for fiduciary expenses he will not be responsible for its loss by failure of the bank. **Gregory v. Parker**, 87 Va. 451, 12 S. E. Rep. 801.

Allowance of Items.

Support of Lunatic.—A committee is entitled to credit for support of the lunatic, though it exceed the amount of interest from the estate. **Davidson v. Pope**, 82 Va. 747, 1 S. E. Rep. 117; **Hauser v. King**, 76 Va. 731; **Snively v. Harkrader**, 29 Gratt. 112.

Lunatic's Debt to Committee.—A debt due committee from estate of lunatic is proper to be entered in his account as it is his only remedy; and when the account is confirmed it is beyond the operation of the statute of limitations like any other item of such confirmed account. **Carter v. Edmonds**, 80 Va. 58.

Payments to Lunatic's Distributees.—In a suit by an administrator to settle the accounts of a committee where the committee, since the death of the lunatic

and before qualification of administrator, had already paid some of the distributees, such distributees should be made parties and credit allowed the committee for such disbursements. **Davidson v. Pope**, 82 Va. 747, 1 S. E. Rep. 117.

Payments on Request of Lunatic's Heirs.—Where a committee rented a farm out of funds belonging to lunatic's estate at the solicitation of one of lunatic's heirs, he will be allowed credit for this rent in a suit by the lunatic's administrator to settle his accounts. **Davidson v. Pope**, 82 Va. 747, 1 S. E. Rep. 117.

Release by Committee to Injury of Sureties.—A committee cannot release a lawful claim against the estate of the lunatic, when such release would work injury to the rights of his surety. **Hauser v. King**, 76 Va. 731.

Liability of De Facto Committee.—Whether the appointment of a committee is valid or not, if he assumes to act under it, he is liable for any estate of the lunatic that comes into his hands. But if such property be lost without his default, and without his having converted it to his own use he is not liable. The estate of committee must be exhausted before that of his sureties is touched. **Pannill v. Calloway**, 78 Va. 387.

4. COMPENSATION OF COMMITTEE.

Commissions.

On Government Bonds.—Commissions were only allowed on the interest collected on an undue, registered, United States bond and not on the principal sum. **Gregory v. Parker**, 87 Va. 451, 12 S. E. Rep. 801.

On Rents.—Five per cent. commission on large rents collected from prompt paying tenants is a full compensation for committee's services where most of the tenants were in possession when he took charge although ten per cent. may be allowed where the debts are small and numerous and the debtors dispersed. **Gregory v. Parker**, 87 Va. 451, 12 S. E. Rep. 801.

On Interest.—A committee is entitled to his commissions out of the interest with which he is chargeable as well as out of the principal. **Bird v. Bird**, 21 Gratt. 712.

May Be Paid Out of Principal.—The fact that commissions have to be paid out of the principal of lunatic's estate is no objection. **Davidson v. Pope**, 82 Va. 747, 1 S. E. Rep. 117.

Forfeiture of Commissions.—A committee under the old statute forfeited all claims to compensation by failure to settle his accounts, and the new statute has no retroactive application; under the latter the court may allow him compensation even though he has failed to settle his accounts. **Crigler v. Alexander**, 33 Gratt. 674.

But where all the transactions were had with the parties entitled to the fund who approved and solicited his acts, failure to settle his accounts ought not to debar his rights to the compensation allowed by law. **Davidson v. Pope**, 82 Va. 747, 1 S. E. Rep. 117.

5. BEQUEST IN TRUST TO A LUNATIC.—Where a legacy is left in trust to a lunatic without directions, the beneficiary is entitled to have the corpus of the trust decreed to his committee. **Sims v. Sims**, 94 Va. 580, 27 S. E. Rep. 436.

6. COMMITTEE A FIDUCIARY.

Purchasers from Committee—Subrogation of Sureties.—One who receives bonds from a committee which show on their face that they belong to lunatic, in payment of a private debt of committee, though a *bona fide* purchaser, must account to the estate of the lunatic and cannot defend by impeaching the regularity of the appointment of a committee, and

sureties who have satisfied claims of estate of lunatic against the committee are entitled to subrogation to the rights of the estate against such a receiver of bonds and the decree in the suit against the sureties, is evidence in the suit by sureties for indemnification. *Edmunds v. Venable*, 1 Pat. & H. 121.

Purchase by Committee of Lunatic's Property.—Where land is sold under a decree of court in pursuance of a bill filed by the committee of two idiots, and purchased by said committee, contrary to the statute, such sale is voidable and not void and is in force until set aside and this cannot be done collaterally. *Cline v. Catron*, 22 Gratt. 378.

7. COMMITTEE APPOINTED BY THE CHANCELLOR.—A committee appointed by the chancellor, as in this case, is a mere commissioner of the court, managing the person and estate of the lunatic under the direction of the chancellor and having such allowances for the support of the lunatic as may be considered proper, accounting for the management of the estate as a receiver of the court, removable in its discretion, and is not liable to be sued on claims either against the lunatic or his estate as in the case of a committee appointed under the statute. *Bolling v. Turner*, 6 Rand. 583.

VI. TERMINATION OF COMMITTEE'S OFFICE.

Removal of Committee.—The appointment of a committee may be revoked under section 10, ch. 87, Code 1887, providing that the court appointing a committee, may, whenever from any cause it appears proper, revoke and annul his powers. *Lance v. McCoy*, 34 W. Va. 416, 12 S. E. Rep. 728; Code Va. (1887) § 2687.

Resignation of Committee.—At common law a committee could not resign; but by W. Va. Code (1891) ch. 118, § 1 a committee may resign on filing a petition and proceeding according to statute. *Evans v. Johnson*, 39 W. Va. 299, 19 S. E. Rep. 623, 45 Am. St. Rep. 912; Code Va. (1887) § 2689.

Death of Lunatic.—The committee is *functus officio* by the death of lunatic. *Paxton v. Stuart*, 80 Va. 878.

VII. RESTRAINT OF INSANE PERSONS, REMEDIES.

Right to Writ of Habeas Corpus.—Where the personal liberty of a person illegally declared insane is involved, any restraint upon such liberty may be removed by *habeas corpus*. *Lance v. McCoy*, 34 W. Va. 416, 12 S. E. Rep. 728.

Right to Mandamus for Discharge on Recovery.—Where a patient, absent from an asylum on a furlough for her improvement, recovers her sanity, a peremptory writ of *mandamus* will lie to the superintendent of the asylum to compel him to discharge her and give her a certificate accordingly. *Statham v. Blackford*, 89 Va. 771, 17 S. E. Rep. 283.

VIII. ACTIONS BY AND AGAINST LUNATICS AND THEIR COMMITTEES.

1. BEFORE INQUISITION.

Lunatic's Liability to Be Sued Personally.—Suit may be brought against the lunatic personally for any valid debt incurred before a committee is appointed, and, after judgment, her person might have been taken in execution, though no execution could issue against her estate, that being under the control of the chancellor, but the chancellor either before or after judgment may direct the debt to be paid out of her estate. *Bolling v. Turner*, 6 Rand. 583.

Appointment of Guardian Ad Litem.—On an application for a guardian *ad litem*, on the ground of incapacity, after a decree of foreclosure of a mortgage,

the only proper subject of inquiry for the court is as to the capacity of defendant at the time of trial. If a guardian were appointed, he might be allowed to show incapacity at time of contract. The court should have inquired into such incapacity, either by referring it to a master, or instead of a guardian *ad litem*, he should have directed the duty of defense to be conducted by the clerk. Instead of this the court suspended the decree for 18 months to allow time for the statutory inquiry to be made and though no inquiry was made, the opportunity for it and neglect of it, is held equivalent to a finding of competency. *Campbells v. Bowen*, 1 Rob. 241.

Laches in Case of Lunatic.—Failure of a next friend to institute suit for a lunatic will not prejudice the lunatic, if suit is brought promptly after there is some one whose duty it is to guard the interests of the lunatic *e. g.*, a committee. *Knight v. Watts*, 26 W. Va. 175.

2. AFTER INQUISITION.

Where There is a Committee.—Where there is a committee every suit respecting the person or estate of the lunatic must be instituted in his name. *Bird v. Bird*, 21 Gratt. 712; *Hinton v. Bland*, 81 Va. 588; *Johnson v. Chapman*, 48 W. Va. 639, 28 S. E. Rep. 744.

As to what suits could be brought by committee before Code of 1819, as the right is statutory, see *Ashby v. Harrison*, 1 Pat. & H. 1.

A bill saying "your complainant C who being a person of unsound mind sues by his next friend and committee A," will be treated as a suit by the committee. *Cole v. Cole*, 28 Gratt. 365.

No Committee or One of Opposing Interest.—Where there is no committee or where the interests of the committee clash with those of the lunatic, the lunatic will be permitted to institute suit in his or her own name by a next friend. *Bird v. Bird*, 21 Gratt. 712; *Hinton v. Bland*, 81 Va. 588.

Suit Erroneously Brought or Revived, Time for Objections.

By Next Friend Instead of by Committee.—Objections for want of proper parties should be made at an early stage of the proceedings, and when the objection, that suit is by plaintiff's next friend instead of by his committee, is not made until the appellate court is reached, the objection will be held to have been waived. *Bird v. Bird*, 21 Gratt. 712.

Against Administrator of Lunatic, on Lunatic's Death, Pending Suit against His Committee.—If a lunatic die pending a suit against his committee and a *scire facias* be issued against his administrators to revive the suit, and the administrators appear by counsel and go to trial on the issue joined and a verdict is rendered and judgment thereon, they cannot object in the appellate court that the suit ought not to have been revived against them. *Paradise v. Cole*, 6 Munf. 218; but see *Calloway v. Dinsmore*, 83 Va. 309, 2 S. E. Rep. 517.

Introduction of Proper Parties.—If objections are made at proper time, the court may enter an order for the cause to proceed in the name of the appellee by some fit and proper person as her next friend, if the one named in the record be found to be unqualified or the court may direct the appointment of a committee and the amendment of the bill by making such committee a party to the suit as co-plaintiff or defendant. *Bird v. Bird*, 21 Gratt. 712.

Proper Parties in Suit to Sell Lunatic's Land, Co-Tenants of Lunatic.—In a proceeding by the committee of a lunatic to sell the undivided interest of such lunatic in the oil and gas underlying a tract of land, the co-tenants of such lunatic are not necessary or

proper parties to such proceeding. *S. Penn. Oil Co. v. McIntyre*, 44 W. Va. 296, 28 S. E. Rep. 922.

Committee's Answer Not Conclusive on Lunatic.—In a suit to subject lands to the satisfaction of liens on them, the answer of lunatic's committee as to the amount of lunatic's lien does not relieve the court from the duty of taking account of such lien by its commissioner, still less after the committee himself declares his statement erroneous. *Calloway v. Dinsmore*, 83 Va. 309, 2 S. E. Rep. 517.

Effect of Death of Lunatic.—Where the lunatic dies pending a suit against his committee, the committee becomes by law *functus officio* by such death, and the suit abates and must be revived in the name of the lunatic's personal representative and heirs and all proceedings had, after lunatic's death and before such revival are void. *Paxton v. Stuart*, 80 Va. 873.

Revival of Suits by and against Committee.—The right of revivor is a statutory remedy and in absence of statute did not exist. *Ashby v. Harrison*, 1 Pat. & H. 1. See also, *Paradise v. Cole*, 6 Munf. 218.

Committee as a Witness.—A committee is a competent witness as to any contract made with a former committee touching the lunatic's affairs. *Carter v. Edmonds*, 80 Va. 58.

3. COMPROMISE OF SUITS BY COMMITTEE.—A committee cannot make a contract of compromise of a suit touching the estate of a lunatic, without the sanction of the court, especially where it changes the nature of the estate. *Hinchman v. Ballard*, 7 W. Va. 152.

4. SUITS AGAINST COMMITTEE'S SURETIES.—Where a suit in chancery is brought against the sureties of a committee, all the sureties must be made parties and process must be served on them all. *Hedrick v. Hopkins*, 8 W. Va. 167.

5. JUDICIAL SALES OF LUNATIC'S LAND.—See *Hess v. Rader*, 26 Gratt. 746.

IX. QUESTIONS OF LAW AND FACT.

1. The Existence of Insanity a Question for the Jury.—Whether or not a deed was obtained by fraud from a person incapacitated to contract from drink is a question for the jury. *Mettert v. Hagar*, 18 Gratt. 281.

2. When an Issue Out of Chancery is to Be Directed.—“Where there is such a conflict of evidence, and it is so nearly balanced, as to make it doubtful, on which side is the preponderance, an issue ought to be directed; but where, though there be a conflict, it is not of such a character, no issue should be directed; and if it is improperly refused in the one case or directed in the other, such mistake by the chancellor in the exercise of his discretion will be corrected on appeal. Such doubt in the mind of the chancellor must not be a factitious, but a reasonable one, justified by such conflict of the evidence.” *Jarrett v. Jarrett*, 11 W. Va. 584.

In *Anderson v. Cranmer*, 11 W. Va. 582, the court said: “In this case the preponderance of the legal testimony was clearly against the sanity of the grantor, both before and after the execution of the deed; and no lucid interval at the time of the execution of said deed is proved; it was error therefore to have directed the issue. It was the duty of the chancellor to have disregarded the verdict of the jury, and to have set aside the order directing the issue, and to have entered a decree, upon the proofs as they stood at the time the issue was ordered. And it is the duty of the Appellate Court, in reviewing a decree founded on the verdict of a jury, rendered on an issue out of chancery, to look to the

state of the proofs at the time the issue was ordered, and if satisfied that the chancellor has improperly exercised his discretion in directing the issue, to render a decree, notwithstanding the verdict, according to the merits, as disclosed by the proofs on the hearing when the issue was ordered.” See also, *Beverley v. Walden*, 20 Gratt. 147; *Samuel v. Marshall*, 3 Leigh 567; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. Rep. 575.

X. PRESUMPTIONS.

Of Sanity.—“Every man is presumed to be sane until the contrary is made to appear, and the burden of proving insanity is on the person alleging it.” *Hiett v. Shull*, 36 W. Va. 563, 15 S. E. Rep. 146; *Anderson v. Cranmer*, 11 W. Va. 582; *Cunningham v. Hedrick*, 23 W. Va. 579; *Porter v. Porter*, 89 Va. 118, 15 S. E. Rep. 500; *Miller v. Rutledge*, 82 Va. 863, 1 S. E. Rep. 202; *Honesty v. Com.*, 81 Va. 283; *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. Rep. 883; *Nicholas v. Kershner*, 20 W. Va. 251.

Same Rule Applies after Recovery.—Where no habitual insanity is shown but a temporary insanity only, from which the records of the asylum show him to have recovered, the burden to show incompetency when the deed was executed is on the party alleging it. *Cropp v. Cropp*, 88 Va. 753, 14 S. E. Rep. 529.

Exception in Case of Wills.—“At common law a man could not make a will; and the statutes of wills changing the common law, and permitting persons to dispose of their property by will, but requiring, that the testator should be of sound mind, as to testamentary capacity, changed the common law presumption of sanity, and cast the burden of proof upon the propounder of the will, to show that the testator was sane when the will was executed.” *McMechen v. McMechen*, 17 W. Va. 688; *Hiett v. Shull*, 36 W. Va. 563, 15 S. E. Rep. 146; *Nicholas v. Kershner*, 20 W. Va. 251. *Contra*, *Burton v. Scott*, 3 Rand. 399. But in this case the judge seems not to note the distinction between wills and other transactions and lays down the rule broadly that the burden of proof is always on the party alleging insanity.

Of Continuance of Insanity.—If a previous condition of insanity has been established, the burden of proof is shifted to him who claims under the deed. *Jarrett v. Jarrett*, 11 W. Va. 584; *Anderson v. Cranmer*, 11 W. Va. 582.

And the evidence applying to a lucid interval ought to go to the state and habit of the person and not to the accidental interview of any individual or to the degree of self-possession in any particular act. *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. Rep. 575.

XI. EVIDENCE OF INSANITY.

Transactions Not Revoked by Finding of Lunacy.—A will made at a time when, by the evidence, the testator is of sound mind is not revoked by a subsequent finding of the testator's insanity, by a commission of lunacy. *Hughes v. Hughes*, 2 Munf. 209.

Letters, and Recitals in Written Instruments.—“The deed written by a lunatic himself with great particularity and technical precision and letters relating to the sale and the execution of the deed, expressing his regret that his wife had refused to join in the deed, and on other subjects, all furnish intrinsic proof of a sound mind.” *Beverley v. Walden*, 20 Gratt. 147.

Particular Facts and Circumstances Tending to Show Mental Aberration.

Mere Old Age.—Mere old age of the party in question is not of itself sufficient to show mental in-

capacity. *Hiett v. Shull*, 36 W. Va. 563, 15 S. E. Rep. 146; *Jarrett v. Jarrett*, 11 W. Va. 584; *Beverley v. Walden*, 20 Gratt. 147; *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. Rep. 383.

Improvident Bargains—Inadequacy of Consideration.—The mere fact that a transaction has turned out disastrously, when prudent and judicious men were doing the same thing, though in the light of after events it may appear injudicious, is no evidence of unsoundness of mind. *Beverley v. Walden*, 20 Gratt. 147.

Mere Inadequacy of Consideration.—Mere inadequacy of consideration is not in itself sufficient to justify a court of equity in setting aside a deed, *JOHNSON, J.*, saying in *Jarrett v. Jarrett*, 11 W. Va. 584: "Where a legal capacity is shown to exist in the grantor, and he had sufficient understanding to clearly comprehend the nature of the business, and he consented freely to the special matter about which he was engaged, and no fraud or undue influence is shown to have been had to bring about the result, the validity of the deed cannot be impeached: however unreasonable, imprudent or unaccountable it may seem to others. It is not the propriety or impropriety of the disposition, but the capacity to make it, and the fact that it was freely made, with the full assent of the grantor, that must control the judgment of the court." *Greer v. Greers*, 9 Gratt. 330.

Disease, Domestic Troubles, etc.—The fact that plaintiff was laboring under a painful malady, from which at times he suffered great agony; that he had serious domestic troubles, that he was much depressed by the unhappy condition of the country and that he was an old man bordering on 70 years is not inconsistent with the sanity and mental capacity of the plaintiff. *Beverley v. Walden*, 20 Gratt. 147; *Porter v. Porter*, 89 Va. 118, 15 S. E. Rep. 500.

Drunkenness.—Drunkenness, if produced by the donee or if so extreme that the party does not know what he is about, has been considered a material circumstance in deciding the validity of a contract, and imbecility of mind, produced by drunkenness or otherwise, combined with other ingredients, particularly with the utter absence of consideration, has always had an important influence on the validity of contracts. *Samuel v. Marshall*, 3 Leigh 567; *Harvey v. Pecks*, 1 Munf. 518.

To make intoxication a good defense, a man's faculties must have been so impaired as to make him, for the time being, *non compos mentis*. *Loftus v. Maloney*, 89 Va. 576, 16 S. E. Rep. 749.

Weight of Evidence.

Expert Evidence.—"Expert evidence, proper, as usually given, based on long hypothetical questions and their still longer and sometimes still more hypothetical answers, as we often see it given, is in a manner worthless and only tends or seems to tend to darken counsel." *Hiett v. Shull*, 36 W. Va. 563, 15 S. E. Rep. 146; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. Rep. 575; *Burton v. Scott*, 3 Rand. 399.

When Questions Must Be Hypothetical.—On the direct examination, the questions put to the expert must be framed hypothetically unless there is no conflict of evidence as to the facts, or unless the expert is personally acquainted with them. *State v. Maler*, 36 W. Va. 757, 15 S. E. Rep. 991.

Non-Professional Evidence, Neighbors, etc.—Ordinarily the reliable evidence in cases of insanity is the evidence of neighbors of sound judgment and fair powers of observation, who have known plaintiff long and well and who have had occasion to observe

or test the vigor of his mental faculties and who can give the facts upon which their impressions and opinions are based. *Hiett v. Shull*, 36 W. Va. 563, 15 S. E. Rep. 146. See also, *Jarrett v. Jarrett*, 11 W. Va. 584; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. Rep. 575; *Burton v. Scott*, 3 Rand. 399; *Cropp v. Cropp*, 88 Va. 753, 14 S. E. Rep. 529.

Witnesses Present at Execution of Deed.—Evidence of witnesses present at the execution of the deed is entitled to peculiar weight. *Jarrett v. Jarrett*, 11 W. Va. 584; *Beverley v. Walden*, 20 Gratt. 147; *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. Rep. 383; *Beckwith v. Butler*, 1 Wash. 224.

Evidence of Attending Physicians.—The evidence of physicians, especially those who attend the grantor and were with him considerably during the time it is charged he was of unsound mind is entitled to great weight. *Jarrett v. Jarrett*, 11 W. Va. 584; *Beverley v. Walden*, 20 Gratt. 147; *Porter v. Porter*, 89 Va. 118, 15 S. E. Rep. 500.

Mere Opinion Evidence.—But the mere opinions of witnesses not experts are entitled to little or no regard, unless they are supported by good reasons, founded on facts which warrant them; but if the reasons and facts upon which they are founded are frivolous, the opinions of such witnesses are worth but little or nothing. *Jarrett v. Jarrett*, 11 W. Va. 584; *Beverley v. Walden*, 20 Gratt. 147; *Anderson v. Cramer*, 11 W. Va. 562; *Hinchman v. Ballard*, 7 W. Va. 152.

Proper Questions.—In all inquiries relating to insanity, every reasonable latitude should be allowed in the examination of witnesses, however false or unfounded the court may consider the defence; but no questions should be asked whose only tendency is to consume the time and attention of the court and to mislead and confuse the minds of the jury. *Dejarnette v. Com.*, 75 Va. 867.

In *State v. Maler*, 36 W. Va. 757, 15 S. E. Rep. 991, it was held proper to ask witnesses, examined by the state in rebuttal, who had known the prisoner well for years, whether they had ever seen anything about him indicative of insanity.

Evidence of Hereditary Insanity, When Material.—When the defence does not claim that insanity is hereditary, but that it is the result of a blow, evidence of hereditary insanity is not material and to exclude it is not error. *State v. Maler*, 36 W. Va. 757, 15 S. E. Rep. 991.

Competency of Evidence as to Time.

Condition at Time of Act is Point for Decision.—The point of time to be looked to by the court or jury in determining the competency of a grantor to make a deed is that when the deed was executed. *Jarrett v. Jarrett*, 11 W. Va. 584; *Cropp v. Cropp*, 88 Va. 753, 14 S. E. Rep. 529; *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. Rep. 383.

The fact that a man was in the asylum both before and after the execution of the deed is immaterial, if at the time of the act he was competent. *Beverage v. Ralston*, 98 Va. 625, 37 S. E. Rep. 282.

Evidence of Condition before and after Act Admissible.—The condition of the grantor's mind both before and after the execution of the deed is proper to be considered in determining what was his mental condition at the time the deed was executed. *Jarrett v. Jarrett*, 11 Gratt. 584.

Before the Act.—Evidence of the insanity of accused before the act is admissible, without first proving the accused's insanity on the day of the act. *Vance v. Com.*, 2 Va. Cas. 132.

Requisite Degree of Proof in Criminal Cases.

Must Be Proved to the Satisfaction of the Jury.—Insanity, when relied on as a defence to a charge of crime, must be proved to the satisfaction of the jury; though such proof may be furnished by evidence introduced by the commonwealth to sustain the charge as well as by evidence introduced by the accused to sustain the defence. He is not to be acquitted on any fanciful ground, that, though they believe he was then sane, yet, as there may be a rational doubt of his sanity, he is therefore entitled to his acquittal. *Boswell v. Com.*, 20 Gratt. 860; *Baccigalupo v. Com.*, 33 Gratt. 807, 36 Am. Rep. 796; *Honesty v. Com.*, 81 Va. 288; *Dejarnette v. Com.*, 75 Va. 867; *State v. Strauder*, 11 W. Va. 747, 27 Am. Rep. 601; *State v. Robinson*, 20 W. Va. 713; *Hite v. Com.*, 96 Va. 489, 31 S. E. Rep. 896.

XII. LIABILITY FOR CRIMES.**Test of Insanity.**

American Modification of Rule in *McNaghten's Case* Adopted.—The following instruction was approved by the court in *Dejarnette v. Com.*, 75 Va. 867: "But in every case, although the accused may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences, and has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, and possesses withal a will sufficient to restrain the impulse that may arise from a diseased mind, such partial insanity is not sufficient to exempt him from responsibility to the law for his crimes." *State v. Harrison*, 36 W. Va. 729, 15 S. E. Rep. 982; *State v. Maier*, 36 W. Va. 757, 15 S. E. Rep. 991.

"Irresistible Impulse"—Theory Rejected, Contra.—Irresistible impulse as an excuse for crime is positively rejected in West Virginia. *State v. Harrison*, 36 W. Va. 729, 15 S. E. Rep. 982; *State v. Maier*, 36 W. Va. 757, 15 S. E. Rep. 991. But in *Dejarnette v. Com.*, 75 Va. 867, it seems to be impliedly recognized by the court.

Insanity from Drunkenness.—Permanent insanity from excessive drinking excuses an act which would be otherwise criminal, just as insanity produced in any other way, but any thing short of permanent insanity from drink is no excuse, even though it amount to temporary insanity. *Boswell v. Com.*, 20 Gratt. 860. See also, *State v. Robinson*, 20 W. Va. 713.

But temporary insanity from drink may lessen the degree of murder from 1st to 2nd degree since it cannot then be premeditated. *State v. Robinson*, 20 W. Va. 713. See also, *Hite v. Com.*, 96 Va. 489, 31 S. E. Rep. 896.

How Defense of Insanity May Be Set Up.—The defense of insanity may be set up by the accused under the plea of not guilty. *Baccigalupo v. Com.*, 33 Gratt. 807, 36 Am. Rep. 796; *Gruber v. State*, 3 W. Va. 699; *Stover v. Com.*, 92 Va. 780, 22 S. E. Rep. 874.

And after the verdict of the jury has been rendered, when nothing has transpired since the trial which could cause the court to have any reasonable doubt as to his sanity, or authorize it to proceed under section 4082 of the Code, the court will not empanel another jury to determine the sanity of the accused, since that question had been directly put in issue under the plea of not guilty, and finding him guilty they necessarily found him to have been sane

when the offense was committed. *Stover v. Com.*, 92 Va. 780, 22 S. E. Rep. 874.

Insanity at Time of Trial.—If there is reasonable doubt as to the sanity of the prisoner at the time of the trial, after a jury is impanelled, it is the duty of the court to suspend the trial and impanel another jury to enquire into the fact of such sanity, and if it be found that accused was insane at time of trial, this same jury should inquire whether or not he was insane at the time of the alleged offense, and if they find him so, it will be a good defense to further prosecution. But if the jury find him sane at the time of the verdict then the trial in chief should proceed. *Gruber v. State*, 3 W. Va. 699. See *Com. v. Tyree*, 2 Va. Cas. 262.

But in *State v. Harrison*, 36 W. Va. 729, 15 S. E. Rep. 982, it is held to be discretionary with the judge whether to submit the question of the sanity of the prisoner at the time of trial to a jury or not, under W. Va. Code, ch. 159, §§ 9, 10, and the decision of the trial court would have a very weighty if not conclusive influence with the appellate court and it will not be reversed unless it appear manifestly wrong or that the trial court abused the discretion given it.

Effect of Discharge of Jury on Account of Doubt as to Prisoner's Sanity.—If the jury is discharged because of a doubt as to the sanity of the accused at the time of the alleged offence, though there was no suggestion of his insanity at the time of the trial, it is contrary to law and a wrong to the accused who cannot be tried before another jury since he could have pleaded insanity under the plea of "not guilty." *Gruber v. State*, 3 W. Va. 699.

XIII. LIABILITY ON CONTRACTS.

General Rule.—A person during lunacy is incapable of making any contract. *Bolling v. Turner*, 6 Rand. 583.

Exception in Case of Necessaries.—During lunacy a person is only liable to be sued for necessaries. *Bolling v. Turner*, 6 Rand. 683.

But even for necessaries the corpus of her real estate can only be subjected by the aid of a court of equity. *Hanley v. Nat. L. & Inv. Co.*, 44 W. Va. 450, 29 S. E. Rep. 1002.

After Adjudication of Insanity.—An adjudged lunatic cannot make a valid contract either as to herself or her estate. *Hanley v. Nat. L. & Inv. Co.*, 44 W. Va. 450, 29 S. E. Rep. 1002.

Test of Mental Capacity.—"The party contracting must have reason, memory and will enough to do the act in question freely and intelligently." *Hiett v. Shull*, 36 W. Va. 563, 15 S. E. Rep. 146.

"If he be capable at the time, to know the nature, character and effect of the particular act, that is sufficient to sustain it." *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. Rep. 383.

Distinction between Deed and Will.—It requires more capacity to make a valid deed than it does to make a will. *Jarrett v. Jarrett*, 11 W. Va. 584.

But where the deed stands in the place of and seems to have been regarded by the grantor in the nature of a testamentary disposition of his property, the same rules apply as to mental capacity as in the case of wills. *Greer v. Greers*, 9 Gratt. 330.

Mere Weakness of Intellect.—As to what degree of weakness of intellect will not amount to such incapacity as to invalidate a deed, see *Cunningham v. Hedrick*, 23 W. Va. 579.

"A grantor in a deed may be extremely old, his understanding, memory and mind enfeebled and weakened by age, and his actions occasionally

strange and eccentric and he may not be able to transact many affairs of life. yet if age has not rendered him imbecile, so that he does not know the nature and effect of the deed, this does not invalidate the deed." *Buckey v. Buckey*, 88 W. Va. 168, 18 S. E. Rep. 883.

Monomania Unconnected with Subject of Contract.—When grantor is laboring under monomania, but upon a subject in no wise connected with the subject-matter of the contract, this is not sufficient to invalidate such contract. *Boyce v. Smith*, 9 Gratt. 704, 60 Am. Dec. 313.

What is Sufficient to Avoid.—Where it appears from the evidence that the grantor of a deed was old and physically infirm and was subject to delusions clearly showing insanity and the consideration was grossly inadequate, the deed will be cancelled. *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. Rep. 575.

As to what degree of weakness of mind along with other circumstances, as inadequacy of consideration, etc., will invalidate a deed, see *Whitehorn v. Hines*, 1 Munf. 557. See also, "Evidence of Insanity," *supra*, and monographic note on "Consideration."

Avoidance of Contracts by Committee.—"A committee of an insane person should not institute a suit to set aside a contract made by the insane person prior to his appointment, on the ground of insanity, unless the person was insane, or there are reasonable grounds to believe he was insane, at the time the contract was made. If the person was sane when the contract was made, and the contract is otherwise valid and binding, the court would not set it aside. And though the person was insane when the contract was made, still if it clearly appears that the transaction was in good faith and was beneficial to his interests, the court will not set it aside, in all cases, as a matter of course, at the instance of the committee. So, if a purchase is made in good faith, without any knowledge of the incapacity, and no advantage has been taken of the insane party, a court of equity will not interfere to set aside the contract, if injustice will thereby be done to the other side, and the parties cannot be placed in *statu quo*, or in the state in which they were before the purchase." *Hinchman v. Ballard*, 7 W. Va. 152.

Equitable Relief.

Cancellation of Note for Mental Incapacity.—A court of equity has power to decree the delivery up and cancellation of a promissory note and the refunding of money given by an old man who is clearly shown

to be mentally incapable of transacting such business, nor is it any bar that courts of law can afford a remedy. *Hiett v. Shull*, 36 W. Va. 563, 15 S. E. Rep. 146; *Horner v. Marshall*, 5 Munf. 466; *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. Rep. 316.

XIV. LIABILITY FOR TORTS.

Slander.—It is good ground for a perpetual injunction to stay proceedings on judgments, that at the time of speaking the slanderous words and when the judgments were obtained, the complainant was in a state of partial mental derangement, that is, on the subject to which the defamatory words related. *Horner v. Marshall*, 5 Munf. 466. See *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. Rep. 316.

XV. LIABILITY ON JUDGMENTS.

Melancholy, etc.—Whether or not a man's derangement of mind is so complete as to invalidate any specific contract he might have entered into, if his condition of mind from melancholy, etc., was such as to account for his having failed to search out and set up, a real defense at law; if he possessed such real defense, the judgment ought not to preclude his representatives from it afterwards. *Tabb v. Gist*, 6 Call 279. See *Horner v. Marshall*, 5 Munf. 466.

Insanity at Time of Judgment, Remedy.—A judgment against defendant for a slander uttered by his wife, is not void because defendant was insane at the time of rendition of judgment; the remedy is in equity, and a writ of error *coram vobis* will not lie since that only corrects errors which appear on the face of the record. *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. Rep. 316.

XVI. COMPETENCY AS A WITNESS.

A Lunatic Not Per Se Incompetent.—"It will be seen then, that a witness is not excluded by this rule, merely because he is a lunatic. That is not enough *per se* to exclude him; but he must at the time of his examination be so under the influence of his malady as to be deprived of that 'share of understanding' which is necessary to enable him to retain in memory the events of which he has been witness, and gives him a knowledge of right and wrong. If at the time of his examination he has this share of understanding, he is competent. That is the test of competency, and of such competency the court is the judge; whilst the weight of testimony—the credit to be attached to it—is left to the jury." *Coleman v. Com.*, 25 Gratt. 865.

INDEX.

ACTIONS.

1. An action on the case lies against a party who has a public employment—as common carrier or other bailee—for a breach of duty, which the law implies from his employment or general relation.

Southern Express Co. v. McVeigh, 264

2. Where there is a public employment, from which arises a common-law duty, an action may be brought in tort, although the breach of duty assigned is the doing something contrary to an agreement made in the course of such employment, by the party on whom such general duty is imposed.

Idem, 264

3. A railroad company has the land of R. condemned for its road, and the commissioners assess the damages, and their report is confirmed, and the company pay the amount of the damage to R. R. sells the land to D. D. may maintain an action against the company for injury to his land done since the purchase, which could not be foreseen and estimated by the commissioners.

Southside R. R. Co. v. Daniel, 344

4. In such cases the assessment of damages is only a bar to an action for such injuries as could properly have been included in such assessment. The commissioners are bound to presume the company will construct its works in a proper manner, and they have no right to award damages upon the supposition that the company will negligently and improperly perform its work. A failure to do so will, therefore, impose a liability to any one who may sustain any loss or injury by reason of such negligence.

Idem, 344-5

AD QUOD DAMNUM.

1. Supervisors of a county may proceed, by writ of *ad quod damnum*, to condemn land for the erection of the public buildings of the county.

Board of Supervisors of Culpeper v. Gorrell & als., 484

2. In the act authorizing the condemnation of land for public purposes, Code, ch. 56, the tenant of the freehold, referred to in § 7, is the tenant in possession appearing as visible owner.

Idem, 484

ADVERSARY POSSESSION.

1. In 1819, L. conveys a lot of ground to C. in trust, to pay certain debts, some of which are upon executions in the hands of the sheriff, and the other is due to the father of C. Ten years after, the father dies, and makes C. his ex'or and one of his residuary legatees. The lot is never sold under the deed of L., but, in 1839, C. takes possession of it and encloses it, and some years after

leases it in his own name to R. for eight years. In 1854, W., claiming it under another title, sues R. for it, and C. being then dead, his heirs make themselves parties and defend the suit, and obtain a final judgment in 1867. Then the heirs of L. sue the heirs of C. for the lot, alleging that C. took and held possession as trustee under the deed, and his heirs held under the trust, and defended the action under that title. The heirs of C. deny this, claim that C. took possession for himself, and he and they have so held for twenty-eight years; and they defended for themselves. HELD: The heirs of L. are barred.

Bargamin & als. v. Clarke & als., 544

AGENTS.

1. If goods are under the control of parties as forwarders, and not as common carriers, and are consumed by accidental fire in a warehouse, without any *fault or negligence on their part, they are not liable; unless they had expressly agreed, for compensation paid, to insure them, and had failed to do it.

Southern Express Co. v. McVeigh, 264

2. N., living in the country, employs M., a broker living in Richmond, to invest his money in Missouri bonds. In November, 1862, M. invests at \$112 50, and in February, 1863, he invests at \$125. In March N. sends a claim upon the Confederate government to M. for collection, and tells of other funds which will be paid in to M. in May, and directs him to invest in Missouri bonds. M. collects the claim, and invests it at \$160, and so writes to N. The 23d of May the funds spoken of by N. are received by M., and then Missouri bonds have advanced seventy or eighty per cent. above the last investment, and are difficult to be gotten. On the 29th of June M. writes to N., acknowledging the receipt of this fund, stating that Missouri bonds were then at 230 and 235, and asks whether he shall invest at the advance price when to be had. M. receives no answer to his enquiry, and therefore does not invest the money in his hands; the Missouri bonds continuing to advance in price. HELD: M. was justified in waiting for further instructions, and is not liable to N. for the loss.

Bernard v. Maury & Co., 434

3. When payments to a branch bank of debts due to the mother bank are not valid. See *Banks*, No. 2, 3, and

Bank of the Old Dominion v. McVeigh, 457

4. A., B. and C. are the heirs of W., and also heirs of M., and D. and E. are heirs of M. They all appoint S. an agent to collect and sell land scrip due to W., and also scrip due to M. The scrip is obtained and sold, but the agent does not pay over the proceeds.

All the heirs unite in a suit for the recovery of the proceeds and call for a discovery. The bill is not demurrable, either for multifariousness, or because the plaintiffs have a complete remedy at law.

Segar & al. v. Parrish & als., 672

5. S. having failed for twelve years to pay over the proceeds of the sale, or to give the parties any information on the subject, he has forfeited the compensation which, by the original agreement, he was to receive.

Idem, 672

6. S. having stated in his answer, and also in his deposition, that he sold the scrip for 91 cents per acre, and there being no other evidence on this point, in the cause, he is to be charged at that price, with interest upon it; and not at the legal price of public lands.

Idem, 672

7. S. having sold the scrip *bona fide* to F., and received the money for it, before the scrip was issued, he may substitute F. as attorney for the principals, to enable F. to obtain the scrip; and this being the mode recognized at the land office, F. does not become liable to the principals, as their agent, for the purchase money.

Idem, 672

APPEALS.

1. To entitle any person to appeal from a judgment, he must be a party in the cause, and must be aggrieved by the judgment.

Board of Supervisors of Culpeper v. Gorrell & als.,

APPELLATE COURT.

1. When an objection not taken in the court below will not be allowed to be made in the Court of Appeals. See *Partition*, No. 1, and *Howery v. Helms & als.*, 1

2. The judges of the Court of Appeals who were in office under military appointment when the State was restored to the Union, holding over and continuing to exercise their office, their judgments and decrees are valid and binding.

Griffin's ex'or v. Cunningham, 31

Wash. Alex. & Georget. R. R. Co.

v. Alex. & Wash. R. R. Co., 31

3. The proviso to § 2, of the act of March 5, 1870, called the enabling act, is unconstitutional; and the present Court of Appeals has no authority to rehear the cases referred to in it.

Idem, 31

4. A case decided by the Supreme Court of Appeals at one term of the court, at which no motion is made to rehear it, cannot be reheard at a subsequent term. *Idem*, 31

5. If an issue out of chancery is improperly directed, an Appellate court will correct it.

Beverly v. Walden, 147

881 6. *In an action on the case for damages to plaintiff's land, there is a plea of not guilty, on which issue is joined, and there is a special plea, to which there is a special replication concluding to the country. To this there is no rejoinder, and the record does not say that issue was joined upon it; but the parties go to trial, and the subject of the special plea and replication are contested before the jury, which renders a verdict for the

plaintiff. No objection having been taken to the want of joinder of issue in the court below, it seems that the objection cannot be taken in the appellate court.

Southside R. R. Co. v. Daniel, 344

7. In such a case, if the subject of the replication is such that the defendant cannot rejoin special matter without a departure from the defense set up in this plea, but must take issue upon the replication, the nonjoinder of issue will be cured by the statute.

Idem, 344

8. Court decrees a sum of money in favor of defendant, and dismisses the bill. Upon appeal by plaintiff, court affirms the money decree, and will correct that part dismissing the bill, and affirm the decree with costs.

Kraker v. Shields, 377

9. When court will correct and affirm decree. See *Practice in Chancery*, No. 13, 6, 7, and

Idem, 377

10. In a bill of exceptions to the refusal of the court to grant a new trial, the evidence, and not the facts proved, is stated. If all the evidence was introduced by the exceptor, the appellate court will not review the judgment; but if all the evidence is introduced by the party who recovers the judgment, the Appellate court will review the judgment, and if taking it all as true, the verdict and judgment is erroneous, will reverse it.

Gimmi v. Cullen, 439

11. When in the Supreme Appellate court, in an application for a writ of prohibition, the petitioner will not be required to file a declaration.

Board of Supervisors of Culpeper v.

Gorrell & als., 484

12. What the Court of Appeals will do when a prisoner escapes after a writ of error has been obtained.

Leftwich's case, 716

13. Appellate court reversing a judgment against a prisoner in the penitentiary, and directing a new trial; how he will be sent back. See *Criminal Jurisdiction and Proceedings*, No. 16, and

Jones' case, 848

ATTACHMENTS.

1. O. has attached the effects of M. at law and in equity. He may dismiss his attachment at law, and proceed on his attachment in equity.

Magill v. Manson, 527

Magill v. Manson & al., 527

2. Upon a decree in favor of an attaching creditor and an appeal therefrom, the appellant gives an appeal bond. The giving the bond does not release the attachment.

Magill v. Sauer, 540

3. The act, Code of 1860, ch. 151, § 31, has no application to the attachment lien upon the estate of the debtor, whether it be real or personal property or choses in action. To relieve the property attached, bond is to be given as in § 13 of the act. *Idem*, 540

BANKS.

1. The principles decided in the cases of Exchange Bank of Virginia for Camp, trustee, &c. v. Knox, &c., and Farmers' Bank of Virginia for Goddin, &c. v. Anderson & Co., 19 Gratt. 739, reaffirmed.

Saunders, &c. v. White & als., 327

2. M., a debtor to the bank of D., which is within the Federal lines, in July 1864, pays his debt to D., into a branch of the bank of D., which branch is within the Confederate lines; the payment being made in Confederate currency. The payment is not valid, and the bank of D. may recover the amount from M.

Bank of the Old Dominion v. McVeigh, 457

3. The act of the General Assembly sitting at Richmond, passed March 3, 1864, authorizing such payments, is not obligatory upon a mother bank within the Federal lines.

Idem, 457

4. The act is unconstitutional in its application to debts contracted before its passage.

Idem, 457

BROKERS.

See *Agents*, No. 2, and
Bernard v. Maury & Co., 434

882

*CASE.

1. An action on the case lies against a party who has a public employment—as a common carrier or other bailee—for a breach of duty which the law implies from his employment or general relation.

Southern Express Co. v. McVeigh, 264

2. Where there is a public employment from which arises a common law duty, an action may be brought in tort, although the breach of duty assigned is the doing or not doing something contrary to an agreement made in the course of such employment, by the party on whom such general duty is imposed.

Idem, 264

3. Though the declaration does not allege that the defendants are common carriers, yet if the facts set out constitutes them such in law, it is sufficient to sustain the action against them as common carriers.

Idem, 264

4. Though the declaration in case does not allege the duty of the defendants as common carriers to carry the goods, and the breach of that duty, if it avers facts from which the law infers the duty, and that the defendants, not regarding their duty, &c., and assigns the breach, that is sufficient.

Idem, 264

CHARITIES.

B. by his will, dated in November, 1848, and admitted to probate in February, 1850, gave land and personal estate for the establishment and support of a school in a certain neighborhood in W. county; and he appointed certain persons trustees to carry out his devise, with power to fill vacancies in their body. L. was appointed one of the trustees, and president and treasurer of the board, and also ex'or. The school was established, and L. settled his account before a commissioner,

which shewed a balance in his hands of \$3,701 on the 1st of November, 1859. He died during the war; and in 1866, the then acting trustees filed their bill against his adm'r and sureties to recover the money in his hands.

Held:

1. At common law the devise and bequest was illegal and void.

Kelly & als. v. Love's adm'r & als., 124

2. But by the act of April 2, 1839, concerning devises and bequests made to schools, &c. and the act of 1840-41, Code, ch. 80, § 2, it was made valid, though it had not been reported to the general assembly as directed by § 7 of said first act, and no act had been passed incorporating the institution.

Idem, 124

3. The trustees could maintain the suit. But an act having been passed since it was commenced, incorporating the institution, the corporation should be made a party, and the decree should be for the payment of the money to the corporation.

Idem, 124

CITIES AND COUNTIES.

1. See *Currency, passim*, and *Miller & Franklin v. City of Lynchburg*, 330

2. See *Usury*, Nos. 2, 3, 4, and *Town of Danville v. Sutherlin*, 550
City of Lynchburg v. Norvell and others, 601

COMMISSIONERS IN CHANCERY.

1. In what cases the court of chancery may direct an enquiry by a commissioner. See *Practice in Chancery*, No. 13, and

Kraker v. Shields, 377

COMMISSIONERS OF THE REVENUE.

1. A commissioner of the revenue under § 7 of the act of 1867, in relation to the assessment of taxes on licenses, appoints an assistant commissioner, and the appointment is approved by the proper court. The question whether the facts existed which authorized the appointment, cannot be made in a collateral proceeding.

Commonwealth v. Byrne, 165

2. The act authorizing the assistant to perform all the duties which his principal is authorized to perform, it is not necessary that the certificate given by him shall be given in the name of the principal, or that the name of the principal shall be signed to the certificate.

Idem, 165

COMMON CARRIERS.

1. See *Case*, No. 1, 2, and
Southern Express Co. v. McVeigh, 264

2. Though the declaration in case 883 does *not allege that the defendants are common carriers, yet if the facts set out constitute them such in law, it is sufficient to sustain the action against them as common carriers.

Idem, 264

3. An express company is to be regarded as a common carrier, and its responsibilities for the safe delivery of the property entrusted to it, are the same as that of the carrier.

Idem, 264

4. Though the declaration in case does not allege the duty of the defendants as common

carriers to carry the goods, and the breach of that duty, if it avers facts from which the law infers the duty, and that the defendants not regarding their said duty, &c., and assigns the breach, that is sufficient.

Idem, 264

5. To subject a party to the responsibility of a carrier for goods lost, it must appear that he received the goods, and that they were delivered to and received by him as a common carrier.

Idem, 264

6. V., owner of certain goods about to arrive at the depot of a railroad in Charlotte, N. C., wishes them to be carried from thence to Richmond, Va., and an express company, by their agent at Charlotte, undertakes to move and deposit said goods in their warehouse as soon as possible on the arrival of the goods at the depot in Charlotte, and to carry them to Richmond within a reasonable time, for a reward paid. The goods arrive at the depot, and the express company has notice of their arrival. This is a delivery to the express company as carriers.

Idem, 264

7. Where goods are delivered to parties to be forwarded and transported, and these parties are expressmen, and receive compensation for forwarding and transporting, the goods are in their custody as carriers.

Idem, 264

8. If goods are under the control of parties as forwarders and not as common carriers, and are consumed by accidental fire in a warehouse without any fault or negligence on their part, they are not liable, unless they have expressly agreed for compensation paid, to insure them, and had failed to do it.

Idem, 264

CONFEDERATE CONTRACTS.

1. See *Currency, passim*.

2. Confederate money is loaned to and advanced for M. by O., and services are also rendered during the war. These claims are to be ascertained by reducing the currency to its gold value at the time of the advance or loan, or service rendered. And the decree should be rendered in the legal currency of the United States for the equivalent, at the time of the degree, of the amount of the gold so ascertained.

Magill v. Manson, 527

Magill v. Manson & al., 527

CONFESSIONS.

1. That a confession of a prisoner tried for murder, is voluntary, is a condition precedent to its admissibility; and the court must be satisfied that the confession was voluntary, before it can be permitted to go to the jury.

Thompson's case, 724

2. Though a confession may be inadmissible because not voluntary, it may become admissible by being subsequently repeated by the accused when his mind was perfectly free from the undue influence which produced the original confession. *Prima facie*, the undue influence will be considered as continuing; though the presumption may be repelled by evidence; which, however must be strong and clear.

Idem, 724

CONSTITUTION AND CONSTITUTIONAL LAW.

1. The proviso to § 2, of the act of March 5, 1870, called the enabling act, which authorized the Court of Appeals organized under the present constitution to rehear and affirm or reverse the decrees made by the military judges, at its term commencing the 11th of January, 1870, the term having ended before the passage of the act, is unconstitutional, and the present court has no authority to rehear such cases.

Griffin's ex'or v. Cunningham, 31

Wash., Alex. & Georget. R. R. Co.

v. Wash. & Alex. R. R. Co., 31

2. The § 63, of ch. 57, Sess. Acts 1866-7, p. 849, in relation to the assessment of taxes on licenses, is not in conflict with the constitution of Virginia.

Commonwealth v. Bryne, 165

3. Article 5, of the amendments of the constitution of the United States, was designed as a limitation of the powers of the national government, and is inapplicable to the legislation of the States.

Idem, 165

*4. The bill of rights of Va., which declares that no man shall "be deprived of his liberty, except by the law of the land or the judgment of his peers," does not forbid the State to enforce the collection of the tax on license, by imprisonment of the delinquent, when no personal property can be found by the officer out of which to make the tax.

Idem, 165

5. The 7th section of the act of March 3, 1866, entitled an act imposing a duty on oysters, imposes a tonnage duty, and is, therefore, in violation of the constitution of the United States. art. 1, § 10.

Johnson & als. v. Drummond, &c., 419

Crockett & als. v. Thomas, &c., 419

6. The act of March 3, 1864, to authorize the debtors of a mother bank to pay to a branch, and *vice versa*, is unconstitutional in its application to debts contracted before its passage.

Bank of the Old Dominion v. McVeigh, 457

7. Under the constitution of Virginia, of 1830, an act authorizing the common council of the city of Lynchburg to tax persons and property within the corporate limits, and for half a mile around and outside of the corporate limits, to pay the interest upon the guarantee by the city of six *per cent. per annum* upon the stock of the Virginia and Tennessee Railroad company, to the amount of half a million of dollars, is not a violation of that constitution.

Langhorne & Scott v. Robinson, 661

8. The third section of the third article of the constitution in relation to the qualification of jurors, does not operate *proprio vigore*, and without any legislation on the subject, to repeal all existing laws in conflict therewith; but until such legislation is had, the existing law continues in force.

Chahoon's case, 733

Sands' case, 800

9. The second and fourth sections of the

schedule to the constitution continues in force the existing act in relation to juries, until altered by legislation. *Idem*, 733
Idem, 800

CONTRACTS.

1. That is not a contract of wager, by the terms of which all the profit or loss is to be on one of the parties.

Brown v. Speyers, 296

2. Contracts for the sale and purchase of gold are not void as against public policy.

Idem, 296

3. The present State government is not liable for articles furnished for manufacture in the penitentiary during the late war.

Commonwealth v. Chalkley, 404

4. What is not such a contract of hazard as will relieve it from the taint of usury. See *Usury*, No. 4, and

City of Lynchburg v. Norvell & others, 601

COUNTY AND CITY ORGANIZATION.

1. For the power of the courts of the county and the city over the election of county and city officers. See *Elections of County and City Officers*, No. 1, 2, and

Ellyson & als. ex parte, 10

2. What assistant commissioners of the revenue may do, and how they may act. See *Commissioners of the Revenue*, No. 1, 2, and

Commonwealth v. Byrne, 165

3. For the powers of the board of supervisors of a county, see *Supervisors of Counties*, *passim*, and the *Board of Supervisors of Culpeper v. Gorrell & als.*, 484

COURTS.

1. The judgment and decrees of the military courts are valid judgments and decrees, and the Legislature cannot authorize them to be reviewed by the present court of appeals.

Griffin's ex'or v. Cunningham, 31

Wash., Alex. & Georget. R. R. Co.

v. Alex. & Wash. R. R. Co., 31

Quinn & als. case, 138

2. When Circuit court has no jurisdiction to review the judgment of the County court. See *Prohibition*, No. 2, and *Board of Supervisors of Culpeper v. Gorrell & als.*, 484

3. Jurisdiction of County and Corporation courts, in cases of election. See *Elections of County and City Officers*, No. 1, 2, and

Ellyson & als. ex parte, 10

4. Trial of a felony is to be in the Corporation court, where committed, and
 885 *prisoner cannot elect to be tried in the circuit court.

Boswell's case, 860

5. Corporation court has not jurisdiction to try a party indicted in the County court.

Marshall's case, 845

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. When a prisoner has been taken to the penitentiary before the judgment against him is reversed by the Court of Appeals,

that court will bring him before them by *habeas corpus*, and discharge him.

Leftwich's case, 716

2. The Court of Appeals will not hear a case where the prisoner has escaped and is going at large; but will make an order to dismiss the appeal unless he returns into custody. But having heard and reversed a case, without having been informed of the escape of the prisoner, the court will not afterwards set it aside. *Idem*, 716

3. C. is indicted for felony in the Corporation court of R., the proper court to try him for the offence. When indicted he is not in custody, and has not been arrested or examined by a justice. *Quære*: If he should be arrested and sent before a justice to be examined, or whether he may be taken on a *capias*, and tried upon the indictment without an examination by a justice.

Chahoon's case, 733

4. The third section of the third article of the constitution, in relation to the qualification of jurors, does not operate *proprio vigore*, and without any legislation on the subject, to repeal all existing laws in conflict therewith; but until such legislation is had, the existing law continues in force.

Idem, 733

Sands' case, 800

5. Even if this provision of the constitution did operate *proprio vigore*, a grand jury summoned and empannelled under the existing law, which requires that they should be freeholders, could not be objected to on this ground, it not appearing that they did not have the qualification required by the constitution. *Idem*, 733

6. The act in force at the time of the adoption of the constitution not having been since altered by legislation, a *venire facias* for the trial of a prisoner for felony should be conformed to act, under the second and fourth sections of the schedule to the constitution. *Idem*, 733

Sands' case, 800

7. The County and Circuit courts of Henrico being held within the city of Richmond, an offence committed by proceedings in them is committed within the jurisdiction of the Hustings court of Richmond. *Idem*, 733

Sands' case, 800

8. The only proper endorsement on an indictment is "a true bill," or "not a true bill," with the name of the foreman; and anything else is not a part of the finding of the grand jury.

Thompson's case, 724

9. The record of the finding of the grand jury, saying, in commission of rape, which was on the indictment, it mere surplusage.

Idem, 724

10. The three terms spoken of in the act, ch. 208, § 34, Sess. Acts 1866-'67, are three terms after that at which the prisoner is first held for trial. And though the prisoner has been arrested and committed to jail, or gives bail to appear, and does appear, or is brought

into court, on the first day of the term of a court, that term is not to be counted as one of the three terms aforesaid.

Sands' case, 800

11. The question whether the name in the indictment for rape is *idem sonans*, with the true name of the person upon whom the offence was committed, is a question for the jury, and not for the court.

Taylor's case, 825

12. The indictment charges that the rape was committed upon Ellen Frances Davis, and the true name is Helen Frances Davids; but the proof is, she was as frequently called the first in the community as the last. The proof of the rape upon Helen Frances Davids is admissible under the indictment.

Idem, 825

13. An indictment for felony was found in July 1870, against M. in the County Court of Alexandria, and it was removed to the Corporation court of Alexandria. The Corporation court had no jurisdiction to try it.

Marshall's case, 845

14. Though M. must be discharged from trial on this indictment, he may be again indicted and tried for the same offence.

Idem, 845

15. On a trial for a felony, for which the shortest terms of imprisonment is five years, the jury find the prisoner guilty, and fix the term of his imprisonment in the penitentiary at three years, and the judgment is according to the verdict. Upon a writ of error to the judgment, on the application of the prisoner, the judgment will be reversed; but the prisoner will not be discharged, but will be remanded for another trial.

Jones' case, 848

16. The prisoner being in the penitentiary, he will be brought before the Appellate court by writ of *habeas corpus*, and committed to the sheriff of Henrico, to be taken back to the county from whence he was sent.

Idem, 848

17. A prisoner indicted in a Corporation court, for murder, is not entitled to be tried in the Circuit court. In this respect the act of April 27, 1867, Sess. Acts 1866-'67, p. 931, is altered by the act of April 2, 1870. Sess. Acts 1869-'70, p. 35.

Boswell's case, 860

18. The act, Code, ch. 208, § 3, which provides that a person tried for felony shall be personally present during the trial, does not apply before his arraignment; but before his arraignment an order may be made in his absence.

Idem, 860

19. An instruction which assumes an important fact as true, or is calculated to mislead the jury, should not be given.

Idem, 860

20. Insanity, when it is relied on as a defence to a charge of crime, must be proved to the satisfaction of the jury to entitle the accused to an acquittal on that ground. If, upon the whole evidence, the jury believe he was insane when he committed the act, they

will acquit him on that ground; but not on the fanciful ground that, though they believe he was then sane, yet, as there may be a rational doubt of his sanity, he is therefore entitled to acquittal. *Idem*, 860

CURRENCY.

1. The act of March 29, 1862, to provide a currency of notes of less than five dollars, was intended to be temporary in its operation.

Miller & Franklin v. City of Lynchburg, 330

2. The city of L., on the 8th of May, 1862, passed an ordinance for the issue of \$120,000 of small notes, and directed its treasurer to exchange them for coin or currency, which should be held or invested for the redemption of the notes. From May to October, \$72,418 was received in currency in exchange for the notes, of which \$68,000 was invested in Confederate bonds, and the balance was held in hand. The notes were directed to express, and did express, on their face, received in payment for taxes and all other city dues. The city did not levy a tax for the redemption of the notes. HELD:

1. The notes were issued and received with reference to Confederate currency as a standard of value. *Idem*, 330

2. By the act, the notes were required to be redeemed within the period prescribed by the act. *Idem*, 330

3. The city of L. having provided for the issue of the notes, under the act of March 29, the act of May 15, extending the time of redemption does not apply to the notes issued by the city. *Idem*, 330

4. The city of L., having provided ample funds for the redemption of her notes, she was not required to levy a tax for their redemption. *Idem*, 330

5. Some of these notes not having been presented for redemption within the time prescribed by the act of March 29, the holders of them are not entitled, after the war, to set them off against taxes due from them to the city; and the fund which had been provided and held ready for their payment, having perished, without fault of the city, the city of L. is not under any obligation, in law or equity, to redeem them.

Idem, 330

3. Confederate money is loaned to and advanced for M. by O., and services are also rendered during the war. These claims are to be ascertained by reducing the currency to its gold value at the time of the advance or loan, or service rendered. And the decree should be rendered in the legal currency of the United States, for the equivalent, at the time of the decree, of the amount in gold so ascertained.

Magill v. Manson, 527

Magill v. Manson & als., 527

4. When the purchase of bonds from the obligor with Confederate notes is usury.

See *Usury*, No. 2, and

887 **Town of Danville v. Sutherlin*, 555
City of Lynchburg v. Norvell & others, 601

DAMAGES.

See *Actions*, No. 3, 4, and
Southside R. R. Co. v. Daniel, 344

DEDICATION TO THE PUBLIC.

1. In order to constitute a dedication of property to the public, there must be an intention to appropriate the land for the use and benefit of the public. The acts and declarations of the owner, indicating such an intention, must be unmistakable in their purpose, and decisive in their character, to have that effect. *Harris' case*, 833

2. The intent may be presumed from circumstances connected with a long and uninterrupted user by the public. And this presumption may be rebutted by circumstances showing that an appropriation of the property to the use of the public was not intended. *Idem*, 833

3. In this State there may be a valid acceptance of an easement in a town without any distinct act of recognition by the corporate authorities of such town. The mere user, however, by the public, of the *locus in quo*, will not of itself constitute an acceptance, without regard to the character of the use, and the circumstances and length of time under which it was claimed and enjoyed. *Idem*, 833

4. Where property in a town is set apart for public use, and is enjoyed as such, and private and public rights are acquired with reference to it and its enjoyment, the law presumes an acceptance on the part of the public as will operate an estoppel *in pais*, and preclude the owner from revoking the dedication. *Idem*, 833

5. Where no public or private interests have been acquired upon the faith of the dedication, the mere user, by the public, of the supposed street or alley, although long continued, should be regarded as a mere license, revocable at the pleasure of the owner; unless there be evidence of an express dedication; or unless, in connection with such long continued user, the way has been, by the proper town authority, recognized as a street, so as to give notice that a claim to it as an easement was asserted. *Idem*, 833

DEPOSITIONS.

1. A deposition of a party, to be read in a pending cause at law, was commenced before the passage of the act of March 2, 1866, Sess. Acts 1865-66, p. 86, which required the parties should testify *ore tenus*, but it was not completed until that law went into effect. The deposition is inadmissible as evidence, if objected to.

Crawford v. Halsted & Putman, 211

2. The act, ch. 16, § 18 of the Code, edi. 1860, does not save the right to a party to a suit to give evidence by his deposition, where the taking of it was commenced before the passage of the act of March 2, 1866, but was not completed until the act was passed.

Idem, 211

DEVISES AND BEQUESTS.

See *Estates*, No. 1, and
May v. Joynes & als., 692

DRUNKENNESS.

1. A person, whether he be an habitual drinker or not, cannot voluntarily make himself so drunk as to become, on that account, irresponsible for his conduct during such drunkenness. He may be perfectly unconscious of what he does, and yet he is responsible. He may be incapable of express malice, but the law implies malice in such a case, from the nature of the instrument used, the absence of provocation, and other circumstances under which it is done.

Boswell's case, 860

2. If permanent insanity is produced by habitual drunkenness, then, like any other insanity, it excuses an act which would otherwise be criminal. *Idem*, 860

3. If a person kills another without provocation, and through reckless wickedness of heart, but, at the time of doing so, his condition, from intoxication, was such as to render him incapable of doing a willful, deliberate and premeditated act, he is guilty of murder in the second degree. *Idem*, 860

888

*EASEMENTS.

See *Dedication to the public*.

ELECTIONS.

Of County and City Officers.

1. Under § 69, of the act to provide for general elections, Sess. Acts 1870, p. 97, the county and corporation courts have authority to vacate an election.

Ellyson & als., ex parte, 10

2. Though a person voted for has received the return, and has qualified and entered upon the discharge of the duties of his office, the court may vacate the election, and direct another election to be held. *Idem*, 10

EQUITABLE JURISDICTION AND RELIEF.

1. It is improper, in a trustee in a deed of trust to secure a debt, to make a sale so long as it remains uncertain what amount is due on account of the debt; and if the amount due is uncertain, or if credits properly applicable thereto, be not so applied, it is his duty, before making a sale, to ascertain the amount to be raised by the sale, and to bring a suit in chancery, if necessary, to procure a settlement by a commissioner; or if he fails to do this, the debtor may do it, and in the meantime enjoin the sale.

Hogan v. Duke & als., 244

2. On a bill to enjoin a sale of land by a trustee, the demurrer denies all the grounds of equity stated in the bill; and there is no proof to sustain them. The court may dissolve the injunction and dismiss the bill; or it may dissolve the injunction, and have the sale made and the proceeds distributed under its direction. *Idem*, 244

3. The decree for the sale should be on the terms of the deed. *Idem*, 244

4. When and for what the court may proceed to decree against the plaintiff in favor of the defendant. See *Practice in Chancery*, No. 13, 4, 5, and

Kraker v. Shields, 377

5. Who may join in a bill to enjoin a sale for taxes, and test the constitutionality of the law. See *Practice in Chancery*, No. 14, and

Johnson & als. v. Drummond, &c., 419

Crockett & als. v. Thomas & als., 419

6. After scaling a Confederate debt to the gold value, the decree should be rendered in the legal currency of the U. S. for the equivalent, at the time of the decree, of the amount in gold. *Magill v. Manson*, 527

7. R. is entitled to a decree for the sale of real estate to pay a debt due to him, secured by a deed of trust upon the property; but before the decree is made, T. by petition in the cause, alleges that he holds a prior lien upon the property to secure a debt due him; and he exhibits his bond and deed of trust. It is error to decree a sale of the property, and that the proceeds of sale be brought into court, before passing upon the claims of T. and ascertaining whether or not it is a valid prior lien, and the amount thereof.

Lipscombe v. Rogers & als., 658

8. When principals may sue agents in equity. See *Agents*, No. 4, and

Segar & als. v. Parrish & als., 472

9. When a bill seeks relief, and asks for an injunction to restrain the sale of real estate in another county, as ancillary to the relief sought, the court of the county or city where the defendants, or some of them, reside, has jurisdiction of the cause; and the order for the injunction properly proceeds from the court of that county or city.

Winston & als. v. The Midlothian Coal Mining Co. & als., 587

ESTATES.

1. Testator says—I give to my beloved and excellent wife, subject to the provisions hereafter declared, my whole estate, real and personal, and especially all real estate which I may hereafter acquire, to have during her natural life, but with full power to make sale of any part of the said estate and to convey absolute title to the purchaser, and use the purchase money for investment or any purchase that she pleases; with only this restriction, that whatever remains at her death shall, after paying any debts she may owe, or any legacies she may leave, be divided as follows: There are then limitations to his children and grandchildren. HELD: The wife takes a fee simple in the real and an absolute property in the personal estate, and the limitation over of whatever remains at her death, is inconsistent with and repugnant to such fee simple and absolute *property is said real and personal estate, and fails for uncertainty.

May v. Joynes & als., 692

ESTOPPEL.

1. Where the record of a court appears on its face to have been regularly signed by the judge who presided at the trial of a cause, parol evidence is not admissible to shew that the proceedings had not been read in court, and that the record had not been signed by the judge until some days after the adjournment of the court for the term.

Quinn & als. case, 138

2. A commissioner of the revenue under § 7 of the act of 1867, in relation to the assessment of taxes on licenses, appoints an assistant commissioner, and the appointment is approved by the proper court. The question whether the facts existed which authorized the appointment, cannot be made in a collateral proceeding.

Commonwealth v. Byrne, 165

3. Two actions on the case are brought in the same court, at the same time, by the same plaintiff against the same defendant. The same act of the defendant is charged as the cause of the damage in each case; but the damage in one case is charged to the plaintiff's land, and in the other to the crops grown and growing upon it. The case as to the crops is first tried, and the evidence is as to the crops, and there is a verdict and judgment for the defendant. This verdict and judgment cannot be set up as an estoppel to the plaintiff in the other action for damages to the land.

Southside R. R. Co. v. Daniel, 344

4. A party in a suit will not be estopped from setting up a defence on the ground that it is inconsistent with the defence he made in another by other plaintiffs, unless the fact of such inconsistency distinctly appears.

Bargamin & als. v. Clarke & als., 544

5. The judgment in the first suit, or the opinion of the judge in it, is not competent evidence for the plaintiff in the second suit to shew the nature of the title set up in it by the defendants.

Idem, 544

See *Dedication to the public*, No. 4, and *Harris' case*, 833

EVIDENCE.

1. W. sues C. for a lot and fails. B. then sues C. for the same lot. The judgment in the first suit, or the opinion of the judge in it, is not competent evidence for the plaintiff in the second suit, to show the nature of the title set up in it by the defendants.

Bargamin & als. v. Clarke & als., 544

2. When confessions are admissible as evidence. See *Confessions*, No. 1, 2, and *Thompson's case*, 724

3. What opinion of witness as to handwriting, on a trial for forgery, is admissible. See *Forgery*, No. 1, and

Chahoon's case, 733

4. On such a trial the Commonwealth may prove that the party whose name is alleged to be forged, was prompt in the payment of

his debts, and that he owned a large property, real and personal, and was doing a good business. *Idem*, 733

5. What assertions or declarations of the accused are evidence, on a trial for forgery, to show his attempt to utter the forged instrument. See *Forgery*, No. 3, and

Idem, 733

6. How the failure of the accused to explain the subject by evidence may affect him. See *Forgery*, No. 4, and

Idem, 733

7. What evidence admissible to show complicity of the prisoner on a trial for forgery, in the uttering of the forged paper. See *Forgery*, No. 8, and

Sands' case, 800

8. The *ex parte* settlement of a personal representative, by a commissioner of the court, though it has been confirmed, is not competent evidence to show that a witness not connected with the estate had the means to pay for real estate which he purchased, at a sale made by the person who was personal representative, as commissioner of the court, in order to sustain the veracity of the witness.

Idem, 800

9. A map of a city, though made by a former city surveyor, and found in the office of the register of the city, in a book labelled "plans and charts," not appearing to have been made by the authority of the city government, or adopted by it, is not competent for the Commonwealth in prosecution for obstructing what is claimed to be a street of the city.

Harris' case, 833

890 *EXECUTORS AND ADMINISTRATORS.

1. A balance is found against an executor in 1859, a part of which is interest. Suit against his adm'r to recover this balance in 1866. He is not to be charged interest upon the interest; but only upon the principal. And he is to be charged interest during the war.

Kelly & als. v. Love's adm'r & als., 124

2. Comm'r having made a special statement at the instance of the adm'r, he cannot object that it is not stated on the basis of an executorial account. *Idem*, 124

EXPRESS COMPANIES.

1. An express company is to be regarded as a common carrier, and its responsibilities for the safe delivery of the property entrusted to it is the same as that of the common carrier.

Southern Express Co. v. McVeigh, 264

2. For the liabilities of express companies, and what is a delivery to them as common carriers. See *Common Carriers, passim*, and

Idem, 264

3. For the form of action, and mode of declaring against express companies. See *Case*, No. 1, 2, 3, 4, and

Idem, 264

FALSE PRETENCE.

See *Indictments*, No. 1, 2, and

Leftwich's case, 716

FELONY.

1. On a trial for a felony, for which the shortest term of imprisonment is five years, the jury find the prisoner guilty, and fix the term of his imprisonment in the penitentiary at three years, and the judgment is according to the verdict. Upon a writ of error to the judgment on the application of the prisoner, the judgment will be reversed; but the prisoner will not be discharged, but will be remanded for another trial.

Jones' case, 848

2. The act, Code, ch. 208, § 3, which provides that a person tried for a felony shall be personally present during the trial, does not apply before his arraignment; but before his arraignment an order may be made in his absence.

Boswell's case, 460

3. See *Criminal Jurisdiction and Proceedings; Forgery, Indictments, Murder and Rape*.

FORGERY.

1. Upon a trial for forgery, to prove that the paper was forged, a witness was introduced, who said he knew H., the party whose signature was in question, and who was dead, about two years; was his tenant; had seen him write; thinks he knew his handwriting tolerably well; but could not swear to a particular signature as his without knowing the fact; thought he had sufficient knowledge and recollection of his signature to enable him to give an opinion as to the genuineness of the signature, though he would not swear absolutely about it. Says: I think it is not his handwriting; but at the same time I cannot say on oath positively it is not. This is admissible evidence.

Chahoon's case, 733

Sands' case, 800

2. On such a trial the Commonwealth may prove that H. was prompt in the payment of his debts, and that he owned a large property, real and personal, and was doing a good business.

Idem, 733

Sands' case, 800

3. Uttering a forged paper may be proved by shewing that the prisoner attempted to employ as true the forged writing, with a knowledge, at the time of the said attempt, that the same was forged, with the intent to defraud. And any assertion or declaration, by word or act, that the forged writing is good, with such knowledge or intent, is an uttering or attempt to employ as true, the said writing, if such assertion or declaration was made in the prosecution of the purpose of obtaining the money mentioned in said writing.

Idem, 733

Sands' case, 800

4. To convict of forgery, the jury must be governed entirely by the testimony before them, and they must not presume or assume the guilt of the accused by reason of his failure or neglect to produce evidence in his own behalf. But if the jury believe that it is in the power of the accused to produce evidence in elucidation of the subject mat-

ter of the charge against him, then
891 *his failure or neglect to produce such
evidence may be considered by the jury,
in connection with the other facts proved in
the case. *Idem*, 733

5. The forgery charged was the note of H.,
an unnaturalized foreigner. The forging or
uttering it was in fraud of the adm'or of H.,
and the heirs of H., if he had any, or the State,
if he had none. *Idem*, 733

6. The bringing a suit at law, as counsel,
upon the forged note, and recovering judg-
ment thereon, and the filing a bill to enforce
payment of the judgment out of the real estate
of H., and having the same sold, and receiv-
ing the proceeds—the same being done with
the knowledge that the note was a forgery—
was an attempt to employ the said note as
true, within the meaning of the statute.
Idem, 733

7. Though the suit at law was brought in
the County court of Henrico, and the suit in
equity was in the Circuit court of Henrico,
yet as both these courts were held within the
limits of the city of Richmond, and the pris-
oner lived in the city, the Hustings court of
the city had jurisdiction to try the prisoner.
Idem, 733

Sands' case, 800

8. An action at law was brought on the
note alleged to be forged against the curator
of H., and judgment rendered without any
defence. A suit in equity was then brought
to subject the real estate of H. to the payment
of the judgment; and there was a decree for
a sale, and sale; in both of which suits the
prisoner was counsel for the estate; and he
purchased a part of the property. The re-
cords of these cases, with the testimony of
the clerks of the respective courts, were ad-
missible evidence, with other evidence, to
shew the uttering of the forged paper, and
the complicity of the prisoner in the utterance
of it.

Sands' case, 800

IDEM SONANS.

See *Rape*, No. 2, and
Taylor's case, 825

INCHOATE RIGHTS.

1. Inchoate rights, derived under a statute,
are lost by the repeal of the statute before
they are perfected, unless they are saved by
express words in the repealing statute.

Crawford v. Halsted & Putnam, 211

INDICTMENTS.

1. The statute for punishing persons ob-
taining money or other property, which may
be the subject of larceny, by any false pre-
tense, makes the offence larceny; Code, ch.
192, § 49, p. 796; and an indictment for the
offence may be either in the form of indict-
ment for larceny at common law, or by charg-
ing the specific facts, which the act declares
shall be deemed larceny.

Leftwich's case, 716

2. In an indictment under this statute, for
obtaining money upon a false pretense, it is
not sufficient to describe it as "ninety dollars
in United States currency;" but it should

shew what kind of United States currency
was obtained. *Idem*, 716

3. Every count in an indictment must con-
clude "against the peace and dignity of the
Commonwealth;" or the count which omits
it will be fatally defective.

Thompson's case, 724

4. The only proper endorsement on an in-
dictment is "a true bill," or "not a true bill,"
with the name of the foreman; and anything
else is not a part of the finding of the grand
jury. *Idem*, 724

5. The record of the finding of the grand
jury, saying, in commission of rape, which
was on the indictment, is mere surplusage.
Idem, 724

6. An indictment for rape does not charge
that it was committed on a female, but the
name given is a woman's name, and the in-
dictment uses the pronouns "she" and "her"
in speaking of the person upon whom the rape
was committed. *Held*: Though it would
have been better to use the word "female,"
as it is the word used in the statute, yet the
language used sufficiently shews the rape was
committed on a female, and is therefore good.

Taylor's case, 825

INJUNCTIONS.

1. Where a bill seeks relief, and asks for
an injunction to restrain the sale of real
estate in another county, as ancillary to the
relief sought, the court of the county or city
where the defendants or some of them reside,
has jurisdiction of the cause; and the

892 order for the injunction *properly pro-
ceeds from the court of that county or
city.

*Winston & als. v. The Midlothian
Coal Mining Co. & als.*, 686

INSANITY.

1. Plaintiff seeks to set aside his deed and
contract, on the ground that he was, at the
time, of unsound mind, and incapable of
making the contract. *Quære*: If the denial,
in the answer, of the unsoundness of mind
and incapacity, is the denial of a fact which
puts the plaintiff upon the proof of it by two
witnesses, or one witness, and strong corrob-
orating circumstances, or merely puts him
upon proof of the fact by such evidence as
may be satisfactory to the court?

Beverley v. Walden, 147

2. In such a case, the testimony of wit-
nesses present at the factum, and the written
acts of the party attesting his capacity, is
more to be relied on than the opinions of other
witnesses, based upon facts which may be
true, and yet not be the result of unsound-
ness of mind. *Idem*, 147

3. See *Drunkennes*, No. 1 and 3, and
Boswell's case, 860

4. If permanent insanity is produced by
habitual drunkenness, then, like any other
insanity, it excuses an act which would be
otherwise criminal. *Idem*, 860

5. How and by whom insanity set up as
a defence on a trial for murder is to be estab-
lished. See *Criminal Jurisdiction and Pro-
ceedings*, No. 20, and *Idem*, 860

INSTRUCTIONS.

An instruction which assumes an important fact as true, or is calculated to mislead the jury, should not be given.

Boswell's case, 860

INSURANCE.

1. In an action on a policy of insurance against fire, all that can be required of the plaintiff is a reasonable and substantial compliance with the conditions of the policy.

Home Ins. Co. v. Cohen, 312

2. One of the conditions of the policy is, among other things, that the insured shall forthwith give notice of his loss, and as soon as possible deliver in a particular account of such loss, signed with his own hand, and verified by his oath or affirmation; and also, if required, shall produce their books of accounts, &c., and exhibit the same for examination by any person named by the company; and until such proofs are furnished the loss shall not be deemed payable. The account having been furnished, first under the oath of an agent, and when objected to, under the oath of the principal, and the company having been called upon to state what other proofs they required, and not stating what: HELD:

1. The company will be held to have waived any demand for further preliminary proof. *Idem*, 312

2. The books and papers being to be produced if required, and the company not having named a person to examine them, it must be considered as a waiver of any demand for them.

Idem, 312

3. In July, 1857, W., of Richmond, obtains from the M. Ins. Co. of New York, through their agent in Richmond, a policy of insurance for the life of S., his debtor, forfeited if premiums not paid on the day. An endorsement on the policy says: No payment of premiums binding on the company unless the same is acknowledged by a printed receipt, signed by an officer of the company. Payments of premiums are made and such receipts given, signed by an officer in New York, countersigned by the agent here, to whom the money is paid, until 1861, when the premium is paid to the agent here, but only the receipt of the agent given for it; and the company does not receive it. In July, 1862, W. offers to pay the premium to the agent here; but he declines to receive it, the company having directed him that the premiums must be paid in New York. S. dies in November, 1862. The M. Ins. Co. is liable to W. for the amount of the insurance, less the premium he had not paid.

The Manhattan Life Ins. Co. v. Warwick, 614

INTEREST.

1. An ex'or and trustee settles his account in 1859, showing a balance due by him, a part of which is interest. On suit against his adm'r in 1866, to recover that balance, the interest is not to *bear inter-

est; but he is to be charged interest upon the principal during the war.

Kelly & als. v. Love's adm'r & als., 124

2. A note is given for a deferred payment for land, and the interest for the time it has to run is included in the note. Interest from the time the note falls due is to be paid upon the whole amount of the note.

Kraker v. Shields, 377

ISSUES—At Common Law.

1. When the non-joinder of issue upon a replication cannot be taken advantage of in the appellate court. See *Appellate Court*, No. 6 and 7, and

Southside R. R. Co. v. Daniel, 344

2. In an action on the case for damages to plaintiff's land, there is the plea of not guilty on which issue is joined, and there is a special plea to which there is a special replication concluding to the country. To this there is no rejoinder, and the record does not say that issue is joined upon it; but the parties go to trial, and the subject of the special plea and replication is contested, and there is a verdict for the plaintiff. If the subject of the replication is such that the defendant cannot rejoin special matter without a departure from the defence set up in his plea, but must take issue upon the replication, the non-joinder of issue will be cured by the statute. *Idem*, 344

ISSUES—Out of Chancery.

1. Whether a court of equity will direct an issue to be tried by a jury, is a question of discretion; but it is a sound judicial discretion, and, if improperly exercised, an appellate court will correct it.

Beverley v. Walden, 147

2. When the allegations of the bill are positively denied by the answer, and the plaintiff has failed to produce two witnesses, or one witness and strong corroborating circumstances in support of the bill, it is error in the chancellor to order an issue. No issue should be ordered until the plaintiff has thrown the burden of proof on the defendant.

Idem, 147

3. What not a case for an issue. See *Practice in Chancery*, No. 13-2, and

Kraker v. Shields, 377

4. Bill is filed to set aside the bond of plaintiff, on the ground of fraud in its procurement; and the evidence being conflicting, an issue should be directed to ascertain the fact.

Magill v. Manson, 527

Magill v. Manson & al., 527

JUDGES.

See *Officers—Judges*.

JUDGMENTS.

1. When judgments not evidence in a second suit by a different plaintiff against the same defendant. See *Evidence*, No. 1, and *Bargamin & als. v. Clarke & als.*, 544

JUDICIAL SALES.

1. See *Partition*, No. 1, 2, 3, 4, 5, 6, and *Howery v. Helms & als.*, 1
2. See *Practice in Chancery*, No. 10, and *Hogan v. Duke*, 244

JURIES.

1. The third section of the third article of the constitution, in relation to the qualification of jurors, does not operate *proprio vigore* and without any legislation on the subject, to repeal all existing laws in conflict therewith; but until such legislation is had, the existing law continues in force.

Chahoon's case, 733

Sands' case, 800

2. Even if this provision of the constitution did operate *proprio vigore*, a grand jury summoned and empaneled under the existing law, which requires that they should be freeholders, could not be objected to on this ground; it not appearing that they did not have the qualifications required by the constitution.

Idem, 733

Idem, 800

3. The act in force at the time of the adoption of the constitution, not having been since altered by legislation, a *venire facias* for the trial of a prisoner for a felony, should be conformed to the act, under the second and fourth sections of the schedule to the constitution.

Idem, 733

Idem, 800

JURISDICTION—*At Common Law*.

1. When the Circuit court has no jurisdiction to reverse a judgment of a
894 *County court in a case of *ad quod damnum*. See *Supervisors of a County*, No. 5, and

Board of Supervisors of Culpeper v. Gorrel & als., 484

2. To entitle a person to appeal from a judgment, he must be a party in the cause, and must be aggrieved by the judgment.

Idem, 484

3. The Hustings court of the city of Richmond has jurisdiction to try a prisoner for forgery, though the uttering or attempting to use the instrument as true, was by proceedings in the County and Circuit courts of Henrico; these courts being held within the city limits.

Chahoon's case, 733

Sands' case, 800

4. When Corporation court has no jurisdiction to try a case removed from the County court.

Marshall's case, 845

5. Prisoner indicted for murder in a Corporation court is not now entitled to be tried in the Circuit court.

Boswell's case, 860

LACHES AND LAPSE OF TIME.

1. See *Adversary Possession*, No. 1, and *Bargamin & als. v. Clarke & als.*, 544

LARCENY.

1. How indictment should describe the article obtained by false pretence. See *Indictments*, No. 1, 2, and *Leftwich's case*, 716

LIENS.

There is a landlord's lien on personal property in a house, for a year's rent, a deed of trust on a part of this property to secure a debt, and a second deed on all the property to secure another debt. The landlord should be paid out of the property not embraced in the first deed, if sufficient; and when he is paid, then the property, or what remains of it, embraced in the first deed, is to be applied to pay that debt. And if the landlord distrains upon and sells the property embraced in the first deed, the creditor thereby secured will be substituted to his rights upon the other property.

Jones & als. v. Phelan & Collander, 229

LIMITATION OF ESTATES.

1. When the first taker under a will takes the whole property, and the limitations over are void. See *Estates*, No. 1, and *May v. Joynes & als.*, 692

MURDER.

1. See *Drunkenness*, No. 1, and *Boswell's case*, 860
2. If a person kills another without provocation, and through reckless wickedness of heart, but, at the time of doing so, his condition, from intoxication, was such as to render him incapable of doing a willful, deliberate and premeditated act, he is guilty of murder in the second degree. *Idem*, 860

NEW TRIALS.

1. It is an established rule of the courts to grant new trials very rarely, upon the ground of after-discovered evidence; and never but under very special circumstances. The party asking it must show he was ignorant of the existence of the evidence, and it must be such that a reasonable diligence on his part would not have secured it at the former trial; that the new evidence is not of like import with any part of that offered on the former trial. He must produce the affidavits of the witnesses, stating the facts they will testify to, or if that be impracticable, the affidavits of persons who have conversed with them, showing the facts they will state.

Brown v. Speyers, 296

2. A new trial will never be granted on the ground of after-discovered evidence, if it appears that the evidence might, with reasonable attention and diligence, have been procured before the first trial; nor when the affidavit states only that a person had told a party what he would say; nor when the evidence does not relate to new facts, but consists merely of cumulative facts or circumstances relative to the same matter controverted on the former trial. *Idem*, 296

3. In a bill of exceptions to the refusal of

the court to grant a new trial, the evidence, and not the facts proved, is stated. If all the evidence was introduced by the exceptor, the Appellate court will not review the judgment; but *if all the evidence is introduced by the party who recovers the judgment, the Appellate court will review the judgment, and if, taking it all as true, the verdict and judgment is erroneous, will reverse it.

Gimmi v. Cullen, 439

OFFICERS.

Commissioners of the Revenue.

1. A commissioner of the revenue, under § 7 of the act of 1867, in relation to the assessment of taxes or licenses, appoints an assistant commissioner, and the appointment is approved by the proper court. The question whether the facts existed which authorized the commissioner to appoint an assistant, cannot be made in a collateral proceeding.

Commonwealth v. Byrne, 165

2. The act authorizing the assistant to perform all the duties which his principal is authorized to perform, it is not necessary that the certificate given by him shall be given in the name of the principal, or that the name of the principal shall be signed to the certificate.

Idem, 165

Of Counties and Cities.

1. Under § 69 of the act to provide for general elections, Sess. Acts 1870, p. 97, the County and Corporation courts have authority to vacate an election of county and corporation officers.

Ellyson & als. ex parte, 10

2. Though a person voted for has received the return, and has qualified and entered upon the discharge of his duties of his office, the court may vacate the election, and direct another election to be held.

Idem, 10

3. For the powers of Supervisors of a County. See *Supervisors of Counties, passim*, and *Board of Supervisors of Culpeper v. Gorrell & als.*, 484

Judges.

1. The judges of the Court of Appeals who were in office under military appointment when the State was restored to the Union, holding over and continuing to exercise their office, their judgments and decrees are valid and binding.

Griffin's ex'or v. Cunningham, 31

Wash. Alex. & Georget. R. R. Co.

v. Alex. & Wash. R. R. Co., 31

2. A judge by military appointment in Virginia, holding a court and trying a criminal after the admission of the State into the Union; his act is valid.

Quinn & als. case, 138

PARTIES.

1. Testator by his will gives a fund for the establishment and support of a school at a place mentioned or near it, and appoints trustees to manage it, with power to them to fill vacancies in their body, one of whom he appoints executor of his will. The ex'or settles his accounts, shewing a balance in his hands, and dies. Several vacancies occur in

the board, which are filled. The trustees may sue to recover the money due by the ex'or; but the school having been incorporated after the suit was brought, the corporation should be made a party, and the money should be decreed to be paid to it.

Kelly & als. v. Love's adm'or & als., 124

2. A statute requires the captain or other officer of a vessel engaged in the oyster trade to take out a license. A number of such captains or officers may unite in one bill to enjoin the sale of their vessels, and test the constitutionality of the act.

Johnson & als. v. Drummond, &c., 419

Crockett & als. v. Thomas, &c., 419

3. Upon a proceeding by writ of *ad quod damnum* to condemn land for county buildings, persons having no interest in the land have no right to become parties to oppose the confirmation of the report; nor can they obtain an appeal from the judgment of the County court.

Board of Supervisors of Culpeper v. Gorrell & als., 484

4. A., B. and C., are the heirs of W., and also heirs of M., and D. and E. are the heirs of M. They all appoint S. an agent to collect and sell land scrip due to W., and also scrip due to M. The scrip is obtained and sold, but the agent does not pay over the proceeds. All the heirs unite in a suit for the recovery of the proceeds, and call for a discovery. The bill is not demurrable either for multifariousness, or because the plaintiffs have a complete remedy at law.

Segar & al. v. Parrish & als., 672

896

*PARTITION.

1. In a suit for partition, the court has no authority to order a sale of the land, unless it is made to appear by an enquiry before a commissioner, or otherwise, that partition cannot be made in some of the modes provided by the 2d and 3d sections of ch. 128 of the Code. But when it did not so appear, and no such enquiry was asked in the court below, a party who promoted the suit, and at whose instance the decree was made, will not be allowed to raise the objection for the first time in the Appellate court.

Howery v. Helms & als., 1

2. When the commissioner appointed by a decree in a partition suit, to sell the land, becomes himself the purchaser, the purchase is voidable at the election of any party interested in the land. And the law is the same where the purchase is nominally by a third person, who is reported by the commissioner to the court as the purchaser, but who really purchased for the commissioner, and conveyed the land to him accordingly, after the purchase, as reported, had been confirmed.

Idem, 1

3. When a party interested in the land, with a full knowledge of all the facts, elects to affirm the sale, he will be concluded by it; and in this case the acceptance, without objection, of his share of the proceeds of sale, in Confederate money (for which the sale was made), was held to be such an affirmation.

Idem, 1

4. Where any of the parties interested elect to avoid the sale, while it has been affirmed by other parties, the entire property, and not merely the undivided interest of the parties objecting to the sale, must be resold; and the original purchaser will be entitled to the shares of the proceeds of the resale, which would otherwise have belonged to those who have elected to affirm the original sale.

Idem, 1

5. Where land is resold in cases of this sort, the usual and proper course is to offer the property at an upset price, to be fixed by the decree, according to the cases of *Buckles v. Lafferty*, 2 Rob. 292, and *Baily's adm'x v. Robinson*, 1 Gratt. 4. But this is intended for the parties who elect to avoid the first sale; and where the decree for resale directed a sale in general terms, without fixing an upset price, it cannot be assigned as error in the Appellate court, either by the original purchaser, or by any party who has elected to affirm the first sale.

Idem, 1

6. A bill was filed during the late war, for partition of real estate among co-parceners, some of whom were non-residents, and so continued until the end of the war, and were proceeded against by publication. A decree for sale was made, and a sale made under it, at which M. became nominally the purchaser. The commissioner reported to the court he had made the sale; that M. was the purchaser, and desired to pay all the purchase money down, without awaiting the terms of credit provided by the decree, and that he had, under a provision in the decree, accepted the purchase money from him accordingly. In fact, M. was only nominally the purchaser, the commissioner himself being the real purchaser, to whom M. conveyed the land as soon as the sale was confirmed. The sale was confirmed, and the shares of the non-resident parties were, by direction of the court, invested in their names in the bonds of Floyd county, issued during the war. All this was done during the war. After the war, the non-resident defendants, instead of appearing in the original suit, as provided by § 13, ch. 170 of the Code, filed their original bill, impeaching the original sale, and asking a resale. HELD: They were entitled to file an original bill, because:

1. The commissioner, by purchasing at his own sale, did an act which a court of equity treats as a fraud upon the parties interested: And

2. By reporting to the court that M. was the purchaser, and concerning the fact that he was himself the real purchaser, he was guilty of an actual fraud upon the court and the non-resident parties; and thereby obtained from the court a confirmation of the sale, which might not otherwise have been decreed, and ought not to have been, if at all, without further enquiry.

Idem, 1

3. Held, also, that the investments in the bonds of Floyd county were at the risk of the purchaser, and that the bonds should be surrendered to him as his property, the obligee being required, if desired, to assign them to him without recourse.

Idem, 1

897

*PAYMENTS.

1. M., a debtor of the bank of D., which is within the Federal lines, in July, 1864, pays his debt to D. into a branch of the bank of D., which branch is within the Confederate lines; the payment being made in Confederate money. The payment is not valid, and the bank of D. may recover the amount from M.

Bank of the Old Dominion v. McVeigh, 457

2. The act of the General Assembly sitting at Richmond, passed March 3, 1864, authorizing such payments, is not obligatory upon a mother bank within the Federal lines.

Idem, 457

PLEADING—At Common Law.

1. In case against common carriers and express companies, see *Case*, No. 1, 2, 3, 4, and *Southern Express Co. v. McVeigh*, 264

PLEADING—In Chancery.

1. When bill not multifarious. See *Practice in Chancery*, No. 14, and *Johnson & als. v. Drummond & als.*, 419
Crockett & als. v. Thomas & als., 419
And see *Agents*, No. 4, and *Segar & al. v. Parrish & als.*, 672

PRACTICE—At Common Law.

1. Deposition of a party, though commenced before but completed after the passage of the act of March 2, 1866, Sess. Acts 1865-66, p. 86, is not admissible as evidence on a trial at law, if objected to.

Crawford v. Halsted & Putnam, 211

2. Upon what principles the courts will grant new trials on the ground of after-discovered evidence. See *New Trial*, No. 1, 2, and

Brown v. Speyers, 296

3. When the nonjoinder of issue upon a special replication will be disregarded in an appellate court, and when it will be cured by the statute. See *Appellate Court*, No. 6 and 7, and

Southside R. R. Co. v. Daniel, 344

4. Whether the name in indictment for rape is *idem sonans*, with the true name of the person upon whom the offence was committed is a question for the jury.

Taylor's case, 825

PRACTICE—In Chancery.

1. What enquiries should be directed before a sale is made in a suit for partition. See *Partition*, No. 1, and

Howery v. Helms & als., 1

2. How commissioner will be dealt with, who purchases at his own sale and conceals the fact from the court. See *Partition*, No. 2, 3, 4, 5, 6, and

Idem, 1

3. How in such case land will be resold. See *Partition*, No. 4, 5, and

Idem, 1

4. Whether a court of equity will direct an issue to be tried by a jury is a question of discretion; but it is a sound judicial discretion, and, if improperly exercised, an appellate court will correct it.

147

Beverley v. Walden,

5. When the allegations of the bill are positively denied by the answer, and the plaintiff has failed to produce two witnesses, or one witness and strong corroborating circumstances, in support of the bill, it is error to direct an issue. No issue should be ordered until the plaintiff has thrown the burden of proof on the defendant. *Idem*, 147

6. Plaintiff seeks to set aside his deed and contract, on the ground that he was, at the time, of unsound mind, and incapable of making a contract. *Quære*: If the denial, in the answer, of the unsoundness of mind and incapacity, is the denial of a fact which puts the plaintiff upon the proof of it by two witnesses, or one witness and strong corroborating circumstances, or merely puts him upon proof of the fact by such evidence as may be satisfactory to the court. *Idem*, 147

7. In a suit against the adm'r of an ex'or and trustee, the comm'r having made a special statement at the instance of the adm'r, he cannot object that it is not stated on the basis of an executorial account.

Kelley & als. v. Love's adm'r & als., 124

8. On a bill to enjoin a sale of land by a trustee, the answer denies all the grounds of equity stated in the bill; and there is no proof to sustain them. The court may dissolve the injunction and dismiss the bill; or it may dissolve the *injunction and have the sale made and the proceeds distributed under its direction.

Hogan v. Duke & als., 244

9. In such a case, the trustee having been declared a bankrupt, it was especially proper for the court to retain the cause, and have the trust administered under its direction, and to require the trustee to give security for the faithful performance of his duties.

Idem, 244

10. The decree for the sale of the property should be upon the terms of the deed.

Idem, 244

11. It was proper to allow compensation for the services of an auctioneer in making the sale ordered by the court, and also the expense of a former advertisement of the sale of the property by the trustee, which had been enjoined by the debtor, and the injunction dissolved; as well as for the expense of drawing and stamping the deed to be made by the commissioner to the purchaser.

Idem, 244

12. When, though decree for account for some small items, there may be a decree for part of the debt.

Idem, 244

13. In November, 1862, S. sells to K. a house and lot in Richmond for \$14,500, of which \$4,500 is paid in cash, and notes, with interest added, for the balance, are given, payable in one, two, three and four years, with a deed of trust to secure them. The cash payment and first and second notes are paid in Confederate money; the third is paid four months before it fell due, by a compromise, S. taking \$2,000 in U. S. currency. Bill to enjoin the sale of the house and lot for the payment of the fourth note, alleges that it was given with reference to Confederate currency as the standard of value, and prays that S. might be required to receive

payment according to the value of that money at the time of the contract. S. denies this was the contract, and says he was to be paid in the currency of the time the note fell due, and asks the court to adjudicate the question. **Held**:

1. The court may refer the case to a commissioner, to enquire whether the contract was made with reference to Confederate money as a standard of value, or whether the notes were to be paid in the currency of the time they fell due.

Kraker v. Shields, 377

2. It is not a case in which the court should have directed an issue. And this, especially as there was no conflict of testimony when the case was referred to a commissioner.

Idem, 377

3. In what cases court may refer a case to a commissioner. See the opinion of *Moncure, P.*

Idem, 377

4. The interest being included in the note, if there is a decree for the payment of the note, it is proper to decree interest on the whole amount.

Idem, 379

5. The court being of opinion that the note should be paid in the currency of the time it fell due, may decree in favor of S. against K. for the amount.

Idem, 377

6. It was irregular, after decreeing in favor of S., to dismiss the bill; and the Appellate court will correct the decree in this respect, and affirm it, with costs.

Idem, 377

7. The decree should reserve liberty to S. to apply to the court, by motion or petition in the cause, for a sale of the house and lot under the trust, if the personal decree against K. failed to produce the money. This, too, the Appellate court will correct, and affirm the decree.

Idem, 377

14. A statute requires the captain or other officer of a vessel engaged in the oyster trade to take out a license. A number of such captains or officers may unite in one bill to enjoin the sale of their vessels, and test the constitutionality of the act.

Johnson & als. v. Drummond, &c., 419

Crockett & als. v. Thomas, &c., 419

15. M. sues O. in equity, to set aside her bond as having been fraudulently obtained. O. files a cross bill in the cause, to attach a debt due by S. to M. for payment of his claim on M. The cases may properly be heard together.

Magill v. Manson, 527

Magill v. Manson & al., 527

16. O. has attached the effects of M. at law as well as in equity. He may dismiss his attachment at law, and proceed on his attachment in equity.

Idem, 527

17. Upon the question whether the bond of M. was obtained by the misrepresentations of O., the evidence being conflicting, an issue should be directed.

Idem, 527

*18. If the bond is set aside, O will have claims against M. for advances made and money lent in Confederate currency, and also for services rendered during the war. These claims are to be ascertained by reducing the currency to its gold value

at the time of the advance or loan or the service rendered. And the decree should be rendered in the legal currency of the United States, for the equivalent, at the time of the decree, of the amount in gold so ascertained.

Idem, 527

19. R. is entitled to a decree for the sale of real estate, to pay a debt due to him, secured by a deed of trust upon the property; but before the decree is made, T., by petition in the cause, alleges that he holds a prior lien upon the property to secure a debt due him; and he exhibits his bond and deed of trust. It is error to decree a sale of the property, and that the proceeds of sale be brought into court, before passing upon the claims of T, and ascertaining whether or not it is a valid prior lien, and the amount thereof.

Lipscombe v. Rogers & als., 658

PRACTICE—In Criminal Cases.

See *Criminal Jurisdiction and Proceedings*.

PROHIBITION.

1. The writ of prohibition is only a proper proceeding to restrain a judge from exceeding his jurisdiction; and not to correct an erroneous judgment in a case in which he has jurisdiction.

Ellyson & als. ex parte, 10

2. Upon a proceeding by the supervisors of a county to condemn land for county buildings, the Circuit court having no jurisdiction, on the application of persons not parties to the proceeding, to revise the judgment of the County court, the writ of prohibition is a proper proceeding to restrain him from proceeding in the cause.

Board of Supervisors of Culpeper v. Gorrell & als., 484

3. Though it is a general rule that a writ of prohibition will not be awarded without requiring the plaintiff (if the defendant insists upon it) to file a declaration; yet, when the application for the writ is to the Supreme Appellate court, it may be dispensed with, if the court is satisfied that the merits of the case is presented fully on the petition and answer.

Idem, 484

PUBLIC POLICY.

1. Contracts for the sale and purchase of gold are not void on the ground of public policy.

Brown v. Speyers, 296

RAILROAD COMPANIES.

1. A railroad company has the land of R. condemned for its road, and the commissioners assess the damages, and their report is confirmed, and the company pays the amount of the damages assessed to R. R. sells the land to D. D. may maintain an action against the company for an injury to his land done since the purchase, which could not be foreseen and estimated by the commissioners.

Southside R. R. Co. v. Daniel, 344

2. In such cases the assessment of damages is only a bar to an action for such injuries as could properly have been included in such assessment. The commissioners are bound to presume the company will construct its works in a proper manner, and they have no right to award damages upon the supposition

that the company will negligently and improperly perform its work. A failure to do so by the company, will therefore impose a liability to any one who may sustain any loss or injury by reason of such negligence.

Idem, 344

RAPE.

1. An indictment for rape does not charge that it was committed on a female, but the name given is a woman's name, and the indictment uses the pronoun "she" and "her" in speaking of the person upon whom the rape was committed. *Held*: Though it would have been better to use the word "female," as it is the word used in the statute, yet the language used sufficiently shews the rape was committed on a female, and is therefore good.

Taylor's case, 825

2. The question whether the name in the indictment is *idem sonans* with the true name of the person upon whom the offence was committed, is a question for the jury, and not for the court.

Idem, 825

900 *3. The indictment charges that the rape was committed upon Ellen Frances Davis, and the true name is Helen Frances Davids; but the proof is, she was as frequently called the first in the community, as the last. The proof of the rape upon Helen Frances Davids is admissible under the indictment.

Idem, 825

RECORDS.

1. Where the record of a court appears on its face to have been regularly signed by the judge who presided at the trial of a cause, parol evidence is not admissible to shew that the proceedings had not been read in court, and that the record had not been signed by the judge until some days after the adjournment of the court for the term.

Quinn & als. case, 138

2. When the record of a cause may be evidence against a prisoner on a trial for forgery. See *Forgery*, No. 8, and

Sands' case, 800

SCHOOLS.

See *Charities*.

SET OFF.

1. When notes of a bank cannot be set off in an action by the trustees of the bank, under the act of February 1866, requiring the banks to go into liquidation, brought upon a note discounted by the bank for the defendants.

Saunders, &c. v. White & als., 327

STATE GOVERNMENT.

The present State government is not liable for articles furnished to be manufactured in the penitentiary during the late war, the party furnishing them, recognizing the authority of the Richmond government.

Commonwealth v. Chalkley, 404

STATUTES.

1. The act, Sess. Acts 1870, p. 97, § 69, in relation to elections, construed in

Ellyson & als. ex parte, 10

2. The proviso to § 2 of the act of March 5, 1870, called the Enabling act, declared to be unconstitutional, in

Griffin's ex'or v. Cunningham, 31
Wash., Alex. & Georget. R. R. Co.
v. Alex. & Wash. R. R. Co., 31

3. The act of April 2, 1859, concerning devises and bequests to schools, and Code, ch. 80, § 2, construed in

Kelly & als. v. Love's adm'r & als., 124

4. The act, ch. 57, § 63, Sess. Acts 1866-67, p. 849, concerning assessments of taxes on licenses, is not unconstitutional.

Commonwealth v. Byrne, 165

5. The act of March 2, 1866, Sess. Acts 1865-66, p. 86, in relation to depositions of parties, construed in

Crawford v. Halsted & Putnam, 211

6. The act of March 29, 1862, in relation to the issue of small notes by counties and towns, construed in

Miller & Franklin v. City of Lynchburg, 330

7. The 7th section of the act of March 3, 1866, imposing a duty upon oysters, construed in

Johnson & als. v. Drummond, &c., 419

Crockett & als. v. Thomas, &c., 419

8. The act of March 3, 1864, to authorize payments due to a branch bank to be paid to the mother bank, and *vice versa*, declared not obligatory, and unconstitutional.

Bank of the old Dominion v. McVeigh, 457

9. The act, Code of 1860, ch. 151, § 31, in relation to appeals in attachment cases, construed in

Magill v. Sauer, 540

10. The § 3, article 3 of the constitution in relation to juries, construed in

Chahoon's case, 733

Sands' case, 800

11. The act of 1866-67, ch. 207, § 15, 16, Sess. Acts, p. 929, in relation to arrests for felony, construed in

Chahoon's case, 733

12. The act, ch. 208, § 34, of 1866-67, in relation to the discharge of a prisoner after three terms, construed in

Sands' case, 800

13. The act of April 2, 1870, in relation to trials for felony, construed in

Boswell's case, 860

14. The act, Code, ch. 208, § 3, in relation to the personal presence of the accused at his trial, construed in *Idem*, 860

901 *SUBSTITUTION.

1. When trust creditor will be substituted to the landlord's lien for a year's rent. See *Lien*, No. 1, and

Jones & als. v. Phelan & Collander, 229

SUPERVISORS OF COUNTIES.

1. The board of supervisors of a county have authority to provide land for building a courthouse, clerk's office and jail, either by purchase, or by proceeding to have it con-

demned in the mode prescribed in the statute. Code, ch. 56, § 6-16, p. 324-26.

Board of Supervisors of Culpeper v. Gorrell & als., 484

2. The board of supervisors of a county have authority to sell the lands belonging to the county, on which the courthouse and other public buildings once stood.

Idem, 484

3. It is for the board of supervisors to determine what land they will procure for the public buildings of their county; and whether their judgment is wisely or unwisely exercised in the selection, cannot be enquired into in the proceeding instituted to condemn the land.

Idem, 484

4. The board of supervisors proceeding to have certain land condemned for the purpose of building thereon a courthouse, clerk's office and jail, and the persons whose land is proposed to be condemned, not objecting to the report of the commissioners, other citizens of the county have no right to make themselves parties in the proceeding, and object to the confirmation of the report.

Idem, 484

5. In such a case the Circuit court of the county has no jurisdiction, on the application of these citizens, to award a writ of error and supersedeas to the judgment to the County court refusing to admit such citizens as parties, and confirming the report of the commissioners.

Idem, 484

6. The circuit court having no jurisdiction, on the application of persons not parties to the proceeding, to revise the judgment of the County court, the writ of prohibition is a proper proceeding to restrain him from proceeding in the case.

Idem, 484

TAXES AND TAXATION.

1. The § 63 of ch. 57, Sess. Acts 1866-'67, p. 849, in relation to assessment of taxes on licenses, is not in conflict with the constitution of Virginia.

Commonwealth v. Byrne, 165

2. The State may enforce the tax on licenses by imprisonment of the delinquent taxpayer, when no personal property can be found by the officer, out of which to make the tax.

Idem, 165

3. A commissioner of the revenue under § 7, of the act of 1867, in relation to the assessment of taxes on licenses, appoints an assistant commissioner; and the appointment is approved by the proper court. The question whether the facts existed which authorized the commissioner to appoint an assistant, cannot be made in a collateral proceeding.

Idem, 165

4. The act authorizing the assistant to perform all the duties which his principal is authorized to perform, it is not necessary that the certificates given by him shall be given in the name of the principal, or that the name of the principal shall be signed to the certificate.

Idem, 165

5. The assistant commissioner having delivered to the sheriff a certificate of the tax assessed on B. for a license to distill spirits, and B. failing to pay the tax, the

sheriff levies upon personal property of B., and leaves it in his possession. On the day appointed for the sale of the property, the sheriff goes to the place and finds the property in possession of a United States revenue officer, who claims it under a levy for tax due from B. to the U. S. government; this levy having been subsequent to the levy by the sheriff. Thereupon the sheriff takes no further steps to obtain possession of the property, and it is sold for the tax due the U. S. government. The sheriff not being able to find any other property of B., takes and holds him in custody. B. is legally in custody. *Idem*, 165

6. The 7th section of the act of March 3, 1866, entitled an act imposing a duty on oysters, imposes a tonnage duty and is, therefore, in violation of the constitution of the United States, article 1, § 10.

Johnson & als. v. Drummond, &c., 419

Crockett & als. v. Thomas, &c., 419

7. What taxation by cities or counties may be authorized under the constitution of 1830. See *Constitution and Constitutional Law*, No. 7, and *Langhorne & Scott v. Robinson*, 661

TRUSTS AND TRUSTEES.

1. A balance is found against an ex'or and trustee in 1859, a part of which is interest. Suit against his adm'r in 1866, to recover this balance. He is not to be charged interest upon interest, but only interest upon the principal. And he is to be charged interest during the war.

Kelly & als. v. Love's adm'r & als., 124

2. In a suit against the adm'r of such ex'or and trustee, the com'r having made a special statement at the instance of the adm'r, he cannot object that it is not stated on the basis of an executorial account. *Idem*, 124

3. G. is tenant of a house and lot leased of S., and he gives a deed of trust on a part of the personal property in the house to secure a debt to P., which is recorded. He afterwards gives another deed of trust on all the property in the house to secure a debt to J. S. distrains for a year's rent upon the property embraced in the deed to secure P. By consent of all the parties, all the property conveyed in the deeds is sold, and after paying the rents there is a balance left. **HOLD:**

1. S. is entitled to be paid first for his year's rent, out of the proceeds of the whole property, if necessary; but the proceeds of the property not embraced in P's deed is to be first applied to pay S.

Jones & als. v. Phelan & Collander, 229

2. After S. is satisfied, P. is entitled to have the balance of the proceeds of the property, embraced in his deed, applied to pay *pro tanto* his debt. *Idem*, 229

4. It is improper in a trustee in a deed to secure a debt, to make a sale so long as it remains uncertain what amount is due on account of the debt; and if the amount is uncertain, or if credits properly applicable thereto be not so applied, it is his duty, before making a sale, to ascertain the amount to be raised by the sale; and to bring a suit

in chancery, if necessary, to procure a settlement by a commissioner; or, if he fails to do this, the debtor may do it, and in the meantime enjoin the sale.

Hogan v. Duke & als., 244

5. On a bill to enjoin a sale of land by a trustee, the answer denies all the grounds of equity stated in the bill; and there is no proof to sustain them. The court may dissolve the injunction and dismiss the bill; or it may dissolve the injunction and have the sale made and the proceeds distributed under its direction. *Idem*, 244

6. In such a case the trustee having been declared a bankrupt, it was especially proper for the court to retain the cause, and have the trust administered under its direction, and to require the trustee to give security for the faithful performance of his duties.

Idem, 244

7. The decree for the sale of the property should be according to the terms of the deed.

Idem, 244

8. It was proper to allow compensation for the services of an auctioneer in making the sale ordered by the court, and also the expense of a former advertisement of the sale of the property by the trustee, which had been enjoined by the debtor, and the injunction dissolved, as well as for the expense of drawing and stamping the deed to be made by the comm'r to the purchaser. *Idem*, 244

9. Though the court decree an account involving a few items of small amount, it was not error to direct the payment of so much of the debt secured by the deed as might be safely paid, leaving enough to meet any possible amount which could be reported as due on that account to the debtor.

Idem, 244

USURY.

1. G. makes his note, which is endorsed, and makes a deed of trust on land to secure it, and puts it in the hands of L., a broker and banker, to sell; and L. advances to him nearly as much as it is expected will be the net proceeds of the note. On the next day L. offers the note to C. at one and a quarter per cent, per month discount. C. says he has no money, but L., who has on deposit notes of C., coming soon to maturity, proposed to advance the money for him; and C. agrees to take the note, if after examining the title to the property he is satisfied. L. there-

903 upon advances to G. the whole of the net proceeds of the note. C. examines the title, and is satisfied and in sixteen days afterwards he pays L. the money he had advanced for him, and interest upon it for sixteen days. C. has no knowledge of the character of the note, or for whose benefit it is sold. This is not usury.

Gimmi v. Cullen, 439

2. The council of the town of Danville has authority under its charter to contract loans and issue certificates of debt. In 1863, the council sold the bonds of the city, to be issued, at public auction, for Confederate money, and for a bond of \$5,000, bearing six per cent. interest, and payable at the end of twenty

years, the purchaser gave \$11,050; Confederate money being at the time as ten for one of gold. This is usury.

Town of Danville v. Sutherlin, 555

3. City bonds, payable thirty years after date, and bearing six per cent. per annum interest from date, sold in 1864, for Confederate money, at the rate of 2½ for one, when Confederate money was at the rate of twenty to one for gold. This is usury.

City of Lynchburg v. Norvell & others, 601

4. The fact that these bonds might be paid for in the currency which, at the time they fell due, would be taken by the State for taxes, does not constitute such a contract of

hazard as relieved it from the taint of usury.
Idem, 601

VENIRE FACIAS.

See *Juries*, No. 3, and
Chahoon's case, 733
Sands' case, 800.

WAGERS.

1. What is not a contract of wager, by the terms of which all the profit or loss is to be borne by one of the parties.
Brown v. Speyers, 296

WRITS.

1. See *Juries*, No. 3, and
Chahoon's case, 734

REPORTS OF CASES
DECIDED IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA

BY PEACHY R. GRATTA.

VOLUME XXI.

FROM JUNE 1, 1871, TO MARCH 14, 1872.

JUDGES
OF THE
SUPREME COURT OF APPEALS
DURING THE TIME OF THESE REPORTS.

RICHARD C. L. MONCURE, PRESIDENT.	
WILLIAM T. JOYNES.*	JOSEPH CHRISTIAN.
WALLER R. STAPLES.	FRANCIS T. ANDERSON.

Attorney General: JAMES C. TAYLOR.

*Judge Joynes was prevented by ill health from sitting in any of the cases reported in this volume.
He resigned his office on the 12th day of March, 1872.

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TABLE OF CASES REPORTED.

Accord's ex'or <i>and</i> Seig, adm'r.....	365	Hale <i>v.</i> Wilkinson.....	75
Alexander <i>and</i> Bell.....	1	Hamilton & al. <i>and</i> Stover, assignee....	273
Allen & als. <i>and</i> Carter.....	241	Harman & als. <i>and</i> Davis, comm'r.....	194
Atwell <i>and</i> Wall.....	401	Harshbarger <i>and</i> Blosser.....	214
Bailey <i>v.</i> Bailey.....	43	Henderlite <i>and</i> Dungan.	149
Bank of the Old Dominion <i>and</i> Yeaton..	593	Herring <i>and</i> Walker.....	678
Barnett <i>v.</i> Cecil, &c.....	93	Hilb, for, &c. <i>v.</i> Peyton & als.....	386
Bayly & al. <i>and</i> Muller, &c.....	521	Hirsh's case.....	785
Bell <i>v.</i> Alexander.....	1	Holland & Co. <i>v.</i> Commonwealth.....	511
Bickle <i>and</i> Moffett.....	280	Horne & als. <i>and</i> Hale.....	112
Bird's case.....	800	Howard & als. <i>v.</i> McCall, adm'r, for, &c..	205
Bird's committee <i>v.</i> Bird.....	712	Jeffries & al. <i>and</i> Michie.....	334
Blosser <i>v.</i> Harshbarger.....	214	Jones <i>v.</i> Thomas.....	96
Booten <i>v.</i> Scheffer.....	474	Kerngood & als. <i>and</i> Straus.....	584
Bragdon <i>v.</i> Owners of steamboat Wenonah.....	685	Lee county justices <i>v.</i> Fulkerson.....	182
Brown & al. <i>v.</i> Molineaux, Duffield & Co. & als.....	539	Lewellen, sergeant, for, &c. <i>v.</i> Lock- harts.....	570
Burwell's adm'r's <i>v.</i> Fauber & als.....	446	Lockharts <i>and</i> Lewellen, sergeant, for, &c.....	570
Caldwell <i>v.</i> Craig.....	132	Massie <i>and</i> Green & Suttle.....	356
Campbell <i>v.</i> Ranson & als.....	405	McCall, adm'r, for, &c. <i>and</i> Howard....	205
Carter <i>v.</i> Allen & als.....	241	McComas <i>v.</i> Easley.....	23
Carter <i>v.</i> Ragland.....	574	McCue's adm'x & als. <i>and</i> Dixon & als..	373
Cecil, &c. <i>and</i> Barnett.....	93	McCue & als. <i>and</i> Ramsey's adm'r's.....	349
Chahoon's case.....	822	McDearman & Co. <i>v.</i> Commonwealth....	511
Chesapeake & Ohio R. R. Co. <i>and</i> Wilson.....	654	Meredith & als. <i>v.</i> Salmon.....	762
Christian <i>and</i> Walker.....	291	Michie <i>v.</i> Jeffries & al.....	334
City of Richmond <i>v.</i> Richmond & Dan- ville R. R. Co.....	604	Milners <i>v.</i> Commonwealth.....	511
Clark & als. <i>and</i> Glenn.....	35	Mitchell <i>v.</i> Thornton & al.....	164
Cleek's case.....	777	Moffett <i>v.</i> Bickle.....	280
Coffman <i>v.</i> Sangston & als.....	263	Molineaux, Duffield & Co. <i>and</i> Brown & al.....	539
Commonwealth <i>and</i> Bird.....	800	Moore & als. <i>and</i> Zollman.....	313
“ <i>and</i> Chahoon.....	822	Morgan's adm'x <i>v.</i> Otey & als.....	619
“ <i>and</i> Cleek.....	777	Moses <i>v.</i> Trice.....	556
“ <i>and</i> Dock.....	909	Muller, &c. <i>v.</i> Bayly & al.....	521
“ <i>and</i> Hirsh.....	785	Myers' ex'or <i>v.</i> Zetelle.....	733
“ <i>and</i> Holland & Co.	511	Neal <i>v.</i> Commonwealth.....	511
“ <i>and</i> McDearman & Co..	511	Omohundro's ex'or <i>v.</i> Omohundro.....	626
“ <i>and</i> Milners.....	511	Otey & als. <i>and</i> Morgan's adm'x.....	619
“ <i>and</i> Neal.....	511	Owners of steamboat Wenonah <i>v.</i> Brag- don.....	685
“ <i>and</i> Pace, Brothers & Co.	511	Pace, Brothers & Co. <i>v.</i> Commonwealth.	511
“ <i>and</i> Price.....	846	Page & als. <i>and</i> Walker's ex'or & als....	636
“ <i>and</i> Ruffin.....	790	Peck <i>and</i> Taylor.....	11
“ <i>and</i> Sands.....	871	Peyton & als. <i>and</i> Hilb, for, &c....	386
“ <i>and</i> Smith.....	809	Pharis <i>v.</i> Dice.....	303
“ <i>and</i> Wells.....	500	Pidgeon <i>v.</i> Williams' adm'r's.....	251
Craig <i>and</i> Caldwell.....	132	Pierce <i>and</i> Walker, Per. Rep.....	722
Crane's guardian <i>v.</i> Crane.....	579	Pizzini's committee <i>v.</i> Zetelle..	733
Davis, comm'r, <i>v.</i> Harman & als.....	194	Poague & al. <i>v.</i> Spriggs & als.....	220
Davis & wife <i>and</i> Richardson.....	706	Price's case.....	846
Dice <i>and</i> Pharis.....	303	Ragland <i>and</i> Carter.....	574
Dixon & als. <i>v.</i> McCue's adm'x & als....	373	Ralston & als. <i>and</i> Effinger.....	430
Dock's case.....	909	Rambo <i>and</i> Wright.....	158
Dungan <i>v.</i> Henderlite.....	149	Ramsey's adm'r's <i>v.</i> McCue & als.....	349
Easley <i>and</i> McComas.....	23	Ranson & als. <i>and</i> Campbell.....	405
Effinger <i>v.</i> Ralston & als.....	430	Raper <i>v.</i> Sanders.....	60
Fauber & als. <i>and</i> Burwell's adm'r's.....	446	Richardson <i>v.</i> Davis & wife.....	706
Fulkerson <i>and</i> Lee county justices.....	182	Richmond & Danville R. R. Co. <i>and</i> City of Richmond.....	604
Glenn <i>v.</i> Clark & als.....	35	Ruffin's case.....	790
Goolsby & als. <i>v.</i> Strother, comm'r.....	107	Salmon <i>and</i> Meredith & als.....	762
Green & Suttle <i>v.</i> Massie.....	356	Sanders <i>and</i> Raper.....	60
Gunn & als. <i>v.</i> Turner's adm'r.....	382	Sands' case.....	871
Hale <i>v.</i> Horne & als.....	112		

Sangston & als. <i>and</i> Coffman.....	263	Walker <i>v.</i> Christian.....	291
Scheffer <i>and</i> Booten.....	474	Walker <i>v.</i> Herring.....	678
Seig, adm'r, <i>v.</i> Acord's ex'or.....	365	Walker's ex'or & als. <i>v.</i> Page & als.....	636
Smith's case.....	809	Walker, Per. Rep. <i>and</i> Pierce.....	722
Spriggs & als. <i>and</i> Poague & al.....	220	Wall <i>v.</i> Atwell.....	401
Stover, assignee, <i>v.</i> Hamilton & al.....	273	Wells <i>v.</i> Commonwealth.....	500
Straus <i>v.</i> Kerngood & als.....	584	Wilkinson & Hale.....	75
Strider & al. <i>v.</i> Winch. & Pot. R. R. Co..	440	Williams' adm'rs <i>and</i> Pidgeon.....	251
Strother, comm'r, <i>and</i> Goolsby & als....	107	Wilson <i>v.</i> Chesapeake & Ohio R. R. Co..	634
Taylor <i>v.</i> Peck.....	11	Winch. & Pot. R. R. Co. <i>and</i> Strider	
Taylor <i>and</i> Tyler.....	700	& al.....	440
Thomas <i>and</i> Jones.....	96	Wright <i>v.</i> Rambo.....	156
Thornton & al. <i>and</i> Mitchell.....	164	Yeaton <i>v.</i> Bank of the Old Dominion....	593
Trice <i>and</i> Moses.....	556	Zetelle <i>and</i> Myers' ex'or.....	733
Turner's, adm'r, <i>and</i> Gunn & als.....	382	Zetelle <i>and</i> Pizzini's committee.....	733
Tyler <i>v.</i> Taylor.....	700	Zollman <i>v.</i> Moore & als.....	313

TABLE OF CASES CITED.

<i>Acer and Crosier</i> , 7 Paige, 137.....	323	<i>Bennington and Parkins' adm'r</i> , 1 Har-	
<i>Adams v. Claxton</i> , 6 Ves. 226.....	758	rington, 209.....	370
<i>Addison v. Gandasequi</i>	444	<i>Bently and State</i> , 3 Zab. 532.....	609
<i>Alexander and Bell</i> , 21 Gratt. 1.....	217	<i>Bicknell and Gill</i> , 2 Cush. 355... ..	682
<i>Alexander and Watson & Hartshorne</i> , 1		<i>Bierne v. Erskine</i> , 5 Leigh, 59.....	139
Wash. 440.....	774	<i>Billings & Pitman and Providence Bank</i> ,	
<i>Allen v. McKean</i> , 1 Sumner, 277.....	599	4 Peters, 514.....	615
<i>Allen and Meech</i> , 17 New York, 300.....	590	<i>Bishop v. Harrison's adm'r</i> , 2 Leigh, 533.	370
<i>Allen and Thomas</i> , 6 Hill, 145.....	105	<i>Blair v. Thompson</i> , 11 Gratt. 441 ...	39
<i>Allen, Walton & Co. v. Hamilton</i> , 9 Gratt.		<i>Blessing's adm'r v. Beatty</i> , 1 Rob. 287..	139
255.....	361	<i>Blosser v. Harshbarger</i> , 21 Gratt. 214...	812
<i>Allen v. Wells</i> , 22 Pick. 450	590	<i>Bodine and People</i> , 1 Denio, 281.....	868
<i>Alley v. Ledbetter</i> , 1 Dev. Eq. 449.....	360	<i>Bodley and Parker's heirs</i> , 4 Bibb, 102..	680
<i>Ambler v. Wyld</i> , 2 Wash. 54.....	775	<i>Bogle, Somerville & Co. v. Vowles</i> , 1	
<i>Anthony v. Leftwich</i> , 3 Rand. 238.....	29	Call, 244.....	774
<i>Aranguese v. Schofield</i> , 38 Eng. L. & E.		<i>Bohn v. Sheppard</i> , 4 Munf. 403.....	173
424.....	563	<i>Bolling v. Turner</i> , 6 Rand. 584.....	717
<i>Armstead and Brown</i> , 6 Rand. 594.....	323	<i>Bolton v. Corporation of Liverpool</i> , 1	
<i>Arnold v. Arnold</i> , 2 Dev. ch. 467.....	31	Mylne & Keen, 88	837
<i>Arnold v. Lyman</i> , 17 Mass. 400.....	101	<i>Botsford and Peck</i> , 7 Conn. 172.....	370
<i>Arnold v. Smith</i> , 5 Mason, 414.....	682	<i>Boulware v. Newton</i> , 18 Gratt. 708.....	
<i>Athedyn and Bunhur</i> , 35 Maine, 364.....	371	..... 392, 631, 772	
<i>Atkinson and White</i> , 2 Wash. 91....	493, 577	<i>Bowen v. Evan</i> , 1 I. & L. 264.....	321
<i>Bacon v. Paige</i> , 1 Conn. 404.....	631	<i>Bowles v. Woodson</i> , 6 Gratt. 78.....	31, 491
<i>Baldwin and Millard</i> , 3 Gray, 484.....	101	<i>Bowly and Lammot</i> , 6 Har. & John, 500	324
<i>Baltimore & Ohio R. R. Co. v. Mayor, &c.</i>		<i>Bowyer & als. and Hill & als.</i> 18 Gratt.	
of Baltimore, 6 Gill, 288.....	607, 609	364.....	245
<i>Bank of Cape Fear v. Edwards</i> , 5 Ired.		<i>Boyce's ex'or v. Waller</i> , 2 B. Mun. 91...	248
516.....	609	<i>Brackan v. Griffin</i> , 3 Call, 375.....	392
<i>Bank of Colombia and Renner</i> , 9 Wheat.		<i>Bradbury v. White</i> , 4 Greenl. 391... ..	31
581.....	562	<i>Bradford v. Union Bank of Tennessee</i> , 13	
<i>Bank of the Old Dominion v. McVeigh</i> ,		How. U. S. 57.....	31
20 Gratt. 457.....	601, 603	<i>Bradshaw and Jones</i> , 16 Gratt. 355..	362, 363
<i>Bank of the United States v. Daniel</i> , 12		<i>Brainard, v. Brainard, Wright</i> , 354.....	48
Peters, 32.....	323	<i>Brawford and Keytons</i> , 5 Leigh, 48....	140
<i>Bank of Virginia v. Ward</i> , 6 Munf. 166..	562	<i>Braxton and Lane</i> , 5 Call. 537.....	249
<i>Barber v. Elkins & Simpson</i> , 1 John. ch.		<i>Brett v. Ming</i> , 1 Florida, 447.....	631
465.....	359	<i>Brickey and Hazeltine & Walton</i> , 16	
<i>Barber and Storrs</i> , 6 John. Ch. 169.....	329	Gratt. 116.....	360
<i>Barkley and Jones</i> , 2 Doug. 684.....	634	<i>Briscoe v. Clark</i> , 1 Rand. 213.....	703
<i>Barr, &c. and Strother, &c.</i> , 5 Bing. 136,		<i>Brosen and Merritt</i> , 19 New Jer. Eq. 286	495
15 Eng. C. L. 391.....	20	<i>Brown v. Armstead</i> , 6 Rand. 594.....	323
<i>Barratta, &c. and Mitchell, &c.</i> 17 Gratt.		<i>Brown v. Heuley</i> , 1 Stewart (Alab.), 144	680
445	163	<i>Brown and Michaux's adm'r</i> , 10 Gratt. 612	122
<i>Bassett v. Nasworthy</i> , 2 Lead. Cas. Eq.		<i>Brown v. Swan</i> , 10 Peters, 497.....	359
55.	249	<i>Brown and Thompson</i> , 4 John. Ch. 619	
<i>Baxter v. Baxter</i> , 1 Mass. 346.....	50	..... 200, 759	
<i>Baxter v. Little</i> , 6 Metc. 7.....	564	<i>Brugh v. Shanks</i> . 5 Leigh, 598....	136, 216
<i>Beal v. Wilson</i> , 4 Munf. 380.....	109	<i>Brush v. Ware</i> , 15 Peters, 93.....	463, 467
<i>Batty and Blessing's adm'r</i> , 1 Rob. 287..	139	<i>Buckmaster v. Harrop</i> , 13 Ves. 456.....	683
<i>Beaumarchais and Commonwealth</i> , 3		<i>Bull's case</i> , 14 Gratt. 613.....	212
Call, 122.....	774	<i>Bunhur v. Athedyn</i> , 35 Maine, 364.....	371
<i>Beckley v. Palmer</i> , 11 Gratt. 625.....		<i>Burgess v. Commonwealth</i> , 2 Va. Cas.	
..... 362, 530, 533,	534	483.....	860
<i>Beebe v. Hutton</i> , 47 Barb. 187.....	79	<i>Burr v. Burr</i> , 7 Hill, N. Y. 207.....	57
<i>Beirne v. Dunlap</i> , 8 Leigh, 514...142, 153,	156	<i>Burr v. McElvine</i> , 1 Bald. 162.....	759
<i>Belchier v. Parsons</i> , 1 Amb. 218.....	758	<i>Butcher v. Carlyle</i> , 12 Gratt. 520 151, 152,	156
<i>Bell v. Alexander</i> , 21 Gratt. 1.....	217	<i>Butler v. Kingsbury</i> , 4 Verm. 466.....	632
<i>Bell v. Crawford</i> , 8 Gratt. 110.....	566	<i>Calhoon and State</i> , 1 Der. & Bat. 374...	858
<i>Bell and Hodgson</i> , 7 T. R. 96.....	105	<i>Callagan and Carr</i> , 3 Litt. 365.....	249
<i>Benedict v. Lynch</i> , 1 John. Ch. 370.....	491	<i>Camden and Amboy R. R. Co. v. Hille-</i>	
<i>Benham and Taylor & als.</i> 5 How. U. S.		gas & als. 3 Harr. 11.....	609
233.....	200, 201	<i>Campbell & Lee and Piatt & als.</i> 9	
<i>Bennett v. State</i> , 8 Humph. 118.....	858, 865	Cranch, 456.....	495

Campbell <i>v.</i> Wister, 1 Litt. 30.....	153	Cornall <i>and</i> Jackson, 1 Sanf. Ch. 348....	590
Cannon <i>and</i> Gordon, 18 Gratt. 387.....	590	Corporation of Liverpool <i>and</i> Bolton, 1	
Carlyle <i>and</i> Butcher, 12 Gratt. 520.....		Mylne & Keen, 88.....	837
.....151, 152, 156	156	Cousins <i>and</i> Parker, 2 Gratt. 372.....	568
Carpenter <i>and</i> Howe, 53 Barb. 382.....	79	Cox <i>and</i> State, 6 Ired. 440.....	858
Carpenter <i>v.</i> Snelling, 97 Mass. 452. . .	79	Cralle <i>and</i> Eppes, 1 Munf. 258.....	174
Carr <i>v.</i> Callagan, 3 Litt. 365.....	249	Crawford <i>and</i> Bell, 8 Gratt. 110.....	566
Carr <i>and</i> Mews, 1 Hensht. & Norm., 1		Crawford <i>v.</i> Daigh, 2 Va. Cas. 5, 215....	151
Exch. 484.....	683	Creighton <i>and</i> State, 1 Nott & McC. 256.	858
Carson <i>and</i> Morgan, 7 Leigh, 238.....	362	Crenshaw's adm'r <i>v.</i> Clark, &c., 5 Leigh,	
Carton & als. <i>and</i> Elliott, 9 Gratt. 541...		65.	345
.....200, 201, 759, 760	760	Cribbins <i>v.</i> Markwood, 13 Gratt. 495..	85, 86
Cawood <i>and</i> Commonwealth, 2 Va. Cas.		Crocker <i>and</i> Dennett, 8 Greenl. 239... ..	20
527	858	Crosier <i>v.</i> Acer, 7 Paige, 137	323
Chahoon's case, 20 Gratt. 733.....	825, 860	Crowe <i>and</i> Ramuz, 1 Exch. 166, 18 Law	
Chapman <i>and</i> Greeville, 5 Ad. & El. 731,		& Eq. 514 . . .	561
N. S., 48 Eng. C. L.....	906	Culpeper's Case, cited 2 Lead. Cas. Eq.	
Charles River Bridge <i>v.</i> Warren Bridge,		52.....	322
11 Peters, 420.....	614	Crowhurst <i>and</i> Regina, 47 Eng. C. L.	
Chiles <i>v.</i> Conley's heirs, 2 Dana, 21.....	100	370.....	866
Churchill <i>v.</i> Hunt, 3 Denio, 321..	105	Cunningham <i>v.</i> Cunningham, 4 Gratt.	
City council of Charleston <i>and</i> State		43.....	720
Bank & als. 3 Rich. 342.....	609	Cunningham <i>and</i> Hull, 1 Munf. 330....	137
City of Alexandria <i>and</i> Orange & Alex.		Curtis <i>and</i> Clark & al. 9 Leigh, 559 . . .	28
R. R. Co., 17 Gratt. 176	609	Daigh <i>and</i> Crawford, 2 Va. Cas. 5, 215..	151
City of Lynchburg <i>and</i> Miller & Frank-		Daniel <i>and</i> Bank of the United States, 12	
lin, 20 Gratt. 330	634, 772	Peters, 32.....	323
City of Quincy <i>and</i> Von Hoffman, 4 Wall.		Dartmouth College <i>v.</i> Woodward, 4	
535.....	616	Wheat. 518.....	598
City of Richmond <i>and</i> Wade & als. 18		Dashiel's adm'r <i>and</i> McCulloh, 1 Har. &	
Gratt. 583.....	617	Gill, 96.....	590
City of Sheboygan <i>and</i> Gilman, 2 Black,		Davenport <i>and</i> Thomson, 9 Barn. & Cres.	
570.....	616	78.....	444
Clark, &c. <i>and</i> Crenshaw's adm'r, 5		Davis, trustee, <i>v.</i> Harman, 21 Gratt. 194.	760
Leigh, 65.....	345	Davis <i>v.</i> Hone, 2 Sch. & Lef. 341 . . .	31
Clark & al. <i>v.</i> Curtis, 9 Leigh, 559.....	28	Davis <i>and</i> McCulloch, 22 Eng. C. L. 385	
Clark <i>and</i> Briscoe, 1 Rand. 213.....	703	.....369, 370	
Clark <i>v.</i> Long, 4 Rand. 452.....	709	Davis <i>v.</i> Millers, 14 Gratt. 1.....	563, 564
Clayton <i>v.</i> Fife, 13 Ves. 546.....	31	Davis <i>v.</i> Thomas, 5 Leigh, 1.....	224
Clayton <i>and</i> Hunt, 3 Camp. 27.....	676	Dearing's adm'r <i>v.</i> Rucker, 18 Gratt. 426	
Claxton <i>and</i> Adams, 6 Ves. 226.....	758	.....142, 567, 577	
Clegham <i>v.</i> Insurance Bank of Colum-		Delancey <i>and</i> Seymour, 6 John. Ch. 222	
bus, 9 Georgia 319.....	590	.....30, 82, 83	
Clement's case, 11 Price, 68.....	503	Delaval <i>and</i> Vaise, 1 T. R. 11.	212
Clement's <i>and</i> Pleasants, 2 Leigh, 479..	702	Denn <i>and</i> Webb, 17 How. U. S. 576.....	100
Cliff <i>and</i> Jones, 1 Crompt. & Mees. 539...	634	Dennett <i>v.</i> Crocker, 8 Greenl. 239....	20
Clinch <i>and</i> Skipwith, 2 Call, 213	774	Dewolf <i>v.</i> Johnson, 10 Wheat. 367.....	345
Cochran <i>v.</i> Street, 1 Wash. 79.....	212	Dill <i>v.</i> Railway Co., 7 Rich. 158.....	669
Cocke <i>and</i> Tucker, 2 Rand. 51	137	Dillard, &c. <i>and</i> Sage, &c. 15 B. Mun.	
Coit <i>v.</i> Starkweather, 8 Conn. 289.....	102	340.....	599
Coleman <i>v.</i> Moody, 4 Hen. & Mun. 1, 18	136	Doe <i>v.</i> Harvey, 8 Bing. 239.....	19
Coles <i>v.</i> Trecothick, 9 Ves. 234....	84	Duke & als. <i>and</i> Hogan, 20 Gratt. 244... ..	346
Collins <i>v.</i> Lofftus & Co., 10 Leigh 5....	710	Duncan <i>v.</i> Lyon, 3 John. Ch.....	350
Calvin <i>v.</i> Menefee, 11 Gratt. 87.....	9	Dunlap <i>v.</i> Bierne, 8 Leigh, 15.. 142, 153,	156
Comm'rs of Mansfield <i>and</i> State, 3 Zabr.		Dunn <i>v.</i> Tullock, Ry. & Mood. 416, 21	
532.....	609	Eng. C. L. 478.....	371
Commonwealth <i>v.</i> Beaumarchais, 3 Call.		Durfee <i>v.</i> Old Colony & Fall River R. R.	
122	774	Co., 5 Allen 230.....	599
Commonwealth <i>v.</i> Burgess, 2 Va. Cas.		Durham <i>and</i> Thurmond, 3 Yerg. 99 . . .	360
483.....	860	Duchess of Kingston's case, 2 Smith's	
Commonwealth <i>v.</i> Cawood, 2 Va. Cas.		Lead. Cas. 648.....	224
527	858	Duvall <i>and</i> Petty, 4 Greene, 120.....	582
Commonwealth <i>v.</i> Hilliard, 2 Gray, 294..	912	Earl Ferrers <i>and</i> Rex, 1 Burr. 631 . . .	503
Commonwealth <i>v.</i> Mead, 12 Gray, 167....	912	Earl of Plymouth <i>and</i> Knight, 3 Atk. 480,	
Commonwealth <i>v.</i> Ricks, 1 Gratt. 416... ..	710	1 Dick. 124.....	200
Commonwealth <i>v.</i> Smith, 11 Cush. 473..	857	Eastern Railroad Company <i>and</i> Mary	
Commonwealth <i>v.</i> Walters, 6 Dana, 290.	858	Brown, 11 Cush. 97.....	673
Conley's heirs <i>and</i> Chiles, 2 Dana, 21....	100	Eddy & Stebbins, 4 Mason, 414.....	140
Conroy <i>v.</i> Warren, 3 John. Cas. 259.....	7	Edmonds <i>v.</i> Peake, 7 Beav. 299.....	758
Cooke <i>v.</i> Cooke, 2 Philim. 40, 1 Eng. Sec.		Edwards <i>and</i> Bank of Cape Fear, 5 Ired.	
178.....	58	516.....	609
Cooke <i>v.</i> Toombs, 2 Anst. 429.....	680	Elkins <i>and</i> Simpson, 1 John. Ch. 465. . .	359

Elliott v. Carter & als. 9 Gratt. 541.	200, 201, 759, 760	Harvey and Doe , 8 Bing. 239.....	19
Ellis v. Marshall , 2 Mass. 279.....	598	Harwood and Faulkner's adm'r , 6 Rand.	
Emery and Vezo , 5 Ves. 146	200	133.....	359, 360
Entz v. Mills & Beach , 1 McM. 454 ...	683	Hawkins and Fleet , 6 Munf. 188.....	138
Eppes v. Cralle , 1 Munf. 258.....	174	Hazeltine & Walton and Brickey , 16	
Erskine v. Bierne , 5 Leigh, 59.....	132	Gratt. 116.....	360
Erwin and Galalian , Hopk. 48.....	248	Head's ex'ors v. Manner's adm'r , 5 J. J.	
Evans and Bowen , 1 I. & L. 264.....	321	Marsh. 255.....	371
Evans and Powell , 5 Ves. 439 ..	201	Hearn and Woolam , 2 Lead Cas. Eq. 404	85
Falconer and Muise , 10 Gratt. 12	174	Hemmings v. Smith , 4 Doug. 33.....	806
Fales v. Russell , 16 Pick. 315....	561	Henderson v. Hudson , 1 Munf. 510.....	680
Farmers Bank v. Mutual Assurance So-		Henley v. Brown , 1 Stewart (Alab.) 144.	680
ciety , 4 Leigh, 69.....	568	Hill's case , 2 Gratt. 594.....	217
Farmers Bank of Va. v. Reynolds , 4		Hill & als. v. Bowyer & als. , 18 Gratt.	
Rand . 186.....	562	364.....	245
Faulkner's adm'r v. Harward , 6 Rand.		Hillegas & als. and Camden & Amboy R.	
133.....	359, 360	R. Co. 3 Harr. 11.....	609
Fay and Pendleton , 3 Paige, 204.....	245	Hilliard and Commonwealth , 2 Gray, 294	912
Fellows v. Gilman , 4 Wend. 414.....	99	Hite and Jolliffe , 1 Call, 262.....	138
Field and State , 14 Maine, 294.....	911	Hodgson v. Bell , 7 T. R. 96... ..	105
Fife v. Clayton , 13 Ves. 546.	31	Hogan v. Duke & als. 20 Gratt. 244.	346
Fisher v. Smith , 5 Leigh, 611.....	170, 174	Holland v. Holland , 2 Mass. 154.....	500
Fleet v. Hawkins , 6 Munf. 188.....	139	Holmes v. Rhodes , 1 Bas. & Pul. 638....	105
Foltz v. Powrie, &c. , 2 Desarc, 40	360	Holt and Gilmore , 4 Pick. 258.....	634
Franklin v. Osgood , 14 John. 527.....	759	Holy Trinity Kingston upon Hull and	
Franklin v. State , 29 Alab. 14	911	Rex , 7 Barn. & Cress. 611.....	19, 20
Freeman and State , 13 New Hamp. 488..	856	Hone and Davis , Sch. & Lef. 341.....	31
Friend v. Friend , Wright, 639.....	48	Hook v. Ross , 1 Hen. & Mun. 310.....	32
Fulton's ex'ors and Irich & wife , 3 Gratt.		Hooper and Thurston , 14 Calif. 1.....	617
193.....	324	Hopkins and Reg , 8 Car. & P. 591.....	820
Galalian, &c. v. Erwin , Hoph. 48.....	248	Horne and Green , 1 Salk. 197.. ..	99, 104
Gardner v. People , 3 Scam. 83.....	858	Horne and Rowley , 3 Bing. 2.....	676
Garland and Knox , 2 Call, 241.....	703	Horton v. McCarty , 53 Maine, 394.....	682
Garnett v. Macon , 6 Call 308.....	495	Hough v. Shreeve , 4 Munf. 490... ..	531
Gaskell and Greenough , 1 Mylne & Keen,		Howard v. Smith , 3 Man. & Gran. 254,	
98	837	42 Eng. C. L. 139... ..	21
Gill v. Bicknell , 2 Cush. 355.....	682	Howe v. Carpenter , 53 Barb. 187.....	79
Gilman v. City of Sheboygan , 2 Black.		Howell and Rowth , 3 Ves. 565.....	758
570	616	Hubbs and Livingston , 3 Johns. Ch. 124	245
Gilman and Fellows , 4 Wend. 414... ..	99	Hudson and Henderson , 1 Munf. 510....	680
Gilmore v. Holt , 4 Pick. 258.....	634	Hudson v. Kline , 9 Gratt. 379	362
Gordon v. Cannon , 18 Gratt. 387.....	590	Hull v. Cunningham , 1 Munf. 330.....	137
Gould and Washburn , 3 Story, 122.	633	Hume and Norris , 2 Leigh, 334.....	360
Grantland v. Wright , 2 Munf. 178.....	138	Hunt v. Churchill , 3 Denio, 321.... ..	105
Gray v. Gray , 15 Alab. 779.....	47	Hunt v. Rousmanier , 8 Wheat. 174.....	323
Gray v. Lynch , 8 Gill, 403.....	759	Hunter and Moore , 1 Gilman 317.....	248
Grayson's case , 6 Gratt. 124.....	136, 215	Hutchins v. King , 1 Wall. U. S. 53.....	122
Green v. Horne , 1 Sulk. 197.....	99, 104	Hutchison and Pierson , 2 Camp. 211... ..	563
Greenway ex parte , 6 Ves. 862.....	563	Hutchison and Stephens , 6 Gratt. 147....	
Gregory v. Pierce , 4 Metc. 478.....	48	.....	438, 439
Greenough and Gaskell , 1 Mylne & Keen.		Hutton and Beebe , 47 Barb. 187.....	79
98.....	837	Inh. of Brampton and Rex , 10 East. 282.	806
Greeville v. Chapman , 5 Ad. & El. N. S.		Inh. of Cambridge and Watson , 15 Mass.	
731, 48 Eng. C. L.....	906	286	101
Griffin v. Brackan , 3 Call, 375.....	392	Insurance Bank of Columbus and Cleg-	
Griffith v. Griffith , 7 Paige 315.....	248	horn , 9 Georgia, 319	590
Griffith v. Spratley , 1 Con. Cas. 384. ..	85	Irick & wife v. Fulton's ex'ors , 3 Gratt.	
Hale v. Wilkinson , 21 Gratt. 75.....	494	193.....	324
Haleys v. Williams , 1 Leigh, 140.....	122	Jackson v. Cornell , 1 Sanf. Ch. 348.....	590
Halleck v. Jaudin , 34 Calif. 167.....	79	Jackson v. Jackson , 1 Atk. 513	758
Hamilton and Allen , Walton & Co., 9		Jackson v. Ligon , 3 Leigh, 161	73
Gratt. 255.....	361	Jackson and Port , 17 Johns. 239, 479 ..	105
Hansard v. Robinson , 7 Barn. & Cres. 90		James River & Kan. Co. v. Turner , 9	
.....	561, 564	Leigh, 313.....	179
Harman and Davis , trustee, 21 Gratt. 194	760	Jaudin and Hallock , 34 Calif 167.....	79
Harrison's adm'r and Bishop , 2 Leigh,		Jefferson Branch Bank v. Skelly , 1 Black,	
532.....	371	436.....	615
Harrison v. Harrison , 1 Litt. 137... ..	360	Jennings and Pettit , 2 Rob. 676.....	224
Harrison and Kirby , 2 Ohio St. 326....	495	Jett and Wilkinson , 7 Leigh, 115.....	903
Harrop and Buckmaster , 13 Ves. 456... ..	683	Johnson and De Wolf , 10 Wheat. 367....	345
Hart v. Ten Eyck , 2 John. ch. 62... ..	200, 759	Jolliffe v. Hite , 1 Call, 262.....	138
		Jones v. Barkley , 2 Doug. 684.....	634

Jones <i>v.</i> Bradshaw, 16 Gratt. 355 ... 362, 363	Mason <i>v.</i> Patton, 1 Missouri, 279..... 631
Jones <i>v.</i> Cliff, 1 Crompt. & Mees. 539.... 634	Mayor, &c., of Baltimore <i>v.</i> Baltimore & Ohio Railroad Company, 6 Gill. 288 607, 609
Jones <i>v.</i> Powles, 3 Mylne & Keen, 581, 10 Eng. Ch. 310..... 248	McAlister <i>v.</i> Marbury, 4 Humph. 426.... 101
Jones <i>v.</i> Smith, 1 Hare, 43 463	McCarty and Horton, 53 Maine, 394... 682
Joynes <i>v.</i> Statham, 3 Atk. 388..... 30	McCleary and Purcell, 10 Gratt. 246.... 653
Kean and State, 10 New Hamp. 347 807	McComb <i>v.</i> Wright, 4 John. Ch. 659 682
Kearney, <i>ex parte</i> , 7 Wheat, 38..... 504	McCulloh <i>v.</i> Dashiell's adm'r, 1 Harr. & Gill. 96..... 590
Kearney and Sunderland Marine Ins. Co. 71 Eng. C. L. 925..... 99	McCullough <i>v.</i> Somerville, 8 Leigh 415.. 590
Keeran and Russell, 8 Leigh, 9 137, 138, 140	McDonald <i>v.</i> State, 8 Missouri, 283..... 858
Keeth and Procter, 12 B. Monr. 256..... 325	McElvine and Burr, 1 Bald. 162..... 759
Kerby <i>v.</i> Schoonmaker, 3 Barb. Ch. 46.. 590	McGuffie <i>v.</i> State, 17 Georgia, 498..... 858
Kettelle and Newman, 13 Pick. 418..... 631	McKean and Allen, 1 Sumn. 2 277, 599
Keytons <i>v.</i> Brawford, 5 Leigh, 48..... 140	McMurdo and Wernick, 5 Rand. 51..... 454
Kimmel and Konigsmacher, 1 Penr. & Watts, 207..... 759	McVeigh and Bank of the Old Dominion, 20 Gratt. 457..... 601, 603
King and Hutchins, 1 Wall, 53..... 122	Mead and Commonwealth, 12 Gray, 167.. 912
Kingsbury <i>v.</i> Butler, 4 Verm. 460..... 632	Means and Westerman, 12 Penn. St. 97.. 495
Kirby <i>v.</i> Harrison, 2 Ohio St. 326. 495	Meech <i>v.</i> Allen, 17 New York, 300..... 590
Kirby <i>v.</i> Kirby, 1 Paige, 261 58	Menefee and Colvin, 11 Gratt. 87..... 9
Kline and Hudson, 9 Gratt. 379..... 362	Merrell and als. and Malden & wife, 2 Atk. 8..... 322
Knight <i>v.</i> Earl of Plymouth, 3 Atk. 480, 1 Dick. 124 200	Merritt <i>v.</i> Brown, 19 New Jer. Eq. 286.. 495
Knox <i>v.</i> Garland, 2 Call, 241..... 703	Merters and State, 14 Missouri, 94..... 858
Konigsmacher <i>v.</i> Kimmel, 1 Penr. & Watts, 207..... 759	Mews <i>v.</i> Carr, 1 Hurlst. & Norm. 1 Exch. 484..... 682
Kounsler <i>v.</i> Ward, Gilm. 127.... 174	Michaux's adm'r <i>v.</i> Brown, 10 Gratt. 612 122
Kraker <i>v.</i> Shields, 20 Gratt. 377..... 773	Midlothian Coal Mining Company and Winston, 20 Gratt. 686 531
Lammot <i>v.</i> Bowly, 6 Har. & John. 500.. 324	Millard <i>v.</i> Baldwin, 3 Gray, 484.... 101
Langhorn & Scott <i>v.</i> Robinson, 20 Gratt. 661 617	Miller <i>v.</i> Davis, 14 Gratt. 1 563, 564
Laurent <i>v.</i> State, 1 Kansas, 313..... 858	Miller & Franklin <i>v.</i> City of Lynchburg, 20 Gratt. 330..... 634, 772
Law & Campbell and Piatt & als. 9 Cranch, 456..... 495	Mills & Beach and Entz, 1 McMul. 454.. 683
Ledbetter and Alley, 1 Dev. Eq. 449.... 360	Milne and Ross, 12 Leigh, 204..... 101
Leftwich and Anthony, 3 Rand. 238.... 29	Ming and Brett, 1 Florida, 447..... 631
LeNeve <i>v.</i> LeNeve, 2 Lead. Cas. Eq. 23. 463	Minor and Taliaferro, 1 Call, 456 39
Lenows <i>v.</i> Lenow, 8 Gratt. 349..... 653	Mitchell, &c. <i>v.</i> Barratta, &c., 17 Gratt. 445..... 163
Lessee of Young and Stringer, &c. 3 Peters, 320 903	Mitchell and Oakes, 16 Maine, 360. 371
Lethbridge <i>v.</i> Mytton, 22 Eng. C. L. 181. 105	Mitchell, &c. <i>v.</i> Riviera, &c., 17 Gratt. 445..... 163
Lewis <i>v.</i> Long, 3 Munf. 136..... 151, 152	Moore <i>v.</i> Hunter, 1 Gilman, 317.... 249
Lewis and Singleton, 6 Munf. 397..... 531	Morgan <i>v.</i> Carson, 7 Leigh, 238..... 362
Lewis <i>v.</i> Thornton, 6 Munf. 87 653	Morris' adm'r <i>v.</i> Morris' adm'r, 4 Gratt. 294... 454, 587. 592
Lewis <i>v.</i> Washington, 5 Gratt. 265..... 174	Muire <i>v.</i> Falconer, 10 Gratt. 12 174
Liggat & Mathews and Tate, 2 Leigh. 84 653	Mutual Assurance Society and Farmers Bank, 4 Leigh, 69..... 568
Ligon and Jackson, 3 Leigh, 161..... 73	Mytton and Lethbridge, 22 Eng. C. L. 181..... 105
Little and Baxter, 6 Metc. 7. 564	Newman <i>v.</i> Kettelle, 13 Pick. 418..... 631
Livingston <i>v.</i> Hubbs, 3 John. Ch. 124.... 245	Newton and Boulware, 18 Gratt. 708.... 392, 681, 772
Lofftus & Co. and Collins, 10 Leigh, 5... 710	Nomaque's case, Bresse, 109..... 857
Long and Clark, 4 Rand. 452. 709	Noreom <i>v.</i> Rogers, 1 C. E. Green, N. Jer. 484..... 718
Long and Lewis, 3 Munf. 136..... 151, 152	Norris <i>v.</i> Hume, 2 Leigh, 334..... 360
Longworth and Taylor, 14 Peters, 172... 492	Nosworthy and Basset, 2 Eq. Lead. Cas. 1, 22..... 249
Love <i>v.</i> Braxton, 5 Call, 537..... 249	Oakes <i>v.</i> Mitchell, 15 Maine, 360..... 371
Loyd and Smith, 11 Leigh, 512..... 209	Old Colony & Fall River R. R. Co. and Durfee, 5 Allen. 230..... 599
Lyman and Arnold, 17 Mass. 400..... 101	Oneale's case, 17 Gratt. 582..... 807
Lynch and Gray, 8 Gill 403..... 759	Orange & Alex. R. R. Co. <i>v.</i> City of Alexandria, 17 Gratt. 176..... 609
Lynn <i>v.</i> Richmond, 2 John. Ch. 60..... 327	Osgood and Franklin, 14 John. 527..... 759
Lyon and Duncan, 3 John. Ch. 359	Page and Bacon, 1 Conn. 404..... 631
Magill <i>v.</i> Manson, 20 Gratt. 527..... 566	Palmer and Beckley, 11 Gratt. 625..... 362, 530, 533, 534
Malden & wife <i>v.</i> Merrill & als. 2 Atk. 8. 322	Parker's heir <i>v.</i> Bodley, 4 Bibb, 102.... 680
Manner's adm'r and Head's ex'ors, 5 J. J. Marsh. 255 371	
Manson and Magill, 20 Gratt. 527.. 566	
Marbury and McAlister, 4 Humph. 426.. 101	
Markwood and Cribbins, 13 Gratt. 495 85, 86	
Marquis of Hertford and Wyatt, 3 East. 147..... 445	
Marshall and Ellis, 2 Mass. 279..... 598	
Mary Brown <i>v.</i> Eastern Railroad Com- pany, 11 Cush. 97.... 673	

Parker v. Cousins, 2 Gratt. 372.....	568	Robinson v. Ward, 12 Eng. C. L. 28	255
Parkins' adm'r v. Bennington, 1 Har-		Rogers and Noreom, 1. C. E. Green, N.	
rington, 209.....	370	Jer. 484.....	718
Parsons and Belchier, 1 Amb. 218.....	758	Rogers v. Rogers, 3 Wend. 503.....	369, 370
Patton and Mason, 1 Missouri, 279.....	631	Rogers, &c. v. Rogers, &c. 3 Paige, 379.	711
Peake and Edmunds, 2 Beav. 239.....	758	Rood and State, 12 Verm. 396	807
Peck v. Botsford, 7 Conn. 172.....	370	Ross and Hook, 1 Hen. & Mun. 310.....	32
Pendleton v. Fay, 3 Paige, 204.....	245	Rousmanier and Hunt, 8 Wheat. 174.....	323
Pendleton's ex'ors v. Stewart, 5 Call 1..		Rowley v. Horne, 3 Bingh. 2.....	672
.....	137, 140	Rowth v. Howell, 3 Ves. 565.....	758
People v. Bodine, 1 Denio, 281.....	868	Rucker and Dearing's adm'x 18 Gratt.	
People and Gardner, 3 Scam. 83.....	858	426.....	142, 567, 577
People v. Ruloff, 18 New York, 179.....	819	Ruloff v. The People, 18 New York, 179..	819
People v. White, 24 Wend. 520.....	868	Russell and Fales, 18 Pick. 315.	561
People v. Woods, 7 Calif. 579..	617	Russell v. Keeran, 8 Leigh 9....	137, 138, 140
Peter and Thompson, 12 Wheat. 565.....	371	Sage v. Dillard, &c. 15 B. Mun. 340	599
Pettit v. Jennings, 2 Rob. 676.....	224	Scholey v. Walton, &c. 12 M. & W. 509 .	371
Petty v. Duvall, 4 Greene, 120.....	582	Scholfield and Aranguise, 38 Eng. L. &	
Piatt & al. v. Law & Campbell, 9;Cranch,		E. 424.....	563
456.....	495	Schoonmaker and Kerby, 3 Barb. Ch. 46.	590
Pierce and Gregory, 4 Metc. 478.....	48	Seymour v. Delancey, 6 John. Ch. 222	
Pierson v. Hutchison, 2 Camp. 211	563	.....	30, 82, 83
Pleasants v. Clements, 2 Leigh, 474....	702	Shanks and Brugh, 5 Leigh 598.....	136, 216
Pollard's adm'r and Tunstall & als. 11		Sheppard and Bohn, 4 Munf. 403.....	173
Leigh, 1.....	369	Shields and Kraker, 20 Gratt. 377.....	773
Pooley and Slatterie, 8 Mees. & Welsb.		Shreeve and Hough, 4 Munf. 490.....	530
864.....	'20, 21	Singleton v. Lewis, 6 Munf. 397.....	531
Post v. Jackson, 17 John. 239, 479.....	105	Skelly and Jefferson Branch Bank, 1	
Powell v. Evans, 5 Ves. 439.....	201	Black, 436	615
Powles and Jones, 3 Mylne & Keen, 581,		Skipwith v. Clinch, 2 Call, 213.....	774
10 Eng. Ch. 310.....	248	Slack v. Wood, 9 Gratt. 40.....	361
Powrie, &c. and Foltz, 2 Desau, 40.....	360	Slatterie v. Pooley, 6 Mees. & Welsb. 664	
Pratt and Walkup, 5 Har. & John. 51....	903	.....	20, 21
Procter v. Keeth, 12 B. Mon. 256.....	325	Smith v. Arnold, 5 Mason, 414.....	682
Providence Bank v. Billings & Pittman,		Smith and Fisher, 5 Leigh, 611... ..	170
4 Peters, 514	615	Smith and Hemmings, 4 Doug. 33.....	806
Pulliam v. Winston, 5 Leigh, 324.....	531	Smith and Howard, 3 Man. & Gran. 254,	
Purcell v. McCleary, 10 Gratt. 246	653	42 Eng. C. L. 139.....	21
Quesenberry v. State, 3 Stew. & Por. 308	911	Smith & Jones, 1 Hare, 43.....	463
Quesnel v. Woodlief & al. 6 Call, 218....	138	Smith v. Loyd, 11 Leigh, 512.....	209
Railroad Comp. and Rice, 1 Black, 358..	614	Smith and State, 11 Cush. 473.....	857
Railway Co. and Dill, 7 Rich. 158.....	669	Smith and Thorington, 8 Wall. U. S. 1	
Ramuz v. Crowe, 1 Exch. 166, 18 Eng. L.		.....	78, 88, 600, 770
& E. 514	561	Smith's ex'or, v. Walker, 1 Call, 39.....	774
Randolph's ex'r, &c. v. Tucker & al. 10		Smith and Zebach's lessee, 3 Binn. 69...	759
Leigh, 655.....	530, 533	Snapp and Spengler, 5 Leigh, 478.....	345
Rankin and Tapp's adm'r, 9 Leigh, 478..	362	Snelling and Carpenter, 47 Mass. 452....	79
Rees v. Rees, 3 Philim. 387, 1 Eng. Ecc.		Somerville and McCullough, 8 Leigh, 415.	590
418.....	57	Spengler v. Snapp, 5 Leigh, 478.	345
Regina v. Crownhurst, 47 Eng. C. L. 370	866	Spiers v. Willison, 4 Cranch, 398.....	20
Reg. v. Hopkins, 8 Car. & Payne, 591....	820	Spratley and Griffith, 1 Cox. Cas. 384....	85
Renner v. Bank of Columbia, 9 Wheat.		Spratt v. State, 8 Missouri, 247.....	858
581.....	562	Stafford and Wilkinson, 1 Ves. jr. 32	
Rex v. Earl Ferrers, 1 Burr, 631.....	503	.....	200, 759
Rex v. Holy Trinity, Kingston upon Hull,		Starkweather and Coit, 8 Conn. 289.....	102
7 Barn. & Cres. 611, 14 Eng. C. L. 102..		Starr and Sturge, 2 Mylne & Keen, 195, 7	
.....	19, 20	Eng. Ch. 195.....	322
Rex v. Inh. of Brampton, 10 East, 282...	806	State Bank & al. v. City Council of	
Rex v. V. Ch. &c. of Cambridge, 3 Burr,		Charleston, 3 Rich. 342.....	609
1647	598	State and Bennett, 8 Humph. 118	858
Reynolds v. Farmers Bank of Va., 4 Rand.		State v. Bently, 3 Zab. 532.....	609
186.....	562	State v. Calhoon, 1 Dev. & Bat. 374.....	858
Rhodes and Holmes, 1 Bos. & Pul. 638...	105	State v. Comm'rs of Mansfield, 3 Zab.	
Rice v. Railroad Comp. 1 Black. 358.....	614	510... ..	609
Richmond and Lynn, 2 John. Ch. 60....	23	State v. Cox, 6 Ired. 440.....	858
Ricks and Commonwealth, 1 Gratt. 416..	710	State v. Creighton, 1 Nott & McC. 256....	858
Riviera, &c. and Mitchell, &c. 17 Gratt.		State v. Field, 14 Maine, 294.....	911
445.....	163	State and Franklin, 29 Alab. 14	911
Robinson and Hansard, 7 Barn. & Cres.		State v. Freeman, 13 New Hamp. 488....	756
90	561, 564	State v. Kean, 10 New Hamp. 347.....	807
Robinson and Langhorn & Scott, 20		State v. Laurent, 1 Kansas, 313.	858
Gratt. 661.....	617	State and McDonald, 8 Missouri, 283....	858

REPORTS OF CASES
DECIDED IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA

BY PEACHY R. GRATTA N.

VOLUME XXI.

FROM JUNE 1, 1871, TO MARCH 14, 1872.

JUDGES
OF THE
SUPREME COURT OF APPEALS
DURING THE TIME OF THESE REPORTS.

RICHARD C. L. MONCURE, PRESIDENT.
WILLIAM T. JOYNES.* JOSEPH CHRISTIAN.
WALLER R. STAPLES. FRANCIS T. ANDERSON.

Attorney General : JAMES C. TAYLOR.

*Judge Joynes was prevented by ill health from sitting in any of the cases reported in this volume.
He resigned his office on the 12th day of March, 1872.

CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Bell v. Alexander.

June Term, 1871, Wytheville.

Absent, STAPLES, J.*

Negotiable Paper—Check—Case at Bar.—B purchased cattle of M in 1861. M informed B that he wanted the money to pay a debt he owed A, due in 1858 by bond; whereupon B agreed with M that he would pay the debt to A, and accordingly drew a check in favor of A upon the Exchange Bank at Salem. The check bore date April 17th, 1862, and was for \$1.435, the amount of the debt due from M to A, and A accepted the check in payment of M's debt, and M's bond was surrendered to him. A held the check until April 1863, when he presented it at bank for payment, which was refused; the cashier stating that all the funds of B had been drawn out a few days before. There was nothing said at the time the check was given as to the kind of currency in which it was to be paid, and at that time Virginia bank notes, Virginia treasury notes and Confederate treasury notes were circulated as of equal value. In April 1863, when payment was demanded, only Confederate notes were paid out by the bank. On the 25th of August 1862, B drew all his funds out of the bank, and made no further deposit until the 6th of April 1863, when he deposited \$1.914; but he drew this out on the 27th of same month. **HELD:**

2 *1. **Same—Same—Delay in Presentment.**†—B is not relieved from the payment of the check by the delay of A to present it; and in any case he would only be relieved to the extent that he was injured by the delay.

2. **Same—Same—Same—Measure of Recovery.**—B having asked the court for an instruction that A was only entitled to recover the value of said check on the — day of April 1863, when it was presented for payment, it was proper for the court to add to it—"provided the jury shall believe it to be a Confederate contract."

3. **Same—Same—Same—Scaling.**—B asked for another instruction, that if the jury should believe it was a Confederate contract, then they are to assess the plaintiff's damages at the value of Confederate notes on the day of the demand

*JUDGE STAPLES had been counsel in the cause.

†**Negotiable Paper—Check—Delay in Presentment.**—The proposition laid down in the principal case that the drawer of a check is released by the holder's failure to present the check at the bank in due time, only to the extent to which he has been prejudiced thereby, seems too well settled to admit of controversy. The principal case was cited as authority for this proposition in *Purcell v. Allemong*, 22 Gratt. 739; *Cox v. Boone*, 8 W. Va. 510; *Compton v. Gilman*, 19 W. Va. 317. See also, *Blair v. Wilson*, 28 Gratt. 171; *foot-note* to *Purcell v. Allemong*, 22 Gratt. 739.

of payment. It was proper for the court to add to it—"scaling the same by such rule as to the jury may seem right under all the circumstances."

4. **Statute—Scale of Depreciation for the Jury.**—The statute, Sess. Acts 1866-67, ch. 270, § 2, p. 695, prescribing no rule or scale of depreciation, it is for the jury to fix it in each case upon the evidence before them.

5. **Verdict Contrary to the Evidence.***—A verdict for the whole amount of the check, with interest from its date, will not be disturbed by the appellate court as being contrary to the evidence.

This was an action of assumpsit in the Circuit court of Pulaski county, brought in February 1867, by Jabin B. Alexander against Francis Bell, to recover the amount of a check for fourteen hundred and thirty-five dollars, drawn by Bell upon the Exchange Bank of Virginia, at Salem, in favor of Alexander. The facts of the case are stated by Judge Christian in delivering the opinion of the court. There was a verdict and judgment for the plaintiff for the full amount of the

***Verdict Contrary to Weight of Evidence—Appellate Proceedings.**—Several cases cite the principal case, among others, as laying down the rule which governs an appellate court in reversing the judgment as contrary to the weight of evidence. See *Blosser v. Harshbarger*, 21 Gratt. 217; *Read's Case*, 22 Gratt. 942; *Steptoe v. Flood*, 31 Gratt. 342; *Snouffer v. Hansbrough*, 79 Va. 181.

RICHARDSON, J., in delivering the opinion of the court in *Jones v. Rixey*, 79 Va. 657, said: "The principles governing courts in respect to setting aside verdicts and granting new trials, have been often laid down by this court. BURKS, J., in *Blair & Hoge v. Wilson*, 28 Gratt. 165, says: 'Every reasonable presumption should be made in support of a verdict of a jury fairly rendered, and according to the long-established, well-settled rule of this court, such a verdict cannot be set aside as against the evidence, unless there is a plain deviation—unless the evidence is plainly insufficient to warrant the finding.' See also, *Read's Case*, 22 Gratt. 924, and *Bell v. Alexander*, 21 Gratt. 8, where the rule is stated with clearness and force by JUDGE CHRISTIAN."

See also, *foot-note* to *Read's Case*, 22 Gratt. 924, where cases in point are collected. *Hilb v. Peyton*, 22 Gratt. 550, and *foot-note*; *Goode v. Love*, 4 Leigh 635; *Brugh v. Shanks*, 5 Leigh 508; *Patteson v. Ford*, 2 Gratt. 18; *Blair v. Wilson*, 28 Gratt. 165, and *foot-note*, where cases in point are collected. *Ross v. Overton*, 3 Call 309; *Mays v. Callison*, 6 Leigh 230; *Brown v. Handley*, 7 Leigh 119; *Mahon v. Johnston*, 7 Leigh 317.

See monographic *note* on "Bills of Exception" appended to *Stoneman v. Com.*, 25 Gratt. 887.

check, with interest from the 20th of April 1863; the time when the check was presented at the bank for payment. And thereupon Bell applied to this court for a supersedeas; which was awarded.

Baxter, for the appellant.

Wade and Walker, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

This case comes up to this court
3 upon a writ of supersedeas *to a judgment of the Circuit court of Pulaski county.

It was an action of assumpsit brought by J. B. Alexander to recover the amount of a check drawn in his favor on the Exchange Bank at Salem, by the plaintiff in error, Francis Bell, for the sum of fourteen hundred and thirty-five dollars, and bearing date the 17th day of April 1862.

The plaintiff in error pleaded "non assumpsit;" and upon this issue alone the cause was submitted to the jury.

The record discloses the following state of facts:

That in October 1861 the plaintiff in error, Francis Bell, purchased a lot of cattle of one Morgan; that shortly after the sale, Morgan informed Bell that he wanted the money due for the cattle to settle a debt which he, Morgan, owed to Alexander, the defendant in error. Whereupon Bell agreed with Morgan that he would pay the debt to Alexander, and accordingly drew the check, upon which the suit is brought, in favor of Alexander, which was accepted by the latter in payment of Morgan's debt, and his bond surrendered to him. The debt from Morgan to Alexander was contracted in the year 1858. The check was dated April 17th, 1862. Nothing was said by any of the parties as to the kind of currency in which the check was to be paid, and upon its face it directed the payment of fourteen hundred and thirty-five dollars, which was the amount of Morgan's debt to Alexander contracted in 1858.

It was further proved that in the spring of 1862 the currency paid out by the Bank at Salem consisted of Virginia bank notes, Virginia treasury notes and Confederate treasury notes, which then circulated as of equal value. It was also proved that the check was presented at the Exchange Bank at Salem, in the month of April 1863, and payment demanded, which was refused; the cashier stating that all the funds of the plaintiff in error

had been drawn out a few days before.

4 On behalf of the *plaintiff in error, was offered a certified account with said bank, by which it appeared that on the 25th of August 1862, he had drawn out all his funds, and that he made no further deposits, until the 6th day of April 1863, when there was placed to his credit the sum of one thousand nine hundred and fourteen dollars. But this amount was withdrawn on the 27th of the same month, so that it appears from the evidence furnished by the plaintiff in error, that from the 25th day of August 1862,

to the 6th day of April 1863, a period of nearly eight months, he did not have one dollar in bank to meet the check for fourteen hundred and thirty-five dollars which he had drawn in favor of the defendant in error.

It was further proved on the part of the plaintiff in error, that in the fall of 1862, and thence afterwards, the bank at Salem paid out no other funds than Confederate treasury notes, and he also offered in evidence a scale of depreciation, prepared by the banking house of Miller & Franklin, of the city of Lynchburg. Upon this evidence, and upon certain instructions given by the court, the jury found a verdict for the whole amount called for by the check, with interest from its date. A motion for a new trial was made upon the ground that the verdict was contrary to the evidence; which was overruled by the court, and judgment entered in accordance with the verdict. A writ of supersedeas to that judgment brings the case before this court.

The errors, assigned by the plaintiff in error, are:

1. "That the court erred in refusing to give the instructions in the form in which they were asked for, giving the same in a modified form; and also in giving the first instruction asked for, by the defendant in error; and

2. "That the court was in error in refusing to set aside the verdict of the jury and grant a new trial."

The first instruction asked for by the plaintiff in error was as follows:

5 "If the jury shall believe from the evidence that the *defendant gave the plaintiff the check in the declaration mentioned on the 17th day of April 1862, and when he gave it, he had funds in bank on which it was drawn sufficient to pay it, and continued to have funds in bank sufficient to pay it until the 27th day of April 1863; and if the jury shall further believe that the plaintiff retained the said check in his possession, and did not present it to said bank until after the said—day of April 1863; and if the jury shall further believe that the said check was duly presented to said bank for payment on the—day of April 1863, and that payment was refused on that day, and that no other presentation of the said check was made to the said bank; then the plaintiff's cause of action arose on the said—day of April 1863, and he is only entitled to recover the value of said check on the said—day of April 1863, with interest thereon."

The court refused to give this instruction in the form it was offered, but added the words, "provided the jury shall believe it to be a Confederate contract." It is to this modification or addendum that the plaintiff in error objects.

This court is of opinion that there was no error in the modification made by the Circuit court to this instruction. Indeed, without such modification, the instruction would have been plainly erroneous. Upon the hypothesis assumed in the instruction, the jury were told that they could only find the value of the check on the—day of April 1863, the day

of its presentation, without finding either the fact that the drawer had sustained damage or loss from the delay of presentation, or the further fact that the check was payable in Confederate currency. One or the other of these conditions was necessary to support the hypothesis upon which the instruction was based. But it was earnestly insisted by the learned counsel, who argued the case here, that there was error in the modification made

6 by the court below ; because the instruction as moved was intended to assert *a principle of commercial law independent of the statute scaling Confederate contracts. It is true that a check upon a bank is a commercial instrument in the nature of a bill of exchange payable on demand, and generally it is the duty of the holder to present it for payment within a reasonable time, otherwise the holder takes upon himself the risks of the bank's responsibility. But there is a material difference between the drawer of a check and the drawer of a bill of exchange. The drawer of a check is not discharged by the holder's failure to present the same in due time, unless he has sustained actual damage or loss. Byles on Bills, 78 ; Story on Promissory Notes, § 497.

The drawer of a check is in no case discharged from his responsibility to pay the same, unless he has suffered some loss or injury by the omission or neglect to make such presentment, and then only "pro tanto." 3 Kent's Com., 5th ed., p. 104, and note ; 3 John. Cases, 5 ; Id. 259 ; 6 Cow. R. 490 ; 10 Wend. R. 306 ; 2 Hill N. Y. R. 425, 428, 429 ; Story on Promissory Notes, § 497-498.

When the drawer, at the date of the check, or at the time of the presentment of it for payment, had no funds in the bank, or if, after drawing the check, and before its presentment for payment or dishonor, he had withdrawn his funds, the drawer would remain liable to pay the check, notwithstanding the lapse of time.

When a party draws a check upon a bank, he appropriates and dedicates the amount of the check to the use of the drawee ; and we take it to be clear, that the drawer impliedly engages that, at the time when the check is due and payable, he has, and will have then, and at all times thereafter, sufficient funds in bank to pay the same upon presentment, for by the draft he appropriates those funds absolutely for the use of the holder. Story on Promissory Notes, § 498, and note. If he

7 withdraws the funds, he is guilty of a manifest *wrong in thus substracting the very funds already appropriated to the payment of the check. Id. ; and Conroy v. Warren, 3 John. Cases, 259. While, therefore, the law makes it the duty of the holder to present his check within a reasonable time, yet the holder does not lose his remedy against the drawer by failure to present it, unless it can be shown the drawer has suffered loss or damage in consequence of such delay. So that, putting the case upon the ground insisted upon by the appellee, and taking his theory of the instruction under consideration, the court is of opinion that the Circuit court committed no error in rejecting the instruc-

tion in the form in which it was offered ; for, as before observed, one of two conditions was necessary to support the hypothesis upon which the instruction was based, to wit : either that the drawer had been prejudiced by the delay in presenting the check, or that the check was payable in Confederate currency. The court below might well have rejected the instruction as offered.

But was there any error in the modification or addendum made by the court ? "Provided the jury shall believe it to be a Confederate contract." We think not. The court had been asked to instruct the jury that, upon a certain state of facts proved, the plaintiff was "only entitled to recover the value of said check on the said — day of April 1863." The plaintiff in error had offered in evidence a broker's sale of depreciation of Confederate currency, and the instruction pointed in terms to that depreciation. It was, therefore, not only not erroneous, but highly proper, that the court should have added the words : "Provided that the jury shall believe it to be a Confederate contract."

Another error assigned is, that the court refused to give the second instruction asked for by the plaintiff in error in the form in which it was asked, and gave the same in a modified form.

8 This instruction is in these words : "If the jury shall *believe from the evidence that when the said check was given, on the 17th day of April 1862, the parties understood and agreed that it would be paid in Confederate treasury notes ; and if the jury shall also believe, that on the 17th day of April 1862, when this check was drawn, the banks in Virginia generally, and especially the bank on which the check was drawn, were paying only Confederate treasury notes, and continued so to pay Confederate treasury notes until after the month of May 1863, and if the jury shall further believe, that the said check was duly presented for payment at said bank on the—day of April 1863, and payment was then refused, and this was the only presentation and refusal of payment, then the jury in ascertaining the plaintiff's damages are to assess them in the value of Confederate treasury notes on the said—day of April 1863."

To this instruction the court added the words : "Scaling the same by such rule as the jury may seem right under all the evidence in the case."

Thus modified, the instruction was given. We are of opinion that there was no error in this modification of the instruction. The statute authorizing the scaling of Confederate contracts prescribes no fixed rule by which it shall be done. The statute simply provides that, "such contracts," &c., "shall be liquidated by reducing the nominal amount to its true value at the time they were respectively made and entered into, or at such other time as may to the court, or if it be a jury case, to the jury, seem right in the particular case." Sess. Acts 66-7, ch. 270, § 2, p. 695.

The statute prescribing no rule or scale of depreciation, it is for the jury to fix it in each case upon the evidence before them.

We do not think that there was any error in giving the first instruction asked for by the plaintiff's counsel, it was but the converse of the other instructions, and in effect instructed the jury that the debt should not be

9 *scaled unless the jury were satisfied that it was the express or implied understanding or agreement of the parties that the check was to be paid in Confederate currency.

It is difficult to conceive how these instructions could in any way prejudice the defendant, and even if they were erroneous, the judgment would not be reversed on that account, as they manifestly could not operate to his prejudice or injury. *Colvin v. Menefee*, 11 Gratt. 87.

The remaining error assigned is the refusal of the court to set aside the verdict and grant a new trial, because the verdict was contrary to the evidence.

The principles governing new trials are now too well settled by this court to admit of doubt or dispute.

A new trial asked on the ground that the verdict is contrary to the evidence, ought to be granted only in a case of plain deviation from right and justice, and not in doubtful case.

This court will set aside a verdict because it is contrary to the evidence, only in a case where the jury have plainly decided against the evidence or without evidence. 6 Leigh, 230; 2 Gratt., 594; and 6 Gratt., 723.

In the case before us, the jury have found for the defendant in error the whole amount of the check with interest from the date. They have in effect said, that the contract was not according to the true understanding and agreement of the parties payable in Confederate currency, or made with reference to that currency as a standard of value. They have also in effect, said by their verdict, that the plaintiff in error has sustained no loss or damage in consequence of the delay in presenting the check.

These questions were fairly submitted to the jury and fairly responded to by their verdict. This court cannot say that this verdict was found contrary to the evidence or without evidence, but on the contrary, we are of

10 opinion that the facts disclosed in the record strongly support *the verdict.

The check in question was given for a debt contracted in the year 1858. At the time it was given, Confederate currency was but slightly depreciated, and that depreciation scarcely known to any others but to bankers and brokers and dealers in money. Nothing was said about the kind of currency in which it was to be paid, and the bank upon which it was drawn was then paying out State bank notes, Virginia treasury notes and Confederate treasury notes as of equal value. The fact that the drawee presented the check for payment in 1863, when only Confederate currency was in circulation, ought not to be weighed as a circumstance of any importance against the other pregnant facts in the case. His willingness to accept Confederate currency at that time, can impose no obligation now, especially in favor of a party whose own

default prevented him from receiving it then. Nor is it shown that the drawer suffered any loss or damage in consequence of the delay in presenting the check.

Before he can avail himself of such a defence, he must show that he kept a fund in bank appropriated absolutely and exclusively to meet the check which he had given. So far from showing this, he proves by evidence he introduced, that for nearly eight months he had not a dollar in bank, and whatever conflict of testimony there may be as to the date of the presentation of the check and the date of the last deposit, it is a conceded fact, that the bank refused to pay his check upon the ground that he had drawn out all his funds. He cannot now be permitted to take advantage of his own default.

We are therefore of opinion, that the judgment of the Circuit court of Pulaski county be affirmed.

Judgment affirmed.

11

*Taylor v. Peck.

June Term, 1871, Wytheville.

(Absent, STAPLES.*)

1. **Continuances—Absence of Material Witnesses.**†—T sues P in unlawful detainer. P has T summoned as a witness; but agrees with T, that if she will produce in evidence on the trial, the deed of lease under which he claimed to hold, he would not require her to be present. When the case is called, T's counsel, she being absent, is asked whether the lease will be introduced in evidence, and they say it will be produced, but its admissibility will then have to be determined. P is entitled to a continuance of the cause.
2. **Same—Same.**—Even if T and P misunderstood each other as to whether the paper was to be introduced in evidence or produced on the trial, P is entitled to a continuance.
3. **Landlord and Tenant—Written Lease—Evidence of Tenancy—Receipts.**—Though a tenant holds under a written lease, he may, in an ejectment by his landlord against him, without producing the lease or accounting for its non-production, introduce receipts of his landlord for rent, showing that at the time the action was instituted, he held as tenant and his year was not out.
4. **Evidence—Private Writings—Proving Contents—Exception.**‡—A parol admission of a party to a suit is always admissible in evidence against him, although it relate to the contents of a deed or other written instrument, and even though its contents be directly in issue in the cause.

*JUDGE STAPLES had been counsel in the cause.

†Continuances.—See generally, monographic note on "Continuances" appended to *Harman v. Howe*, 27 Gratt. 676.

‡Evidence—Private Writings—Proving Contents—Exception.—As said in the principal case, as a general rule, parol evidence is inadmissible to prove the contents of a written contract, unless the non-production of such contract is first duly accounted for. An exception to this rule is that a parol admission by a party to a suit is always receivable in evidence against him, although it relates to the contents of a

On the 5th of November 1869, Margaret B. Taylor sued out of the clerk's office of the county of Montgomery, a writ of unlawful detainer against Charles L. Peck, to recover possession of a tract of land which she alleged he illegally withheld from her. A number of questions were made in the cause in the County court, but it is only necessary to refer to two of them. One of these questions is presented by the second bill of exceptions taken by the defendant. From this, it appears that at the February

12 term 1870, after the court had rejected *a plea which the defendant had tendered, he moved the court to continue the cause, because of the absence of the plaintiff, Miss Taylor, who the defendant proved would be a material witness on his behalf on the trial of the cause. He showed that she had been duly summoned; and it was proved by him that he had told her if she would cause a written agreement between them, then in her possession, under which he claims to be entitled to the possession of the lands in question, to be produced in evidence on the trial of said cause, then she need not attend this court; and the counsel for Miss Taylor refused, in open court, upon being applied to on the day of the motion, to consent that said writing should go before the jury, but said they would produce it in court on the trial of the case, as notified, and that the question of admitting it before the jury was to be determined hereafter.

And it was proved by a single witness, that C. L. Peck had told the witness that he (Peck) told the plaintiff that if she would produce the said writing before the court, she need not attend; that the said witness did not hear Mr. Peck say, that if she would produce it to be read in evidence. This witness did not hear the conversation between Miss Taylor and Mr. Peck; but Mr. Peck had told him about it, but he did not attempt to repeat the conversation verbatim.

deed or other written instrument; and even though its contents be directly in issue in the cause. This exception is known as a doctrine of *Slatterie v. Pooley* (6 M. & W. 664). The principal case is cited as affirming the doctrine of *Slatterie v. Pooley*. 1 Greenl. (16th Ed.) 692.

Evidence—Declarations.—In *Powell v. Tarry*, 77 Va. 261, the court said: "As to the second exception of the plaintiff in error, because the court allowed the letter of E. T. Hamilton to be received in evidence. It does not lie with Hamilton to object to the reading of this letter in evidence. It was his own statement about the very questions at issue, and his admission that he had received the land brought by Powell, as mentioned above, and *may have been* most material to the just determination of the questions at issue, the letter was clearly admissible as evidence against Hamilton; the weight to be attached to it was quite another question, and came within the province of the jury. See opinion of *MONCURE, P.*, in the case of *Taylor v. Peck*, 21 Gratt. 11.

"This general rule, admitting the declarations of a party to the record in evidence, applies to all cases where the party has any interest in the suit. Greenleaf, 1st vol. § 172."

It further appeared that at the last term of the court said Margaret B. Taylor was not present, and that Peck then announced that he would have been ready for a trial but for the absence of a witness named Terry; and that Peck at that term had no reason to believe that any objection would be made to the introduction in evidence of the writing aforesaid; and it was proved that the plaintiff's counsel were asked at the last term of the court whether the contract of lease aforesaid would be produced on the trial, and that they replied it would be produced; but it did not appear that the plaintiff's counsel were at any

13 *time until the day of the motion, asked whether they would agree to admit the said lease to go before the jury.

It further appeared that the plaintiff's witnesses were in attendance upon the court, to the number of ten or twelve, since Monday, and that the defendant's witnesses were also in attendance; and upon the calling of the cause on the day before, the plaintiff's counsel asked that a jury might be called and sworn; whereupon the defendant's counsel enquired of the said counsel whether the lease in question would be produced on the trial, and were answered that it would; but the defendant's counsel said they could not announce the defendants as ready for trial, as they did not know whether all their witnesses were present; and the case was laid over until the next day. Upon this state of facts the court refused to continue the cause; and the defendant excepted.

In the progress of the trial the defendant introduced two receipts of the plaintiff to the defendant for the rent of the land for the years 1868 and 1869, and also evidence to prove his possession of the land from the 1st of January 1868, and thereupon announced that he was through with his evidence. And the plaintiff then moved to exclude from the jury all the evidence of the defendant; which motion the court sustained, and excluded the evidence; and the defendant excepted.

After this exception had been signed, the plaintiff waived her objection to the evidence of the defendant proving his possession. To this the defendant objected, as excluding evidence properly explanatory of the evidence which the plaintiff proposed to admit. But the court overruled the objection; and the defendant again excepted. The evidence is set out in the opinion of *Moncure, P.*

There was a verdict and judgment for the plaintiff; which, upon appeal to the Circuit court of Montgomery, was reversed, and the cause was remanded to the County court for a new trial to be had therein.

14 And, thereupon, *M. B. Taylor applied to this court for a supersedeas to the judgment of the Circuit court, which was awarded.

Doddridge and Trigg, for the appellant.

The Attorney-General and Phlegar, for the appellee.

MONCURE, P., delivered the opinion of the court.

This is a supersedeas to a judgment of the Circuit court of Montgomery county, reversing a judgment of the County court of said county, in an action of unlawful detainer. It appears that the land sued for had been leased by the plaintiff to the defendant by a sealed lease for the term of five years, commencing the first day of January 1868, and ending on the 1st of January 1873, at an annual rent of three hundred dollars. The action was brought on the 5th day of November 1869, before the end of the second year of the said term of five years. Several errors in the judgment of the County court (which was for the plaintiff) were assigned in the defendant's petition for a supersedeas to the Circuit court, but one of them only was noticed in the judgment of the Circuit court, and on that the judgment of the County court was reversed. Before noticing that, we will notice one other of the errors assigned in the judgment of the County court, which error, we think, is well assigned, and upon it, also, that judgment might have been reversed. The error here referred to is the first in the defendant's assignment of errors in his petition for a supersedeas to the said judgment of the County court; that is, that "the court erred in refusing to continue the case upon motion of petitioner, as appears from the second bill of exceptions filed in the case."

The defendant, undoubtedly, would have had good ground for a continuance of the case on account of the absence of the plaintiff, but for the agreement made between

15 them in regard to the production on the trial of *the cause of the agreement, then in her possession, under which he claimed to be entitled to the possession of the land in question. She had been duly summoned as a witness, and was absent at the trial; and her materiality as a witness for the defendant was proved to the court. This state of facts, standing by itself, would have presented a plain case for a continuance. But the defendant further proved that he had told the plaintiff, that if she would cause the said agreement to be produced in evidence on the trial of the cause, then she need not attend the court. And if the plaintiff had been willing, when the case was called for trial, to produce the said agreement as evidence in the cause, there would have been no ground for a continuance on account of her absence. But her counsel refused in open court, upon being applied to, to consent that the said writing should go before the jury, but said they would produce it in court on the trial of the case, as notified, and that the question of admitting it before the jury was to be determined hereafter. Now, if the understanding between the plaintiff and defendant was as proved by the defendant, that the said writing should be produced in evidence on the trial, then, clearly, the refusal of the plaintiff's counsel to consent

that said writing should go before the jury entitled the defendant to a continuance, notwithstanding the declaration of said counsel, as aforesaid, that they would produce said writing in court on the trial of the case, as notified, and that the question of admitting it before the jury was to be determined hereafter. The condition on which the defendant had consented to dispense with the necessity of the plaintiff's personal attendance on the trial as a witness on his behalf, not having been performed, he of course had the same right to a continuance that he would have had if there never had been any such condition. The declaration of the plaintiff's counsel, that they would produce said writing in court on the trial, and that the ques-
16 tion *of admitting it before the jury was to be determined hereafter, makes no difference. The condition as proved by the defendant, in which view we are now considering it, was that the said writing should be produced in evidence on the trial; that is, should be read as evidence before the jury; not that the question of admissibility should first be referred to the decision of the court, and the writing be produced in evidence only in the event of its being determined to be legally admissible.

There was, on the motion for a continuance, evidence before the court tending to show that the defendant had said he told the plaintiff she need not attend as a witness, if she would produce the said writing before the court, saying nothing about its being produced to be read in evidence on the trial of the cause. But the weight of evidence decidedly sustained the defendant in his view of the condition on which he agreed to dispense with the necessity of the presence of the plaintiff as a witness on the trial.

But whether the plaintiff or the defendant were right in regard to their respective views of the said condition, there was, at least, a misunderstanding between them on the subject; and that of itself, entitled the defendant to a continuance of the cause to prevent the effect of a surprise upon him.

If, however, the plaintiff desired to avoid a continuance on that ground, she had it in her power to do so, by consenting that the said writing, which her counsel then had in court, should be read in evidence before the jury on the trial of the cause. There could have been no good reason for refusing so to consent, if the said writing were legally admissible, as the plaintiff by her counsel now contends that it was. It is contended further by her counsel that there was no necessity for such consent; that the said writing was clearly admissible evidence though insufficiently stamped, and

17 that the defendant would have been entitled to read it in evidence *before the jury when the time came to do so. But it was not then, if it be now, a settled question, that such evidence is admissible. The defendant's counsel manifestly thought that it was not admissible, and the plaintiff's counsel probably then entertained the

same opinion; though he is now of a different opinion, and cited in his brief several recent authorities to sustain his present opinion. At all events, the plaintiff's counsel, by refusing to consent that the said writing should be read in evidence, plainly indicated an intention to question its admissibility when it should be offered as evidence before the jury; and the defendant was not bound to run the risk of its being excluded, but had a right to have the case continued, when the plaintiff refused to give her consent as aforesaid.

We will now proceed to consider the ground of error on which the judgment of the County court was reversed by the Circuit court; that is, that the evidence of the defendant which was excluded by the County court, was admissible evidence and ought not to have been so excluded.

The question presented by this assignment of error arises on the 4th bill of exceptions; from which it appears, that on the trial of the cause, the plaintiff proved herself to be the owner in fee of the lands in question, and that defendant was in possession on the 5th day of November 1869, the date of the writ, and was still in possession at the time of the trial, and the plaintiff lived two miles from the main dwelling which was occupied by the defendant on said premises; and closed her evidence. The defendant, to sustain the issue on his part, then introduced two receipts signed by the plaintiff in the words and figures following, to wit:

"Received of C. L. Peck, three hundred dollars, amount in full for the rent of my property for the year 1868.

M. B. Taylor."

[U. S. revenue stamp, 2 cents; cancelled.]

18 *"Received of C. L. Peck, January 1, 1870, three hundred dollars in full, for the rent of my property for the year 1869, according to contract. M. B. Taylor."

[U. S. revenue stamp, 2 cents; cancelled.]

And proved that the sum of money mentioned in the receipt which is not dated, was paid partly in 1868, and the balance in September 1869; that the payment in September 1869, was not made by the defendant in person, but by an agent, and that the receipt was given on the 1st day of January 1870. And he further proved that the sum of money mentioned in the receipt bearing date January 1st, 1870, was actually paid on the said 1st day of January 1870, and was for the use and occupation of said premises for the year 1869; and he further proved that he had been in possession of said land since the 1st of January 1868. And thereupon, the defendant announced that he was through with his evidence. The plaintiff then moved the court to exclude from the jury all the evidence introduced by the defendant, on the ground that there was a written article of lease between the parties relative to the land in dispute; which motion was resisted by the defendant. But the court sustained the plaintiff's motion and excluded the said evidence;

and the defendant excepted. Other matters are set out in the bill of exceptions, which need not be here repeated. Afterwards, on the plaintiff's motion, the court admitted so much of the defendant's evidence as proved that defendant had been in possession of the land in controversy since the 1st January 1868, but excluded all the balance of said evidence; to which ruling of the court the defendant again excepted; and this constitutes the ground of his 5th bill of exceptions.

The defendant's evidence was excluded by the County court upon the ground that parol evidence is inadmissible to prove the contents of a written contract, unless

19 *the non-production of such contract is first duly accounted for; and that to admit the said evidence of the defendant in this case, would be to violate that rule.

There is no doubt about the existence of the rule or its wisdom. The only question is, does this case fall within it? Or does not this case come within some exception to the rule?

First. We think this case does not fall within the rule. In other words, that the rule does not apply to it. The evidence was not offered, and does not tend, to prove the contents of a written contract. It was offered, and tends only, to prove that at the time of the institution of the action, the defendant occupied the land in controversy as the plaintiff's tenant. The terms of the tenancy, or of the lease under which the defendant then held the premises, was perfectly immaterial. If he held them at that time as tenant, no matter on what terms and conditions, he held them lawfully, and the plaintiff had no right to recover in the action. That he held them as tenant of the plaintiff, and not adversely, was a fact which could be proved by parol evidence, and need not of necessity be proved by the production of the lease, though there may have been no reason for its non-production. It is well settled in England that the existence of a tenancy between the parties may be shown by parol, though the demise be in writing. *Rex v. Holy Trinity, Kingston upon Hull*, 7 Barn. and Cres. 611, 14 Eng. C. L. R. 101. If the fact of the occupation of land is alone in issue, without respect to the terms of the tenancy, this fact may be proved by any competent oral testimony, such as payment of rent, or declarations of the tenant, notwithstanding it appears that the occupancy was under an agreement in writing; for here the writing is only collateral to the fact in question. Thus the law is laid down by Professor Greenleaf, 1 Greenl. on Ev. § 87; and he cites the following cases to sustain him: *Rex v. Holy Trinity, &c.*, supra; *Doe v. Harvey*, 8 Bing. R. 239, *241; *Spiers v. Willison*, 4 Cranch. U. S. R. 398; *Dennett v. Crocker*, 8 Greenl. R. 239, 244. The case of *Rex v. The Holy Trinity, &c.*, which was decided by the whole court of King's Bench in 1827, was questioned in the case of *Strother, &c. v. Barr, &c.*, decided by the common pleas in 1828; 5 Bing.

R. 136, 15 Eng. C. L. R. 391; and the opinion of Best, C. J., in that case, was much relied upon in the argument of the counsel for the plaintiff in this case. But in that case there was an equal division of the court, and the decision was against the opinion of the Chief Justice. He was the only judge in the case who questioned the correctness of the decision of *Rex v. The Holy Trinity, &c.*, while two of the three other judges strongly relied upon it as a binding authority.

Secondly. But even if the rule in question were applicable to such a case as this, it comes within the exception to the rule which was declared in the case of *Slatterie v. Pooley*, 6 Mess. & Welsb. R. 664, decided by the Court of Exchequer in 1840, and cited by the Attorney-General in this case. That exception is, that "a parol admission by a party to a suit is always receivable in evidence against him, although it relate to the contents of a deed or other written instrument; and even though its contents be directly in issue in the cause." Parke, B., in his opinion in that case, after admitting that the case of *Bloxam v. Elsee*, decided by Lord Tenterden at Nisi Prius, was no doubt to the contrary, said, that "since that case, as well as before, there have been many reported decisions, that whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions may involve what must necessarily be contained in some deed or writing." "Many of these cases are collected in the 1st Vol. of Messrs. Phillips & Amos, p. 364; and any one experienced in the conduct of causes at Nisi Prius, must know how constant the practice is. Indeed,

21 if such evidence were inadmissible, *the difficulties thrown in the way of almost every trial would be nearly insuperable. The reason why such parol statements are admissible, without notice to produce, or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas, what a party himself admits to be true, may reasonably be presumed to be so. The weight and value of such testimony is quite another question. That will vary according to circumstances, and it may be in some cases quite unsatisfactory to a jury. But it is enough for the present purpose to say, that the evidence is admissible." Lord Abinger, C. B., "concurred in what was said by Parke, B.; and stated that he had always considered it as clear law, that a party's own statements were in all cases admissible, whether they corroborate the contents of a written instrument or not." The other Barons who sat in the case, also concurred. This case is entitled to very great respect, looking to the high character of the judges who decided it. Than Baron

Parke and Lord Chief Baron Abinger, there have perhaps been no English judges of higher standing.

The case of *Slatterie v. Pooley* has since been confirmed by a unanimous decision of the court of Common Pleas in the case of *Howard v. Smith*, 3 Man. & Gran. 254, 42 Eng. C. L. R. 139, decided in 1841, and also cited by the Attorney-General.

According to these cases, which we think correctly expound the law, the receipts of the plaintiff for rent for the years 1868 and 1869, which were excluded as aforesaid, were clearly admissible.

And we think that all the evidence of the defendant which was excluded by the County court was admissible evidence, and ought not to have been so excluded.

22 *We are, therefore, of opinion that there is no error in the judgment of the Circuit court, and that it be affirmed.

The judgment is as follows:

This day came, &c., and the court having maturely considered, &c., is of opinion, for reasons stated in writing and filed with the record, that there is no error in the said judgment of the said Circuit court. Therefore, it is considered that the said judgment be affirmed, and that the defendant recover of the plaintiff thirty dollars damages, and his costs by him about his defence in this behalf expended. Which is ordered to be certified to the said Circuit court of Montgomery county.

Judgment of the Circuit court affirmed.

23 *McComas v. Easley.

June Term, 1871, Wytheville.

Absent, STAPLES, J.*

1. Parol Contract for Sale of Land—Specific Performance.—In a bill by the purchaser for the specific performance of a parol contract for the sale of land, the contract as stated in the bill must be sustained by the evidence, or the bill will be dismissed.

2. Same—Same—Bill Does Not State True Contract.—In such a case, where a different contract is stated in the answer, and is sustained by the evidence, the bill may be dismissed, or the court may, in a proper case, give to the plaintiff the election to have the contract as proved enforced, or to have it rescinded.

*He had been counsel in the cause.

†Contracts—Specific Performance.—See foot-note to *Stearns v. Beckham*, 31 Gratt. 379.

‡Same—Specific Performance—Bill Does Not State True Contract.—In *W. Va., O. & O. L. Co. v. Vinal*, 14 W. Va. 687, the court said: "If the contract between the parties is different from the contract set up in the bill, and the true contract is proved by the defendant, the court ought generally not to dismiss the bill, but decree specific performance of the contract as proved, where it will produce neither hardship nor injustice to the parties. *McComas v. Easley*, 21 Gratt. 31; *Baldenberg v. Warden*, 14 W. Va. 407."

3. **Contract for Personalty and Realty—Lien on Realty.***
—Where one contract is made for the sale and purchase of both real and personal property, and a lumping sum is to be paid for both; the whole sum is a charge upon the real estate, and a conveyance of the real estate will only be decreed upon the payment of the whole amount.

4. **Same—Rescission of Contract—Improvements.†**—If the purchaser elect to have the contract rescinded, he is to be charged with the value of the personal property which he has received, with interest, and with rents and profits of the real estate of which he has been in possession, and is to be credited with so much of the purchase money as he has paid, with interest, and with the value of permanent improvements made upon the property.

This was a bill filed in the Circuit court of Giles county, in December 1866, by John W. Easley against Sarah M. McComas, widow, devisee and administratrix of Dr. Wm. W. McComas, deceased, to enforce the specific execution of a contract for the sale by the latter, in his lifetime, to the plaintiff, of a house and lot in the town of Pearisburg, in the county of Giles, and to enjoin the defendant from further proceedings in an action of ejectment which she

24 had instituted for the recovery of *the property. The case is sufficiently stated in the opinion of the court, delivered by Judge Christian. The court below decreed a specific execution of the contract, as alleged in the bill, and perpetuated the injunction. And thereupon Mrs. McComas applied to this court for an appeal from the decree; which was allowed.

B. R. Johnston and Jno. T. Campbell, for the appellant.

Mahood and J. R. Johnston, for the appellee.

CHRISTIAN, J., delivered the opinion of the court:

This cause is before us upon an appeal from a decree of the Circuit court of Giles county. The bills, original and amended, are filed by the appellee, John W. Easley, to enforce the specific execution of a contract which he alleges was entered into with the appellee's testator, Wm. W. McComas, in the year 1860. The original bill alleges that the appellee Easley purchased of McComas, some two years before the death of the latter, a certain house and lot in the town of Pearisburg, for the sum of \$1,200, to be paid in a note for that sum at ninety days, negotiable and payable at the Bank of the Old Dominion at Pearisburg. It is further alleged that this note was afterwards negotiated in said bank by McComas and paid at maturity by Easley, and that the proceeds of said note were paid over to McComas as full payment for the purchase of said house and lot. It is admitted by the appellee (Easley) that the contract with

McComas was by parol—his said bill alleging that he "took no title bond or other writing, or memorandum, setting forth the contract, for the reason that McComas promised to make to him a title in fee simple to said house and lot." He further alleged in his original bill, that at the time of the contract, McComas and his family

25 were residing in the house; that he, McComas, had expressed *his intention to remove to one of the Southern States in a short time; and that by the terms of their agreement he was to continue in the possession of the house and lot until it was convenient for him to vacate it; that in the fall of 1860 he did vacate the premises and deliver full possession to the appellee, and that he has continued in actual possession ever since. The appellee further states in his said original bill, that the said McComas entered the army shortly after the commencement of the late war, and was killed in battle in April 1862; and that he never conveyed the legal title to said house and lot. That by his will he devised his whole estate, real and personal, to his wife, Sarah M. McComas, who thereby became invested with the legal title; and he further alleges that she had instituted an action of ejectment against him to recover possession of the property. The prayer of his bill is that the "said Sarah M. McComas may be enjoined and inhibited from further proceedings in her action of ejectment, and that the court may decree a specific execution of the contract" between the appellee and the said W. W. McComas; and that the said Sarah McComas should be compelled to execute a deed conveying to him the legal title to said house and lot.

Upon the presentation of this bill to the judge of the Circuit court of Giles, the honorable R. M. Hudson, in vacation, an injunction was awarded, upon condition that the complainant (the appellee here), should confess judgment in the action of ejectment, and give bond for the payment of costs and damages; which was accordingly done.

To this bill the appellant, Sarah M. McComas, who was the sole devisee of her husband, Wm. W. McComas, promptly filed her answer. She denies that the contract as set forth in the complainant's bill was the contract between him and her deceased husband, but insists that from frequent conversations with her husband, she 26 believed *the contract to have been entirely different from that set forth; and proceeds to give in much detail the conversation of her said husband, and the repeated admissions of the complainant to her in reference to the contract; alleging that the complainant and her deceased husband were partners in the practice of medicine, and that her husband, Dr. McComas, proposing to retire from the profession, and probably to leave the State, agreed to sell the house and lot, together with his goodwill, medicines and surgical instruments, for a certain price. That the object in making the sale of the house and lot to the

*Contract for Personalty and Realty—Lien on Realty.

—See Clarke v. Curtis, 11 Leigh 559.

†Same—Rescission—Improvements.—See Hoover v. Calhoun, 16 Gratt. 109.

appellee, Dr. Easley, was to enable him also to dispose of his good-will, medicines, &c., at the same time; that the sale of the house and lot and of the medicines, good-will, &c., was one and the same transaction, the one dependent on the other, made at the same time; that no definite amount was fixed upon as the price of the house and lot; that while she had heard Dr. McComas speak of \$1,650 as the value of the house and lot, he said at the same time he would not dispose of them unless he could also get a certain amount for his medical practice, medicines, and surgical instruments.

The appellant further answers, that in the spring of 1860 Dr. McComas retired from the practice of medicine, thus dissolving the partnership, and that complainant then took exclusive use of the office, medicines, surgical instruments, &c., and employed them for his own individual use.

Upon the filing of this answer, the complainant amended his bill. He admits the medical partnership that existed between himself and Dr. McComas. He admits, that at the time of the purchase of the house and lot he also purchased of Dr. McComas, his medicines, surgical instruments and the good-will of his medical practice, at the price of \$450; but insists that "this formed no part of the purchase money of the house

and lot, and that no particular time
27 was specified for its *payment." He reiterates the prayer of his original bill for a specific execution of the contract as to the house and lot, insisting that this was an independent transaction, and alleging that the \$450 was no longer due, because upon a settlement of the partnership account between him and Dr. McComas, there would be an indebtedness to him more than sufficient to liquidate the said sum of \$450.

Upon these issues of fact made by the bills and answers, numerous depositions were taken, and while the evidence is conflicting to some extent, (though much apparent conflict may easily be reconciled by a careful analysis of the testimony), yet, upon a careful consideration of the whole evidence produced by both parties, taken in connection with the appellee's own statement of his case in his amended bill, we are of opinion that there is an overwhelming preponderance of the testimony to show that the real contract between the parties was not the contract which the appellee sets forth in his said original and amended bills, and which he has come into a court of equity to enforce. But the contract proved indubitably by the evidence was, that Dr. McComas sold to Dr. Easley his house and lot, together with his medicines, surgical instruments, and the good-will of his medical practice, for the lumping consideration of \$1,650. Easley himself, in his amended bill, alleges that this was the sum which he agreed to pay, but insists it was a separate transaction, admitting, however, that the purchase of the real and personal property was made at the same

time. We are constrained to say, from the uncontradicted evidence in the cause, that this was not a several contract, but that it was one and indivisible. The object of Dr. McComas was to sell his house and lot to the same person who would buy out his medicines, &c. He proposed to retire from the practice of a profession in which he was well established. The fact that he could sell his personal effects belonging to his profession, together with the good-

28 will of his practice, *to his former professional partner, was a most material consideration in selling him his house and lot. It was also a reciprocal inducement to Dr. Easley, when he purchased the medicines, instruments and good-will of Dr. McComas' medical practice, that he should purchase the house and lot, in order to secure the same locality in which Dr. McComas had achieved success and position in the same profession. We are firmly of opinion that the sale and purchase of the real and personal property were made at the same time, under one contract, that the consideration to be paid for the whole was the sum of \$1,650. The sum of \$1,200 of the purchase money was paid by Easley, and there remains due the sum of \$450, with interest from the day of the sale. This balance is a charge upon the land in Easley's possession. The contract being for the sale of real and personal estate, for a lumping price, the real estate is bound for the whole purchase money. Clarke & al. v. Curtis, 9 Leigh, 559. Certain it is, that Easley is not entitled to a deed conveying to him the legal title, which was in McComas, and with which the appellant has now become invested as his devisee, until every dollar of the purchase money for both real and personal property has been paid. His pretence is, that he owes nothing on account of that balance; that, upon a settlement of the partnership account between himself and Dr. McComas, there will be due to him an amount more than sufficient to discharge that balance. Such a pretension cannot be allowed in a court of equity. The partnership was dissolved in 1860. Dr. McComas was killed in battle in 1862. It was his duty, as surviving partner, to have closed and settled the business of the partnership. Nine years have elapsed, and he has not taken the first step towards such settlement, and the debts due to the concern must now, in all probability, be barred by time or are hopeless of collection. He has not only made no settlement, but, according
29 to his own admissions, has destroyed the evidence *upon which alone a fair and just settlement could possibly be made.

He cannot be permitted now to come into a court of equity and set off against a certain existing demand, admitted to be due, an unliquidated, uncertain claim which may probably arise upon a settlement of a partnership which terminated as early as 1860, which settlement has been now made impossible by lapse of time and his own default. We are, therefore, of opinion that

the appellee is not entitled to demand a deed, conveying to him the legal title, until he has first paid the balance due upon the whole purchase, to wit: the sum of \$450 with interest from the day of sale.

The appellee having failed to establish by proof the contract which he sets out, and seeks to enforce, and the evidence in the cause having established a different contract between the parties, the court ought either to have dismissed his bill, or put him to his election either to have the contract as proved, executed, or rescinded. It was clearly error in the court below to decree specific execution of the contract which he sought to enforce. The evidence shows that there was no such contract, but the true contract was entirely different.

The court might have dismissed the bill, for it is well settled that a party coming into a court of equity asking for the specific execution of a contract, must state his contract with reasonable certainty, and prove it as stated; and if there be any material difference between the allegations and the proofs, the court may dismiss the bill, and leave the parties to their remedies at law. Fry on specific performance, 165; Anthony v. Leftwitch, 3 Rand., 238. But every bill for the specific execution of a contract is an application to the sound discretion of the court. It is not a case requiring the interposition of the court *ex debito justitiæ*, but rests in their discretion upon all the circumstances of each particular case. In

the language of Lord Eldon, in 13 Vesey's R. 331: "The jurisdiction *is not compulsory upon the court, but the subject of its discretion; the question is not what the court must do, but what it may do under the circumstances, either exercising the jurisdiction by granting the specific performance on abstaining from it." And long previous to him, Lord Hardwicke and other eminent equity judges in England, had, in a great variety of cases, asserted the same discretionary power of the court. In Joynes v. Statham, 3 Atk. R. 388, Lord Hardwicke said, the constant doctrine of this court is, that it is in their discretion whether under the circumstances of the case before them, they will decree specific performance, or leave the plaintiff to his remedy at law. Later jurists both in England and the United States have reiterated the same doctrine. Chancellor Kent in Seymour v. Delancey, 6 John. Ch. R. 222, upon an extended review of the authorities on the subject, declares it to be a settled principle that a specific performance of a contract of sale rests entirely in the discretion of the court. This court has repeatedly asserted the same doctrine. 3 Rand. 245; 6 Gratt. 78. The Supreme court of the United States in the recent case of Willard v. Tayloe, 8 Wall., U. S. R. 553, have reviewed and approved the decisions above referred to. Of course the discretion to be exercised is not an arbitrary and capricious one, depending upon the mere pleasure of the court, but one which is to be exercised and controlled by the established

doctrines and settled principles of equity, governed by the circumstances of each particular case. Willard v. Tayloe, *ubi supra*; 2 Story Eq. § 742, 751. And indeed it is not in conflict at all with these views to say, that where a contract respecting real property is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it, as it is for a court of law to give damages for the breach of it. 2 Story's Eq., § 751; 9 Ves. R. 608; 4 Peter's U. S. R. 311, 328. The court may, 31 under *certain circumstances, refuse its aid and leave the parties to their legal remedies, or it may rescind the contract and place the parties in statu quo. Bowles v. Woodson, 6 Gratt. 78. Or if the plaintiff alleges one contract and the defendant proves another, the court may compel the specific execution of the contract as proved. 1 Dan'l Ch. Pract., Perkins' edition 451, and note; Fife v. Clayton, 13 Ves. R. 546.

Where the contract between the parties is different from the contract set up in the bill, and the true contract is proved by the defendant, the court ought generally not to dismiss the bill, but decree specific performance of the contract as proved, where it will produce neither hardship nor injustice to the parties: Fry on Specific Performance, 302 and note; Bradford v. Union Bank of Tennessee, 13 How. U. S. R. 57; and it seems this too against the claim of the plaintiff to have his bill dismissed. Fry (*ubi supra*) and note; Bradbury v. White, 4 Greenl. R. 391; 5 Paige's R. 164; Arnold v. Arnold, 2 Dev. Ch. R. 467.

It is the advantage of a court of equity, as observed by Lord Redesdale in Davis v. Hone, 2 Sch. & Lef. R. 341; which case is quoted approvingly by Mr. Justice Field in delivering the opinion of the Supreme court in Willard v. Tayloe: "it is the advantage of a court of equity that it can modify the demands of parties according to justice, and it may refuse its decree unless the party will take a decree upon condition of doing or relinquishing certain things to the other party."

In the case before us, we think, it would be most equitable not to dismiss the plaintiff's bill, and remit the parties to their legal rights. Where equity can do complete justice between the parties, it will never turn them out of court to pursue their remedy at law. 1 Munf. 63; 5 Pet. U. S. R. 263. But a court of equity having complete jurisdiction of the parties, and the subject matter, should make such decree as 32 will settle the rights of *the parties, do complete justice between them, and close the controversy forever. We are therefore of opinion, that while the plaintiff cannot have specific execution of the contract he seeks to enforce, yet, under the circumstances of this case, he ought to have his election (see Hook v. Ross, 1 Hen. & Mun. 310), either to have the contract rescinded, or to have it performed in accordance with the agreement, as proved; that

is to say, he shall be entitled to demand and receive from the devisee of Dr. McComas, a deed conveying such title as Dr. McComas had in the house and lot in controversy, upon condition that he at the same time shall pay over to the personal representative of Dr. McComas the sum of four hundred and fifty dollars, with interest from the 14th day of April 1860. But if he shall so elect, then the contract shall be rescinded, and he shall deliver up the house and lot to Mrs. McComas, and shall be entitled to receive back from the estate of Dr. McComas the sum of \$1,200, with interest from the 14th day of April 1860, which amount, however, shall be subject to a credit of \$450, as of the same day, and be credited also by the rents and profits from the time he took possession of the said house and lot, less the value of improvements made by him, and also by whatever amounts he has received for the small portion of the lot which he has sold.

There are other questions presented in the record, which we do not deem it necessary to notice, as in the view we have taken of the case, they become of no importance.

We are of opinion that the decree of the Circuit court of Giles must be reversed, and the cause remanded to that court to be further proceeded in, in accordance with the principles announced herein.

The decree is as follows:

33 The court is of opinion, for reasons stated in writing, *and filed in the record, that the contract set forth in the original and amended bills of the appellee, was not established by the proofs in the cause. But the court is of opinion that the true contract and agreement of the parties was, that the appellant's testator, W. W. McComas, sold to the appellee (Easley) his house and lot, together with his medicines, surgical instruments, and good-will of his medical practice, for the lumping price of \$1,650.

And the court is further of opinion that the balance of that sum (\$1,200 having been paid), to wit: the sum of \$450, with interest from the 14th day of April 1860, is still due, and is a charge upon the said house and lot, and that the said appellee (Easley) is not entitled to demand and receive from the devisee of W. W. McComas a deed conveying to him the legal title, until he shall have first paid to his personal representative the said sum of \$450, with interest from the 14th day of April 1860.

But the court is further of opinion that the said appellee should be put to his election, either to perform the contract, as hereinbefore set out, or have the same rescinded; and, if he should refuse to perform the same, or elect to have the same rescinded within a reasonable time, then the house and lot shall be delivered up to the appellant; and an account shall be taken, in which the appellee shall be credited with the sum of \$1,200, with interest from the 14th day of April 1860, together with the value of any permanent improvements he may have put on the premises;

and he is to be charged with the sum of \$450, with interest from 14th April 1860, and also the rents and profits from the date of his possession, together with any amounts he may have received for any portion of the said lot which he has sold since he came into the possession of the same, the appellant to convey the title to the purchaser; and the balance due, if any, shall be a claim against the estate of the said Wm. W. McComas.

34 *It is therefore decreed and ordered, that the said decree of the said Circuit court be reversed and annulled, and that the appellant recover against the appellee her costs in the said Circuit court, together with her costs expended in the prosecution of her appeal here. And the cause is remanded to the said Circuit court, to be further proceeded in, in accordance with the foregoing opinion.

Decree reversed.

35

*Glenn v. Clark & als.

June Term, 1871, Wytheville.

1. **Wills—Equitable Election.***—C by his will gave a farm by name to M, and he gave another farm by name to G, the latter farm being the most valuable; and G accepted the devise. The farm given to M was in fact the property of G, and had been sold by his father to C, when G was but twelve years of age. G having elected to take the farm given to him, must relinquish to M his claim to the farm devised to her.

2. **Chancery Practice—Decree between Co-Defendants.**†—Where the equities between the defendants do not arise out of the pleadings and proofs between plaintiff and defendants, there can be no decree between co-defendants.

3. **Same—Same—Case at Bar.**—M having filed a bill to enforce her claim to the land left to her by C, and made G and the executor of C defendants, and G, in his answer, having repudiated the sale of his land by his father, and insisted that the will of C did not raise a case of election; but that he was entitled to hold both farms; though it may be that a part of the purchase money for his land is still due from C's estate, that question cannot be considered in this case, and there can be no decree between these co-defendants upon it.

William G. Clark died in July or August 1861. By his will, which was duly admitted to probate, he devised to his sister Mary

***Wills—Equitable Election.**—For further instances of equitable election in keeping with the principal case, see *Upshaw v. Upshaw*, 2 H. & M. 381; *Dixon v. McCue*, 14 Gratt. 540; *Gregory v. Gates*, 30 Gratt. 83, and *foot-note*; *Kinnaird v. Williams*, 8 Leigh 400; *Moore v. Harper*, 27 W. Va. 362; *Bennett v. Harper*, 36 W. Va. 546, 15 S. E. Rep. 143.

†**Chancery Practice—Decree between Co-Defendants.**—See *Ould v. Myers*, 23 Gratt. 383, and *foot-note*, where cases in point are collected. In addition, see *Donnelly v. Hewitt*, 14 W. Va. 741; *Vance v. Evans*, 11 W. Va. 342; *Alley v. Rogers*, 19 Gratt. 366; *Hoffman v. Ryan*, 21 W. Va. 416; *Tavener v. Barrett*, 31 W. Va. 656; *Yates v. Stuart*, 30 W. Va. 124, 19 S. E. Rep. 422.

Clark, for her life, three tracts of land in the county of Washington, called respectively the Home Place, the Hogue Place, and the "Double Cabin Place," and he gave these three tracts, at the death of Mary Clark, to his nephews James C., Peter J., and Thomas Hope. And he gave to his nephew Benjamin Glenn a farm called the Callison farm.

It appears that the tract called Double Cabin Place had been given to Benjamin Glenn by his uncle James *Clark; and that James C. Glenn, the father of Benjamin Glenn, had sold the land to Wm. G. Clark in 1848, when Benjamin was about twelve years old; and said Wm. G. Clark, and his devisees had been in possession of this land under this sale for some eighteen years. The land was sold for \$360, and it is probable that a part of the purchase money was still due. After the death of Wm. G. Clark, Benjamin Glenn took possession of the Callison farm, devised to him by Wm. G. Clark, and the bill alleges, and the answer seems to admit, that he has sold it. He certainly accepted the devise.

Benjamin Glenn instituted an action of ejectment against Mary Clark to recover the Double Cabin tract of land, and obtained a judgment thereon in April 1867; and in March 1868, Mary Clark, James C., Peter J. and Thomas Hope, obtained from the judge of the Circuit court of Washington county, an injunction to the judgment. The bill, after setting out the foregoing facts and charging that after Benjamin Glenn came of age, he permitted Wm. G. Clark to remain in possession of the land, and in fact not only acquiesced in the sale, but actually ratified it, says that they understand Benjamin Glenn claims a balance as due him for the land; and that if there is, it is due from the estate, which is ample to pay it, and it should be paid by the executor and not by the plaintiffs. They are advised, that as Benjamin Glenn has accepted the devise to him of the Callison place, he cannot dispute the devise to the plaintiffs, and it was his duty to prosecute his claim in the courts for the balance due him.

They made Benjamin Glenn and Wm. F. Barr, as executor of Wm. G. Clark, parties defendants to the bill, and prayed that Glenn be restrained from ousting the plaintiffs from the possession of the land, and that he be compelled to convey the said tract of land to them according to their respective rights therein; that if there *be any of the purchase money due the said land, that the same be paid by the said executor, and for general relief.

Benjamin Glenn demurred to the bill, and also pleaded the statute of frauds and perjuries. He also answered: He says he does not believe that any contract was made between James S. Glenn and Wm. G. Clark, that they regard as binding. Respondent knew that the property had been devised to him by his uncle, James Clark, and did

not consider that Wm. G. Clark had any contract for it, nor did he ever claim that he had. He never called on respondent to convey it, nor did he ever offer to pay, and he did not pay respondent one cent for the property. He never acquiesced in the holding of Wm. G. Clark and those claiming under him, by way of acknowledging any right in him, for he never asserted any right in it to respondent. He denies that the will of Wm. G. Clark requires him to elect between the devise to him and his own land. He holds what Wm. G. Clark devised to him, and he holds the Double Cabin lot because it belongs to him. He cannot account for the disposition made by his uncle, Wm. G. Clark, of the Double Cabin place, to which he well knew he had no title, and complainants admit that a balance is due to respondent on the contract they allege was made with James G. Glenn. He says possession of the land had been delivered to him by the sheriff in October, 1867, and files the writ and return. He says he would at one time have taken the sum of \$360 with interest from 1848, and proposed to W. F. Barr, the executor of Wm. G. Clark, to do so, if he or Mary Clark would give him a note for the amount, but the executor declined.

The deposition of Wm. F. Barr, the executor of Wm. G. Clark, was filed in the cause by the plaintiffs. He states that in 1862, in an interview between himself and James and Benjamin Glenn, James Glenn informed him that there was a balance still due for the Double *Cabin tract, and he was requested to settle it, and that Benjamin Glenn expressed himself willing to convey the land, if the balance stated by James Glenn to be due upon the land was paid. Witness said he would consult the counsel of Clark's estate, and would do according to his instruction. Upon consulting the counsel he was instructed not to pay the balance, as witness would be liable for it, as the statute of limitation barred it. Of this, he informed James Glenn; but told him that there was no disposition to evade the payment, and advised him to sue for it. And he afterwards told Benjamin Glenn that he was authorized to state to him he would be paid the balance due him by the parties interested, as his aunt, Mary Clark, and the Hopes were desirous to avoid a family suit. He replied he had no compromises to make, but to get the farm, as he thought he was entitled to it. This conversation was after the action of ejectment had been instituted.

There was other evidence as to Benjamin Glenn's willingness to make the deed to Wm. G. Clark in his lifetime, which it is not necessary to state; and it was proved that the devise to Benjamin Glenn was much more valuable than the Double Cabin tract.

The cause came on to be heard on the 17th of September 1868, when the court held that Benjamin Glenn having accepted the devise of the Callison place under the will of Wm. G. Clark, could not assert a claim to

the Double Cabin place; and he was directed to deliver possession of it to the plaintiff, Mary Clark, within thirty days from the date of the decree, and that he convey the same to Mary Clark for life, and after death, to James C. Peter and Thomas Hope. From this decree Benjamin Glenn obtained an appeal to this court.

Baxter, James C. Sheffey and J. T. Campbell, for appellant.

B. R. Johnston and John A. Campbell, for the appellee.

39 *STAPLES, J. The principle of election is a well established doctrine of courts of equity. It is said to be founded upon the equitable ground of an implied condition that he who accepts a benefit under an instrument, must adopt the whole of it, conforming with all its provisions, and renouncing every right inconsistent with them. A party availing himself of such instrument in one particular, must not defeat its operation in another. It is also well settled that where a party disposes of the absolute right in property in which he has but a limited interest, he necessarily shows an intention to extinguish all other conflicting adverse interests, whether present or future, direct or contingent. 1 *Leading Cases in Equity* 400; 2 *Story Equity Jur.* § 1096.

According to these familiar principles, the appellant having accepted the devise of the "Callison Farm," must be held to have ratified the devise to the appellees of the "Double Cabin Farm," and is thereby estopped to assert title or claim to the latter. This was conceded in the petition, and in the argument of appellant's counsel before this court. It is insisted, however, that the appellant is entitled to the purchase money contracted to be paid for his land, and that the court below ought to have rendered a decree accordingly in his behalf. The practice of decreeing between co-defendants is not much favored by the courts. There is an increasing indisposition to extend that practice further than it has already been carried.

In *Taliaferro v. Minor*, 1 Call. 456, the Court of Appeals reversed the decree of the court below upon the ground that the pleadings raised no issue between the co-defendants as to the state of the accounts between them. And in *Blair v. Thompson*, 11 Gratt. 441, Judge Allen laid down the rule to be, "where the equities between the defendants do not arise out of the pleadings and proofs between plaintiffs and defendants, there can be no decree between co-defendants."

40 *In this case, the appellees in their bill alleged that James Glenn, the father of the appellant, sold the land in controversy to the testator Clark, and that this sale had been ratified by appellant upon arriving at maturity; and in any view the appellant, by accepting the devise of the Callison estate, had ratified the devise to

the appellees. In his answer the appellant controverted all these positions, denying the sale—denying the ratification on his part—insisting that the transaction did not present a case of election, and claiming title to the estate devised to the appellees. These are the issues, and the only issues, presented by the pleadings, presenting questions for adjudication between appellant and appellees, and not between appellant and the estate of William Clark.

It is very true, that a legacy will not be deemed a satisfaction of a debt, where the legacy and debt are different in their nature, as where the testator is indebted by bond, and bequeaths to his creditor an interest in land. If the appellant desired to invoke this principle in his behalf, and to assert a claim to the purchase money, he should have adopted a course of proceeding calculated to raise that question, upon a direct issue between himself and the executor of William G. Clark. In such proceeding, the executor would have been afforded an opportunity of contesting the claim, of relying upon the statutory limitation, of establishing payments, and of showing, it may be, that the devise to the appellant was a satisfaction of the debt due him from Clark's estate. No such issues, however, were made; none were asked. No settlement of the executorial accounts was required to ascertain the sufficiency of the assets, and the court could make no decree affecting them.

The appellant not only did not assert any claim to the purchase money, but he repudiated the sale, affirming his title to the land.

Under these circumstances, I cannot
41 *conceive that the Circuit court was authorized even to consider any supposed claim of the appellant to the purchase money for the land, much less to render a decree in his favor.

It was argued, however, that all the parties were before the court. It might have required the payment of the debt as a condition of granting the relief sought by the bill. It is true, the executor was a party to the suit; but, as he asked for no relief, I cannot see by what authority, or upon what principle, the court could impose terms upon him, as a condition of affording relief to third parties, with whom he had no connection or privity.

The appellees asked the interposition of the court, upon the ground that the appellant, by his acceptance of the devise, was precluded from contesting the other provisions of the will. The testator, in disposing of the "Double Cabin farm," manifested an intention, not merely to extinguish appellant's title thereto, but any lien he might have thereon for unpaid purchase money. If the debt still subsisted, it constituted a claim against the estate of William G. Clark, and not against the appellees, or the land in their possession. So soon as they established a case of election, and that the appellant had made that election, they were entitled to the aid of a court of equity, without any terms imposed

of paying a debt for which they were in no manner responsible.

It was asserted in the argument, that the appellant had made his election, upon condition of receiving the unpaid purchase money for his land. It may be so, but the facts disclosed in this record do not warrant such a conclusion. When informed by the executor that he would be paid the balance due him by the parties interested, he replied that he had no compromises to make; that he was entitled to the land claimed by the appellees, and his purpose was to recover it. In his answer, he repudiated the sale made by his father;

42 denied its validity, *so far as he was concerned; denied also that he had ever ratified the contract; and insisted that, under a true construction of the will of William G. Clark, he was not required to make an election. These facts would seem to indicate that he accepted the devise under a mistaken impression that he was entitled to hold both estates, and not under any expectation of recovering the purchase money. However, it is not my purpose to express any opinion upon the merits of the case. Whether the appellant has the right to a recovery against the estate of William G. Clark, is a question not sufficiently presented by the pleadings to justify this court in rendering a decision thereon.

For these reasons, I am of opinion the decree of the District court should be affirmed, with costs, but without prejudice to any claim the appellant may assert to the purchase money for the land, as against the estate of William G. Clark.

The other judges concurred in the opinion of Staples, J.

Decree affirmed.

43

Bailey v. Bailey.

June Term, 1871, Wytheville.

1. **Divorce a Mensa et Thoro—Grounds for Desertion.**†—Abandonment and desertion which entitles a husband or wife to a divorce *a mensa et thoro*, consists in the actual breaking off of matrimonial cohabitation with the intent to abandon and desert in the mind of the party so acting. And the intent to desert being once shown, the same intent will be presumed to continue until the contrary appears.

*For monographic note on Divorce, see end of case.

†**Divorce a Mensa et Thoro—Desertion.**—Desertion is a breach of matrimonial duty, and is composed first, of the actual breaking off of the matrimonial cohabitation, and secondly, an intent to desert in the mind of the offender. Both must combine to make the desertion complete. *The intent to desert* is usually the principal thing to be considered. These words, used in the principal case, were cited and approved in Carr v. Carr, 22 Gratt. 168; Latham v. Latham, 30 Gratt. 322, 392; Martin v. Martin, 33 W. Va. 701, 11 S. E. Rep. 15; Burk v. Burk, 21 W. Va. 450.

When a separation and intent to desert are once shown, the same intent will be presumed to continue until the contrary appears. Bailey v. Bailey, 21

2. **Same—Statute—Period of Desertion.**‡—The statute, Code, ch. 109, fixes no period for which the desertion must have continued to entitle a party to a divorce *a mensa et thoro*. Desertion for less than five years may be good cause, and the question is to be determined by the court exercising a sound discretion, according to the facts and circumstances of each case, and the principles of law applicable thereto.

3. **Same—Evidence—Effect of Statute.**§—The act, Code, ch. 109, § 9, is not intended to change the rules of evidence in divorce cases; and the letters of the parties are admissible in evidence for the plaintiff to show the intention of the defendant to abandon and desert her.

4. **Same—Case at Bar.**—B leaves his home and family in November 1865, and returns in November 1866. He remains at home two weeks, and then leaves it, and had not returned in September 1867, when Mrs. B files a bill for a divorce. B's intention to desert his wife being clearly proved, she is entitled to a decree for a divorce *a mensa et thoro*.

5. **Same—Amount of Alimony.**|—For the principles on which the amount of alimony will be fixed, see opinion.

6. **Same—Same—Earnings of Husband.**—Where a wife is compelled to seek a divorce from her husband on account of his misconduct, in fixing the amount of her alimony, the earnings of the husband may be taken into the account, if necessary, as well as his property.

7. **Same—Same.**—In such a case, in fixing the amount of alimony, the court will not seek to find how light the burden may possibly be made, but what, under all the circumstances, will be a fair and just allotment.

44 This was a suit instituted in September 1867, in the *Circuit court of

Gratt. 47; Burk v. Burk, 21 W. Va. 451; Thornburg v. Thornburg, 18 W. Va. 526. Protracted absence, without necessary detention, is potent proof of intent to desert. Harris v. Harris, 31 Gratt. 29, and cases cited.

See also, *foot-note* to Carr v. Carr, 22 Gratt. 168; *foot-note* to Latham v. Latham, 30 Gratt. 307.

‡**Same—Period of Desertion.**—See the principal case cited in Carr v. Carr, 22 Gratt. 172, as authority for the proposition that under the statute no particular period is prescribed in which the desertion must continue, to entitle a party to a divorce *a mensa et thoro*.

§**Same—Evidence—Effect of Statute.**—See *foot-note* to Latham v. Latham, 30 Gratt. 307. See generally, monographic *note* on "Divorce" at end of case.

|**Same—Alimony—Matter of Judicial Discretion.**—The proposition laid down in the principal case, that, in regard to the allotment of alimony there is no fixed rule but it is a matter within the judicial—not arbitrary—discretion of the court, was approved in Harris v. Harris, 31 Gratt. 17; Cralle v. Cralle, 84 Va. 202, 6 S. E. Rep. 12; Miller v. Miller, 92 Va. 200, 23 S. E. Rep. 232; Brown v. Brown (Va.), 24 S. E. Rep. 239; Heninger v. Heninger, 90 Va. 274, 18 S. E. Rep. 193.

In this last case, the court said: "In respect to alimony, the general rule is that the income of the husband, however derived or derivable, is the fund from which the allowance is made. 2 Bish. Mar. and Div. (5th Ed.), sec. 447; Bailey v. Bailey, 21 Gratt. 43; Cralle v. Cralle, 84 Va. 198, 6 S. E. Rep. 12."

See generally, monographic *note* on "Alimony" appended to Carr v. Carr, 22 Gratt. 168.

Washington county, and afterwards removed to the Circuit court of Wythe, by Georgiana F. Bailey against her husband, James A. Bailey, for a divorce. The grounds for a divorce stated in the bill are adultery, cruelty and abandonment, by her husband. The first two of these grounds are not sustained.

It appears that the parties were married in June 1865, in the county of Washington. Bailey was a widower with nine children, some of them nearly or quite of age, and others quite young. The wife was young. He lived on his farm in that county, and the father of Mrs. Bailey lived about a mile or a mile and a half from him. Bailey, who was a professional gambler, made a visit some weeks after his marriage to Richmond, where he stayed less than a month, when he returned home; and the parties seem to have lived happily together whilst he remained at home. In November 1865 he left home on a professional tour, went first to Memphis, from thence to St. Louis, and then to New York, and he did not return to his home until November 1866. During this period Mrs. Bailey seems to have stayed for the most part at her father's, and to have gone over occasionally to Mr. Bailey's house; and she, during his absence, became the mother of a boy. Bailey stayed at home on this visit about two weeks, and then returned to New York, and had not returned to his home in Washington when the bill was filed in this case.

During this last visit to his home, he seems to have treated his wife with coldness and reserve, and he left without bidding her farewell, though it appears he enquired for her to do so.

The plaintiff filed with her bill copies of several letters which she alleges she wrote to her husband after he left home on his last visit; and she filed with an amended bill other letters of hers, and also four letters of his. The character of these letters are given by Judge Christian, in delivering the opinion of the court. In

45 one *written by him, and dated New York, January 22, '67, he says: "I have received three letters from you since I saw you, and concluded I would drop you a line. You wish to know whether I wish you to go up home and stay. As to that question, you can use your own discretion about. If you choose to go there and stay, you can do so, and I will support you and your child; but as for ever living together as husband and wife, that is played out. Your treatment, and your conduct towards me during my short stay at home, and your remarks about me after I left, and that beautiful letter you wrote me, have entirely alienated my feelings from you. I have no love for you, nor never will again, for the simple reason that you are not what I believed you to be."

The other letters need not be inserted; one dated June 16th, 1867, could leave no doubt that he had determined not to live with his wife as such; nor does he deny this in his

answer, but he says he had made sufficient provision for her support at his house. The other important facts in the case are stated in the opinion.

The cause came on to be heard on the 14th of October 1869, when the court held that the conduct of the defendant amounted to abandonment and desertion of the plaintiff, and made a decree that she be divorced from the bed and board of the defendant. The care and custody of the child of the marriage was given to the mother; and the sum of thirty dollars per month, the sum reported as proper by the commissioner, was allowed to her for the support of herself and her child, which allowance was to commence from the 1st of December 1868; it appearing that nothing had been paid since that time. And this sum was to continue to be paid monthly so long as the parties remain in their present condition, and until by death or other change of circumstances the same may become improper. From this decree James A. Bailey applied to a judge of this court for an appeal; which was allowed.

46 *John T. Campbell and B. R. Johnston, for the appellant.

John W. Johnston, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

This is an appeal from the Circuit court of Wythe county. The bill is filed by Georgiana F. Bailey against her husband, James A. Bailey, seeking a divorce. The court below decreed a divorce a mensa et thoro, and from this decree an appeal has been allowed to this court.

Happily for the interests of society, and the sanctity of marital rights and relations, suits of this character are not of frequent occurrence in this State. And in these modern days of so-called social progress and social reform, it is a fact worthy of record, and one which fitly illustrates the purity of social life, and the inviolable sanctity of the marriage bond in this State, that there can be found but two reported cases, in all its judicial history from the foundation of the Commonwealth down to the present time, touching questions arising out of the separation of husband and wife. And the two cases referred to were not suits for divorce, but for alimony, brought by the wife after desertion by the husband.

These facts speak volumes in favor of the morality, purity and chastity of that social life, which recognizes marriage as the very basis of the whole fabric of civilized society, and seeks to preserve its sanctity inviolable. We regret that this first case must be put upon the record of reported cases in Virginia.

The plaintiff's bill charges the defendant with adultery, cruelty, and abandonment, or desertion, and prays "to be divorced from her said husband so far as facts upon final hearing may justify," and asks the court for a decree for so much of his estate

"as may be necessary to support her and her child so long as she and the said James A. Bailey may both live." The charge of adultery is not proved; nor is there
 47 evidence sufficient to *support the charge of cruelty. Indeed, both charges are abandoned by the learned counsel for the appellee (Mrs. Bailey) in his argument of the case here; and the whole case rests upon the charge of abandonment or desertion.

According to the provisions of the Code, ch. 109, § 7, "a divorce from bed and board may be decreed for cruelty, reasonable apprehension of bodily hurt and abandonment or desertion." Before considering the facts of the case, it becomes necessary to enquire, what in its legal sense, is that desertion, for which a court may decree a divorce a mensa et thoro? Upon this question, we have no express adjudication in this State. But desertion is well defined by the decisions of the English ecclesiastical courts and of the courts of the other States in the Union.

Desertion is a breach of matrimonial duty, and is composed first, of the actual breaking off of the matrimonial cohabitation, and secondly, an intent to desert in the mind of the offender. Both must combine to make the desertion complete. Bishop on Marriage and Divorce, § 506. The intent to desert is usually the principle thing to be considered. Obviously, a mere separation by mutual consent, is not desertion in either, nor as a matter of proof can desertion be inferred against either from the mere unaided fact that they do not live together, though protracted absence, with other circumstances, may establish the original intent. Gray v. Gray, 15 Alab. R. 779; 1 Harris' Pa. R. 211; Bishop on Marriage and Divorce, § 511; 9 B. Mon. R. 295, 303; 3 Metc. R. 257. But it is equally obvious, and it follows from well settled principles of law, that when a separation and intent to desert are once shown, the same intent will be presumed to continue until the contrary appears. 1 Greenl. Ev. § 41, 42; Gray v. Gray, 15 Alab. 779. Under our statute, no particular period is prescribed in which the desertion shall continue to entitle a party to a divorce a mensa et thoro. By the § 6, of ch. 109,

48 Code, *it is provided that a divorce from the bond of matrimony, among other causes, may be decreed where either party willfully deserts or abandons the other for five years, in favor of the party so abandoned. We take it as the fair and reasonable construction of the 7th section, which authorizes a decree for divorce from bed and board for desertion, that desertion for less than five years may be good cause for a divorce from bed and board, and that the discretion of the court is not to be limited by any fixed period, but that discretion is to be soundly exercised according to the facts and circumstances of each particular case, and the settled principles of law which govern the established facts in such case. The courts have not laid down any

particular rules of evidence for determining whether a separation does or does not, as matter of proof, amount to desertion; the question does not admit of such rules, but each case must rest on its own circumstances. Still, the intent to desert is a fact of which the court must in some way be affirmatively satisfied. Bishop on Mar. & Div. § 520; Friend v. Friend, Wright's R. 639; Brainard v. Brainard, Wright's R. 354. In Gregory v. Pierce, 4 Metc. R. 476, Shaw, C. J., said: "The husband's desertion may be proved by a great variety of circumstances, leading with more or less probability to that conclusion; as, for instance, leaving his wife with a declared intention never to return; absence for a long time, not being necessarily detained by his occupation or business or otherwise; making no provision for his wife, being of ability to do so; prohibiting her from following him, and many other circumstances." 4 Metc. R. 874, cited in Bishop on Mar. & Div. 520.

We think it may be safely asserted, as a general principle of law to be extracted from the English and American cases on the subject, that, wherever there is an actual breaking off of matrimonial cohabitation, combined with the intent to
 49 desert in the mind of the offender, *in such case desertion is established, and the party deserted is entitled to a divorce a mensa et thoro; and, if it be the wife, she is entitled to alimony.

Having thus laid down the legal principles which apply to suits for divorce, upon the ground of abandonment or desertion, we come now to apply these well-settled principles to the evidence in the case before us. But, upon the threshold of this enquiry, we are met with a question which must first be disposed of. The evidence contained in the record, in the main made up of letters, of both the plaintiff and defendant, filed and relied upon by the plaintiff. It is insisted by the learned counsel for the defendant, that these letters are but the declarations and admissions of the parties, and cannot, by the express terms of the statute, be regarded as evidence in the cause. They rely upon that provision of the statute which declares that "such suit shall be instituted and conducted as other suits in equity, except that the bill shall not be taken for confessed; and whether the defendant answer or not, the cause shall be heard independently of the admissions of either party in the pleadings or otherwise." Code, ch. 109, § 9. Let us briefly examine this objection. Previous to the act of 1847-48, from which this provision of the Code is taken, the jurisdiction of suits for divorce was vested in the legislature. When that jurisdiction was by that act transferred to the courts, the legislature imposed by statute certain limitations and restrictions to the exercise of that jurisdiction. They defined in express terms the grounds upon which alone the courts were authorized to decree a divorce a vinculo matrimonii, as well as those upon which the courts might decree a divorce a mensa

et thoro. The whole scope and purpose of the act was to limit the jurisdiction of the courts, and to discourage suits of this character. Having specified particularly the causes for which the courts might sever the ties which bind together husband and wife,

50 their purpose was to prevent a divorce *from being obtained by the collusion of the parties. All that was intended

by the 9th section (above quoted) was to put in the form of a statutory enactment, that principle which had been well settled by the ecclesiastical courts of England and the whole current of decisions of the courts of the States of the Union, (where courts and not the legislature had jurisdiction of the subject of divorce), to wit, that a divorce would never be granted merely upon the consent, or on the default of the party charged, but only on proof of the cause alleged. 1 Matthews' Digest, 590; Williams v. Williams, 3 Greenl. R. 135; Holland v. Holland, 2 Mass. R. 154; Baxter v. Baxter, 1 Mass. R. 346. This salutary rule was intended to prevent parties who were weary of the bond of matrimony, and impatient of its restraints and obligations, from obtaining the aid of the court through their own collusion and default. It was a rule for the protection of public morals and the sanctity of the marriage relations. These were the paramount objects of the rule, and these were the paramount objects of the statute, enforcing a well settled rule of law. But surely it could never have been the intention of the legislature to change the rules of evidence, when the suit was a suit for divorce, and provide a different mode of proving facts in such a case. If the construction contended for by the learned counsel for the appellant be the true one, then everything that the parties write, everything that the parties say, no matter under what circumstances, must not be read or heard by the court, because they are the admissions of the parties, and under the operation of the words of the section "or otherwise" must be excluded. So that, according to this construction, in a suit for divorce upon the charge of adultery, the letters of the guilty party to his or her paramour, written at a time when the other party was living in the unsuspecting confidence and happy security of conjugal fidelity and affection, could not be read in

51 evidence in behalf of the injured party. Or if the ground *alleged be desertion, letters from the husband ordering the wife from home under threats of violence, plainly expressing his purpose not to provide for her support, and deliberately declaring his intention to desert her forever, according to the theory of the counsel, such a letter could not be read in evidence in behalf of the wife; and in the one case, though the guilt of the party is acknowledged and unquestioned, the court cannot lend its aid to sever a connection which by the laws of God and man it is a crime to continue; and in the other, the helpless and deserted wife is to be turned out upon the cold charities of the world with-

out the right or the power to have appropriated to her support one dollar of her husband's estate, though it all might have been derived from her. These would be the unjust and absurd results to which such a construction of the statute would inevitably lead. We cannot give it such a construction, but we think that this section was merely intended to prevent decrees for divorce upon the collusion of the parties, or upon the consent or default of the party charged. We are of opinion that the letters of the parties may be admitted in evidence in a suit for divorce (except where it is shown they were written by collusion for the purpose of obtaining a divorce,) just as in any other case, for the purpose of proving, or as tending to prove facts pertinent to the question which the court is called upon to decide, to have precisely the same weight as in other cases. The question which the court was called upon to decide in this case was whether James A. Bailey had abandoned and deserted his wife. One of the constituent elements of the offence of desertion, being the intent to desert, in the mind of the offender, we think the letters of the parties may be read as evidence of that intent. Their genuineness are not impeached nor attempted to be impeached by the evidence in the cause.

The attempt upon the part of the able and ingenious counsel to show in argument,

52 that these letters were fabricated *for the purpose of using them afterwards in a suit for a divorce which she contemplated at the time they were written, was entirely futile. No impartial and disinterested man can read those letters without the conviction that they were the spontaneous and natural outpourings of a heart stricken with grief for the loss of her husband's affections, and yearning for the restoration of conjugal love and confidence which had made her happy in the early days of her wedded life.

Take for example the following extracts from two only, (and there are numerous others of the same character) of her letters: "You say that your feelings are entirely alienated from me, and that you have no love for me, and never will have again. Pause here my dear husband, and reflect on your own words, cruel words, that you have written to your young and confiding wife, whose very existence is bound up in you; and take, oh take them back, I beseech you. Please answer this letter without delay and tell me you were only joking concerning the separation, or something to alleviate my sufferings, for no one on earth can be more miserable than I am with that letter staring me in the face, and with the knowledge that I love so deeply and purely and am not beloved in return."

Take another: "When Oscar came, I met him and asked him for an answer to my letter. He said he gave you mine, and that you threw it into the fire and cursed me, and said you wanted to hear nothing from me, and wanted me to leave your house; for you never intended coming home until

I did leave. Just think how miserable I felt. Scarce a twelve month has elapsed before I have the consciousness of having lost my husband's affection. May you never know blasted hope. It withers all our enjoyment; it sears the best qualities of the heart. Days gone by of love and happiness, my soul can never forget. Be not too hasty in separating from me, and

do not debar me from a share of your
53 affections and your *society forever.

A woman's love once won, remains steadfast and faithful forever. Time and change cannot alter it. It burns purely and brightly amid care and sorrow, coldness and neglect, and it asks nothing but a return of love. If your trust in me be so poorly based that it can be thrown away by a breath of detraction; if you be so ready to believe any falsehoods you may have been told on me, you have never loved me with that pure and sincere affection that I have bestowed on you, my heart's idol."

Can any man read such letters as these, and say they were coldly and deliberately fabricated after a purpose formed to bring a suit for divorce, to be read in evidence in the cause? Can we believe this of one against whom the record does not show a breath of suspicion affecting her fair fame as a wife or woman? Are we, without evidence and against evidence, to believe that she has, with deliberate malice and falsehood, palmed off on the court below a wholesale forgery and fabrication, and thus make her, whose fair fame and name has not been assailed in the record, the bases of her sex—a fiend incarnate? The letters themselves bear upon their face internal evidence that they are genuine, not only from the intrinsic nature of the letters, but the fact that many of them refer to her husband's letters, and to time, place and circumstances, which show beyond question that they are really what they purport to be; and the court below was right in regarding them as evidence to be considered in the trial of the cause.

Having disposed of this question, we come now to state what are the facts as proved upon the whole record, and apply to those facts the principles of law hereinbefore set forth.

The parties were married on the 22d day of July 1865. A few weeks after the marriage, the defendant, James A. Bailey, went to the city of Richmond, where he remained about a month. He then

54 returned home, and *remained until the 7th day of November 1865, when he left for Memphis; from thence he went to St. Louis, and afterwards to New York, and did not return home again until November 1866. He then remained at home about two weeks, left again for New York, and did not return until the latter part of October or the first of November 1867. He was many years the senior of his wife, being a widower with ten children when he married her; but the record shows that, up to the return of Bailey in November 1866, nothing had occurred of an unpleasant

nature between them, and there is no proof that she even unreasonably complained of his long absence. On his return in November 1866, there seems, for the first time, to have grown up certain coldness between them. What was its cause the record does not show. But it is shown that he remained only about two weeks, and left again for New York, without taking leave of his wife, though she was at dinner with him, and he left immediately after dinner, leaving her in the dining room when he left to start on his journey. After he left, she wrote numerous letters to him, all (except the first, in which she reproaches him, but not harshly, for his coldness after their long separation) breathing the most devoted affection for him, begging his forgiveness if she had offended him, and praying him to return to his home. All these affectionate appeals he treats with silent contempt for months.

The first letter which he deigns to write to her, is in January '67. In this letter he coldly and cruelly says: "You wish to know whether I wish you to go up home and stay. As to that, you can use your own discretion. If you choose to go there and stay you can do so, and I will support you and your child; but as for ever living together as husband and wife, that is played out." On the 3d of May he writes the following: "Miss Georgie: I have

55 learned that you are running me in debt in Abingdon, *and trying every way to ruin me and my family. Now, I want you to understand, that if I hear of another bill you have made, I shall be under the necessity of advertising you in the Virginian; disagreeable as it may be to me, I am bound to do it for the protection of myself and family." The last letter received from him before filing her bill in September 1867, bears date June 16th 1867. It is couched in terms so cruel and harsh as would be reprehensible if used towards any woman, much more to a wife, in which he complains of bills she had made with merchants at Abingdon, and deliberately charges her with falsehood and fraud. Notwithstanding such letters as these, she continues to write to him in the most affectionate and endearing terms, imploring his forgiveness, praying for reconciliation, appealing to him in the name of their early wedded love, and in the name of their infant child, the holy pledge and mutual bond of their union. But all in vain. He refuses to be reconciled, but deliberately informs her that he no longer loves her, and that they can never live together as husband and wife.

Here then is a man who marries a young wife, takes her to his home, leaves her there, as she says in one of her letters, to take his first wife's place in the very face of his grown children, without him to aid and advise her in her embarrassing duties; and he goes off to ply his nefarious trade as a professional gambler, in the cities of St. Louis, Memphis, and New York. He visits her but once in two years, and re-

mains but two weeks, and then leaves her without a kind good-bye, and returns not until after her bill for divorce has been filed. She then again seeks reconciliation. He spurns her humble petition for pardon, and refuses even to visit his ill child lest he may come in contact with his rejected wife. We are constrained to say that this conduct amounts to desertion. Here is a case of actual breaking off matrimonial co-

habitation, combined with the intent
56 *to desert deliberately declared, not only in words, but in acts, which brings the case within the very definition of the authorities.

We are constrained to say, too, that the evidence does not show any default upon the part of the wife that can justify, palliate or excuse the misconduct of the husband in this case. The only complaint that able and ingenious counsel can find to allege against her is, that she made an account with the merchants of Abingdon amounting to \$300, and that she spent most of her time at the house of her mother during his long absence. An inspection of the accounts filed show that they were necessary for the support and maintenance of a woman and her child, and it is proved that a part of them were purchased for the use of other members of his family. As to her frequent visits to her mother who lived in the same neighborhood, what so natural, as that when left for twelve months at a time by her husband she should seek her mother's society, especially in those trying days of her first maternity, when nothing, not even the presence of the husband can take the place of a mother's care and a mother's sympathy. Not being in default, then, she is entitled to a divorce from the bed and board of a man who has so utterly disregarded the martial rights of the wife and the martial obligations of the husband as to reject and desert her to whom he had solemnly pledged his vows to love, cherish and protect.

The only remaining question to be considered is as to the amount to be allotted to the wife for alimony. The court below fixed the sum of thirty dollars per month as a fair allotment of alimony in this case. The counsel for the appellant insist that this is excessive. We do not think so. His property is estimated by the commissioner, to whom the matter was referred, as follows: his real estate at \$7,513; his personal at \$1,020 and his interest in a mercantile business at \$1,000; making the aggregate sum of \$9,533. But it is

57 said his debts will take *half of his estate. A judgment is exhibited in favor of Hopkins, Hull & Atkinson for the principle sum of \$3,026.78, (with considerable interest), against the appellant as surviving partners of Huntze & Co. But so far as shown to the court, it may be that the partnership assets will be sufficient to pay this debt. The commissioner estimates his interest in that concern as worth \$1,000, and the fair presumption is that this estimate is based upon the hypothesis that the partnership assets would pay the

partnership debts. A deed of trust is also exhibited, which secures a debt to Milton White of \$3,998; but this deed upon its face provides that the trustee shall sell the land if it be not paid on the 1st day of June 1868. For aught that is shown to the court, that debt, or the greater part of it, has been paid; as three years have elapsed and the land remains unsold.

In regard to allotment for alimony, there is no fixed rule. It is a matter within the discretion of the court. Yet, it is not an arbitrary but a judicial discretion, to be exercised in reference to established principles of law relating to the subject, and upon an equitable view of all the circumstances of the particular case. Bishop on Marriage and Divorce, § 603; Rees v. Rees, 3 Philim. R. 387, 1 Eng. Ec. R. 418; Burr v. Burr, 7 Hill N. Y. R. 207. The general rule in respect to alimony is, that the wife is entitled to a support corresponding to her condition in life and the fortune of her husband. And in the language of Nelson, C. J., in Burr v. Burr (supra): "When the delinquency of the husband has been established, and the wife is the injured party driven by his cruelty or other wrongful conduct, from the comfort of domestic enjoyments, she should be liberally supported."

But while alimony is commonly defined a proportion of the husband's estate, yet the duty of a husband to maintain his wife does not depend alone upon his having visible tangible property. While the parties

are living together, they are bound
58 to contribute by their several *personal exertions to a common fund, which in law is the husband's, but from which the wife may claim support. If she is compelled to seek a divorce on account of his misconduct, she loses none of her rights in this respect, only she is to draw her maintenance in a different way; that is under a decree for alimony, based, if he has no property, upon his earnings or ability to earn money. Bishop on Marriage and Divorce, 604; Cooke v. Cooke, 2 Philim. R. 40, 1 Eng. Ec. R. 178; Kirby v. Kirby, 1 Paige's R. 261; 2 B. Mon. R. 370.

It appears in this case, that the appellant was able, from the income derived from his property and his personal earnings, to support in comfort a large family at home, and to maintain himself and two grown children for a considerable time in the city of New York. These earnings, whether derived from his nefarious trade as a far-dealer, or from legitimate business, may be considered in providing a support and maintenance for his wife and infant child. To lessen the amount decreed by the court below, would be to give to the wife a mere pittance, and would violate not only her rights, but the wise and humane policy of the law. The high morality of the law requires, that no man shall be permitted to take a woman as his wife, and after making her a mother, throw her upon society, in the undefined character of a wife without a husband, burdened with disgrace, to struggle with poverty.

In fixing the amount of alimony in a case

like this, the court will not seek to find how light the burden may possibly be made, but what, under all the circumstances, will be a fair and just allotment. We are not disposed to disturb the decree of the court below in this respect. If it be a grievous burden upon the appellant, he can easily relieve himself of that burden, by receiving back to his "bed and board" the wife whom he has driven from him by his own misconduct, and who has shown by the record that she is willing and anxious to return to him.

59 *We regret that this first case must be put on the record of reported cases in Virginia, and in conclusion we express the hope that such cases may be in the future as infrequent as they have been in the past; that, amid the whelming tide of social and political revolutions which threaten to sweep away all the forms of our cherished southern civilization, one pillar at least of the social fabric may still stand firm, and that the time may never come when the sacred bond of matrimony can be lightly broken, or the holy duties and high obligations it imposes, can be disregarded with impunity; but that marriage may in the future, as it has been in the past, be ever recognized in Virginia as an institution to be cherished by law and sanctified by religion, as one upon which alone the happiness and purity of social and domestic life must ever depend.

We are of opinion that the decree of the Circuit court of Wythe county be affirmed.

Decree affirmed.

DIVORCE.

I. Marriage.

II. Grounds of Divorce.

- A. In General.
- B. Cruelty.
- C. Desertion.
- D. Adultery.

III. Defences.

IV. Pleading and Practice.

V. Proofs.

- A. Burden of Proof.
- B. Evidence Admissible—Statutes.
- C. Weight of Evidence.

VI. Decrees of the Court.

VII. Effect of Decrees.

- A. On the Marriage Relation.
- B. On Property Rights.
- C. Res Judicata.

VIII. Custody of Children.

IX. Counsel Fees.

X. Cross References.

Allimony, see *note* to Carr v. Carr, 23 Gratt. 168.
Dower, see *note* to Davis v. Davis, 25 Gratt. 587.
See monographic *note* on "Curtesy."

I. MARRIAGE.

By What Law Governed—Interpretation.—The legal validity and existence of a marriage is to be tested by the law in force at the time it was celebrated.

Statutes should never be construed retrospectively unless the language plainly requires it in express words or by necessary implication. Every reasonable doubt should be resolved against such retroactive operation. Stewart v. Vandervort, 84 W. Va. 524, 12 S. E. Rep. 736.

While the terms and ceremonies of marriage are governed by the laws of the place where celebrated, the essentials of the contract depends upon the *lex domicilii*. Kinney v. Com., 30 Gratt. 858; Greenhow v. James, 80 Va. 636.

Proof of Marriage—Evidenced by Cohabitation and Repute.—In a suit for divorce, the fact of the parties acting at times as husband and wife and calling each other such, and of the alleged husband following the alleged wife after she had fled from his house, and abusing and threatening her with violence, and of their general reputation as such among their neighbors, and the fact that the woman (who applied for the divorce) was proved to be chaste and virtuous, of good general character and submissive to her alleged husband, are sufficient evidence to force conviction on the mind of the truth of the alleged marriage. Hitchcox v. Hitchcox, 3 W. Va. 435; 1 Min. Inst. (4th Ed.) 274; Purcell v. Purcell, 4 H. & M. 507. See also, Womack v. Tankersley, 78 Va. 244; Brown v. Brown (Va.), 24 S. E. Rep. 238; Francis v. Francis, 31 Gratt. 283.

Void Marriages—Allimony.—A marriage occurring between persons, one of whom had a husband living at the time is absolutely void under Va. Code 1860, ch. 109, § 1. Hence no allimony could be decreed on separation. Stewart v. Vandervort, 84 W. Va. 524, 12 S. E. Rep. 736; Brown v. Brown (Va.), 24 S. E. Rep. 238; Stones v. Keeling, 5 Call 143; W. Va. Code 1899, ch. 64, § 1, p. 660.

One who failed to prove a valid marriage in an action for divorce, cannot complain of a refusal to allow suit money, and allimony. In such suit a decree declaring that there was no valid marriage between the parties is not equivalent to a decree annulling the marriage. Brown v. Brown (Va.), 24 S. E. Rep. 238. See "Decrees of Court," *infra*.

Same—Negro and White Person.—A marriage between a white person and negro is void. But a marriage between a white man and a woman who is of less than one fourth negro blood is legal, however small this lesser quantity may be. McPherson v. Commonwealth, 23 Gratt. 939; Kinney v. Commonwealth, 30 Gratt. 858; Jones v. Commonwealth, 80 Va. 538; Va. Code 1887, § 2352.

II. GROUNDS OF DIVORCE.

A. IN GENERAL.—For what constitutes ground for divorce *a mensa et thoro* and *a vinculo matrimonii*, see 1 Min. Inst. (4th Ed.) 284 *et seq.* where the law is thus stated.

1. CAUSES FOR DIVORCE A MENSA ET THORO IN VIRGINIA.—These are determined by the provisions of the statute upon the subject, which declares, that "a divorce from bed and board may be decreed for cruelty, reasonable apprehension of bodily hurt, abandonment or desertion." Va. Code 1873, ch. 105, § 7; Va. Code 1887, ch. 101, § 2258; Carr v. Carr, 23 Gratt. 173; Latham v. Latham, 30 Gratt. 321; Throckmorton v. Throckmorton, 86 Va. 777, 11 S. E. Rep. 289; Bailey v. Bailey, 21 Gratt. 47; Harris v. Harris, 31 Gratt. 28; Heninger v. Heninger, 90 Va. 271, 18 S. E. Rep. 193; W. Va. Code, ch. 64, § 6, p. 661; Burk v. Burk, 21 W. Va. 445.

2. CAUSES FOR DIVORCE A VINCULO MATRIMONII, EXISTING AT THE TIME OF THE MARRIAGE.—1. Prior

marriage, when the consort still survives; 2. Want of age; 3. Difference of race, one party being white and the other a negro; 4. Want of reason; 5. Natural or incurable impotency of body at the time of marriage; 6. Consanguinity and affinity; 7. Conviction of either party of an infamous offence prior to the marriage, without the knowledge of the other; 8. Pregnancy of the wife at the time of the marriage, without the knowledge of the husband, by some person other than he; 9. Prostitution of the wife prior to the marriage, without the knowledge of the husband; and 10. Fraud or force. See, concerning prior marriage, Va. Code 1887, ch. 101, § 2252; difference of race, McPherson's Case, 28 Gratt. 940; Va. Code 1887, § 2255.

3. CAUSES FOR DIVORCE A VINCULO MATRIMONII, SUPERVENING AFTER MARRIAGE.—1. Adultery; 2. Sentence of either party to the penitentiary; 3. Indictment of either party for felony, when such party is a fugitive from justice, and has been absent for two years; and 4. Wilful abandonment or desertion for three years. Throckmorton v. Throckmorton, 86 Va. 768, 11 S. E. Rep. 289; Bailey v. Bailey, 21 Gratt. 47; Carr v. Carr, 22 Gratt. 172; Latham v. Latham, 30 Gratt. 322; Va. Code 1887, § 2257; Acts 1893-4, 425; Hitchcox v. Hitchcox, 2 W. Va. 435; Peck v. Marling, 22 W. Va. 708; Alkire v. Alkire, 33 W. Va. 517, 11 S. E. Rep. 11; Martin v. Martin, 33 W. Va. 695, 11 S. E. Rep. 12; Wass v. Wass, 41 W. Va. 126, 23 S. E. Rep. 537; W. Va. Code 1899, ch. 64, § 5, p. 661.

B. CRUELTY.

Definition.—The cruelty that authorizes a divorce is anything that tends to bodily harm, and thus renders cohabitation unsafe; or as expressed in the older decisions that involves danger of life, limb or health; and angry words, coarse and abusive language, humiliating insults and annoyances in all the forms that malice can suggest, may as effectually endanger life or health as personal violence, and will, therefore, afford ground for relief by the court. Latham v. Latham, 30 Gratt. 321; Myers v. Myers, 83 Va. 806, 6 S. E. Rep. 630; Trimble v. Trimble, 97 Va. 217, 33 S. E. Rep. 531, 5 Va. L. R. 401. See also, Kinsey v. Kinsey, 90 Va. 16, 17 S. E. Rep. 819; Carr v. Carr, 22 Gratt. 168. See *infra*, *Desertion*, *What Constitutes*.

Cruelty by Members of Husband's Family.—In Hutchins v. Hutchins, 93 Va. 68, 24 S. E. Rep. 903, it is held that if the husband permit the inmates of his house to treat his wife with cruelty, the cruelty is his and she may leave his home without furnishing him with cause for divorce.

Violence Amounting to Cruelty.—It was held in Kinsey v. Kinsey, 90 Va. 16, 17 S. E. Rep. 819, in a suit for divorce *a mensa et thoro* that where defendant habitually annoyed and mortified the plaintiff, was often drunk and struck her, came into her room at night with flourishing pistol, threatening to kill her, and finally drove her with their young child out at night, plaintiff was entitled to relief asked. See also, for other examples, Trimble v. Trimble, 97 Va. 217, 33 S. E. Rep. 531; Heninger v. Heninger, 90 Va. 271, 18 S. E. Rep. 193.

Profane, Abusive, or Harsh Language—Charge of Adultery.—Frequent indulgence in such language will not constitute cruelty where such conduct does not create an apprehension of bodily harm. Such conduct may be sufficient, however, where it produces mental suffering sufficient to injure health. Myers v. Myers, 83 Va. 806, 6 S. E. Rep. 630; Kinsey v. Kinsey, 90 Va. 16, 17 S. E. Rep. 819; Latham v. Latham,

30 Gratt. 307. See Owens v. Owens, 96 Va. 196, 51 S. E. Rep. 72, where it was held that the charge of adultery against the wife standing alone was generally regarded as not sufficient to justify a divorce, yet when presented with other facts increasing its enormity, it was regarded as a gross act of cruelty. See also, Carr v. Carr, 22 Gratt. 168. See *infra*, "Desertion."

Duress—Evidence of—Insufficient.—One is not entitled to a divorce on the ground that the marriage was contracted under duress, where the only evidence of duress is the fact that, having been arrested on the charge of seduction, he married defendant to avoid the prosecution. Copeland v. Copeland (Va.), 21 S. E. Rep. 241. In this case the evidence failed to establish that there was duress sufficient to justify the court in decreeing a divorce on that ground; it further showed that the plaintiff, immediately after the marriage had deserted his wife and remained away from her during the entire four years until the institution of this suit; and that he paid no attention to her requests for money, or treated her as his wife in any manner whatever.

C. DESERTION.

Definition.—Desertion in divorce law is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or wrongful conduct of the other. Alkire v. Alkire, 33 W. Va. 517, 11 S. E. Rep. 11; Martin v. Martin, 33 W. Va. 695, 11 S. E. Rep. 12. See also, Bailey v. Bailey, 21 Gratt. 47; Burk v. Burk, 21 W. Va. 445.

Same—Legal Grounds for Desertion.—Desertion is a breach of matrimonial duty, and is composed, first, of the breaking off of matrimonial cohabitation; and, secondly, an intent to desert in the mind of the offender. Both must combine to make the desertion complete, and a mere separation by mutual consent is not a desertion by either party. Latham v. Latham, 30 Gratt. 307, and *note*. In Harris v. Harris, 31 Gratt. 18, it was held that the circumstances must be very peculiar indeed, if any such case there could be, which justifying a decree for an absolute divorce in behalf of the husband for wilful desertion of the wife, would at the same time warrant a decree in her behalf. See also, Throckmorton v. Throckmorton, 86 Va. 768, 11 S. E. Rep. 289.

What Constitutes.—Abandonment and desertion which entitles a husband or wife to a divorce *a mensa et thoro* consists in the actual breaking off of matrimonial cohabitation with the intent to abandon and desert in the mind of the party so acting. Bailey v. Bailey, 21 Gratt. 48. In this case the husband, a professional gambler had remained away from home one year and returned for two weeks, and leaving then, had not returned at the institution of this suit ten months later. These facts were held to sufficiently establish the intent to desert on the part of the husband, and justify a decree for divorce *a mensa et thoro*.

Where a wife, without any apparent cause other than her dislike of him, voluntarily leaves the home of her husband, and refuses to return or cohabit with him, for a period of more than three years, although she is, in good faith, requested by the husband to do so, the husband will, under the West Virginia statute, be entitled to a divorce from the bonds of matrimony. Alkire v. Alkire, 33 W. Va. 517, 11 S. E. Rep. 11; Martin v. Martin, 33 W. Va. 695, 12 S. E. Rep. 12. See Wass v. Wass, 41 W. Va. 126, 23 S. E. Rep. 537; Engleman v. Engleman, 97 Va. 497.

24 S. E. Rep. 50. In Carr v. Carr, 22 Gratt. 168, it was held a wife has no legal grounds to leave her husband because he is rude and dictatorial in his speech to her, exacting in his demands and sometimes unkind and negligent in his treatment of her even when she was sick and worn and weary in watching and nursing their sick child. Latham v. Latham, 30 Gratt. 307. See Hutchins v. Hutchins, 93 Va. 68, 24 S. E. Rep. 903.

Same—Wife's Residence Changes with Husband's.—The wife's residence changes with the husband's, and if without a legal excuse she refuses to go with him it is desertion on her part. Burk v. Burk, 21 W. Va. 451.

Intent to Desert—Presumption of.—Desertion cannot be inferred from the fact that the parties do not live together. Burk v. Burk, 21 W. Va. 452; Bailey v. Bailey, 21 Gratt. 43.

Intent to desert being once shown, is presumed to continue until the contrary appears. Burk v. Burk, 21 W. Va. 450; Bailey v. Bailey, 21 Gratt. 43.

The protracted absence, without detention is as potent proof of the intent to desert on the part of the wife as of the husband. Harris v. Harris, 31 Gratt. 29. See Bailey v. Bailey, 21 Gratt. 43; Carr v. Carr, 22 Gratt. 168; Latham v. Latham, 30 Gratt. 307.

Just Cause for Desertion.—The wrongful conduct of husband or wife, or justifiable cause which will excuse the one consort for leaving the other must be such conduct as could be made the foundation of a judicial proceeding for divorce *a mensa et thoro*. Alkire v. Alkire, 33 W. Va. 517, 11 S. E. Rep. 11; Martin v. Martin, 33 W. Va. 605, 11 S. E. Rep. 12. See also, Carr v. Carr, 22 Gratt. 168; Harris v. Harris, 31 Gratt. 18; Hutchins v. Hutchins, 93 Va. 68, 24 S. E. Rep. 903. See "Cruelty," *ante*.

Commencement of Desertion.—If a wife, after leaving her husband's home remains away for a considerable time, and her husband requests her return, which she refuses, from that time she deserts her husband. Burk v. Burk, 21 W. Va. 450.

Desertion Continuous.—Two periods of desertion cannot be added together for the purpose of making up the term required by the statute. It must be a continuous, unbroken desertion. Burk v. Burk, 21 W. Va. 450, approved in Harris v. Harris, 31 Gratt. 31.

Desertion Broken.—If the husband cohabits with the wife during the time required by the statute for a divorce from the bonds of matrimony on the ground of desertion, the desertion is broken. Burk v. Burk, 21 W. Va. 450.

Period of Desertion.—Where no definite period of desertion is required by statute to sustain a suit for divorce, any desertion which fulfills the requirements of the definition given above is sufficient to sustain the suit, no matter if the parties have cohabited as man and wife for a short period since the first desertion by the defendant. Bailey v. Bailey, 21 Gratt. 43; Throckmorton v. Throckmorton, 86 Va. 768, 11 S. E. Rep. 289. See Acts 1893-4, p. 425, Acts 1895-6, p. 103.

D. ADULTERY.

Nature of—Proof Required.—Adultery is peculiarly a crime of darkness and secrecy; parties are rarely surprised at it; and so it not only may, but ordinarily must be established by circumstantial evidence. The testimony must convince the judicial mind affirmatively, that the actual adultery has been committed, since nothing short of the carnal act can lay a foundation for a divorce. It is, generally speaking, necessary to prove that the parties were in

some place together where the act might probably be committed. The facts in such case are not of a technical nature, but are determinable on common grounds of reason. The *rational* and legal interpretation must be the same. Musick v. Musick, 88 Va. 15, 13 S. E. Rep. 302. In this case, the defendant, a young man of the neighborhood, in good standing, seduced the plaintiff, under promise of marriage, then in fear of punishment married her and deserted her within a few days. Defendant then spent his time, openly and lasciviously with lewd women, but denied the act of adultery, charged in a suit for divorce by his wife. A divorce was granted on the ground of adultery as shown by circumstantial evidence, though the defendant and the alleged *particeps criminis* both denied the adultery, and a decree was entered prohibiting defendant from marrying again. Lascivious conduct alone, such as being seen at a ball in a house of ill fame is not sufficient proof of adultery. See also, Latham v. Latham, 30 Gratt. 307.

Same—In General.—In a suit for divorce on the ground of adultery, proof thereof should be "such as to lead the guarded discretion of a reasonable and just man to the conclusion of the defendant's guilt." Throckmorton v. Throckmorton, 86 Va. 768, 11 S. E. Rep. 289.

Sufficient Proof.—The fact of a married man closing himself in a room of a brothel, unexplained, is sufficient proof of adultery. Throckmorton v. Throckmorton, 86 Va. 768, 11 S. E. Rep. 289; Musick v. Musick, 88 Va. 15, 13 S. E. Rep. 302.

The fact that a man is seen in a house of ill fame is not conclusive proof of the crime of adultery on his part, though it is *prima facie* sufficient to establish the crime. Latham v. Latham, 30 Gratt. 307; Throckmorton v. Throckmorton, 86 Va. 768, 11 S. E. Rep. 289.

No presumption of guilt can be raised from the fact of a brother-in-law being often seen in the bed room of the defendant, when such room was frequently used as a sitting room by the family and for the brothers to transact their business. Hampton v. Hampton, 87 Va. 153, 12 S. E. Rep. 340.

Presumption in Favor of Innocence.—"To establish the charge of adultery, the evidence must be full and satisfactory—the judicial mind must be convinced affirmatively. The proof should be strict, satisfactory and conclusive." Throckmorton v. Throckmorton, 86 Va. 772, 11 S. E. Rep. 289.

The Charge Must Be Specific.—A bill for a divorce *a vinculo* on the ground of adultery, which only charges that the defendant has been guilty of adultery on many occasions is bad on demurrer. In this case the court said, in a dictum, that while the name of the paramour need not be stated, the time, place, and circumstances, should be set forth so as to enable the defendant to disprove the charge. Miller v. Miller, 92 Va. 196, 23 S. E. Rep. 232. This dictum is criticised at some length by W. Starke, Esq. of the Norfolk bar in 2 Va. L. R. 69, also disapproved by Prof. Lile in his notes to 1 Min. Inst. p. 162.

III. DEFENCES.

Condonation—Definition and Nature.—Condonation is defined to be the remission by one of the married parties, of an offense which he knows the other has committed against the marriage relation, on the condition of being continually afterwards treated by the other with conjugal kindness. While the condition remains unbroken there can be no divorce, but a breach of it revives the original

remedy. *Owens v. Owens*, 96 Va. 191, 31 S. E. Rep. 72.

Condonation of Desertion.—Desertion may be condoned by renewal of cohabitation of husband and wife during the time required by the statute for a divorce from the bonds of matrimony. *Burk v. Burk*, 21 W. Va. 458.

Condonation of Cruelty.—Cruelty consists of successive acts of ill treatment or personal injury, so that some condonation of earlier acts of cruelty must in such cases necessarily take place. Cruelty is cumulative, admitting of degrees and augmenting by addition. It may be condoned and even forgiven for a time, and up to a certain point, without barring the right to bring it all forward when the continuances of it has rendered it no longer condonable. *Owens v. Owens*, 96 Va. 195, 31 S. E. Rep. 72.

Same—Same.—While acts of cruelty on the part of the husband which have been condoned cannot be made the sole foundation for a divorce, they form the subject of investigation and proof by which to determine whether the wife can with safety to her health and person continue to live with him. *Owens v. Owens*, 96 Va. 195, 31 S. E. Rep. 72.

Recrimination.—Under the divorce law of W. Va. as well as the general divorce law, husband and wife cannot each of them be guilty at one and the same time of the act of desertion of the other, and either or both be entitled to divorce from the bonds of matrimony. *Wass v. Wass*, 41 W. Va. 126, 23 S. E. Rep. 537.

Same—Misconduct of Plaintiff.—The misbehavior of the plaintiff in a suit for divorce and alimony, "to be an absolute bar must be of a nature to render it a sufficient legal cause for at least a judicial separation." *Martin v. Martin*, 33 W. Va. 695, 11 S. E. Rep. 12.

IV. PLEADING AND PRACTICE.

In General.—In Virginia and West Virginia the process, practice and proceedings is the same in suits for divorce as in other proceedings in equity. *Latham v. Latham*, 30 Gratt. 312; *Bailey v. Bailey*, 21 Gratt. 43; *Martin v. Martin*, 33 W. Va. 701, 11 S. E. Rep. 12; *Hitchcox v. Hitchcox*, 2 W. Va. 435.

Suits for divorce are governed by the general rule that requires the decree to be justified by both the pleadings and the proofs, which must co-exist and correspond. *Wass v. Wass*, 41 W. Va. 126, 23 S. E. Rep. 537; *Handlan v. Handlan*, 37 W. Va. 486, 16 S. E. Rep. 597.

Causes Arising after Commencement of Suit.—The defendant may set up cause for divorce which accrued after the suit for alimony was commenced, and he may file a cross bill alleging that the plaintiff is guilty of desertion for the required time to obtain a divorce and thus defeat the suit for alimony and himself receive a divorce. *Martin v. Martin*, 33 W. Va. 695, 11 S. E. Rep. 12.

Cross Bills.—In *Willard v. Willard*, 98 Va. 465, 36 S. E. Rep. 518, husband brought suit for a divorce from the bonds of matrimony in the hustings court of the city of Roanoke, Va. on the ground of cruelty and desertion, while the wife was in the state of Connecticut. He obtained the decree asked for and the case was dismissed from the docket. About ten months later the wife on learning of the action of the court, alleged that she had not been served with process or had notice of the suit against her until after judgment, and asked that said decree be set aside, and she be permitted to file her answer to the bill, and that her answer be treated as a cross bill. This was permitted by the court, but a later

request of the wife to file an amended cross bill to introduce new evidence of later acts of adultery on part of the husband was denied. The evidence in the case proved that three years had not elapsed before the original decree of divorce, since the parties had cohabited together as husband and wife, the former decree of divorce was set aside and the case dismissed. From that decree appeal was taken, and it was held that there was no error except in the refusal to allow the wife to file her amended cross bill, the court saying that she was clearly entitled to file her petition to have the case reheard and to plead or answer, in order to have any injustice in the proceeding corrected. See Va. Code, 1887, § 3233.

Cross Bill—Desertion.—Where a wife files a bill for divorce and alimony against her husband, if, at the time of the institution thereof, three years had not elapsed since she left her said husband, and during the pendency of said suit said period does elapse, counting from the date of such desertion, the defendant may file a cross bill alleging that such desertion was wilful, and had continued for three years; and, if the allegations of said cross bill be sustained by the proof, he may be decreed a divorce from the plaintiff. *Martin v. Martin*, 33 W. Va. 695, 11 S. E. Rep. 12. See *Brown v. Brown* (Va.), 24 S. E. Rep. 233, where answer was treated as a cross bill; *Cralle v. Cralle*, 79 Va. 182; *Mettert v. Hagan*, 18 Gratt. 231.

Continuance.—"In the proper circumstances, where justice requires," the courts in divorce causes are liberal in allowing continuances and suspensions of the hearing, to supply defects in the evidence or pleadings. *Martin v. Martin*, 33 W. Va. 695, 11 S. E. Rep. 12.

Effect of Answer.—Where answer in a suit for divorce is responsive to the allegation of the bill, defendant is entitled to the benefit of it as in other cases in equity. *Latham v. Latham*, 30 Gratt. 307.

V. PROOFS.

A. BURDEN OF PROOF.—The burden of proof is on the complainant in a suit for divorce to establish by full, clear and adequate evidence the charges made in his bill. *Hampton v. Hampton*, 37 Va. 148, 12 S. E. Rep. 340.

B. EVIDENCE ADMISSIBLE—STATUTES.—Suits for divorce shall be instituted and conducted as other suits in equity, except that the bill cannot be taken for confessed and whether answered or not shall be heard independently of admissions of either party in the pleadings or otherwise. Acts of 1897-8, p. 753; *Hampton v. Hampton*, 37 Va. 148, 12 S. E. Rep. 340. See Va. Code 1887, § 2260. On this point, see *Hitchcox v. Hitchcox*, 2 W. Va. 435, where it is held that evidence of the parties is admissible to prove the existence of the marriage.

In *Hitchcox v. Hitchcox*, 2 W. Va. 439, it is said that the statute, Va. Code 1860, ch. 109, § 9, "was never intended to change the proof further than to require proof of the adultery or other acts on which the divorce was sought; the evil which the statute was intended to guard against was collusion between the parties, to escape from the bonds of marriage and to remove the temptations to become the witness of their own dishonor." *Bailey v. Bailey*, 21 Gratt. 43; *Latham v. Latham*, 30 Gratt. 312; *Cralle v. Cralle*, 79 Va. 182. Practically the same statute exists in W. Va. Code 1899, ch. 64, p. 662, where it is provided that divorce suits shall be tried in equity as other suits in equity, except that the cause shall be heard

independently of the admissions of either party, but the testimony of either party aside from confessions and admissions is admissible. *Hitchcox v. Hitchcox*, 2 W. Va. 435; *Martin v. Martin*, 33 W. Va. 701, 11 S. E. Rep. 12; *Handlan v. Handlan*, 37 W. Va. 486, 16 S. E. Rep. 597.

Letters as Evidence of Intention.—It was held in *Bailey v. Bailey*, 21 Gratt. 50, that the letters of the parties are admissible in evidence for the plaintiff to show the intention on part of the defendant to desert her, and this decision seems to be approved in *Carr v. Carr*, 22 Gratt. 171. See also, *Cralle v. Cralle*, 70 Va. 183; *Hampton v. Hampton*, 87 Va. 148, 12 S. E. Rep. 340.

Testimony of Complaint—Inadmissible.—The complainant in a suit for divorce, on the ground that the marriage was contracted under duress, is incompetent to testify on his own behalf. *Copeland v. Copeland* (Va.), 21 S. E. Rep. 242; Va. Code (1887), § 3346, as amended by Act of 1897-8, § 753.

C. WEIGHT OF EVIDENCE.—In suit for divorce on ground of adultery the courts do not place much weight upon the denial of the defendant and *particeps criminis*, when circumstantial evidence is full and satisfactory. *Musick v. Musick*, 88 Va. 12, 13 S. E. Rep. 302; *Engleman v. Engleman*, 97 Va. 487, 24 S. E. Rep. 50. "Nor upon the testimony of negro servants with whom defendant has 'bunked,' smoked, drank, ate, slept, and associated." *Hampton v. Hampton*, 87 Va. 161, 12 S. E. Rep. 340. Nor the unsupported testimony of the wife when she bases her charge on what she has heard. *Martin v. Martin*, 33 W. Va. 695, 11 S. E. Rep. 12.

Interested Parties—Detectives.—In a suit for divorce on ground of adultery "where one man accompanies another to a house of ill fame, especially if the visit is made at the suggestion of the former, and he afterwards turns up as an active witness in support of an application for a divorce, based upon such visit, his testimony ought to be received with caution." *Throckmorton v. Throckmorton*, 86 Va. 768, 11 S. E. Rep. 289.

Admissions.—In *Cralle v. Cralle*, 70 Va. 183, it is held that in a suit for divorce the admissions of the plaintiff are competent evidence to support the averments of the answer, citing, with approval, *Bailey v. Bailey*, 21 Gratt. 43, in support of the statement that, "these admissions were not only competent evidence in support of the averments of the answer, but are evidence of the most satisfactory character." See *Martin v. Martin*, 33 W. Va. 695, 11 S. E. Rep. 12; 1 Min. Inst. (4th Ed.) 268.

Decrees Pro Confesso.—A bill for divorce may not be taken as confessed, and it must be heard independently of the admissions of either party on the pleadings. *Latham v. Latham*, 30 Gratt. 307; *Hampton v. Hampton*, 87 Va. 148, 12 S. E. Rep. 340.

Decree Confirming Agreement of Parties.—The fact that a decree of divorce from bed and board confirmed a prior agreement of the parties, in respect to separation, property arrangements, etc., did not make it a decree on the admissions of the parties. *Marshall v. Baynes*, 88 Va. 1044, 14 S. E. Rep. 978.

Confessions Vitiating—Fraud and Duress.—"It is a principle, extending through all the departments of our law, that an act brought about by fraud or by duress, whoever the party may be, is void." Equal effect ought to be given to a threat by a husband to abandon his wife and turn her out upon the world to shift for herself, in the anomalous condition of a wife without a husband. *Hampton v. Hampton*, 87 Va. 161, 12 S. E. Rep. 340.

VI. DECREES OF THE COURT.

Suit Money—Pendente Lite.—Pending a suit for a divorce the trial court may compel the man to pay sums necessary to maintain the woman and enable her to carry on the suit; yet it is not justified in making any order for such purpose, pending appeal in a higher court, from decree rendered in same suit for divorce and alimony. *Cralle v. Cralle*, 81 Va. 773. Va. Code 1887, § 2261. See also, *Almond v. Almond*, 4 Rand. 662; *Purcell v. Purcell*, 4 H. & M. 507; *Dunbar v. Dunbar*, 5 W. Va. 507; *Handlan v. Handlan*, 37 W. Va. 486, 16 S. E. Rep. 597; *Wass v. Wass*, 42 W. Va. 460, 26 S. E. Rep. 440; W. Va. Code 1899, ch. 64, § 9, p. 662.

A statute which empowers the chancery court to restore to the injured party, as far as practicable, the rights of property conferred by marriage on the other does not authorize the court to interfere with, or defeat the vested rights of third persons, which attached upon the property prior to the institution of such proceedings for divorce and when the property was the absolute estate of the husband. *Jennings v. Montague*, 2 Gratt. 350.

Where in suit for divorce neither bill nor petition contains any allegation or prayer for alimony, or prayer or allegation of any kind to justify the court in making any decree disposing of defendant's property, it is error to enjoin defendant from selling, disposing of or incumbering said property, real or personal, until the further order of the court. *Handlan v. Handlan*, 37 W. Va. 486, 16 S. E. Rep. 597.

Creditors' Rights.—An attachment against the effects of the husband as an absconding debtor, levied before the institution of a suit for a divorce by the wife, entitles the attaching creditors to be satisfied out of the attached effects, in preference to the claims of the wife. The courts in adjusting the property of divorce parties have no right to interfere with the vested rights of *bona fide* creditors or purchasers for value who have acquired a vested right in the property. Va. Code 1887, § 2263; 1 Min. Inst. (4th Ed.) 294; *Jennings v. Montague*, 2 Gratt. 350; *Bailey v. Bailey*, 21 Gratt. 57; *Carr v. Carr*, 23 Gratt. 174; *Harris v. Harris*, 31 Gratt. 16; *Cralle v. Cralle*, 81 Va. 773.

Wife's Property—Improvements—Debts of Husband.—Where the facts do not justify it, it is error for the circuit court to subject a divorced wife's property to the payment of the debts of the husband's creditors, by reason of improvement alleged to have been placed thereon with intent to hinder and delay such creditors. *Adams v. Irwin*, 44 W. Va. 740, 30 S. E. Rep. 59; *Handlan v. Handlan*, 37 W. Va. 486, 16 S. E. Rep. 597.

Alimony—Pendente Lite—Citation of Husband.—When a bill praying for a divorce and alimony is presented to a circuit judge in vacation by a wife before any process has been issued against the defendant husband, such judge has no jurisdiction to enter a decree for alimony *pendente lite* or permanent alimony without first in some manner summoning the husband to appear, and thus affording him an opportunity to be heard, and, should such a decree be entered without first citing the husband, a writ of prohibition will lie to prevent its enforcement. *Coger v. Coger* (W. Va.), 35 S. E. Rep. 823.

Concerning Custody of Children.—After a divorce on the ground of adultery at suit of the wife, leaving the child in the wife's custody, husband filed a petition on apparently good ground to recover custody of the child. *Held*, that the court erred in further

decreeing against the husband when no process had issued against the wife on said petition, and no appearance had been made. *Phillips v. Phillips*, 24 W. Va. 591.

Where no notice of the application to modify a decree and to change the custody of the children is given to the husband, the order of the court modifying such decree at suit of the wife is void. *Phillips v. Phillips*, 24 W. Va. 591.

Maintenance of Children.—Where the custody of the children is awarded to the mother the court may make an order that the husband pay a certain sum for their maintenance. *Heninger v. Heninger*, 90 Va. 271, 18 S. E. Rep. 193. See also, in this regard, *Dunbar v. Dunbar*, 5 W. Va. 567.

West Virginia Statute—Ex Parte Proceedings.—Under W. Va. Code 1884, ch. 64, § 11, providing that in divorce proceedings the court may, from time to time, on petition of either of the parents, revise and alter decrees concerning the custody of the children, the proceeding should not be *ex parte*. *Phillips v. Phillips*, 24 W. Va. 591.

Consent Decrees—No Valid Marriage.—No valid marriage being proved in an action by a woman for a divorce *a mensa et thoro*, such woman was competent to consent to a decree giving custody of their children to the defendant, and she having so consented could not complain on appeal that the court erred in making said decree. Va. Code, § 2360; *Brown v. Brown* (Va.), 24 S. E. Rep. 238.

Decree Confirming Agreement of Parties.—The fact that decree of the court confirmed the former agreement of the parties did not make it a decree on the admission of the parties. *Marshall v. Baynes*, 88 Va. 1040, 14 S. E. Rep. 978.

Decree Annuling Marriage—When Proper.—In a suit for divorce *a mensa et thoro*, a decree annulling the marriage would not be proper, but in such case a decree that the appellant was under a legal disability, and incapable to contract the alleged marriage with appellee; that the marriage was invalid; and that appellee was not liable or responsible for appellant's support or maintenance, and not liable for other marital obligations to her was held proper, in *Brown v. Brown* (Va.), 24 S. E. Rep. 238.

Failure to Prove Valid Marriage—Alimony.—One who failed to prove a valid marriage cannot complain of a refusal to allow suit, money and alimony. The allotment of alimony, counsel fees, etc., are matters within the discretion of the court, to be exercised in reference to established principles of law relating to the subject, and upon an equitable view of all the circumstances of the particular case. *Brown v. Brown* (Va.), 24 S. E. Rep. 238; *Bailey v. Bailey*, 21 Gratt. 57; *Miller v. Miller*, 93 Va. 196, 23 S. E. Rep. 232.

Jurisdiction—Court of Appeals.—The court of appeals has jurisdiction to review by appeal a decree of the court below in matters of divorce. *Hitchcox v. Hitchcox*, 2 W. Va. 435.

VII. EFFECT OF DECREES.

A. ON MARRIAGE RELATION.—Decree from the bonds of matrimony dissolves the marriage and each party is free to marry again, unless the statute prohibits the marriage of the guilty party.

In granting a divorce on the ground of adultery the court has power under Va. Code 1887, § 2265 to decree that the guilty party shall not marry again unless such decree be annulled, and this section of the code is constitutional. The court, in its discretion, may set a decree aside, which prohibits the

marriage of the guilty party. *Musick v. Musick*, 88 Va. 17, 13 S. E. Rep. 302.

B. ON PROPERTY RIGHTS.

Where Marriage Declared Void.—A marriage within the prohibited degrees having been declared null by a sentence of the court, the husband has no interest in the property which was the wife's at the time of the marriage; and his creditors cannot subject it to the payment of his debts. *Kelly v. Scott*, 5 Gratt. 479.

Divorce a Vinculo Matrimonii.—E. is possessed of an estate in fee in a tract of land and marries P. and they have two children born of the marriage. Upon a bill by P. the marriage is dissolved for the adultery and desertion of E., but the decree directs nothing as to the property of the parties. Upon the dissolution of the marriage all the husband's claims to the wife's lands which depended on the marriage were extinguished and she is entitled to the possession of the land. *Porter v. Porter*, 27 Gratt. 599. See, for subject of dower, monographic note appended to *Davis v. Davis*, 25 Gratt. 587. See monographic note on "Curtesy."

For the rule that upon the dissolution of the marriage relation, the husband's rights to the wife's property is extinguished, see *Cleek v. McGuffin*, 89 Va. 329, 15 S. E. Rep. 896; *Osburn v. Throckmorton*, 90 Va. 816, 18 S. E. Rep. 285; *Cralle v. Cralle*, 79 Va. 188; *Muse v. Friedenwald*, 77 Va. 62; *Harris v. Harris*, 81 Gratt. 83, all citing the important case of *Porter v. Porter*, 27 Gratt. 599; 1 Min. Inst. (4th Ed.) 302; 2 Min. Inst. (4th Ed.) 118.

Husband's Assignment of Wife's Property.—Assignment of wife's choses in action made by the husband is effectual, if, at the time of the assignment or afterwards during his lifetime, he is in a condition to reduce such choses into his possession; if, however, he dies before the event happens on which he is entitled to reduce the choses into his possession, his assignment is inoperative.

The assignment, in order to be valid, must be of a present (as distinguished from a reversionary) interest, must be for valuable consideration, and must also be a special assignment. *Browning v. Headley*, 2 Rob. 340, 40 Am. Dec. 755.

Divorce a Mensa et Thoro.—A general decree *a mensa et thoro* or a decree of separation does not affect the property rights of the parties, but this may be changed by statute. "In granting a decree from bed and board the court may decree that the parties be perpetually separate and protected in their person and property. Such a decree of perpetual separation has the same effect as a divorce from the bonds of matrimony, except that neither party shall marry again during the life of the other, and such a decree bars curtesy. Va. Code, § 2264; *Marshall v. Baynes*, 88 Va. 1040, 14 S. E. Rep. 978. The decree in this case was a divorce from bed and board, and operated upon the *after-acquired* property, the legal rights and capacities of the parties, as a decree from the bonds of matrimony, except that neither party could marry again during the life of the other.

C. RES JUDICATA.—Where the plaintiff sued for a divorce, alleging intemperance, cruelty and abandonment, and a decree was entered for the defendant, the plaintiff and defendant not having lived together in the meantime, the plaintiff again sues for a divorce on the same ground, the issue is *res judicata*. *Miller v. Miller*, 93 Va. 196, 23 S. E. Rep. 232.

Same—Concerning Property of Parties.—A wife allows her husband to transfer her property in his

name, and upon a decree of divorce from the bonds of matrimony the rights of property were left as they stood at that date. Afterwards the wife claims the property from the husband which was originally hers, alleging ignorance of the law as to her rights. *Held*, from these facts a gift of the property to the husband was established, and ignorance of the law on part of the wife did not invalidate it. *Osburn v. Throckmorton*, 90 Va. 311, 18 S. E. Rep. 285; *Beecher v. Wilson*, 84 Va. 813, 6 S. E. Rep. 209. The rights of property between them became *res judicata* by the decree of divorce. *Osburn v. Throckmorton*, 90 Va. 311, 18 S. E. Rep. 285; *Campbell v. Campbell*, 22 Gratt. 666. See *Findlay v. Trigg*, 83 Va. 589, 3 S. E. Rep. 142; *Porter v. Porter*, 27 Gratt. 599; *Throckmorton v. Throckmorton*, 86 Va. 768, 11 S. E. Rep. 289.

VIII. CUSTODY OF CHILDREN.

At Common Law.—By the common law the father is the legal guardian of his minor child, and has a right to its custody against all the world. *Latham v. Latham*, 30 Gratt. 331. See *Armstrong v. Stone*, 9 Gratt. 105; *Carr v. Carr*, 22 Gratt. 168; 1 Min. Inst. 427.

By Statute.—It is provided by Va. Code 1873, ch. 105, § 12, that upon decreeing a divorce, whether from the bonds of matrimony or from bed and board, the court may make such further decree as it shall deem expedient concerning estate, maintenance, etc., and may determine with which of the parents the children or any of them shall remain. *Latham v. Latham*, 30 Gratt. 307; *Harris v. Harris*, 31 Gratt. 13; *Myers v. Myers*, 83 Va. 806, 6 S. E. Rep. 630; *Brown v. Brown (Va.)*, 24 S. E. Rep. 238. See also, *Bailey v. Bailey*, 21 Gratt. 43, where the child was given to the mother, who was the innocent party and had instituted the suit for divorce. *Owens v. Owens*, 96 Va. 191, 31 S. E. Rep. 72. See *Heninger v. Heninger*, 90 Va. 271, 18 S. E. Rep. 193; *Carr v. Carr*, 22 Gratt. 168; *Francis v. Francis*, 31 Gratt. 283; *Cralle v. Cralle*, 79 Va. 182; *Porter v. Porter*, 27 Gratt. 599; Va. Code 1887, § 2263; *Adams v. Irwin*, 44 W. Va. 740, 30 S. E. Rep. 59; *Dunbar v. Dunbar*, 5 W. Va. 567. See *Phillips v. Phillips*, 24 W. Va. 591; *Stewart v. Stewart*, 27 W. Va. 167; W. Va. Code 1868, ch. 64, § 11; W. Va. Code 1899, § 11, p. 662.

Influence of Circumstances.—On decreeing a divorce the wife is the proper custodian of an infant of seven months. *Trimble v. Trimble*, 97 Va. 317, 33 S. E. Rep. 531, 5 Va. L. R. 401.

Custody of Child Given to the Husband.—Where the wife has left her husband without good legal ground and taken their child with her, though there is no imputation of unchastity or other bad conduct, the child will be restored to the husband upon a decree for divorce *a mensa et thoro*, at the suit of the husband, on the ground of desertion, though the child was a female and but three years old, and this though the husband's treatment of the wife had been coarse, rude, close, petulant, exacting and penurious, leaving her to bear alone the burdens and trials which it should have been his highest pleasure to share and relieve. *Carr v. Carr*, 22 Gratt. 168; *Latham v. Latham*, 30 Gratt. 307. And the wife was denied access to the child in these cases. See *Brown v. Brown (Va.)*, 24 S. E. Rep. 238.

Child's Wishes and Welfare Considered.—When the question as to the custody of the child has to be decided, the court will exercise its discretion according to the facts, consulting the infant's wishes, if of the age of discretion, and if not, exercise its

own judgment as to what is best calculated to promote the infant's welfare, having due regard to the legal rights of the claimants. *Coffee v. Black*, 82 Va. 567; *Armstrong v. Stone*, 9 Gratt. 107.

IX. COUNSEL FEES—SUIT MONEY—PENDENTE LITE.

In General.—"The statute Va. Code 1873, ch. 105, § 10, in express terms, authorizes the trial court to make any order that may be necessary to compel the man to pay such sums as may be required for the maintenance of the woman and to enable her to carry on the suit while it is pending in that court, and this should usually be done before or at the time of the sentence of divorce." *Cralle v. Cralle*, 81 Va. 775; 1 Min. Inst. (4th Ed.) 294. For subject of alimony, see monographic note appended to *Carr v. Carr*, 22 Gratt. 168.

Same—Husband Liable for.—The husband is liable for the fees, where an attorney was employed by the wife to prosecute a suit against the husband for a divorce *a mensa et thoro*, because of actual cruelty, or because of apprehension on her part of bodily hurt where he won the suit, on the ground that husband is liable for necessities of the wife, but this would not be the case if the suit had been for a divorce from the bonds of matrimony, nor for a suit to obtain a divorce *a mensa et thoro* on the ground of abandonment and desertion. *Peck v. Marling*, 22 W. Va. 703.

Effect of Statutes.—W. Va. Code 1883, ch. 66, § 13, authorizing a married woman when living apart from her husband "to carry on any trade or business" by implication removes her common law incapacity to contract, and she would be liable in *assumpsit* for an attorney's services, rendered in obtaining a divorce, when based on abandonment by the husband, but not when based on his cruelty, for in that case the husband would be liable. *Peck v. Marling*, 22 W. Va. 703.

Fees in the Appellate Court.—Allowance will be made to the defendant in a divorce suit, to pay counsel fees, in the appellate court, in the absence of anything to show the financial condition of the plaintiff, but allowance made below will be sufficient. *Engleman v. Engleman*, 97 Va. 487, 34 S. E. Rep. 50; *Cralle v. Cralle*, 81 Va. 775.

Support of Wife—General Rule.—The general rule is that the wife is entitled to support corresponding to her condition in life and the fortune of her husband, and when she presents a bill for divorce, and prays for alimony, the husband should be accorded the privilege of representing his pecuniary condition to the court or judge. *Coger v. Coger (W. Va.)*, 35 S. E. Rep. 823. See *Wass v. Wass*, 42 W. Va. 460, 26 S. E. Rep. 440; *Bailey v. Bailey*, 21 Gratt. 57.

Support—Wife's Property.—On granting a wife a divorce from "bed and board" on the ground of cruelty, where it appears that the wife's separate property is larger than the husband's, and amply sufficient for the support of herself and child, the husband will not be compelled to contribute to their support. *Myers v. Myers*, 83 Va. 806, 6 S. E. Rep. 630.

60

*Raper v. Sanders.

June Term, 1871. Wytheville.

Absent, STAPLES, J.*

Wills—Interpretation—Case at Bar.—Testator directs, first, that so long as his wife L remains his widow,

*JUDGE STAPLES had been counsel in the cause.

all his property, real and personal, shall be kept together, and subject to the control of his executor, but the possession to remain with L during her widowhood. Second. If she marries she is to take one-third of his estate, and the remainder to go into possession of his executor; and if in his opinion it should at any time thereafter be for the interest of testator's children to sell the entire estate and loan the money for their benefit, the executor may sell the same in his discretion. The widow renounces the will, and dower is assigned to her by an order of court, to which the children are not parties. The executor and widow, she selling her dower interest, join in selling and conveying the land, the executor acting under the power. **HELD:**

1. **Same—Same—Same—Authority of Executor to Sell the Property.**—The executor had no authority to sell under the power during the widowhood of L.
2. **Chancery Practice—Bill to Set Aside a Sale—Action of Court.**—On a bill to set aside the sale, by the children, the court may set aside the sale so far as made by the executor, and confirm it so far as made by the widow; and direct a new assignment of dower.
3. **Same—Variance between Decree and the Special Relief Asked.**—Though the bill does not pray that the sale may be set aside, yet, if it makes a proper case for such relief, it may be given under the prayer for general relief.

In November 1849, Stephen Sanders, of Wythe county, made his will, which was admitted to probate in the County court of Wythe in January 1850; when John A. Sanders, the father of the testator, qualified as executor thereof, and executed a bond in the penalty of \$20,000, with sureties, but with a condition only providing for the faithful administration of the personal *estate. The testator left a widow and two infant children.

The second and third clauses of his will are as follows: Secondly. It is my wish that as long as my wife, Locky Sanders, shall remain my widow, all my property be kept together, both personal and real estate, and subject to the control of my executor hereinafter to be named, but the possession to be in my wife, Locky Sanders, during her widowhood.

Thirdly. If my wife, Locky Sanders, shall marry, then it is my will that she take one-third of my estate, and the remainder to be put in immediate possession of my hereinafter named executor; and if in his opinion, it should at any time thereafter, be more advantageous to the interest of my child or children, to sell the entire estate, both real and personal, and loan the money at interest for the benefit of my child or children, he is hereby authorized to sell the same whenever in his discretion it may become necessary to do so.

At the March term of the County court of Wythe county, Mrs. Sanders renounced the provision made for her in the will of her late husband, and dower in the real estate was assigned to her; and at the October term 1851, of the County court of Wythe, she and Robert Raper were appointed

guardians of the two infant children of the testator.

In July 1853, Mrs. Sanders and Raper, as guardians of the infant children of Stephen Sanders, deceased, filed their bill in the Circuit court of Wythe county against John A. Sanders, the executor, to restrain him from selling the slaves of his testator's estate, on the ground that the sale was not necessary for the payment of the debts; and this case continued in court until 1866.

In 1856, John A. Sanders, with the concurrence of the widow Locky Sanders, sold at public auction, at Wythe courthouse, the tract of land belonging to his testator's estate, when Robert Raper became the purchaser at the *price of fifteen thousand dollars. Raper paid \$5,757 96 in bonds, which appear to have been good, though this sum was made up in part of interest due upon the bonds. By the directions of the executor he paid to Mrs. Sanders \$5,000. The balance of the purchase money he paid to the executor; and John A. Sanders as executor and Locky Sanders, on the 11th of December 1856, executed to Raper, a deed with general warranty for the land. This deed recites that \$5,000 of the purchase money was to be paid to Locky Sanders, she conveying her dower in the land.

In the case above mentioned, a commissioner made a report in January 1866, of the executor's accounts; from which it appears that on the 31st of December 1858, upon the account of the personal estate, the executor was in advance to the estate of principal and interest, \$1,886 21; but charging him with two-thirds of the proceeds of the sale of the land, he was debtor to the estate, principal and interest, \$9,306 32. But bringing down the account to the 1st of January 1866, and correcting an error in the account of the personal estate, it appeared that there was due to the executor on that account, \$35 54; and there was due by him on the account of the real estate, \$9,857 58 of principal, and \$4,731 61 of interest; and there was a decree against him accordingly.

In August 1866, Robert Sanders and Stephen Sanders, infant children of Stephen Sanders, deceased, by their next friend, filed their bill against Robert Raper and Locky Sanders, as their guardians, and John A. Sanders, as executor of Stephen Sanders, deceased. They set out in their bill the facts hereinbefore stated. They charge that, without anything in the will to authorize it, John A. Sanders, the executor, and Raper, colluded and entered into an agreement, by which Sanders undertook, as executor, to sell the lands of the plaintiffs to Robert Raper, their guardian.

That at the *time of the sale Sanders was much in debt, and applied the whole proceeds of the sale to his own use. That the circumstances were sufficient to give Raper notice of Sanders' intended misapplication of the money, and Raper, being their guardian, was bound to protect them, and had no right to take to himself,

by any arrangement with the executor, their property, or in any way to deal with it to their prejudice. That Raper, being their guardian, and having in his hands the purchase money of their property, was bound to retain it to their use; and if he paid it to Sanders, he paid it in his own wrong, and is bound to account to them for it. That John A. Sanders had become hopelessly insolvent, and the plaintiffs are penniless, whilst their guardian is in possession of a large estate belonging to them, which he has purchased and obtained by a breach of his duty as guardian. And they pray that Raper may be decreed, as guardian, to account for the portion of the purchase money of the land purchased by him, and which he paid over to said Sanders; and for general relief.

Raper and Mrs. Sanders answered the bill, and it was taken for confessed as to John A. Sanders. Raper denied all collusion with Sanders in the sale and purchase of the property; or that there were any circumstances attending the sale, or the payment of the purchase money, calculated to give him notice, or awaken his suspicions, of any intended misapplication of the purchase money by Sanders. Respondent had nothing to do with the sale except as a purchaser. The land was sold at Wytheville, at public auction, and he became the purchaser. He had no suspicion of anything unfair or illegal in the action of the executor, who he supposed to be selling under a clearly defined discretion vested in him by the testator. At the time of the sale Sanders was reputed to be in entirely solvent circumstances, and respondent had no reason to believe anything to the contrary.

He denies that he, as guardian, was
64 under *any obligation, or had the right, to interfere with the sale, or to retain the purchase money, or to see to its application. The whole question of sale and disposition, and management of the proceeds, was confided by the testator to the judgment and discretion of the executor exclusively; and respondent had the right to presume he was exercising his power fairly and faithfully. The land, at the time of his purchase, was producing very little, and was deteriorating, and it was thought by the executor, and by many others acquainted with the matter, that the money invested would be more advantageous to the parties concerned, than the small income derived from the culture of the land. He insists that he paid a liberal price for the land; and that the widow having renounced the will, and taken her dower, the contingency contemplated by the testator had arisen upon which the executor was authorized to sell.

It is unnecessary to give the answer of Mrs. Sanders. The testimony showed that the land had been rented for some years, for about \$200 a year for the two-thirds belonging to the infants, and was declining in value; and that Raper gave a full price for it. And it was proved that John A. Sanders was, at the time of the sale, re-

garded as a wealthy man, possessing a large property, and his credit was good. He owned forty-odd negroes, mostly young, and a valuable real estate, well stocked; and his credit remained good until after the war. He then became insolvent. There was no evidence of any collusion between him and Raper as to the sale and purchase of the property.

The cause having been removed to the Circuit court of Washington county, came on to be heard on the 16th of November 1867, when the court held, that at the time of the sale of the land and of the conveyance to Raper, the power to sell under the will of Stephen Sanders had not arisen; and that the sale and conveyance made by John A.

Sanders to Raper were inoperative
65 and void, *to the extent of the inter-

ests of Robert and Stephen Sanders, but were valid as to Mrs. Lockey Sander's dower interest. It was therefore decreed that said sale and conveyance, to the extent stated, should be set aside, and to the extent of Mrs. Sander's dower interest should be valid. That a commissioner of the court should take an account of the rents and profits of the land from the time Raper took possession of it, charging him with two-thirds thereof, and crediting him for any permanent and valuable improvements made by him, out of the ordinary course of farming, if any there be, and also charging him with any acts of waste which he may have committed. And commissioners were appointed to lay off to the said Raper the dower interest of Mrs. Sanders in the said land, in such mode as to give to plaintiff (quære, if not defendant?) the house and curtilage of the testator, if that can be done with justice to the parties. And the same commissioners were directed to make partition of the land between the plaintiffs, Robert and Stephen Sanders, so as to divide between them the entire tract including the dower held by Raper. From this decree, Raper obtained an appeal to the District court of Appeals at Abingdon; and the case was afterwards sent to this court.

Kent and John W. Johnston, for the appellant.

Baxter and John A. Campbell, for the appellees.

ANDERSON, J., delivered the opinion of the court.

This suit was brought by the infant heirs of Stephen Sanders, deceased, to recover their paternal inheritance, which had been sold by the executor of their deceased father, and purchased by the appellant, who was one of their guardians. The executor having received the whole fund arising from the sale of the complainant's land, and appropriated it to his own use, had become hopelessly *insolvent; and their
66 guardian was in possession of their land, which he claimed to be his own by purchase.

The bill sets out the will of Stephen

Sanders, and charges among other things, that said sale was without authority of law. The decree of the Circuit court sets it aside as null and void, gives the land to complainants, and holds the appellant to account for rents and profits; from which decree he appeals to this court. The importance of the case, the highly respectable character of the parties, and the magnitude of the interests involved, demand for it our most earnest and careful consideration.

Many questions have been raised, and issues made in argument, by the learned counsel, which, upon the view we have taken of the case, we do not deem it necessary to decide. Whilst the conduct of the executor, in undertaking to execute a trust, to make sale of the real estate, which he claimed to have been confided to him by the will of Stephen Sanders, without having given the bond and security, and taken the oath required by law; and then appropriating the fund arising from the sale of the land to his own use; notwithstanding the confidence he had in his own financial ability to refund it, cannot be regarded otherwise than as extremely reprehensible; and whilst the purchase of his wards' land by the appellant, and the payment of the purchase money partly in paper, a considerable portion of which was not bearing interest, and especially the payment made in the executor's own debt, in satisfaction of his obligation to the executor for a debt which was bearing interest, and which was really due to his wards; and in fact the making of payment at all to the executor, who had not given security and qualified as the law required, of a debt really due from him to his infant wards; considering the relation which he sustained to the beneficiaries of the fund, as their guardian, we must say, evidences great indiscretion, if not unwarrantable insensibility to the obligations

67 of his trust; nevertheless, we are of opinion that there is no evidence of collusion between the said executor and Robert Raper, in the sale and purchase of the land; and no evidence of mala fides, on the part of either; and that the whole question is one of power. Was the said sale and conveyance by the executor, within the scope of the power and authority with which he was clothed by the will of Stephen Sanders?

It is contended by appellant's counsel, that the power results from the charge upon the whole estate for the payment of debts. But we do not think it can be put upon that ground. The sale, it is evident, was not made for that purpose. The bill charges that it was made without authority of law; and the answer of Robert Raper does not pretend that it was sold for payment of debts. On the contrary, he says, he "had no suspicion of any thing unfair or illegal, in the action of the executor, whom he supposed to be selling under a clearly defined discretion, vested in him by the testator." And again, "the whole question of sale and disposition and management of the proceeds, was confided by the testator to the

judgment and discretion of the executor exclusively; and (he) had a right to presume that he was exercising his power fairly and faithfully." The bill as against the executor, is taken for confessed. But his deposition is taken by his co-defendant, Robert Raper, and in that he says, "he sold it under the power he thought he had in the will. And in answer to the question, "what motives governed you in selling the land, under the discretionary power vested in you under the will?" he says, "I thought it was the best thing I could do for the children." It was not pretended by either of them, that the land was sold for the payment of debts. Nor does it appear from the record that there was any necessity to sell the land for payment of debts.

Robert Raper, as guardian, had re-
68 sisted by a suit *which was then pending, the sale of negroes for the payment of debts, upon the ground that it was not necessary, and in fact that there was no indebtedness; and obtained an injunction to restrain the executor from selling the slaves. After the sale of the land, he, with Lockey Sanders, the widow, and his co-guardian, filed a supplemental bill in that suit, in which they allege that "John A. Sanders, in the exercise of a power and discretion claimed by him under the will of his said testator, has proceeded to sell the real estate of the said Stephen Sanders." John A. Sanders, in his answer, admits the sale of the land, "which, he alleges, he had a right to do, in the exercise of the unlimited discretion vested in him by the power conferred in the will of his said testator, which said power does not stop with the mere disposal of the land itself, but is expressly extended to the loaning of the money, the proceeds of the sale." I think, then, there can be no question that the land was not sold for the payment of debts. If the executor had proposed to sell the land for that purpose, Robert Raper, instead of acquiescing and sanctioning it by becoming the purchaser, would doubtless have resisted the sale. Indeed, if after resisting the sale of personal property for the payment of debts, upon the ground that there was no necessity and no indebtedness, he afterwards, while that suit was pending, and undetermined, acquiesced in the sale of the land for such a purpose, and became himself the purchaser, it would have been very strong evidence of fraud and collusion. And it seems to me under the circumstances referred to, that for the executor to hold out to the world, and especially to the guardians of the infant heirs, that he was selling the land, in the exercise of discretion and authority vested in him by the will to make an advantageous investment for the children, when he was in fact selling for the payment of debts, the existence of which was being contested by the guardians
69 in a suit *then depending, such sale would have been a fraud upon the guardians and their wards.

The whole case is then resolvable into

this inquiry: Does the will confer upon the executor the power to make the sale and conveyance of the land which is involved in this suit? The only power given to the executor to sell, is given by the third clause of the will. The second clause requires that, as long as the wife of the testator shall remain his widow, all his property, both personal and real, shall be kept together, subject to the control of the executor, but the possession to be in his wife during her widowhood. But the third section provides, "if my wife Lockey Sanders should marry, then it is my will that she take one-third of my estate, and the remainder to be put in immediate possession of my hereinafter-named executor; and if, in his opinion, it should at any time thereafter be more advantageous to the interest of my child or children, to sell the entire estate, both real and personal, and loan the money at interest for the benefit of my child or children, he is hereby authorized to sell the same, whenever in his discretion it may become necessary to do so." Language could not be more explicit. There is no ambiguity here requiring judicial construction. It was argued for the appellant that the word "thereafter," according to grammatical construction, refers to the taking possession by the executor as its immediate antecedent. To give it that construction, it seems to me, does not alter the effect. Because the will does not authorize him to take possession until after the widow marries. So that, upon that construction, the power to sell is not given, except in the event of the widow's marriage. But the whole sentence should be taken together to perceive what was in the mind of the testator. The first idea was that his wife, who was young and attractive, might marry again. I do not understand the will as designed to be restrictive of her

70 second marriage. In that event *the testator provides liberally for her. He gives her the one-third of his whole estate; a much more liberal provision than the law makes for her, if she should renounce the will. He seems to have had unbounded confidence in his wife, and strong affection for her. I regard his will as investing her with his whole estate, real and personal, for and during the term of her life, upon condition that she remains his widow. His confidence in her is so great, that, in that event, he makes no provision for his children, which were undoubtedly the objects of his tender solicitude and affection. As long as his wife remained a widow, they were entitled to no distribution of his estate. He seems to have relied upon his wife to provide for them as long as she remained a widow. But, in the event of her marriage, there would be such a change in her circumstances and condition in life, as to make a change in the disposition of his property, with reference to his children, necessary. New relations would be formed, and other interests would arise. The second husband would have the use and management of his wife's property, and his

interests might conflict with those of the testator's children. It was necessary, therefore, that he should make other provision for his children in that event. And this is the second thought which would naturally arise in his mind, what provision shall I make for my children, to have effect if that event should take place. Their interests would be separate and distinct from their mother's and a separate and independent provision should be made for them. He therefore provides for a division of his estate. Instead of his wife having his whole estate, during her life, if she remains his widow, he gives her one-third of his estate, and he gives to his children the residue. He not only gives to his children an estate, but provides for it a custodian. He could not commit it to the custody of his wife; that would be to commit it to her husband's control. He commits it to

71 the custody of his father, *whom he constitutes his executor, requiring him to take immediate possession of it, and investing him with power thereafter to sell it, if in his discretion, he should think it would be advantageous to the interests of his children to do so, and to loan the money at interest. The whole provision, giving to his wife one-third of his estate, which she is authorized to retain in possession; the immediate transfer of the residue to the possession of his executor, for the benefit of his children; and the sale thereof, at the discretion of his executor, are all dependent upon the happening of one event; to wit: the marriage of his wife. Until that event occurred, no change was to be made in the disposition which he had, in the previous clause of his will, made of his estate; and until that event, the marriage of his wife, occurred, the whole estate was hers, and no power was vested in the executor to sell.

But it was argued that the renunciation by the wife of the provision made for her in the will, was equivalent to the marriage of the wife; and operated so as to invest the executor with power to sell: That it produced precisely the same state of things, at least as to the necessity for a division of the estate, that would have been produced by the event, upon the happening of which the executor was authorized to sell. I could not admit the soundness of this position, even if the facts of which it is predicated could be conceded. Where the testator gives an authority or power, upon the happening of an event which he specifies, that authority or power does not attach from the happening of a different event, although the effect may be the same upon the condition of his estate, or the status and interests of those who are to be affected by the exercise of the power. But the renunciation by the widow, of the provision made for her by the will of her husband, which seems to be greatly to the prejudice of her own interests, and ill-advised, did not produce that change of relation, and condition, which

72 *would have been caused by her second marriage; and which was doubt-

less in the mind of the testator when he indicted that third clause in his will. It is true, by the renunciation she surrendered the whole estate for life, if she remained a widow, and the one-third in fee, if she married, for one-third of the estate for life; but that was no reason why she might not have retained possession of her children's part of the estate, which she surrendered to them by her act of renunciation; and as their guardian, she was entitled to the possession and management of it. By this act of hers there was no necessity for any interference by the executor, with her possession; and it conferred upon him no powers, and devolved no duties which did not exist prior to her renunciation.

There is no reason to believe that her renunciation of the will, if it had been anticipated by the testator, would have induced him to have taken from her the possession and enjoyment of the whole estate; at least during the minority of the children, if she remained his widow; or, that he would have required his executor to take immediate possession of the children's part, with power to sell it at his discretion. There were reasons for investing the executor with this power, in case of her marriage, which would not apply to the mere act of renunciation. The only effect of renunciation was to give the children a present interest in two thirds of the estate, instead of retaining the whole herself during life, in case she did not marry. And as long as she remained a widow, there was no reason why the desire and will of her husband, that she should have the custody and management of her children's interests in his estate, should not operate after her renunciation as well as before. But whatever disposition the testator might have made, in the event of her renunciation, if he had anticipated it, he made none, as contingent upon such an event, and it is not in the power of the courts to make it for him.

73 Upon the whole, we are of opinion that the language of the will is clear and unambiguous; and that it only gives to the executor power to sell the land of the infant children of the testator, in the event of the widow's marriage; and that there is nothing in the circumstances surrounding the testator at the time he made his will, or in the after act of renunciation by the widow, which can change the plain import of the terms of the will. And the wife of the testator, not having married, the executor had no power to sell and convey the land which descended to the infant children of the testator, to the appellant, Robert Raper, as set forth in this record. In the language of Judge Carr, in *Jackson v. Ligon*, 3 Leigh, 161, 193, a case involving the same question, as to the power of the executor, under a similar provision in the will, and when there was a renunciation by the widow, we may say in this case, "Call it a naked power or a power blended with a trust; construe it strictly or liberally, still you cannot make it a power to sell the land while the wife was unmarried."

It is objected to the decree, that it is inconsistent with the prayer of the bill and with the case stated. We do not think it is inconsistent with the case made by the bill; and, though it is not in accordance with the special relief asked, it is proper under the prayer for general relief.

The objection, that the decree directs the land to be put into the hands of infant heirs, if it were an error, may be corrected, as the decree is only interlocutory. But both of the appellees, being now of age, as shown by the record, it is not necessary to amend the decree in that respect.

It is also objected, that the decree is erroneous, because it interferes with the previous assignment of dower to the widow, which the appellant has purchased. It appears from the record, that on the motion of Lockett Sanders, an order was made by the court for Wythe county, 15th of October 1850, appointing commissioners 74 *to lay off and assign her dower in the lands of her deceased husband, Stephen Sanders. That proceeding was *ex parte*. The heirs were not parties to it; and if the commissioners had reported an assignment of dower, and that had been confirmed by the judgment of the court, which does not appear, it could not have been binding upon them. The wife's dower, and the interests of the heirs, were conveyed to the appellant by the same deed. The decree invalidates and annuls the deed as to the heirs, and confirms it as to the widow. It was necessary, then, to a final decree, and to an adjustment of the rights of all the parties, to ascertain what part of the land the defendant Robert Raper was entitled to under his purchase from the widow, and what part each of the complainants was entitled to, as the heirs at law of Stephen Sanders, deceased, and to allot to each one his share, and thus to make an end of the controversy. And to this end it was necessary and proper to appoint commissioners for that purpose. We are of opinion, therefore, that there is no error in said decree, and that the same ought to be affirmed.

Decree affirmed.

75

*Hale v. Wilkinson.

June Term, 1871, Wytheville.

1. *Contracts—Confederate Currency.**—A contract made in August 1863, for the sale of land to be paid for in Confederate currency is a valid contract.
2. *Evidence—Unstamped Writings—Effect of Act of Congress.*†—A deed or other writing though not stamped, is admissible in evidence; the act of congress not applying to proceedings in State courts. And it seems it is admissible in evidence in the United States courts, unless the omission to stamp it was with fraudulent intent.

**Contracts—Confederate Currency.*—See *foot-note* to *Ambrose v. Keller*, 22 Gratt. 770. See also, *Calbreath v. Va., etc., Co.*, 22 Gratt. 706; *Ambrose v. Keller*, 22 Gratt. 777, 778.

†*Evidence—Effect of Act of Congress.*—In *Crews v. Farmers' Bank*, 31 Gratt. 355, the principal case was cited to support the proposition that congress has

3. **Specific Execution of Contracts—Inadequate Consideration.**—Specific performance of a contract for the sale of land will not be refused on the sole ground of inadequacy of price, unless it is itself evidence of fraud.

4. **Same—Same.**—The inadequacy of price which will operate to prevent the specific performance of a contract, must be inadequacy at the time of the sale.

5. **Same—Same—Case at Bar.**—In August 1863, H sold to S certain real estate for \$10,000, payable in Confederate money, at three and six months. S did not pay the money when it fell due, but he paid it in November 1863, and during the year 1864, and January 1865; H accepting the money and giving receipts for it. The land was estimated to be worth at the time and since the war, \$6,000 in gold; and the value of the Confederate money when paid, was in gold \$385. Upon a bill by S for specific performance of the contract filed since the war, the only objection to it being that of inadequacy of price, S is entitled to the specific performance of the contract.

This was a suit in the Circuit court of Carroll county, brought in March 1866, by James Wilkinson, against Fielding L. Hale, to enforce the specific execution of a contract for the sale and purchase of land. It appears that on the 14th of August 1863, by agreement under seal, Hale sold to Wilkinson a house and lot, including about fourteen acres of land, for ten thousand 76 dollars, *payable in Confederate money, one half to be paid in three, and the other half in six months, from the date.

Wilkinson did not pay all the purchase money as it fell due, but paid it during the months of November 1863, March, May and December 1864, and in January 1865, Hale receiving it, and giving receipts for the nominal amounts paid as so much paid in part of the purchase money.

In September 1865, Hale put Wilkinson into possession of the property, under a no power to declare by law what shall or shall not be evidence in a state court.

‡**Specific Performance—Inadequate Consideration.**—It is a well established rule that mere inadequacy of consideration is not a valid objection to the specific execution of a contract, unless it be so great as to shock the moral sense, and thus be in itself evidence of fraud. The principal case was cited as authority for this rule in *Booten v. Scheffer*, 21 Gratt. 494; *Talley v. Robinson*, 22 Gratt. 895; *White v. McGannon*, 29 Gratt. 515; *Stearns v. Beckham*, 31 Gratt. 391; *Terry v. Coles*, 80 Va. 700; *Whittaker v. South*, etc., Co., 34 W. Va. 223, 12 S. E. Rep. 509; *Clay v. Deskins*, 36 W. Va. 355, 15 S. E. Rep. 87. See also, *foot-note* to *Mayo v. Carrington*, 19 Gratt. 74; *foot-note* to *Griffin v. Cunningham*, 19 Gratt. 571; *foot-note* to *White v. McGannon*, 29 Gratt. 511.

§**Same—Same—Time of.**—In *Pennybacker v. Laidley*, 33 W. Va. 640, 11 S. E. Rep. 45, the court said that the inadequacy must be established as of the date of the contract, and if there were not, at that date, such inadequacy as had been described, none can arise from subsequent enhancement, depreciation, or change of circumstances; and cited the principal case as authority for the proposition.

written agreement, by which Wilkinson was to rent it; and if it should be determined that Wilkinson was entitled to have the contract executed, then he was not to pay the rent.

Hale in his answer, filed on the day the bill was filed, insisted—That the contract, when it was made, was utterly null and void, and in open and plain defiance of law: That the contract wholly failed for want of consideration, which was Confederate money, and, at the time the contract was made, it was a highly penal crime to pass or receive it, and the circulation of it forbidden by law: That the plaintiff did not perform his contract by paying the purchase money when it fell due, but the payments were made long after it was due, and when the money had greatly depreciated, and was in fact worthless: That the receipts were not intended to express the receipt by the defendant of so much of the purchase money as was stated therein; but only so many dollars of Confederate money, to be estimated at the value when it should have been paid; they all express to be "in part payment," or "towards," &c. That his sole object in selling was to remove to Alabama, which was defeated by the delay of the plaintiff in paying the money; though he had removed since the war. That if he had been paid promptly he could have purchased property then that would have suited him. And that the property he sold was worth, in gold, at the time \$6,000, for which he had in fact received not more than \$425 at the utmost.

77 *There is proof that at the time of the contract, and since the war, the property was worth \$6,000 in gold; and that Hale talked of moving South, and was making arrangements to do so about the time of the sale of the property; and that he complained frequently of Wilkinson's failure to make the payments for it. The value in gold of the money received by Hale, at the time of the receipt, a witness fixed from a table in his possession, at \$384.98%.

On the 22d of March 1866, the cause came on by consent to be heard, when the court decreed that Hale should convey the property to Wilkinson; and by a decree of the 24th of August 1866, Hale having failed to make the deed, a commissioner was appointed to do it. And from this decree Hale applied for and obtained an appeal to the late District court at Abingdon; by which court, on the 18th of July 1868, the decree of the Circuit court of the 24th of August 1866 was affirmed. From this decree Hale applied to this court for an appeal, which was allowed.

Richardson and Jno. T. Campbell, for the appellant.

Gilmore, for the appellee.

MONCURE, P., delivered the opinion of the court. After stating the case, he proceeded:

One of the objections, made to the specific execution of the contract in this case, and

the one which seems to have been most relied on in the answer, and in the petition for an appeal to the District court, was, that the consideration was agreed to be paid in Confederate money, the passing and receiving of which is, and was, at the time the contract was made, (the 14th of August 1863), a highly penal crime, and the contract was therefore illegal and void. In the argument of the case before this court, no reliance was placed on this ground, which

78 was not even alluded to, by the counsel for the appellant; *for the very good reason, that since it was taken, the course of adjudication, if not of legislation, also, has shown it to be unsustainable.

In the petition for an appeal to the District court in this case, the learned counsel who drew it, remarked: "It might be curious to think how the Supreme court of the United States would regard this case, if it should, as it may go before them." And yet it has curiously happened, that since that petition was drawn, a case very much like this, involving the question of the legality of such contracts, has gone to the Supreme court, which fully sustained their legality. In *Thorington v. Smith*, 8 Wall. U. S. R. 1, decided by that court in December 1868, it was held, according to the reporter's marginal abstract of the case, that "a contract for the payment of Confederate States treasury notes, made between parties residing within the so-called Confederate States, can be enforced in the courts of the United States, the contract having been made on a sale of property, in the usual course of business, and not for the purpose of giving currency to the notes, or otherwise aiding the rebellion." If such a contract can be enforced in the courts of the United States, a fortiori, it may be enforced in the courts of a State which was one of the Confederate States. After this decision, and without referring to the course of legislation and adjudication in this State, the question as to the legality of such a contract, may be considered as settled.

Another objection was much relied on in the said petition, but not alluded to in the argument of the appellant's counsel in this court; and that is, that the agreements and receipts filed as exhibits with the bill, are null and invalid for want of being properly stamped, and ought not to have been used or considered for any purpose in the cause. All, or nearly all of these instruments appear to have been actually stamped. But

79 the objection seems to be, or rather to have been, that they *were not "duly stamped;" that is, not by the proper person and at the proper time. Now it happens, in regard to this question also, that the Supreme court of the United States has recently decided, that "the omission of a stamp does not invalidate an instrument, unless the omission was with fraudulent intent. Such omission, if fraudulent, cannot be taken advantage of on demurrer; it must be set up by a special plea, or urged at the trial." *Campbell v. Wilcox*, decided at December term 1870, and reported in the

"Law Times, U. S. court's reports," vol. 4, p. 67. If there was an omission in this case, it was obviously not with a fraudulent intent. Nor was the objection set up by special plea, or even in the answer, which refers to the bill and exhibits filed therewith for proof that the contract is as stated in the answer. But it appears to have been recently held in several cases, that the provision of the act of congress of 30th June 1864, declaring that no instrument required by law to be stamped shall be admitted or used as evidence in any court without being legally stamped, does not include the State courts; and that congress has no power to establish rules of evidence for the State courts. 2 Brightley's Dig., p. 375, note (a), referring to *Carpenter v. Snelling*, 97 Mass. R. 452; *Hallock v. Jaudin*, 34 Calif. R. 167; *Beebe v. Hutton*, 47 Barb. R. 187; *Howe v. Carpenter*, 53 Id. 382, and other cases. This objection in regard to stamps is therefore unfounded.

But the defence mainly, if not now exclusively, relied on in this case is, that the question whether there should be a decree for the specific performance of a contract, is one which addresses itself to the sound discretion of a court of chancery under all the circumstances of the case, and that in the exercise of such a discretion no such decree ought to be made in this case. It is true that the specific performance of contracts, in a general sense, is, as has been said, not a matter of right in either party,

80 but a matter of discretion in the court; not, indeed, of *arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion which governs itself, as far as it may, by general rules and principles; but, at the same time, which withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties. 2 Story's Eq., § 742. But this whole subject is so fully considered in the able opinion delivered by my brother Christian in this court a few days ago, in the case of *McComas v. Easley*, that nothing more need here be said about it. I will, however, repeat this much, that "where, indeed, a contract respecting real property is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it, as it is for a court of law to give damages for the breach of it." 2 Story's Eq., § 751. This proposition is self-evident. The law always enforces the contracts of men where they are unobjectionable. The literal and exact enforcement of a contract requires its specific execution, whatever may be the subject of such contracts. Generally, specific execution of a contract in regard to personalty will not be decreed, but the parties will be turned over to their legal remedies, because they are more convenient than equitable remedies, and damages, generally, afford ample and satisfactory compensation. When personal

property has a peculiar value, a legal remedy is provided for its recovery; and, if necessary, resort may be had to a court of chancery for its recovery on that very ground. But land always has, in the eye of the law, a peculiar value, and a contract for the sale and purchase of it, if unobjectionable, will therefore be specifically executed. In no other way can the parties receive the full benefit of their contract. And no court, having jurisdiction of the subject, and being properly applied to for such relief, can withhold it, but by an act of arbitrary power.

81 *Then the question in this case resolves itself into this, whether the contract here, in its nature and circumstances, is unobjectionable?

The only objection made to it is, that the price agreed to be paid, and actually paid, for the land, was an inadequate consideration therefor, and therefore the court should refuse to compel the vendor to convey the land to the vendee.

It is admitted that inadequacy of consideration is always a material circumstance to be considered, along with other circumstances existing in a case, conducing to show that it would be inequitable to enforce the specific execution of a contract.

And it is also admitted, that where there are no such other circumstances, but the inadequacy of consideration is such as to shock the moral sense of mankind, it is in itself evidence of fraud, and sufficient to prevent the specific execution of the contract.

But here the inadequacy of the consideration, if it be inadequate in the sense in which we are now considering it, stands solitary and alone, as the ground on which relief is claimed from the obligation to perform the contract. It is not pretended that any fiduciary relation existed between the contracting parties at the time of the contract, or at any other time. It is not pretended that any fraud or influence, undue or otherwise, was practiced by the vendee on the vendor to induce him to enter into the contract. It is not pretended that it was made under any misrepresentation or mistake. It is not pretended that the vendor was not a man of perfectly sane mind, capable of making contracts, and taking good care of his own interest. It was said in argument by the counsel of the vendee, that the vendor is a man remarkable for his experience in and capacity for business. Of course that is not in the record, and cannot be regarded by the court. But there is not a particle of evidence in

82 the record tending to show the contrary, which doubtless *would have been shown, if the contrary had been the fact. At least, we may say that any circumstance whatever, which would have afforded the least aid to the ground relied on of supposed inadequacy of consideration, would have been proved if it had existed. It must therefore be taken, that the supposed inadequacy of consideration stands alone as the ground relied on. And the

question now is, whether it be, of itself, a sufficient ground.

That it, is not of itself a sufficient ground for setting aside a contract, unless the inadequacy be so great as to shock the moral sense, and thus be proof of actual fraud, seems to be well settled.

But it seems to be supposed that there is a difference in this respect between a suit to set aside and a suit to enforce the specific performance of a contract. And no doubt a court will often refuse to set aside, where it would also refuse to execute, a contract. But I think it will be found that in most, if not all the cases, in which the court has refused to enforce the specific performance of a contract, on the ground of inadequacy of consideration, there has been some other circumstance in connection with it which would have made it inequitable and unconscionable to make such a decree.

The case of Seymour v. Delancey, &c., 6 John. Ch. R. 222, is a leading case of that kind. In that case there were certainly many and strong circumstances, in addition to that of inadequacy of consideration, tending to show that it would not have been proper to decree the specific performance of the contract. The learned Chancellor Kent commences his opinion by saying: "The question in this case is, whether it be fit and proper, under all the circumstances, to decree a specific performance of the contract of sale. To be sure, he then says that "the main objection to the exercise of this power of the court in the present case, is the great inadequacy of price which the plaintiff

83 was to allow for the two *farms, of which he seeks title." But on pages 232 and 233, he details the additional circumstances which induced him to refuse to make the decree sought for.

In that case, it is true, the chancellor expresses the opinion that mere inadequacy of price, though not of itself sufficient to set aside a sale of land, yet is sufficient to induce the court to refuse to decree a specific performance of a contract of such a sale. But the decision in that case was reversed on appeal. Same case, 3 Cow. R. 445; to which book, however, I have not now access.

There are other cases on the same subject, but I deem it unnecessary to refer to them in detail, especially as I have not access to all of them. Most of those which had occurred when Seymour v. Delancey was decided by Chancellor Kent in 1822, are reviewed in his opinion in that case.

In Fry on Specific Preformance, second American edition, chapter 7, under the head "of inadequacy of the consideration, embracing §§ 275-285, the author reviews the principal English cases which had been decided at the time of the publication of his work; and the American editor refers to those since decided, and the principal American cases down to 1861, the date of that edition. In this summary, may no doubt be found as correct an exposition of the law on the subject as anywhere else.

The author commences the chapter by

saying: "We now proceed to enquire how far the inadequacy of the consideration for a contract may furnish a defence against its specific performance. § 275. Further on he says: "There is no doubt that inadequacy of consideration, when combined with any case of fraud, misrepresentation, studied suppression of the true value of the property, or with any circumstances of oppression or even of ignorance, is a most material ingredient in the case, as affecting the discretion of the court in granting specific performance; and further, it may materially concur in constituting a case

84 for setting aside a transaction." *§

277. After referring to several cases of that class, he says: "The question, however, which has been principally discussed is the effect on contracts of the inadequacy of consideration, taken by itself and abstracted from all other circumstances." §

278. "With regard to it as a ground for the setting aside of transactions, the doctrine of the court is, that inadequacy of consideration, if only amounting to hardship, or even great hardship, is no ground for relieving a man 'from a contract which he has wittingly and willingly entered into;' but that it may be so enormously great as to be a conclusive evidence of fraud, and that it is then a ground for setting aside the transaction affected by it."

§ 279. "Regarded as a ground of defence to a specific performance, the doctrine of the older cases was, that it was sufficient, it being regarded, even where not amounting to evidence of fraud, as a circumstance of hardship which would stay the interposition of the court." § 280. After stating some of the older cases, the author thus concludes: "But it seems now to be established by the decisions of Lord Eldon and Sir William Grant, that mere inadequacy of consideration is no defence to specific performance, unless it amount to an evidence of fraud, and so would furnish a ground even for cancelling the contract. (Per Lord Eldon in *Stilwell v. Wilkins*, Jac. R. 282.) 'Unless the inadequacy of price,' said Lord Eldon in one case, (*Coles v. Trecothick*, 9 Ves. R. 234, 246), 'is such as shocks the conscience and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance.'"

There can now, I suppose, be no doubt as to what is the English law on the subject, and that it conforms to the decision of those two great chancery lawyers, Lord Eldon and Sir William Grant. In the American cases, there seems to be some conflict; but as I have before remarked, it will perhaps be found, that in most of the cases in which

85 inadequacy of consideration has been said *to be a sufficient ground of itself to prevent a decree for specific execution, some additional circumstance existed for refusing such specific execution. The cases may be seen by reference to the notes of the American editor to chap. 7 of *Fry on Specific Performance*, and the notes of Hare

and Wallace to *Woolam v. Hearn*, 2 leading cases in equity, edition of 1859, pp. 404, 696 and 697. In this State, we have no case directly on the subject. The case of *Cribbins v. Markwood*, 13 Gratt. 495, which was a unanimous decision of this court, perhaps serves to show the inclination of the mind of the court. In that case it was held: 1st, that a sale of a reversion in real estate by a young man who had just arrived at the age of twenty-one years, there having been no fraud or imposition on the part of the purchaser, and no confidential relation between the parties, will not be set aside for mere inadequacy of price; and 2dly, that the English doctrine in relation to the sale of expectant interests, so far as it relates to vested "interests, is not law in this State." Judge Allen, in delivering the opinion of the court in that case cites, with approbation, the case of *Griffith v. Spratley*, 1 Cox's Cas. 384, in which Lord Ch. B. Eyre uses this strong language: "The value of a thing is what it will produce, and admits of no precise standard. It must be in its nature fluctuating, and will depend upon ten thousand different circumstances. One man in the disposal of his property, may sell it for less than another would. He may sell it under a pressure of circumstances, which may induce him to sell it at a particular time. Now, if courts of equity are to unravel all these transactions, they would throw every thing into confusion, and set afloat all the contracts of mankind. Therefore, I never can agree that inadequacy of consideration is, in itself, a principle upon which a party may be relieved from a contract which he has wittingly and willingly entered into. It may indeed be a

86 strong evidence of fraud, &c. When you see distress on the one *side and money on the other, and a wish on the one side to press that distress into submission to its terms, inadequacy of price goes a great way in warranting the court to infer from this, that some sort of fraud was used to draw the other party into the bargain."

The English doctrine in regard to the sale of expectant interests which was overruled, in part at least, by the case of *Cribbins v. Markwood*, in this State, is thus stated in *Fry on Specific Performance*, § 270: "The court, considering that a man possessed only of a future interest, sells at a disadvantage, has always refused specific performance of contracts by heirs for the sale of such estates, at an under value; and moreover, has thrown the onus of proving that the transaction was for a full consideration, and in all respects fair, on the purchaser asking for the assistance of the court." See also *Id.* § 285.

Now, *Cribbins v. Markwood* was a case in which the rescission of a contract was the object of the suit, and we do not know what would have been the decision of the court, if specific performance had been the object. But I think we may fairly infer that the court would have decreed such specific performance. At all events, I think

we may fairly infer, that if the case had been one to which the doctrine established by the decisions of Lord Eldon and Sir William Grant, as aforesaid, would have been applicable in England, this court would have applied that doctrine to the case.

Having said thus much, and perhaps too much, in regard to the law which seems to have a bearing upon this case, I will now enquire as to the facts of the case, and see how the law applies to them.

I have already endeavored to show, that even if the consideration of the contract can be considered as inadequate, within the meaning of the doctrine we have been considering, yet such inadequacy is not, of itself, a sufficient ground for refusing to decree the specific performance of the contract.

87 *But I think it cannot be predicated of such consideration, that it was inadequate, within the meaning of that doctrine, and I am of opinion that no case which has been cited, or can be shown, would warrant the court in refusing to decree the specific performance of the contract in this case.

To determine whether the consideration was adequate, and whether the court can now refuse to decree specific performance of the contract on the ground of inadequacy of consideration, we must carry ourselves back to the date of the contract, and the time when the purchase money was paid. If, at that time, the consideration would have been deemed adequate; if the court would then have decreed a specific execution of the contract, had this suit then been brought, it follows, I think, necessarily, that the consideration must now be deemed adequate, and the court must now decree such specific execution. Can there be a doubt, that if this suit had then been brought, the consideration would then have been considered adequate, and the court would then have decreed specific execution? I think none whatever. Here is a case in which parties, sui juris, perfectly competent to make a contract, fairly enter into one with each other for the sale and purchase of a tract of land, at a price agreed upon between them, payable in Confederate money, the only currency of the country at the time, and for a long time before and afterwards; and the purchase money is fully paid. Had not the vendee, then, a right to have the title to the land? Could the vendor, then, have lawfully withheld the title? Would not a court of equity, then, have compelled the vendor to convey the title to the vendee? Why not? Was not the money for which the parties contracted, and which was received in payment, lawful money? Even the Supreme court of the United States, we have seen, has decided that it was, for all the purposes of money, in the business transactions of the country.

88 It *was the only currency of the country, without the use of which no business of any kind could be carried on. Was

not the consideration adequate? Who are the proper judges of that, the parties or the court? Certainly the parties, supposing them to have been competent to make a contract, as they were; and, supposing the contract to have been fairly made, as it was. But there is not a particle of evidence in the cause to show that the consideration was not adequate; that ten thousand dollars in Confederate money was not fully as much as the land would bring in the market, and as the land was worth. The best criterion, ordinarily, of the value of land is what it will bring in the market. There is evidence tending to show that the land was worth \$6,000 in gold. But the sale was not made for gold, and could not then have been made for gold. Certainly could not have been made for anything like as much as \$6,000 in gold. It was sold for Confederate money, and could only have been sold for that kind of money, being then the only currency of the country. Confederate money had a purchasing power, in regard to land and other property, which made it worth much more than its market value in gold with the brokers. As was said arguendo in *Thorington v. Smith*, supra: "While it was 20, 30, or 40, to 1, these treasury notes had an exchangeable power of 2, 3, or 4 to 1, in the different species of property." The vendor sold his land, intending with the purchase money to buy other land in Alabama. Suppose he had done so, and the land purchased had been as valuable as the land sold, as might well have been the case, he would then have lost nothing by the sale, and the consideration would of course have been adequate. Suppose he had applied the purchase money, at par, to the payment of a specie debt, as was often done; he would then have gotten what would have been equivalent to \$10,000 in gold, for land worth at most, according to his

89 evidence, not more than *\$6,000.

There would have been in that case, certainly, no inadequacy of consideration. But suppose he did not lay his money out in land, or pay a specie debt with it, but kept it in his pocket till it perished; or invested it in a Confederate bond, which he kept until it perished; as was the case in hundreds of thousands of instances in the Confederate States. Can this subsequent use or non-use of the money affect the question of adequacy of consideration? Can the purchaser be responsible for the application of the purchase money in such a case? But it is said the purchase money was not paid as it became due, but sometime afterwards, when Confederate money had depreciated in value after the maturity of the instalments. Now, certainly, the vendor might have refused to receive the money because it was not punctually paid; and a court of equity would not have compelled him, in that case, to convey the land. That the money was depreciating, made time of the essence of the contract. But, he had a right to receive the money when paid, and did receive it; and by so receiving it, he waived

his right of objection, and the case then stood as if punctual payment had been made. It sometimes happened during the war that Confederate money was received at par in payment of a specie debt. That it should be received at par in payment of an overdue Confederate debt, was more reasonable, and a more common occurrence. It was the duty of the debtor to have paid his debt at maturity, unless he continued to hold the money by the consent, express or implied, of the creditor. The creditor might have left the money in the debtor's hands, as he might have deposited it in bank, and drawn it out as he might find occasion to use it. Such instances, it is believed, were common during the war. There is no evidence of any demand made by the creditor of the debtor; or of any complaint made by the creditor to the debtor of any default of payment, or that the debtor had

any idea that the creditor wanted the money faster than *he received it.

But if the debtor was in default in this respect, certainly that default was cured by the money being received when it was paid without objection by the creditor. The receipts being given for so many dollars on account of the debt, the money was of course received at par, that being the legal construction of the language used, and there being nothing in the receipts or elsewhere to show a contrary intention. A receipt for Confederate money on account of a specie debt, would be construed as a receipt for so much money at par, and the debtor would be entitled to credit to that amount. A fortiori would this be the case in regard to a Confederate debt. We must therefore consider this case as we would consider it if the payments had been duly made at maturity. And so considering it, I cannot conceive of any ground on which a suit by the vendee for specific execution of the contract after such payment and during the war could have been resisted.

If I be right in that, as I think I certainly am, does it not inevitably follow, that the consideration must now be deemed adequate, and the court must now decree such specific execution? Can the continued default of the vendor until after the war, in not executing a contract which he ought, and might have been compelled to have executed during the war, give him any advantage over the vendee? Take away from the vendee the right he certainly had before, to have the contract executed? If so, upon what ground? Can it be upon the ground of failure of consideration; of a change of circumstances rendering it inequitable to compel the complete execution of the contract? There are cases in which a change of circumstances may render it improper for the court to enforce the execution of a contract. But those are cases in which the plaintiff is in default, or in which the rights of third persons have supervened, and the defendant cannot with propriety, if at all, complete the execution of the contract. Where the plaintiff is not in

91 default; has fully *performed his part of the contract; and nothing remains to be done but for the vendor to convey the legal title which is still vested in him, and which he can convey; the court is bound to decree such conveyance. The land is the vendee's, in equity; the vendor is his naked trustee, and a court of equity will compel him to convey the naked legal title to him who has a right to demand it. He has no equity to hold it against a vendee who has fully and duly performed his part of the contract. It is only in a case in which the defendant has an equity against the plaintiff, that the court can refuse to give relief to the latter, or impose terms upon him. Where there is no such equity, the plaintiff's right to have the legal title conveyed to him is a matter of course, and he is as much the owner of the land in equity before the conveyance, as he is at law after the conveyance. That the money paid for the land, which was a legal and adequate consideration when paid, has since perished, without the default of the vendee, certainly cannot give the vendor any equity to withhold the legal title, which he was bound and ought before to have conveyed. If bank notes be paid for land, and afterwards perish in the hands of the vendor by the failure of the bank, will he be entitled to relief on the ground of failure of consideration? Certainly not: and where is the difference between that case and this? If by the fall of the Confederacy the vendor in this case has lost the whole of the consideration money (and there is no evidence in the record that he has), hundreds of thousands of others have suffered from the same cause, and many of them to the extent of their entire fortunes. We deeply sympathize with such sufferers, and were, to some extent ourselves common sufferers with them. But much as we deplore it, we cannot repair the loss by giving to one man the property of another, who may himself have been as great a sufferer from the same cause in some other way. If the present value of Confederate money is to be

92 considered *in determining whether a consideration paid in it during the war was adequate, instead of the value at that time, then we must not only refuse to compel the specific performance of a contract founded on such consideration, but we must undo and set aside every executed contract or transaction which was founded on such consideration; because, if there be any inadequacy at all on account of the present value of Confederate money, which is utterly worthless, it must of necessity be so great as to shock the moral sense; and that is a sufficient ground for setting aside an executed contract. The establishment of such a doctrine would produce incalculable evils in our southern country, and make it almost a pandemonium.

Upon the whole, I am of opinion that there is no error in the decree, and that it ought to be affirmed.

Decree affirmed.

93

*Barnett v. Cecil, &c.

June Term, 1871. Wytheville.

Absent, STAPLES, J.*

Negotiable Paper—Scaling—Case at Bar.†—D owes C a debt, and in January 1861, D gives his negotiable note at four months, for the amount, with B as his endorser upon the note. C has the note discounted at bank, and it is protested for non-payment. In August 1862 C retires the note, paying the bank in Confederate money, and in 1866 sues D and B on the note. It is a specie debt, and is not to be scaled.

This was an action of debt in the Circuit court of Montgomery county, brought in August 1866, by Daniel R. Cecil against James C. Dyerle, as the maker, and Charles T. Barnett, as the endorser, of a negotiable note for \$812, and charges of protest, \$2.76. There was an issue on the plea of "nil debit;" and the parties waiving a jury, submitted the case to the decision of the judge; and he rendered a judgment for the plaintiff for \$814.76 with interest from the 7th of March 1861 till paid, and his costs. The defendants thereupon applied to the court for a new trial, which was refused, and they excepted.

It appears that Dyerle owed Cecil a debt, and in January 1861 the note sued upon was given for the same. It was made payable at the Merchants Bank of Virginia, Lynchburg. Cecil had the note discounted, and received the proceeds of the discount, at the Bank of the Old Dominion at Pearisburg, Giles county. The note was then sent to the bank at Lynchburg for collection, was protested for non-payment, and notice given to the parties. The note

94 was then sent back to the Bank of *the Old Dominion, at Pearisburg, and in August 1862, Cecil retired the note from bank, paying the amount thereof in Confederate money.

Barnett applied to a judge of this court for a supersedeas to the judgment; which was awarded.

Edmonson & Blair, for the appellant.

Wade, for the appellee, Cecil.

MONCURE, P. This seems to me to be a very plain case. Dyerle owed Cecil a debt, for which, on the 4th of January 1861, a negotiable note was made by Dyerle and endorsed by Barnett, payable four months after date. Sometime after the date of the note, Cecil had it discounted at bank for his accommodation, and received the proceeds. The note was not paid at maturity, but was protested for non-payment, and remained at bank, under protest, until August 1862, when Cecil discharged his obligation as endorser to the bank by paying the amount of the note in Confederate money, received the note from the bank, brought an action of debt upon it against

*He had been counsel in the cause.

†See principal case cited and approved in *Shiflett v. Long*, 23 Gratt. 735; *Burton v. Slaughter*, 26 Gratt. 920.

the maker, Dyerle, and endorser, Barnett, and recovered judgment therein for the amount of the note with interest and costs; to which judgment, a supersedeas was awarded on the petition of Barnett, which brings up the case for review before this court.

The only question presented by the record is, whether the judgment ought not to have been rendered for the scaled value of the Confederate money paid by Cecil to the bank, in discharge of his obligation as endorser of the note, instead of being rendered for the amount of the note.

The counsel for the plaintiff in error contends that the judgment ought to have been rendered only for the scaled value of the Confederate money aforesaid, upon the ground that the defendant in error, Cecil, paid the money as a mere surety, and that a surety can recover of his principal no more than he has to pay for the principal.

95 *It is certainly true, as a general rule, that the contract which the law implies between a principal and his surety is merely a contract of indemnity; and that the measure of the liability of the principal to the surety, is the amount which the latter has to pay for the former on account of the suretyship; so that if the discount at bank had been the origin of the transaction in the case, and the note had been made, endorsed and discounted for the accommodation of the maker and first endorser, the last endorser, Cecil, would have been a mere surety of the other parties, and could have recovered of them only the value of what he had to pay for them.

But such was not the case. The debt was due to Cecil by a negotiable note made by Dyerle, and endorsed by Barnett, and it was a specie debt. Afterwards it was discounted at bank upon the endorsement of the creditor and holder, Cecil, and was protested for non-payment and taken up by Cecil with Confederate money, to whom it was returned by the bank. Now the debt of Dyerle and Barnett upon this note did not cease to be a specie debt by any of the transactions which occurred in regard to it between Cecil and the bank. The bank might have released the obligation of Cecil as endorser to it, upon any terms it chose to accept. It might have given the note back to him for nothing, and Cecil might still have enforced its payment by the original debtors as a specie debt. His right of action was not upon an implied contract of indemnity between a principal and his surety; but upon the note itself, which still remained in full force, and can never be discharged until paid in full according to its terms by the original debtors, unless their creditor chooses to release them on other terms.

For these reasons, I think there is no error in the judgment, and that it ought to be affirmed.

The other judges concurred in the opinion of Moncure, P.

Judgment affirmed.

96

***Jones v. Thomas.**

June Term, 1871, Wytheville.

Bonds—Case at Bar.*—A. T. executes his bond as follows: March 12th, 1863. I hereby bind myself, my heirs, &c., to pay — the amount of principal and interest due from W. A. J. on the tract of land purchased by him of G. W. J. and wife. Witness my hand and seal the day and date above: And he delivers it to W. A. J. **HELD:**

1. **Same—Suits by Beneficiaries.**†—W. A. J. may maintain an action of covenant on the bond against A. T. See Code 1860, ch. 116, § 2.
2. **Same—Same—Allegations.**—W. A. J. may recover upon the bond against A. T. if A. T. has not paid the debt, though it is not averred or proved that W. A. J. has paid it, or has been otherwise injured by the failure of A. T. to pay it.
3. **Same—Same—Same.**—The declaration does not, in its commencement, aver that A. T. covenanted with the plaintiff to pay the debt; but it does so in a subsequent part of it. This is substantially sufficient.
4. **Pleading and Practice—Covenant—Declaration.**—In a declaration on a covenant, it should be set out without any intermediate inducements or statement of the consideration; but if averments are made, which may be treated as mere surplusage, they will not vitiate the declaration.
5. **Bonds—Suits by Beneficiaries—Quære.**—*Quære:* If G. W. J. might not sue on this bond in his own name to enforce the covenant of A. T. under the act, Code of 1860, ch. 116, § 2.

This was action of covenant in the Circuit court of Smythe county, brought in September 1866, by Wm. A. Jones, against Abijah Thomas, upon a writing, of which the following is a copy:

March 12, 1863.

I hereby bind myself, my heirs, &c., to pay — the amount of principal and

***Bonds—Declaration.**—See monographic note on "Bonds."

†**Sealed Contract—Suits by Beneficiaries.**—At common law, an indenture or deed *inter partes* is only available between the parties to it, and their privies; and third persons can maintain no action on covenant thereon, though made for their benefit. This rule laid down in principal case was approved in *Stuart v. James River, etc., Co.*, 24 Gratt. 294; *Willard v. Worsham*, 76 Va. 397; *Newberry Land Co. v. Newberry*, 95 Va. 120, 27 S. E. Rep. 899; *Johnson v. McClung*, 26 W. Va. 662. See also, *Ross v. Milne*, 12 Leigh 204.

This rule, however, does not apply to deeds poll, for, at common law, a person, though not a party to a deed poll, could sue upon it if the instrument showed upon its face that it was made for his benefit. See *Jones v. Thomas*, 21 Gratt. 96; *Stuart v. James River, etc., Co.*, 24 Gratt. 297; *Newberry Land Co. v. Newberry*, 95 Va. 120, 27 S. E. Rep. 899; *Johnson v. McClung*, 26 W. Va. 669.

Same—Same—Effect of Statute.—*Newberry Land Co. v. Newberry*, 95 Va. 120, 27 S. E. Rep. 899, was an action of covenant on a sealed contract *inter partes*. The plaintiff was not a party to the contract, nor a privy to such party, nor did he appear in the contract as a beneficiary; but it was contended that the rule laid down above, as to suits by beneficiaries under a sealed contract *inter partes*, had been

97

interest due from W. A. Jones, *on the tract of land purchased by him of G. W. Jones and wife. Witness my hand and seal the day and date above.

Abijah Thomas, [Seal.]

The last amended declaration sets out, that on, &c., the defendant made his certain deed poll signed, &c., and sealed, &c., and delivered the same to the plaintiff, to wit: on the day and year last aforesaid, &c., by which said deed poll the said defendant covenanted and bound himself, his heirs, &c., to pay the amount of principal and interest due from Wm. A. Jones, plaintiff, on a tract of land purchased by him from G. W. Jones and wife. The declaration then sets out that the plaintiff is the Wm. A. Jones mentioned in the deed; that he had purchased the land, and at the time of the execution of the deed poll, there was due upon the land, \$7,500 with interest, which was a charge upon the land, and the plaintiff sayeth, that the said defendant by his deed covenanted to and with the plaintiff, and bound himself and his heirs, to pay the said sum of \$7,500 with interest thereon, to G. W. Jones, to release the said land of the plaintiff from the lien, &c. And the breach was, that he had not paid the said sum of \$7,500, or any part thereof, to the said G. W. Jones, or to any other person.

The defendant cravedoyer of the writing, and demurred to the declaration; and the court sustained the demurrer, and rendered a judgment for the defendant. To which judgment, the plaintiff obtained a supersedeas from the District court of appeals at Abingdon; where it was affirmed, and he then brought the case to this court.

Terry, for the appellant.

abrogated by the statute incorporated in the Code of 1849 and which constitutes sec. 2415 of the Code of 1887. But the court said: "If one of the objects of the statute was to abolish the distinction between deeds *inter partes* and deeds poll in the respect referred to, and to bring the former within the rule of the common law applicable to the latter, it was clearly not intended to change that part of the rule that only a person named or definitely pointed out in the deed as the beneficiary can sue thereon, and this was not its effect. The statute, does not enable one, who is not a party to the deed, to maintain an action thereon, unless he is plainly designated by the instrument as the beneficiary, and the covenant or promise is made for his sole benefit. As was said by JUDGE ANDERSON in *Stuart v. James River, etc., Co.* (24 Gratt. 294), the rule of the common law in this respect has not been changed by the statute."

But it has been well suggested in the 4 Va. L. R. 616, that, while, in the *Newberry* case, the plaintiff could not maintain his suit under sec. 2415, yet, since it seems that under sec. 2860 one may sue as beneficiary owner under a deed *inter partes* though his interest nowhere appears on the face of the instrument, it is probable that his action might have been sustained, under the last mentioned statute if there had been the proper allegation and proof of his beneficial ownership.

B. R. Johnston and Gilmore, for the appellee.

98 STAPLES, J. This is an action of covenant brought *in the Circuit court of Smythe county. It is founded upon the following instrument.

March 12th, 1863.

I hereby bind myself, my heirs, &c., to pay — the amount of principal and interest due from W. A. Jones on the tract of land purchased by him of G. W. Jones and wife. Witness my hand and seal the day and date above.

Abijah Thomas, [Seal.]

The defendant demurred to the declaration, and upon argument the demurrer was sustained, and judgment rendered in favor of the defendant. Upon appeal to the District court at Abingdon, that judgment was affirmed. The case is now before this court upon a writ of error and supersedeas to the judgment of the District court. Various grounds have been urged in support of the demurrer—now to be considered. It is insisted that as the plaintiff in error is not a party to the instrument, nor the debt payable to him, he can maintain no action thereon in his own name. It is undoubtedly true that at common law an indenture or deed inter partes is only available between the parties to it, and their privies; and third persons can maintain no action on covenant thereon, though made for their benefit. This rule, however, does not apply to deeds poll—as to which it has been long settled that persons beneficially interested therein may sue, though not described as contracting parties.

The distinction is founded on the difference in the form and qualities of the respective instruments. A deed inter partes is a agreement under seal between two or more persons executing the same, and entering into reciprocal obligations with each other. It is a solemn declaration that all the covenants comprised in the instrument, are intended to be made between those parties and none others. A deed poll on the other hand, is the act of a single party, 99 and is in the nature of a *declaration made by him of his intentions or obligations to some other person.

The case chiefly relied on by the learned counsel for the defendant in error, is that of *Green v. Horne*, 1 Salk. R. 197. That was an action of covenant upon any instrument in these words: "I (the defendant) do promise and engage myself to bring in the body of A, to the custody of B, bailiff (such a day). The plaintiff declared that A, being indebted to him, and arrested at his suit, the defendant, in consideration that the plaintiff would order the bailiff to let A go at large, covenanted with the plaintiff to bring in the body of A, and deliver him to the custody of the bailiff." The court held that the plaintiff was no party to the deed, and could not maintain an action upon it. Now, it will be observed that the defendant's covenant was to produce the body of

A, and deliver him to the custody of the bailiff. But the plaintiff is not named, nor in any manner alluded to therein. Whatever connection he had with, or interest in, the covenant, could only be shown by testimony dehors the deed.

In *Sunderland Marine Ins. Co. v. Kearney*, 71 Eng. C. L. R. 925, 937, the objection was made that the plaintiff was improperly joined as a party, his name not being mentioned in the policy on which the action was brought; and in support of this objection much reliance was placed on the case of *Green v. Horne*. Lord Campbell, delivering the opinion of the Queen's Bench, said it could not be meant by that rule that the party's name of baptism and his sir name, must necessarily be set out. If he be sufficiently designated in the deed, this must be enough to entitle him to sue for breach of covenant. A description which cannot be mistaken, is, for this purpose, as good as the actual name of the individual. And in *Fellows v. Gilman*, 4 Wend. R. 414, the Supreme court of New York thus expressed the rule: "It must undoubtedly

100 appear that the covenant alleged to have *been broken, was made for the benefit of the person bringing the action. He must in some manner be pointed out or designated in the instrument, but it is not necessary his name should in terms be used. The defendant's covenant is to pay each and every person such sum as the constable shall become liable for. This, in connection with the allegations in the declaration, shows, as satisfactorily as in the case of an heir or executor, that the plaintiff was one of the persons for whose benefit the covenant was executed." See also, 2 Lomax Dig. 9; 4 Comyn Dig. 282; *Chiles v. Conley's heirs*, 2 Dana's R. 21; *Webb v. Denn*, 17 How. U. S. R. 576. These cases show the inclination of the courts to give effect to the contracts of parties, and never to declare them void if by any reasonable and fair construction they can be made good. They establish the proposition that persons not described as parties in deeds poll, or even mentioned as having beneficial interest therein, may sue thereon in their own name, if it manifestly appears the covenants were made for their benefit.

Applying these principles to the covenant here, it is clear the plaintiff in error has a right of action thereon. Slight attention to the language of the instrument will show, that the covenant was made with him, and was intended for his benefit; the obvious design and effect being to relieve him of the payment of the debt due to G. W. Jones. It may operate also to the advantage of the latter in the additional security afforded him, but the person chiefly and primarily interested, is the debtor, in the relief afforded him against a heavy pecuniary obligation binding him personally not merely, but also constituting a lien upon the real estate purchased from G. W. Jones.

It was argued, however, that George W. Jones is also designated in the instrument; and as the money, by the terms of the cov-

enant, is to be paid to him, the suit should have been in his name.

101 *In actions upon parol contracts, the rule is well established, that the party may sue thereon with whom the contract is made, or who is beneficially interested in it. When a promise is made to a person indebted to another, to pay the debt to the creditor, and the latter is a stranger to the contract and to the consideration, the party to whom the promise is made alone has the right of action thereon. A modification of this rule is to be found in a class of cases which hold that where the debtor places money or property in the hands of a third person as a fund from which the creditor is to be paid, the latter may maintain an action against the holder of the fund. In such case a trust is created, and a promise inferred on the part of the holder, from his acceptance of the fund without objection, to pay the creditor. *Ross v. Milne*, 12 Leigh, 204; *Arnold v. Lyman*, 17 Mass. R. 400, 575; and cases cited in 3 Rob. Prac. 18 and 19.

In actions upon sealed instruments different principles apply. When a debt exists from one person to another, and an obligation or bond is given to the debtor to discharge such debt, he alone can maintain an action for the breach of such obligation. In *McAlister v. Marbury*, 4 Humph. R. 426, A bound himself by covenant to pay for B certain debts due by B to C. C instituted an action of covenant against A on the instrument. It was held that he had no legal interest therein, and that an action in his name would not lie. It is laid down in 2 Tucker's Com. 209, and the proposition is sustained by numerous authorities there cited, that when a covenant is made with A to pay him or a third person a sum of money for the benefit of the latter, the action must be brought in the name of A; and the third person cannot even release the demand. See also, *Millard v. Baldwin*, 3 Gray's R. 484; *Watson v. Inh. of Cambridge*, 15 Mass. R. 286; 3 Rob. Prac. 15.

If the covenant in this case had been made in fact with George W. Jones, 102 as it might have been, there *would be no question of his right to sue thereon in his own name. And I am inclined to think that, as it is for his benefit, although not made with him, he might maintain the action under the provisions of the 2d sec. chap. 116, Code of 1860. These provisions, however, do not affect the interests of William A. Jones, the plaintiff in error. The effect of this statute is not to divest rights, but to afford remedies to parties not allowed by technical rules of pleading at common law.

It is said, however, that on the face of the instrument here, it is uncertain whether the covenant was made with George W. Jones and for his benefit, or with the plaintiff in error. It appears, by an inspection of the paper as it was originally drawn, the blank was filled with the name of the plaintiff in error as payee, and the contract in that condition, was a covenant to pay him

the debt due George W. Jones. Subsequently, the name of the plaintiff in error was erased by running a line across it, but yet leaving the name sufficiently distinct. It probably occurred to the parties after the instrument was drawn, that as the arrangement was for the defendant, Thomas, to pay an existing debt due to George W. Jones, it was inconsistent with that arrangement to stipulate for its payment to the plaintiff in error; and so the name was erased, leaving it an obligation to pay George W. Jones.

Whether this be or not, the correct solution, the name of the plaintiff in error in the connection with which it is mentioned, clearly indicates him as the real party to the transaction, and as the person for whose benefit it was made. This presumption is rendered conclusive by the delivery to the plaintiff in error, and his acceptance of the obligation. In *Coit v. Starkweather*, 8 Conn. R., 289, a person known as A. B. was mentioned in the deed. There were, however, two persons known by that name, A. B. and A. B., jun. It was decided to

103 be competent to show that the latter was intended, though the addition *of jun. was omitted. The evidence adduced was, that the son negotiated for the deed, and that it was delivered to and intended for him. Such evidence does not introduce into the deed a new name or another description. Its effect is simply to identify the person, and apply the provisions of the instrument to the subject for which they are obviously intended.

In an action upon an I. O. U., signed by the defendant, objection was made to the introduction of the paper, upon the ground there was no proof it had been given to the plaintiff. But it was held that the production of the instrument by the plaintiff was evidence that the plaintiff received it from the defendant, and established a sufficient case for him, in the absence of evidence tending to show the paper had been in the hands of the other party. It seems to me these decisions are founded on good sense and sound principles.

A paper regularly executed in all respects, having the solemnity of a deed, binding the obligor or covenantor to pay a debt due by A B to C D, nothing else appearing, is delivered by the party executing it to A B, is it possible to come to any other conclusion than that this was a covenant with A B, and intended for his benefit. Are the courts to declare such an instrument void because it accidentally, or from ignorance of the parties, omits to state what is perfectly apparent, that the promise was made to A B, and was intended to relieve him of the payment of the debt. No adjudicated case, no dictum of any commentator, has been cited in support of a doctrine which sacrifices the intent and meaning of the parties upon a so narrow and rigid rule of construction. I think, therefore, the suit was properly brought in the name of the plaintiff in error.

The other objections relate to the form of

the declaration; and will now be briefly noticed. First. It is insisted there is no averment that the covenant was made with the plaintiff. In the commencement
104 of the declaration, *most appropriate for that purpose, no such allegation is made; but further on it is distinctly averred, that the defendant covenanted to and with the plaintiff; which is substantially sufficient.

Secondly. The declaration makes an averment of facts not contained in the obligation; which is not allowable in declaring upon covenants. The better and most usual practice, in such cases, is to set out the covenant without any intermediate inducement or statement of the consideration. Where the deed is so defective that no action thereon can be sustained, the defect cannot be cured by an allegation of extrinsic facts; as was decided in the case of *Green v. Horne*. But where the declaration sets forth a valid contract, and a good cause of action, independently of such averments, the incorporation of such extrinsic matter will be regarded as surplusage, and will not vitiate the pleading. In this case the statement that the debt was a lien upon plaintiff's land was no doubt made with a view to show that plaintiff was exposed to the hazard of the enforcement of that lien by reason of defendant's failure to fulfil his covenant. The most that can be said is, that such an averment is wholly unnecessary, and may therefore be rejected as surplusage.

It was further argued, that the mere failure to pay the debt is not such a breach of the covenant as entitles the plaintiff to recover, without an averment and proof of some special damage; and in any event it should appear that the plaintiff himself has paid the debt, or has been required to do so. The proposition is not sustained by sound reason or by the adjudicated cases.

When the undertaking is to perform a collateral act, the party may perform it any time during his life, unless hastened by request. But, wherever the stipulation is to pay money even to a third person, and no time is specified, it obliges the party to pay immediately; and the failure to do so is a breach of his contract, for which an
105 such action to *say that the plaintiff has not been injured. It would be against all justice to permit the covenantor to say that his covenantee shall subject himself to the inconvenience and embarrassment of first paying the debt before the covenantor shall be called on to pay. The latter suffers no prejudice in being required to pay the whole amount. As he failed to pay the original creditor, he should pay his covenantee: What the latter may do with the money does not concern him. The courts, therefore, hold that the covenantee need not show that he had paid the debt, or that he had been injured otherwise by the failure of the covenantor to comply with his engagement. All that is necessary for him to show in such case, is, that the

debt due by him to the third person was not paid by the covenantor at the appointed time; or, if no time was specified, that it had not been paid at the commencement of the suit. And, upon establishing this fact, the covenantee is entitled to a recovery of damages equal to the whole amount of the debt. These propositions are sustained by the cases of *Holmes v. Rhodes*, 1 Bos. & Pul. R. 638; *Hodgson v. Bell*, 7 T. R. 96; *Port v. Jackson*, 17 John. R. 239 & 479; *Thomas v. Allen*, 1 Hill's R. 145; *Churchill v. Hunt*, 3 Denio 321; *Lethbridge v. Mytton*, 22 Eng. C. L. R. 181.

In the case under consideration, the covenant is not a covenant of indemnity merely, but an undertaking to pay the debt therein mentioned; to do an act in discharge of the plaintiff for his obligation; and the breach of this contract entitles the plaintiff to damages: to what extent this court is not called on to say, as that question is not properly before us, nor have we the materials for rendering a proper decision thereon.

Upon the whole, I think the declaration substantially sufficient; and therefore the judgment of the District court and the Circuit court should be reversed, with costs; and the case remanded to the Circuit court of Smythe county for further proceedings: upon which the *defendant shall have leave to withdraw his demurrer, and plead to the action, if he should so desire.

The judgment was as follows:

The court is of opinion for reasons stated in writing and filed with the record, that the declaration in the record mentioned was substantially sufficient in law, and hence, that the said judgment of the said Circuit court in sustaining the defendant's demurrer to the same, and the said judgment of the said District court of appeals in affirming the said former judgment, were erroneous. Therefore, it is considered that the same be reversed and annulled, and that the plaintiff in error recover against the defendant in error their costs in the said District court and in the said Circuit court, together with their costs expended in the prosecution of their writ of error here. And the cause is remanded to the said Circuit court of Smythe county for further proceedings, in which the defendant shall have leave to withdraw his said demurrer and plead to the action if he shall be so advised.

Judgment reversed.

107 *Goolsby & als. v. Strother, Comm'r.*

June Term, 1871, Wytheville.

1. Judgments by Default—Errors—Appellate Proceedings.—A judgment stating that the defendants

*For monographic note on Statutory Bonds, see end of case.

†Judgments by Default—Definition of—Statute.—All judgments, whether in common-law actions or on motions under some statute, where there has been

were solemnly called and not appearing, on motion, &c., is a judgment by default; though it is stated at the foot of the judgment that on motion of the defendants the execution on this judgment is suspended for sixty days, upon the execution of a suspending bond, &c.; and a supersedeas to this judgment will be dismissed as improvidently awarded if allowed before a motion is made in the court below, or to the judge, to correct it.

2. Forthcoming Bonds—Notice—Statute.—The act of May 28, 1870, entitled an act to prevent the sacrifice of property at forced sales, acts of 1869-70, ch. 120, p. 162, does not require three months' notice of a motion on a forthcoming bond, where the bond was forfeited before the passage of the act.

This was a supersedeas to a judgment upon a forthcoming bond rendered in the Circuit court of Smythe county, upon the motion of Wade D. Strother, commissioner for John N. Hull, against Robert Goolsby, V. G. Morgan and others. The notice of the motion was for a judgment on the bond on the 13th day of June 1870, and service of the notice was acknowledged by the parties on the 14th and 16th of May 1870. The bond bore date the 1st of September 1869. The judgment was as follows: It appearing that the defendants have had legal notice of this motion, they were solemnly called, and not appearing, on motion of the plaintiff, by his attorney, it is considered that the plaintiff recover against the defendants the sum of \$16,566.90, the penalty of said bond, to be discharged by the payment of \$8,283.45, with legal interest from the 1st of September

no appearance by the defendant (whether legally summoned or not) are judgments by default, within the meaning of Code 1860, ch. 181, §§ 5 and 6 (Code 1849, ch. 181, §§ 5 and 6; Code 1887, §§ 3451, 3452); *Davis v. Commonwealth*, 16 Gratt. 134.

This proposition was sustained by the principal case; *Goolsby v. St. John*, 25 Gratt. 159, 160; *Holli-day v. Myers*, 11 W. Va. 298; *Adamson v. Pearce*, 20 W. Va. 61; *Smith v. Knight*, 14 W. Va. 758; *Watson v. Wigginton*, 28 W. Va. 546; *State v. Slack*, 28 W. Va. 375; *Higginbotham v. Haselden*, 3 W. Va. 269; *Staunton, etc., Co. v. Haden*, 92 Va. 205, 23 S. E. Rep. 285; *Brown v. Chapman*, 90 Va. 176, 17 S. E. Rep. 855.

But it was held in West Virginia that if the defendant in such action or motion has appeared, though he subsequently withdraws his plea of defence, and the plaintiff either proves his cause and thereupon obtains his judgment, or he afterwards obtains his judgment by the confession of the defendant, such judgment in neither of these cases is a judgment by default within the meaning of this statute. *Watson v. Wigginton*, 28 W. Va. 546; *Holli-day v. Myers*, 11 W. Va. 297, 298; *Stringer v. Anderson*, 23 W. Va. 485.

Decree on Bill Taken for Confessed.—In *Watson v. Wigginton*, 28 W. Va. 546, the court said that while there had been no conflict in the Virginia or West Virginia decision as to what is a judgment by default within the meaning of the statute under discussion, that the West Virginia decision had not been harmonious as to what is a "decree on a bill taken for confessed" within the meaning of the statute.

In *Gates v. Cragg*, 11 W. Va. 306, where a demurrer had been filed by the defendant and overruled,

1869 till payment, and his costs of this motion.

108 *On motion of defendants, the execution on this judgment is suspended for sixty days, upon the execution of a suspending bond, with good security in the penalty of \$500, conditioned according to law.

After this judgment was rendered, viz: August 16th, 1870, it was agreed by counsel that the note upon which the original judgment was obtained, and upon which the forthcoming bond in this case was given, was a contract made prior to the year 1865. The defendants applied to this court for a supersedeas to the judgment, which was awarded.

Richardson and Jno. A. Campbell, for the appellants.

•Gilmore, for the appellee.

MONCURE, P., delivered the opinion of the court.

The Code, chapter 181, sections 5 and 6, provides, among other things, as follows, to wit: (omitting such portions of the language as are not pertinent to this case or not material to be stated).

§5. The court in which there is a judgment by default, or a decree on a bill taken for confessed, or the judge of said court in the vacation thereof, may on the motion reverse such judgment or decree for any error for which an appellate court might reverse it if the following section was not enacted, and

and the defendant failed to answer the bill or further dispute in any manner plaintiff's claim, the court decided that the decree rendered in the cause was not a decree on a bill taken for confessed within the meaning of the statute, and therefore, it could not be corrected by the court below on motion under this statute; but it could be reversed or corrected by the appellate court though no motion had been made in the court below.

In *Watson v. Wigginton*, 28 W. Va. 548, the court said that *Gates v. Cragg*, 11 W. Va. 300, had gone too far in holding that no decree can in any case be regarded as a "decree taken on a bill for confessed" where the defendant has demurred and the demurrer has been overruled, and that the decision in that case in going to this extent had since been overruled in the case of *Steenrod v. The Railroad Company*, 25 W. Va. 133. The court after a discussion of these last two named cases decides that the general principles announced in *Steenrod v. The Railroad Company* are correct but says that to avoid mistakes they should be to some extent modified. The court then proceeds to lay down the true construction of §§ 5 and 6, ch. 134 of the Code (same as §§ 5 and 6, ch. 181, V. C. 1860), so far as they prohibit an appellate court from entertaining an appeal because of an error in a decree on a bill taken for confessed, until after a motion to reverse or annul such decree has been made and overruled by the court below or by the judge thereof in vacation either in whole or in part.

Judgments by Default—Errors—Appellate Proceedings.—If a party obtains a supersedeas to a judgment by default, before applying to the court in which

give such judgment or decree as ought to be given. Every such motion shall be, after reasonable notice to the opposite party, his agent or attorney, in fact or at law, and shall be within five years from the date of the judgment or decree.

§ 6. No appeal, writ of error or supersedeas shall be allowed by an appellate court or judge, for any matter for which a judgment or decree is liable to be reversed on motion as aforesaid, by the court which rendered it or the judge thereof, until such motion be made and overruled in whole or in part.

The judgment to which the supersedeas was awarded in this case, is a judgment by default. It is a judgment upon a motion on a forthcoming bond, and is in this form: "It appearing that the defendants have had legal notice of this motion, they were solemnly called, and not appearing, on motion of the plaintiff by his attorney, it is considered that the plaintiff recover," &c.

It is stated at the foot of the judgment, that "on motion of defendants, the execution on this judgment is suspended for sixty days, upon the execution of a suspending bond with good security in the penalty of five hundred dollars, conditioned according to law." This may show, or tend to show, that the defendants were present, in person or by attorney, when the judgment was rendered. But it does not show, nor tend to show, that the judgment was not by default; that the defendants made any defence in the court below. It shows the contrary; that instead of making defence in that court, they intended to make it in an appellate court.

There is also in the record a statement to this effect, purporting to be signed by the counsel of the defendant in error: "It is agreed by counsel, that the note upon which the original judgment was obtained upon which the forthcoming bond in this case was given, was a contract made prior to the year 1865." But this paper bears date August 16, 1870, long after the judgment was rendered, and of course can have no effect upon the question as to whether the judgment was by default. It was probably signed about the

the judgment was rendered, or the judge thereof, to correct the errors of which he complains, his *supersedeas* will be dismissed as improvidently awarded. *Davis v. Commonwealth*, 16 Gratt. 134. This proposition is supported in the principal case and has been approved by subsequent cases citing the principal case, or *Davis v. Commonwealth*, 16 Gratt. 134, or both, as authority. See *Watson v. Wigginton*, 28 W. Va. 543, *et seq.*; *Adamson v. Pearce*, 20 W. Va. 61; *Smith v. Knight*, 14 W. Va. 758 *et seq.*; *Higginbotham v. Haselden*, 3 W. Va. 260. See also, *Saunders v. Griggs*, 81 Va. 511; *foot-note* to *Goolsby v. St. Johns*, 25 Gratt. 146.

Decrees on Bill Taken for Confessed—Errors—Appellate Proceedings.—The above laid down proposition holds for "decrees on bills taken for confessed" as well as for judgments by default. See *Dickinson v. Lewis*, 7 W. Va. 676; *Steenrod v. Railroad Company*, 25 W. Va. 137; *Watson v. Wigginton*, 28 W. Va. 546 *et seq.*; *Baker v. West, etc., Co.*, 6 W. Va. 196; *Hartley v. Roffe*, 12 W. Va., 420; *Hill v. Bowyer*, 18 Gratt. 365.

time the supersedeas was applied for, and for the purpose of being made a part of the record in the appellate court. Whether it was signed before or after judgment, it cannot show that the judgment was not, what it conclusively appears on its face to be, a judgment by default.

It necessarily follows, from what has been said, that the supersedeas in this case must be dismissed, as having been improvidently awarded.

As to the case of *Beale v. Wilson, &c.*, 110 4 Munf. 380, to which we have been referred in reference to this question, it is sufficient to say, that it was decided long before the provisions of the Code before mentioned existed, and of course it does not apply to this case, whatever may be the meaning and effect of the decision.

While it is necessary to dismiss the supersedeas, we yet deem it proper to state, with a view of preventing further litigation between the parties, that we have considered the assignment of error contained in the petition, and do not think it sustainable. We would have, therefore, to affirm the judgment if we had jurisdiction of the case in its present situation. We would have to affirm it on this ground, if no other, that according to the true construction of the act approved May 28, 1870, entitled "an act to prevent the sacrifice of personal property at forced sales" (Acts of Assembly 1869-70, ch. 120, p. 162), we think that three months' notice of a motion on a forthcoming bond is not required by the act in any case where the bond was forfeited before the passage of the act; as the bond in this case was. There are other grounds on which the judgment might probably be affirmed, but it is unnecessary to state them.

The supersedeas is therefore dismissed with costs.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that as the said judgment is by default, and it does not appear that any motion has been made to the said Circuit court, or the judge of said court in the vacation thereof, to reverse such judgment in pursuance of the Code, chapter 181, section 5; the said writ of supersedeas, according to the next section, 6, was improvidently awarded, and must, therefore, be dismissed. But, for the purpose of avoiding unnecessary delay and expense to the parties, it seems to be proper to state that the court has considered the question presented by the petition, and argued by the counsel in

111 *this case, and is of opinion, that there is no error in the said judgment; and the court would have to affirm the said judgment but for its being premature to do so, under the provisions of the Code aforesaid. Therefore, it is considered and ordered that the said writ of error be dismissed, and that the plaintiffs in error pay to the defendant in error his costs by him about his defence in this behalf expended. Which is ordered to be certified to the said Circuit court of Smythe county.

Supersedeas dismissed.

STATUTORY BONDS, INCLUDING FORTHCOMING, REFUNDING, REPLEVIN, INDEMNIFYING, DETINUE, AND ATTACHMENT BONDS.

- A. Statutory Bonds—Necessity for.
- B. Statutory Bonds—Validity.
- C. Statutory Bonds—Conditions and Recitals.
- D. Indemnifying Bonds—Duty of Sheriff.
- E. Forthcoming Bonds—Forfeiture.
 - 1. Cause of Forfeiture.
 - 2. Return of Forfeited Bond.
 - 3. Prevention of Forfeiture Allowed.
- F. Statutory Bonds—Remedy for Breach.
 - 1. Form of Remedy.
 - 2. Effect of Supersedeas.
 - 3. Statutory Bonds—Obligors.
 - 4. Statutory Bonds—Relator.
 - 5. Statutory Bonds—Notice.
 - 6. Statutory Bonds—Action—Allegations.
- G. Statutory Bonds—Defences—Pleas.
 - 1. Pleas—Necessity for.
 - 2. Pleas—Kinds.
 - 3. Burden of Proof.
 - 4. Presumptions.
- H. Statutory Bonds—Evidence.
- I. Statutory Bonds—Judgment.
- J. Statutory Bonds—Relief in a Court of Equity.
 - 1. Jurisdiction of Court.
 - 2. When Equitable Relief Granted.
 - 3. When Equitable Relief Refused.
 - 4. Form of Relief.
 - (a) Injunction.
 - (b) Contribution.
 - (c) Subrogation.
 - (d) Exoneretur.
 - 5. Equity Treats That as Done Which Ought to Be Done.
- K. Action of Replevin Abolished.

Cross-References.—In connection with this subject, see monographic *notes* on the following subjects: Attachments, appended to Lancaster v. Wilson, 27 Gratt. 624; Bills of Exception, appended to Stoneman v. Com., 25 Gratt. 887; Damages, appended to Norfolk, etc., R. Co. v. Ormsby, 27 Gratt. 455; Estoppel, appended to Bower v. McCormick, 23 Gratt. 810; Official Bonds.

A. STATUTORY BONDS—NECESSITY FOR.

Executor—Failure to Demand Refunding Bond—Liability.—The law of Virginia is that all debts or liabilities of the testator must be paid before any bequest can be effectual; and an executor who without taking proper refunding bonds delivers legacies directed by a will, is guilty of a *devastavit* for which he and his sureties are liable to creditors of the estate. Edmunds v. Scott, 78 Va. 720.

Where the assets in the hands of an executor are sufficient to pay all the debts of the estate and he makes distribution of the estate without requiring a refunding bond from the legatees he is personally liable to creditors for the fund so improperly distributed. Beverly v. Rhodes, 86 Va. 415, 10 S. E. Rep. 572; Lewis v. Overby, 31 Gratt. 601; Edmunds v. Scott, 78 Va. 720; Cookus v. Peyton, 1 Gratt. 442; Morrison v. Lavell, 81 Va. 519; Lewis v. Mason, 84 Va. 731, 10 S. E. Rep. 529; McGlaughlin v. McGlaughlin, 43 W. Va. 226, 27 S. E. Rep. 378.

An executor who exhausts the personal estate of his testator in paying specific legacies, without taking a refunding bond, will, as to the creditors of said testator, be considered as having committed a *devastavit*, whether he had notice of the debts due such creditors at the time he paid such legacies or

not. McGlaughlin v. McGlaughlin, 43 W. Va. 226, 27 S. E. Rep. 378.

It is error, though the bill be taken for confessed, to decree against an administrator *de bonis non* that he shall pay a legacy, without requiring the legatee to give bond and security for refunding his "due proportion of any debts or demands, which may afterwards appear against the estate of the testator, and the costs attending the recovery thereof." Rootes v. Webb, 4 Munf. 77. See Rev. Code, 1st vol. ch. 92, § 51, p. 166; Clay v. Williams, 2 Munf. 105; Stovall v. Woodson, 2 Munf. 303.

A decree against executors for a legacy, though made upon confession of assets, and without their expressly demanding bond and security from the plaintiff, is yet erroneous, if it does not require such bond and security to be given before the defendants be compelled to pay the legacy. McRae v. Brooks, 6 Munf. 157.

An executor ought not to be compelled to make distribution of a residuum, until bond and security be given by the distributees, as required by the act of Assembly in the case of an administrator. Shepard v. Starke, 3 Munf. 29. See 1 Rev. Code, p. 166, § 51; Stovall v. Woodson, 2 Munf. 303.

It seems that an executor cannot be compelled to pay a legacy, until bond and security be given by the legatee to refund his due proportion of such debts and demands as may thereafter appear against the estate of the testator. Stovall v. Woodson, 2 Munf. 303.

Executor—Failure to Take Forthcoming Bond—Liability.—In the case of Ferguson v. Epes, 77 Va. 400, an executor was held liable for failure to take from a life tenant a forthcoming bond conditioned to return the fund intrusted to him in the event of his dying before marriage and without heirs of his body.

Though an executor may have assented to a specific legacy, he does not thereby dispense with a refunding bond. Nelson v. Cornwell, 11 Gratt. 724.

In Handly v. Snodgrass, 9 Leigh 484, the former decisions, that a decree in favor of a legatee against an executor, who omitted to require a refunding bond, would be considered erroneous, and for such error be reversed with costs, was reviewed by the court, and a different rule established when there is a mere *omission* to require such bond.

Executors and Administrators—Advancements to Heirs—Failure to Take Refunding Bond—Effect.—The rule which refuses to an executor the right to recover back from a legatee an excess of advancements beyond his ratable proportion, which he may have paid him, is not inflexible, even when the deficiency in the assets was not created by the subsequent appearance of debts. But after such voluntary payment, under such circumstances, the executor will have to make out a very strong case to rebut the almost conclusive presumption that he had a sufficiency of assets to justify the payment of the legacy which arises from the mere fact that he has paid it without taking a refunding bond. It will not be sufficient, in such case, in order to rebut such presumption, for the executor to show that he acted *bona fide* and with honest intentions; but he must show further that he acted in paying the legacy with prudence and caution, under existing circumstances. Hurst v. Morgan, 31 W. Va. 521, 8 S. E. Rep. 285.

When Requirement of Refunding Bond Discretionary.—In Young v. Vass, 1 P. & H. 167, it was held that, under the circumstances, considering the admission of assets by the executor, and the character of the

legacy and of the legatees, it should be submitted to the discretion of the court below whether any refunding bond should be required of the legatees.

The power of a court of equity to rule a tenant for life, of slaves, or other personal property, to give security that the property shall be forthcoming at his or her death, is to be exercised, not as a matter of course, but of sound discretion, according to circumstances. *Holliday v. Coleman*, 2 Munf. 162.

Executor—When Not Entitled to Refunding Bond.—When slaves emancipated by will, are set free by the executor, he is not entitled to a refunding bond to indemnify him against the claims of the testator's creditors, though the manumitted slaves are, notwithstanding manumission, subject to debts. *Elder v. Elder*, 4 Leigh 271 [252].

Indemnifying Bond—When Necessary.—In order to authorize any officer who is required to levy an execution or warrant of distress on property to require an indemnifying bond it is necessary that a doubt should arise as to whether said property is liable to such levy, and, when the indemnifying bond so required has been given, the right of the officer to recover, after a judgment has been obtained against him and his sureties in his official bond for making sale of the property, does not depend upon the question as to whether said doubt was well founded or not. *Evans v. Graham*, 37 W. Va. 657, 17 S. E. Rep. 300.

Although a person, whose property is taken in execution to satisfy the debt of another, may proceed to recover that property, or damages for the taking and detaining thereof, in a court of law; and although the sheriff, having doubts as to the title to the property, may demand from the creditor an indemnifying bond, yet neither remedies is in exclusion of a bill of injunction to prevent the sale. *Wilson v. Butler*, 3 Munf. 559.

It seems that it is not necessary, to maintain a suit in equity against the makers and endorsers of a lost negotiable note, that a bond of indemnity should be tendered *before suit*; but whether the proper indemnity, which the court may require, be offered in the bill or not, certainly the court should not decree the payment of the debt without requiring a bond of indemnity to be executed. *Exchange Bank v. Morrall*, 16 W. Va. 546; *Bank v. Reynolds*, 4 Rand. 186.

Attachment Bond—When Necessary.—An order of attachment should not be issued, requiring the officer to whom it is directed to take into his possession the property the same is levied upon, until bond has been given as required by the sixth section of chapter 106 of the Code. *Cosner v. Smith*, 36 W. Va. 788, 15 S. E. Rep. 977.

In a foreign attachment suit under ch. 151 of the Va. Code if the defendant against whom the claim is, has not appeared or been served with a copy of the attachment within a specified time, the plaintiff in order to have the benefit of a sale under section 23 of the said chapter must give bond with sufficient security, in such penalty as the court shall approve, with condition to perform such future order as may be made, upon the appearance of said defendant and his making defence. *Hall v. Lowther*, 22 W. Va. 570.

The act, Code of 1860, ch. 151, § 31, has no application to the attachment lien upon the estate of the debtor, whether it be real or personal property, or choses in action. To relieve the property attached, bond is to be given as required in § 13 of the act. *Magill v. Sauer*, 20 Gratt. 540.

When no Attachment Bond Necessary.—When an attachment issues, no bond is required to be given by plaintiff unless the sheriff is required to take the property into his possession. *Kenefick v. Caulfield*, 88 Va. 122, 18 S. E. Rep. 348; Va. Code 1887, § 2868.

An attachment may be levied upon tangible property in the actual or constructive possession of a non-resident debtor in the same manner as the common-law execution, and no attachment bond need be given in such case provided the goods are not seized and taken into possession. The lien, which is the prime object of the attachment, may be obtained by constructive as well as by actual seizure. *Dorrier v. Masters*, 88 Va. 450, 2 S. E. Rep. 927; Code of 1873, ch. 148, §§ 7 and 8.

An attachment is a lien on personal estate from levy, though no bond be given to authorize the officers to take possession, and one purchasing of the debtor with notice of the levy takes subject to it. *Bowlby v. DeWitt* (W. Va.), 84 S. E. Rep. 919.

Attachment Bond—Decree of Sale—Statute.—If it appears that a copy of the attachment was served on the defendant sixty days before a decree for the sale of the land attached, the decree for the sale may be made without requiring the bond provided for in the statute. *Anderson v. Johnson*, 82 Gratt. 558; Code 1873, ch. 148, § 24, p. 1015; *Smith v. Chilton*, etc., 77 Va. 588.

Where a defendant, in a suit in which an attachment has issued, has been served *either* with process in the suit or with a copy of the attachment, he cannot be properly proceeded against under an order of publication, and has no further time to appear than a defendant in any other case; nor in such case is it necessary that a bond issued be given as a condition precedent to the sale of the property attached. *Capehart v. Dowery*, 10 W. Va. 130.

Failure to Give Replevin Bond—Effect.—The omission to give bond and security before the issuing of a writ of replevin does not invalidate the writ, but only subjects the sheriff to an action by the defendant. *Valden v. Bell*, 3 Rand. 448.

B. STATUTORY BONDS—VALIDITY.

Defective Statutory Bond—Good at Common Law.—

If a forthcoming bond be not good as a statutory bond, it may be good as a bond at common law. *Johnstons v. Meriwether*, 3 Call 454, [524].

Making a forthcoming bond payable to a person other than that provided for in the statute renders it inoperative as a statutory bond, and when forfeited and returned to the clerk's office, it does not have the force of a judgment, nor does it constitute a lien upon the lands of the obligors in the bond, as it would have done if had been taken and returned in the manner provided by the Code. The execution creditor can have the bond quashed because it was not taken in accordance with the statute, but he cannot proceed upon it by action or motion in his own name. It may, however, be a good common-law bond, and the sheriff may bring an action of debt upon it. *Lynchburg, etc., Bank v. Elliott*, 94 Va. 700, 27 S. E. Rep. 467; *Downman v. Chinn*, 2 Wash. 189; *Beale v. Downman*, 1 Call 249; *Johnstons v. Meriwether*, 3 Call 523; Va. Code 1887, § 3619.

Sheriff on seizure of chattels under a *f. fa.* takes indemnifying bond under statute 1 Rev. Code, ch. 134, sec. 25, with condition to save sheriff harmless, and to pay and satisfy any person claiming title to the property, all damages he may sustain by the

seizure and sale; omitting to provide also, as required by the statute of 1828, Supp. to Rev. Code, ch. 215, sec. 1, that the obligors shall warrant the title of the property sold under the execution to the purchaser thereof at the sheriff's sale. *Held*, the bond is defective and not good as a statutory bond; but it is good at common law, and the sheriff may maintain an action on it for indemnity against damages recovered against him by the owner of the property seized and sold. *Dabney v. Catlett*, 12 Leigh 304 [384].

Replevin Bond—Original Lessee as Obligor—Valid.—

A bond taken upon replevying property distrained for rent, must be returned to the court to which the officer levying the distress belongs, or to the court of that county in which the land lies. Such a bond is good if executed by the original lessee, though he be not the tenant in actual possession, nor the owner of the property distrained, if he hath assigned his lease to a third person, without the privity or assent of the lessor. *Ferguson v. Moore*, 2 Wash. 68 [54].

Forthcoming Bond—When Valid.—A debtor in execution executes a forthcoming bond to the creditor, and a third person and the obligee execute the bond with the debtor, as his sureties. The bond being forfeited, the obligee gives notice to the principal obligor and the other surety, of a motion for award of execution upon the bond, against them; but the notice does not mention the obligee as a co-obligor. *Held*, the bond is a valid bond to bind the other surety, but that he is only bound as a co-surety with the obligee. *Booth v. Kinsey*, 8 Gratt. 560.

Indemnifying Bond—Formal Defects.—Upon a sale of property under execution, the sheriff takes a bond of indemnity, with conditions according to the act of 1819, 1 Rev. Code, ch. 134, § 25, p. 533, to indemnify the sheriff, and to pay and satisfy to any person claiming title to the property, all damages sustained, in consequence of the seizure and sale thereof; but it does not contain a provision for the protection of the purchaser of the property, as required by the act of 1828, Sup. Rev. Code 272. In an action by a claimant of the property, against the sheriff, *held*, this is a good statutory bond, and protects the sheriff from the action of the claimant of the property. *Aylett v. Roane*, 1 Gratt. 282.

Forthcoming Bond—Formal Defects.—If in a forthcoming bond the *teneri* be right, though the *solvendum* be wrong, it will not vitiate the bond. *Wilkinson v. M'Lochlin*, 1 Call 42 [49].

If before the act of 1794, the sheriff in taking a forthcoming bond included his commissions on the debt, it was erroneous, but in such case the bond is not void; and judgment shall be entered for the sum due without the commissions. *Worsham v. Egleston*, 1 Call 41 [48].

Defective Forthcoming Bonds—Waiver of Objection.—

A forthcoming bond is not void because founded on an execution issued at a time when it should not have been. Such bond is defective and should be quashed if an objection is made to it before judgment was rendered, but the objection cannot be made in the appellate court. *Conaway v. Odbert*, 2 W. Va. 25.

Indemnifying Bond—Defects—Estoppel.—N living in Virginia brought two suits in South Carolina, and B living there became his security for costs. N executed to B a bond with sureties living in Virginia, with condition to indemnify him against injury for having entered into the undertaking as surety for the said costs. In an action by B against N and his sureties, the records of the suits brought by N in

South Carolina were offered in evidence by B and were objected to on the ground that they showed that B had not become the surety at the date of the bond of N and the sureties to him. *Held*, that the defendants not showing that B was surety for N for costs in other cases, their bond must be held to refer to these suits; and they are estopped by their bond from denying that B was the surety of N at the time of its execution. *Cordle v. Burch*, 10 Gratt. 489. See monographic note on "Estoppel" appended to *Bower v. McCormick*, 23 Gratt. 310.

Forthcoming Bonds—Defects—Estoppel.—Obligors who have voluntarily executed a forthcoming bond are precluded and estopped from all inquiry as to the irregularity and validity of the levy of the execution upon which it was taken. *Shaw v. McCullough*, 8 W. Va. 260.

Where a forthcoming bond has been voluntarily entered into, and the party executing the same has enjoyed the benefit of said bond by retaining in his possession the property levied upon under a distress warrant, which bond was made payable to S. B. H., agent for J. H., instead of to J. H., the party to whom the rent was due, in an action of debt upon the said forthcoming bond the doctrine of estoppel applies, and it is then too late to raise the question as to the validity of said bond. *Hall v. Wadsworth*, 35 W. Va. 375, 14 S. E. Rep. 4.

When the day of sale mentioned in a forthcoming bond arrived, to wit: the 9th of August, 1897, the property was not sold for the want of bidders; and the same parties gave a new bond for the forthcoming of the property. The sergeant is estopped from denying that the property mentioned in the first bond was not delivered up in performance of the condition of the bond. *Adler v. Green*, 18 W. Va. 201.

Forthcoming Bond—Material Defects.—A *fi. fa.* is sued out by M. & M. on judgment recovered by them: they indorse on the writ, that it is for benefit of H.: the sheriff levies it, and takes forthcoming bond payable to H. *Held*, the bond is naught. *Meze v. Howver*, 1 Leigh 442.

Attachment Bond—Material Defects.—An attachment against an absconding debtor is sued out in the name of a partnership, for a debt due the partnership; the bond taken is the bond of F. one of the partners, with surety, reciting that F. has obtained the attachment, and conditioned that if he shall be cast in the suit, he shall pay all costs and damages which shall be recovered against him. *Held*, the bond is naught, and the attachment is therefore illegal and void. *Jones v. Anderson*, 7 Leigh 308.

Replevin Bond—Material Defects.—An action of debt may be brought upon a three months' replevy bond for rent, though it give back interest from the time when the rent became due, and not merely from the date of the bond; which circumstance, the court were inclined to think, makes it not a good bond under the statute. *Early v. Owen*, 6 Munf. 319.

Indemnifying Bond—Material Defects.—A constable, sheriff, or other officer, who sells property taken under execution, is not protected from an action of trespass by the claimant, unless the indemnifying bond taken by him under the Act of 1812, conforms in all respects to that act, and particularly contains the clause inserted for the benefit of the person claiming title to the property. *M'Clunn v. Steel*, 3 Va. Cas. 256.

Indemnity Bond—Excessive Penalty.—In a suit for A's administrator with the will annexed, brought in 1849, he is authorized to pay to M and N, legatees, for life, money in his hands upon their giving secu-

erty for its return at their death; and this is done. *M* dies, and by another decree made in 1853, the money paid her is collected and paid to *N* upon her husband, *B*, and herself giving like bond; and this is done. In June, 1874, upon a suggestion that the sureties in the bonds given by *N* and by *B* and *N* are insolvent, a rule is made upon them to show cause why they should not be required to give a new bond with undoubted security for the return of the money on the death of *N*. *B* appeared and filed his answer on oath to the rule, insisting that there was no evidence in the record that the sureties were insolvent; but upon the affidavit of *T* and the statement of *A*'s administrator, the court, on the same day, on the motion of parties claiming to be entitled in remainder, made an order that unless *B* and *N* executed a bond in the penalty of \$10,000, with condition to pay the sum of \$4,316.23, that being the sum in their hands, on the death of *N*, *A*'s administrator should proceed to collect the money, etc. *Held*, the amount of the penalty of the bond required is excessive; one-half of it, or at most \$6,000, was sufficient. *Beckwith v. Avery*, 81 Gratt. 533.

C. STATUTORY BONDS—CONDITIONS AND RECITALS.

Attachment Bond—What Recitals Proper.—An attachment being sued out by one member of a firm, for a debt due to the firm, and in the name of the firm, it is proper that the bond executed by the partner who sues out the attachment, and his surety, should bind the obligors to be answerable for the failure of the firm to prosecute their attachment with success. *M'Cluney v. Jackson*, 6 Gratt. 96.

Indemnifying Bond—Necessary Recitals.—A constable, sheriff, or other officer, who sells property taken under execution, is not protected from an action of trespass by the claimant, unless the indemnifying bond taken by him under the Act of 1812, conforms in all respects to that Act, and particularly contains the clause inserted for the benefit of the person claiming title to the property. *M'Cluney v. Steel*, 2 Va. Cas. 258.

Several Executions—One Forthcoming Bond Taken.—One forthcoming bond may be taken on several executions. Two separate bonds may be included in one instrument. *Winston v. Com.*, 2 Call 246 [291].

Forthcoming Bonds—Recitals—Names of Obligors.—A forthcoming bond, appearing in other respects to be in proper form, ought not to be quashed on the ground that, in the obligatory or penal part thereof, a blank is left for the names of the obligors. *Beale v. Wilson*, 4 Munf. 380.

A blank being left in the condition of a forthcoming bond for the name of the high sheriff, to whom the property was to be delivered at the time and place of sale, was held not to vitiate it, the name of the high sheriff having been mentioned in a former part of the condition. *Bartley v. Yates*, 3 H. & M. 398.

Forthcoming Bond—Name of Oblige.—Robertson, executor of Cole, recovers judgment against Claiborne, and sues out execution thereon; before the execution is delivered to the sheriff, Robertson dies; the execution being then delivered to the sheriff, he levies it on property of defendant, and takes a forthcoming bond payable to Robertson, executor of Cole. *Held*, the execution was properly levied, though Robertson was dead before it was delivered, and the forthcoming bond was rightly taken to Robertson as executor, and was good. *Turnbull v. Claibornes*, 3 Leigh 392.

Forthcoming Bond—Omission of Name of Defendant in the Execution.—If a forthcoming bond do not recite against whom the execution issued, and upon whose property it was levied, it may be quashed on motion. *Hubbard v. Taylor*, 1 Wash. 334 [259].

Forthcoming Bond—Statement of Ownership.—A forthcoming bond should be deemed neither informal nor defective, although the condition does not recite on whose property the execution was levied, provided enough appear to show that it was the property of the defendants. *Lewis v. Thompson*, 3 H. & M. 100.

Forthcoming Bond—Statement of Ownership.—A forthcoming bond, mentioning the person against whom the execution issued, and that "they were desirous of keeping in their possession, until the day of sale, the property taken by the sheriff," sufficiently describes it as their property. *Bronaugh v. Freeman*, 2 Munf. 266.

On a *A. fa.* against three, *A*, *T*, & *H*, a forthcoming bond is taken, the condition whereof does not distinctly state to which of the three defendants the property taken in execution belonged, and omits to state that it was restored to the debtor. *Held*, the bond is good. *Harpers v. Patton*, 1 Leigh 306.

Forthcoming Bond—Condition—Time of Delivery of Property.—A forthcoming bond, with condition to deliver property taken in execution, on a day of sale occurring after the return day, is valid. *Ballard v. Whitlock*, 18 Gratt. 235.

A forthcoming bond is good, although it appoints no place at which the delivery is to be made. *Burwell v. Court*, 1 Wash. 326 [254].

The condition of a forthcoming bond ought to set forth, with certainty, the time and place of sale; but it need not state that the day mentioned is that appointed for the sale. *Irvin v. Eldridge*, 1 Wash. 203 [161].

In a bond for the forthcoming of property taken under execution, it is not necessary that the time appointed for the delivery of the property should be stated to be that at which the sale is to take place. *Wood v. Davis*, 1 Wash. 90 [69].

Replevin Bond—Recital of Restoration of Property.—In a three months' replevy bond, the condition ought to state that the property was restored to the debtor. *Glassford v. Hackett*, 3 Call 166 [193].

Forthcoming Bond—Recital of Amount of the Execution.—A forthcoming bond should be made payable to the creditor, and not to the sheriff; the amount of the execution ought to be recited, and the condition should be to deliver the property at the time and place of sale, and not when demanded. If the bond be defective in any of the above instances, or in others, the court may, and ought to quash it on motion. *Downman v. Chinn*, 3 Wash. 243.

Forthcoming Bond—Omission of Penal Sum.—A motion for judgment on a forthcoming bond, in the obligatory part whereof no penal sum is mentioned, cannot be sustained; but such bond, with the execution on which it was founded, may be quashed, on a motion for that purpose. *Bragg v. Murray*, 6 Munf. 32.

Attachment Bond—Omission to State Amount of Interest—Effect.—Judgment on attachment should not be quashed because the bond given on suing it out recited only the sum due without mention of interest. *Smith v. Pearce*, Gilmer 24.

A forthcoming bond given on a judgment which bore only five per cent. interest, shall carry but five per cent., although the bond was taken after the

act allowing six per cent. *Brooke v. Roane*, 1 Call 177 [205].

Forthcoming Bond—Excess—Interest—Release.—If the forthcoming bond include an excess, and the plaintiff after judgment, and during the same term, release the excess, the defect is thereby cured, and the judgment rendered valid. *Bell v. Marr*, 1 Call 40.

If a forthcoming bond be taken for more than the sum due by the execution, and the plaintiff release the excess, the bond will support a judgment. *Scott v. Hornsby*, 1 Call 35 [41].

Forthcoming Bond—Indorsement of Clerk.—The requirement by the statute that the clerk of the court shall indorse on a forfeited forthcoming bond "the date of its return," is directory. *Cabell v. Given*, 30 W. Va. 700, 5 S. E. Rep. 442.

Attachment Bond—Indorsement of Clerk.—The failure of the clerk to endorse on an attachment bond that it has been acknowledged and approved may be cured at any time with the permission of the court. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 536.

D. INDEMNIFYING BONDS—DUTY OF SHERIFF.—Under the act of assembly concerning sheriffs (Rev. Code, 2d vol. p. 100), the sheriff having received a bond of indemnity, is bound to sell the property taken in execution, whether it belongs to the debtor, or not. *Stone v. Pointer*, 5 Munf. 287; *Baker v. Rinehard*, 11 W. Va. 238; *Walker v. Hunt*, 2 W. Va. 491.

Indemnifying Bond—Duty of Sheriff—Presumption.—Under the law it is the duty of the sheriff to levy *first* the first execution that comes into his hands to be levied and to proceed to sell under it; and as under the law he is *bound* to sell property in dispute, upon receiving and accepting the indemnifying bond, it must be presumed in the appellate court, in the absence of the evidence to the contrary, that he discharged his duty in these respects. *Hartman v. Campbell*, 5 W. Va. 304.

E. FORTHCOMING BONDS—FORFEITURE.

1. CAUSE OF FORFEITURE.—Where a forthcoming bond is given, and the debtor, on the day of sale, pays to the creditor the full amount of the debt, interest and costs, except the sheriff's commission, the bond will be forfeited, and a motion will lie upon it. *Bernard v. Scott*, 3 Rand. 522.

Where, on the day of sale mentioned in the forthcoming bond, the property is on the spot before 1 o'clock, but not delivered to the sheriff until after 4 o'clock, this will not be a good delivery under the Act of 1821, in certain cases, and the bond will be forfeited. *M'Kinster v. Garrott*, 3 Rand. 554.

A partial delivery of the goods mentioned in the condition of a forthcoming bond, is not a performance, and the penalty becomes forfeited. But if the sheriff secure and sell what is so delivered, the amount must be credited to the obligor. *Pleasants & Co. v. Lewis*, 1 Wash. 273; *Wallace v. McCarty*, 8 W. Va. 193.

Prevention of Forfeiture by Supersedeas.—If a supersedeas to a judgment (execution being levied, and a forthcoming bond taken), be issued before the day of sale, and thereupon the property be not forthcoming, the penalty of the bond is saved, and no motion lies upon it. *Rucker v. Harrison*, 6 Munf. 181.

When Injunction Issued Prevents Forfeiture.—If the forthcoming bond be not forfeited at the time when the injunction issues, the penalty is saved; but it is otherwise, if the bond be forfeited before the injunction issues. *Wilson v. Stevenson*, 2 Call 178 [213].

2. RETURN OF FORFEITED BOND.

Return Necessary.—A forfeited forthcoming bond has the force of a judgment, so as to create a lien upon the lands of the obligors, only from the time the bond was returned to the clerk's office. *Cabell v. Given*, 30 W. Va. 700, 5 S. E. Rep. 442.

It seems that a forthcoming bond has not the force of a judgment, till it is returned forfeited and filed in the clerk's office; and even after it is filed, it is only in a partial sense, that it has the force of a judgment before execution upon it is awarded. *Lipscomb v. Davis*, 4 Leigh 303.

Time of Return.—Though the forthcoming bond be left at the clerk's office before it is forfeited, yet, if the property is not produced on the day of sale, the officer may have the clerk endorse it as filed in the office after the day of sale, and it will operate as a judgment, and as if actually returned to the office after the day of sale. *Central Land Company of West Virginia v. Calhoun*, 16 W. Va. 361.

Contradiction of Return.—The uniform practice in Virginia has been to allow the contradiction of the sheriff's return of "forfeited" upon forthcoming bonds. *Adler v. Green*, 18 W. Va. 201; *McKinster v. Garrott*, 3 Rand. 554; *Bernard v. Scott*, 3 Rand. 522; *Pleasants v. Lewis*, 1 Wash. 273; *Nicolas v. Fletcher*, 1 Wash. 330; *Burke v. Levy*, 1 Rand. 1; *Jones v. Raine*, 4 Rand. 386; *Cole v. Fenwick*, 1 Gilm. 124.

Object of Return.—A forfeited forthcoming bond is a lien upon land from the date of its return to the clerk's office. *Terry v. Wooding*, 2 P. & H. 173; *Jones v. Myrick*, 8 Gratt. 179; Va. Code 1887, § 3023.

On a joint judgment against several, the service of a *ca. sa.* on one, and the execution and forfeiture of a forthcoming bond by him, does not extinguish the lien of the judgment upon the land of the others. *Leake v. Ferguson*, 2 Gratt. 419.

The lien by virtue of a writ of *fieri facias*, upon the property of the debtor, is not released by his giving a forthcoming bond, but continues until such bond is forfeited. *Lusk v. Ramsay*, 3 Munf. 417.

Under chapter 20, Acts of 1864, a person recorded his declaration of "homestead." At the time he was an obligor on a forfeited forthcoming bond which had been returned to the clerk's office. The homestead is subject to the lien created by the bond after its return, having the force of judgment. *Cabell v. Given*, 30 W. Va. 700, 5 S. E. Rep. 442.

3. PREVENTION OF FORFEITURE ALLOWED.—The surety of a forthcoming bond has a right to deliver the property on the day of sale, if he can on that day peaceably obtain possession thereof. *Lusk v. Ramsay*, 3 Munf. 417.

F. STATUTORY BONDS—REMEDY FOR BREACH.

1. FORM OF REMEDY.

When Forthcoming Bond Necessary—Remedy for Refusal to Accept.—A fair purchaser under a sheriff's sale, without knowledge of any improper conduct on the part of the officer, acquires a valid title to the property purchased, and the remedy of the party injured is, by action at law, for damages against the sheriff. The same remedy applies where a sheriff has improperly refused a forthcoming bond, when he ought to have received it. *Hamilton v. Shrewsbury*, 4 Rand. 427.

An action of debt may be brought upon a defective forthcoming bond, even after an unsuccessful motion had been made on it. *Hewlett v. Chamberlayne*, 1 Wash. 474 [367].

Where a forthcoming bond is given, and the debtor, on the day of sale, pays to the creditor the full amount of the debt, interest and costs, except the sheriff's commission, the bond will be forfeited, and a motion will lie upon it. *Bernard v. Scott*, 8 Rand. 522.

A. gave a forthcoming bond with W. security. Judgment was rendered on the bond against A., and *A. fa.* issued. Property was taken, but the *A. fa.* was not returned. These proceedings were no bar to a motion upon the bond against W. *Winston v. Whitlocke*, 5 Call 435.

Liability of Sheriff on Forthcoming Bond.—A judgment cannot be obtained upon a forthcoming bond, bearing date before the 7th of January 1870, against the sheriff to whom the estate of a deceased obligor has been committed, as against an executor or administrator in ordinary cases; but the plaintiff must exhibit his claim before the court, according to the Act of 1792. *Jackson v. Ewell*, 4 Munf. 426. See Rev. Code, 1st vol. ch. 92, § 61, pp. 167, 168.

2. EFFECT OF SUPERSEDEAS.

Replevy Bond—Execution —No Supersedeas Allowed.—A supersedeas will not lie where an execution has improperly issued upon a replevy bond. The injured party may move to quash the execution, and the judgment on that motion, if erroneous, may be corrected on an appeal or supersedeas. *Burwell v. Anderson*, 2 Wash. 249 [194].

Forthcoming Bond—When Supersedeas Not Allowed.—Under the act of January 31st, 1809, "concerning executions, and for other purposes," the debtor was not entitled to a stay of execution, or to sale of the property on credit, on any forthcoming bond executed after the passage thereof. *Richardson v. Perkins*, 4 Munf. 512.

Effect of Supersedeas.—The effect of a writ of supersedeas may be extended to a subsequent judgment on a forfeited forthcoming bond, without writ. *Bell v. Bugg*, 4 Munf. 260; *Monroe v. Webb*, 4 Munf. 73.

If judgment has been rendered against a party and a forthcoming bond then given, and judgment on the forthcoming bond has been rendered before a supersedeas is issued and error exists in the first judgment, the petition for a writ of error ought to pray the supersedeas to both judgments; and they should both be embraced in the supersedeas. *Laidley v. Bright*, 17 W. Va. 779; *Monroe v. Webb*, 4 Munf. 73.

The right to move on a forthcoming bond is not suspended by a supersedeas to the original judgment. *Spencer v. Pilcher*, 10 Leigh 490.

3. STATUTORY BONDS—OBLIGORS.

Attachment Bond—Obligor.—The complaint on which an attachment is issued, and the bond and security for its due prosecution, ought to be made and given by the creditor himself, and not by his attorney at law. *Mantz v. Hendley*, 2 H. & M. 308.

As one member of a mercantile house to which a debt has been contracted is competent to sue out an attachment for the house against the debtor, so that member is the proper person to execute the attachment bond required by the statute, 1 Rev. Code, ch. 123, § 7. And the bond of the partner suing out the attachment, with surety, conditioned that that partner shall pay all costs, in case the house shall be cast in the suit, and all damages that shall be adjudged against him for suing out the attachment, is a good bond. *Kyle v. Connelly*, 3 Leigh 719.

Replevin Bond—Obligor.—The act of Assembly does not give a motion on a three months' replevy bond against executors. *Glassford v. Hackett*, 8 Call 166 [193].

4. STATUTORY BONDS—RELATOR.

Indemnifying Bond—Relator.—An indemnifying bond given to a sheriff, under statute 1 Rev. Code, ch. 184, §§ 25, 26 can only be put in suit at the relation of the person having the legal title to the property taken in execution and sold by the sheriff, not at the relation of any person having a mere equitable right therein. *Garlands v. Jacobs*, 2 Leigh 706 [651].

In an action on an indemnifying bond, the relator claims title to the property sold, under a sale made by one partner without the knowledge or consent of the other, of partnership property. The relator may recover for the undivided interest of the partner who made the sale, under a general allegation in the declaration of his ownership of the property. *Forkner v. Stuart*, 6 Gratt. 197.

Where an officer is required to levy an execution upon property which is claimed as exempt by the judgment debtor, and an indemnifying bond is required and given, and said officer proceeds to make sale of the property, and damages are recovered from him and his sureties on his official bond, he may reimburse himself by a suit on the indemnifying bond. *Evans v. Graham*, 87 W. Va. 657, 17 S. E. Rep. 200.

A constable, sheriff, or other officer, who sells property taken under execution, is not protected from an action of trespass by the claimant, unless the indemnifying bond taken by him under the Act of 1812, conforms in all respects to that Act, and particularly contains the clause inserted for the benefit of the person claiming title to the property. *M'Clunn v. Steel*, 2 Va. Cas. 256.

By virtue of the act of Assembly concerning sheriffs, passed the 8th of February, 1808 (Rev. Code, 2d vol. p. 160), any person claiming the property sold under an execution may prosecute an action of debt on the bond of indemnity, in the name of the sheriff or other officer to whom it was taken, without proving that any damage has been sustained by such officer. *Carrington v. Anderson*, 5 Munf. 82.

Indemnifying Bond—Action—Who May Maintain.—An action on an indemnifying bond given to a sheriff for sale of property taken in execution, under statute 1 Rev. Code, ch. 184, §§ 25, 26, 27, must be brought in the name of the sheriff, but it can only be maintained at the relation of the party injured; but though the party injured is not named as relator in the declaration or other pleadings, yet if the breach assigned is that the obligors did not pay the damages sustained by B. by reason of the sale, and if a special verdict in the cause shews that B. was considered the real plaintiff, this is enough to shew that B. is the relator. *Lewis v. Adams*, 6 Leigh 320.

A declaration on an indemnifying bond in the name of the administrator *de bonis non* of the high sheriff, sets out the bond as made to himself; and without craving oyer of the bond, the defendants demur. As there is enough in the declaration to enable the court to proceed to judgment according to law and the very right of the cause, the demurrer should be overruled. *Duval v. Malone*, 14 Gratt. 24.

Pending an action on an indemnifying bond certain of the plaintiffs died. *Held*, the survivors are entitled to maintain an action on the bond without joining the executors of decedents. *Beckham v. Duncan* (Va.), 5 S. E. Rep. 690.

Attachment Bond—Relator.—The bond authorized by the act, Code, ch. 151, § 8, p. 602, in relation to attachments, is not a general indemnifying bond; but where the attachment issues against the effects of the defendant generally, he alone can sue upon the bond; and where the attachment is issued against specific property, only the defendant or the owner of such specific property, can sue upon the bond. *Davis v. Com.*, 13 Gratt. 139.

A sheriff who levies an attachment and takes care of the property can maintain no action on an attachment bond conditioned to pay all costs and damages which might be rendered against the plaintiff in the attachment or sustained by any person by reason of the suing out of the attachment, unless the said bond be made for his benefit. *Mitchell v. Chancellor*, 14 W. Va. 22.

Upon an attachment bond with condition to pay all costs and damages which may be awarded against the plaintiff in the attachment, or sustained by any person by reason of the plaintiff having sued it out, the defendant in the attachment is included in the words, "any person" and is entitled to sue upon the bond. *Offterdinger v. Ford*, 92 Va. 636, 24 S. E. Rep. 246; *Davis v. Com.*, 13 Gratt. 145, 149.

Forthcoming Bond—Relator.—If a forthcoming bond be taken payable to the sheriff, he may maintain an action of debt upon it. *Beale v. Downman*, 1 Call 219 [249].

Replevin Bond—Relator.—Executors may maintain an action of debt upon a three months' replevy bond payable to their testator. *Booker v. M'Roberts*, 1 Call 213 [243].

A landlord is not entitled to the summary remedy by motion, on a three months' replevin bond, unless it appear that such bond was taken by a sheriff or other officer legally authorized to make distress, and to sell the distrained effects. *Smith v. Ambler*, 1 Munf. 596.

5. STATUTORY BONDS—NOTICE.

Forthcoming Bond—Notice.—A notice upon a forthcoming bond, given to a regular term of a court which the judge fails to attend, is sufficient to authorize an award of execution on the bond, at a special term held under § 17 of the circuit court law, Sup. Rev. Code, p. 141. *Wootten v. Bragg*, 1 Gratt. 1.

The act of May 28, 1870, entitled an act to prevent the sacrifice of property at forced sales, acts of 1869-70, ch. 120, p. 162, does not require three months' notice of a motion on a forthcoming bond, where the bond was forfeited before the passage of the act. *Goolsby v. Strother*, 21 Gratt. 107.

A motion on a forthcoming bond can only be made on the day to which the notice is given, unless the defendant be called, and the motion entered and continued. *Parker v. Pitts*, 1 H. & M. 3.

6. STATUTORY BONDS—ACTION—ALLEGATIONS.

Refunding Bond—Assignment of Breach.—In debt on a bond given by distributees to indemnify an administrator for dividing the estate among them; the condition being, "that they should pay him their respective proportions of all debts which he should be compelled to pay, that should thereafter come against said estate;" it is a sufficient assignment of a breach to say, "that the plaintiff on a day subsequently to the date of the bond, had paid, by the consent of the defendants, a debt which was then due from the estate aforesaid, and which, as administrator, he was bound to pay, and that the defendants had not paid him their respective parts nor any proportion thereof, but the same had

refused, although often requested." *Moss v. Moss*, 4 H. & M. 298.

Detinue Bond—Allegations—Proof.—In an action on a bond given by a plaintiff in detinue, under section 1, ch. 102, Code, to obtain possession of the property, it is indispensable to allege and prove that the property was seized from the plaintiff under process in the case, and delivered to the plaintiff in detinue. *Altizer v. Buskirk*, 44 W. Va. 256, 28 S. E. Rep. 789.

A declaration upon a detinue bond taken under § 1, of chapter 102, of the Code, is fatally defective if it fails to allege that, by reason of the execution of such bond, the property in controversy was delivered to the plaintiff. *Bratt v. Marum*, 24 W. Va. 652.

Attachment Bond—Allegations.—In an action on an attachment bond, it is not sufficient to allege in the declaration, that the defendant "did not pay all such costs and damages as have accrued, etc." but it must be expressly averred, that costs and damages had been actually sustained. *Dickinson v. M'Craw*, 4 Rand. 158.

G. STATUTORY BONDS—DEFENCES—PLEAS.

1. **PLEAS—NECESSITY FOR.**—Upon a motion for judgment upon a forthcoming bond if there is an issue of fact made by the pleadings and neither party ask for a jury the court may try it or direct a jury, either, in the exercise of its discretion. "No formal issue need be joined on a motion on a forthcoming bond, as the pleadings may be *ore tenus* and the court may pronounce judgment on the evidence." *Wallace v. McCarty*, 8 W. Va. 193; *McKinster v. Garrott*, 3 Rand. 554.

Where an attachment bond purports to be the act of the plaintiffs by an attorney in fact, the court on a motion to quash, or a motion to restore the property seized, which is equivalent, can not hold the bond to be a nullity, because no power of attorney under seal to execute the bond is produced. But if the authority to execute the bond is called in question, it must be by plea, if it can be questioned in any form. *Tingle v. Brison*, 14 W. Va. 295.

2. **PLEAS—KINDS.**—On a bond merely conditioned for indemnity, where a plea of *non damnificatus* would be proper, a plea of conditions performed answers the same purpose. *Poling v. Maddox*, 41 W. Va. 779, 24 S. E. Rep. 999; *Archer v. Archer*, 8 Gratt. 539.

Non Damnificatus.—In a suit on an attachment bond whose condition recites that if the plaintiff in the attachment shall pay all costs and damages which may be awarded against him or sustained by any person by reason of his suing out said attachment, then the above obligation to be void, the condition is the same as a condition to indemnify and save harmless and the plea of *non damnificatus* is a good and sufficient plea. *Hoadley v. Roush*, 3 W. Va. 280.

Pleas—Variance—Material.—Where an execution is against four persons and the forthcoming bond recites an execution against three only, this is material variance for which the bond must be quashed. *Holt v. Lynch*, 18 W. Va. 567.

Variance—Material.—In a notice of a motion to be made on a forthcoming bond the bond is described by mistake as executed by John when it was in fact executed by George M. Cooke: *held*, variance material, and notice insufficient. *Cookes v. Patriotic Bank*, 1 Leigh 475 [483].

Variance—Immaterial.—By a *fiat facias*, the sheriff is commanded to cause principal, interest and costs

to be levied of the goods and chattels of J. W. deceased in the hands of S. H. his administrator, if so much thereof he hath, but if not, then of the goods and chattels of S. H. There being no goods and chattels of J. W. in the hands of S. H. the sheriff levies the execution on the individual property of S. H. and takes a forthcoming bond, which recites the execution as being against the goods and chattels of S. H. administrator of J. W. deceased. *Held*, there is no substantial variance between the execution and recital thereof in the forthcoming bond. *Hairston v. Woods*, 9 Leigh 808.

An execution describes defendants as F and H and S his sureties as administrator for J deceased; they are described in the forthcoming bond simply as F, H, and S. This is not a variance for which the bond should be quashed. *Creigh v. Boggs*, 19 W. Va. 240.

If the forthcoming bond recites an execution, and that property has been taken to satisfy it, a variance, between the sheriff's return and the bond, provided the bond agrees with the execution, is unimportant. *Buchanan v. Maynadler*, 6 Call 1.

If the claim of the plaintiff, in an attachment against an absconding debtor, be stated as for a certain sum, due by negotiable note, with interest from the day when such note should have been paid; and the bond for prosecuting the attachment describe it as sued out for the sum of money mentioned therein (saying nothing of interest); the variance is not material. *Smith v. Pearce*, 6 Munf. 585.

The sheriff's failing to mention, in his return of an execution, one of the negroes on whom it was levied, is no ground for reversing a judgment on a forfeited forthcoming bond, in which that negro is mentioned as one of those on whom such execution was levied. *Dix v. Evans*, 8 Munf. 808; *Jones v. Hull*, 1 H. & M. 212.

In an action on an indemnifying bond, the declaration alleges that the obligors bound themselves to indemnify, etc. In the bond they bind themselves, their heirs, executors and administrators, jointly and severally. This is no variance. *Dickinson v. Smith*, 5 Gratt. 135.

In an action on a bond of indemnity, given to the officer, upon a sale of property under execution, at the relation of the claimant of the property, the declaration states the obligation to be, that the obligors bound themselves to pay, among other things, to any person claiming title to the property levied on, all damages which such claimant might sustain by the seizure, and sale, etc. On the trial, the plaintiff offered in evidence an indemnifying bond, in a penalty, and with a condition. *Held*, no variance, and the evidence admissible. *Kevan v. Branch*, 1 Gratt. 274.

Variance—Waiver of Objection.—Where a judgment upon a forthcoming bond is obtained against a defendant, having legal notice, and appearing by attorney, but not moving to quash the bond, nor stating by plea or bill of exceptions, any variance between it and the execution, the appellate court is not to reverse the judgment on the ground of such variance. *Bronaugh v. Freeman*, 2 Munf. 266; *Downman v. Chinn*, 2 Wash. 189; *Jones v. Hull*, 1 H. & M. 211.

Appellate Court—Variance—How Determined.—In reviewing a judgment by default on a forthcoming bond, the appellate court will compare it with the execution on which it was taken. *Glascok v. Dawson*, 1 Munf. 605.

Upon a motion to quash a forthcoming bond, for defects apparent on the face of the execution on which it was taken, an appellate court will regard the execution as part of the record, though not made so by any express order to that effect. *Couch v. Miller*, 2 Leigh 592 [545].

An objection that a forthcoming bond is void because founded on an execution issued at a time when it should not have been, cannot avail in the appellate court. Such objection should be made before judgment was rendered on the bond. *Conaway v. Odibert*, 2 W. Va. 25.

Pleas—Set-Off.—The defence of set-off is admissible in a motion upon a forthcoming bond taken on a warrant of distress. *Allen v. Hart*, 18 Gratt. 722.

No set-off of the sheriff's individual indebtedness can be allowed against a forthcoming bond given on the levy of taxes, under Acts 1893, ch. 23. *Miller v. Wisener*, 45 W. Va. 59, 80 S. E. Rep. 237.

Pleas—Statute of Limitations.—The statute of limitations, 1 Rev. Code, ch. 128, § 5, whereby the remedy on a judgment by debt or *scire facias* is limited to ten years, is no bar to a motion on a forthcoming bond of more than ten years' standing. *Lipscomb v. Davis*, 4 Leigh 808.

Pleas—Release.—If the creditor make an agreement with the principal debtor in a forthcoming bond, to take a certain sum, payable in five annual instalments, in full satisfaction of the bond, without the consent of the surety, this releases the surety from his liability on the bond. *Steele v. Boyd*, 6 Leigh 547, 20 Am. Dec. 218.

If the stay of an injunction to an execution takes effect *after* a forthcoming bond has been forfeited then the obligors in such bond are not discharged but continue bound although the operation of the injunction may stay proceedings for the enforcement of such bond; but where the injunction was obtained *before* the day of sale and was in force on that day, whereby forfeiture of the forthcoming bond was prevented, the performance of its condition is excused or made unnecessary and the obligors therein released and discharged from its obligation. *Hull v. Bloss*, 27 W. Va. 654; *Rucker v. Harrison*, 6 Munf. 181; *Wilson v. Stevenson*, 2 Call 218.

Immaterial Errors.—The failure of the sheriff to make a return on an execution is no ground for reversing a judgment obtained on a forthcoming bond taken in pursuance thereof. *Jones v. Hull*, 1 H. & M. 212.

An appellate court will not reverse the judgment of an inferior court, overruling a motion to quash an undertaking or forthcoming bond made to the sheriff, simply because it appears that the undertaking was executed after the return day of the writ of *scire facias*. *Harwood v. Creel*, 8 W. Va. 579.

Upon an appeal from the judgment of an inferior court, errors in the execution or replevy bond, issued or taken, after the judgment, will not be noticed. They are merely ministerial acts, and must be corrected in the same court upon motion; and if, on such motion, that court give an erroneous opinion, the party injured may then appeal, and have it corrected in the appellate court. *Leftwitch v. Stovall*, 1 Wash. 391 [303].

If a forthcoming bond be delivered by the sheriff to the plaintiff, before notice thereupon be given to the defendants, execution may be awarded upon it, though it has not been filed in the clerk's office. *Eppes v. Colley*, 2 Munf. 523.

If the clerk of the court alter a forthcoming bond,

it will not prejudice the plaintiff; but the bond will be restored to what it originally was. *Buchanan v. Maynadier*, 6 Call 1.

If the motion on a forthcoming bond be signed by the plaintiff, it is sufficient, although it omit to state to whom the bond is made payable, as the defendant, in such a case, has no reason to presume that the plaintiff means to move upon a bond not given to himself. *Lemoigne v. Montgomery*, 5 Call 528.

In a judgment on a forthcoming bond, if the record states that the cause was continued until the next day, but does not mention that the defendant was called, it is not error, if the defendant, on the day of the judgment, prays an appeal, and gives bond, in court, to prosecute it. *Wilkinson v. Hendrick*, 5 Call 12.

Material Errors.—In an action of debt upon a forthcoming bond taken under a distress warrant, the defendant may plead and show by way of defense that the distress was for the rent not due from him at the time of suing out the distress warrant mentioned in the condition of said bond. *Hall v. Wadsworth*, 85 W. Va. 375, 14 S. E. Rep. 4.

When the court summarily and without cause appearing of record quashes an execution and forthcoming bond, the appellate court will for that reason reverse the decision and remand the cause for further proceedings. *Arnold v. Given*, 5 W. Va. 257.

If the commissioners who take a replevy bond act improperly, the court will on motion quash the bond. *Hendricks v. Dundass*, 2 Wash. 63 [50].

An award of execution on a forfeited forthcoming bond cannot successfully be objected to on account of the invalidity of the original judgment, unless such judgment is null and void. *Pates v. St. Clair*, 11 Gratt. 22.

Even after execution has been awarded on a forthcoming bond, the bond may be quashed on the motion of the creditor, to enable him to have execution on the original judgment, if the case be one in which the execution on the forthcoming bond has proved unavailing, without any default of the creditor. *Garland v. Lynch*, 1 Rob. 545.

Notice is given by K. to A. of a motion to be made on a forthcoming bond at June term of a county court, for money paid by K. as A.'s surety; the motion is continued without A.'s consent from June term to August term, passing by the intermediate July term. *Held*, this was a discontinuance, and a judgment subsequently rendered for the plaintiff on the same notice, is therefore erroneous. *Amis v. Koger*, 7 Leigh 221. See monographic note on "Continuances" appended to *Harman v. Howe*, 27 Gratt. 676.

Confession of Judgment—Release of Errors.—The confession of a judgment on a forthcoming bond is a release of errors, if any exist, in the original judgment. *M'Rea v. Turnpike Company*, 3 Rand. 160.

A confession of judgment on a forthcoming bond is a release of all errors in the previous proceedings. *Stanard v. Timberlake*, 3 Leigh 681.

3. BURDEN OF PROOF.

Rent—Distress—Bond—Burden of Proof.—On proceedings upon a forthcoming bond given on a distress for rent, whether by motion or by action on the bond, the plaintiff must prove the contract of rent for which the distress was sued out. *Carter v. Grant*, 33 Gratt. 769.

Upon a motion for judgment on a forthcoming bond, the plaintiff is not bound to show a breach of

the condition; but the defendant is to prove performance. *Nicolas v. Fletcher*, 1 Wash. 427 [330].

4. PRESUMPTIONS.—Where a motion is made to quash an execution and forthcoming bond, on the ground that a previous execution had issued, and a forthcoming bond taken for the same debt, which execution and bond, it was alleged, had been improperly quashed, the court will not enquire into the validity of the first execution and bond, upon the motion to quash the second. The judgment of a competent court will be considered right, until regularly reversed. *Jett v. Walker*, 1 Rand. 211.

A. B. and C. execute a forthcoming bond, to release the goods of A. taken in execution. C. pays the debt, and moves against B. as a principal in the bond. There is nothing in the bond to show whether B. was principal or surety. B. contends that he was only a surety jointly with C. The court below give judgment for C. on the motion. No evidence is in the record to show whether B. was surety or principal. The judgment was affirmed in this court, as it will be presumed that the court below had evidence before them that B. was a principal and not a surety. *Cunningham v. Mitchell*, 4 Rand. 189.

A forthcoming bond, being inserted in the transcript of the record, is to be taken as the bond on which the court gave judgment, without any certificate by the clerk to that effect. *Beale v. Wilson*, 4 Munf. 380.

H. STATUTORY BONDS—EVIDENCE.

Parol Evidence.—It is error to quash a forthcoming bond on motion, simply because the name of the obligee therein has been misspelled, or so written as to make it doubtful as to the person intended. Parol evidence of the surrounding circumstances should be admitted in such case that the court may be placed as nearly as possible in the situation of the person who wrote the deed or note, and thus ascertain the person intended by the name employed. *Ambach v. Armstrong*, 29 W. Va. 744, 3 S. E. Rep. 44.

Indemnifying Bond—Admissibility of Evidence.—In debt on an indemnifying bond given to a sheriff for seizure and sale of a slave under execution, it is competent to the defendants to prove that the relator of the plaintiff had only a life estate in the slaves, though it appear that he had *bona fide* purchased of the tenants for life an absolute estate. *Stevens v. Bransford*, 6 Leigh 246.

Indemnifying Bond—Admissibility of Evidence.—Arbitrators, in the estimation of damages, upon a bond given by the deputy to indemnify and save harmless the high sheriff, may consider all elements of damage within the terms of the submission. *Holcomb v. Flournoy*, 2 Call 365 [434].

Indemnifying Bond—Competency of Witness.—A deputy sheriff, who sells property under an execution, is not a competent witness, in an action in the name of the high sheriff upon a bond of indemnity, to prove that, in fact, the property is that of the person against whom the execution is issued. *Carrington v. Anderson*, 5 Munf. 32.

The decision in *Carrington v. Anderson*, 5 Munf. 32, approved, and the law now settled, that in an action upon an indemnifying bond, brought by a person claiming the property sold, the deputy sheriff who sold the property under the execution, and took the bond, is not a competent witness for the defendants, to prove that the property belonged to the person against whom the execution issued. *Wilson v. Alexander*, 9 Leigh 459.

In an action on an indemnifying bond, at the relation of parties claiming under a deed of trust from the debtor in the execution, upon the levy of which the bond was taken, the grantor in the deed, being the debtor in the execution, is a competent witness for the plaintiff. *Patteson v. Ford*, 2 Gratt. 18.

I. STATUTORY BONDS—JUDGMENT.

Joint Bond—Notice—Form of Judgment.—On a joint notice to all the obligors in a forthcoming bond, the plaintiff may take judgment against one of the defendants. *Glassel v. Delima*, 2 Call 809 [808].

Forthcoming Bond—Form of Judgment.—A forthcoming bond given by the defendant only, without any security, will support a motion, and judgment will be rendered on it in favor of the plaintiff. *Washington v. Smith*, 3 Call 13.

Replevy Bond—Form of Judgment.—Conditional judgment was rendered against A., and his appearance bail B., and writ of enquiry executed against A. with only a *f. fa.* against A. and B., and replevy bond was taken from both. *Ca. sa.* was afterwards sued out against A. only, on whom it was executed, and he was imprisoned. Judgment was correctly entered against B. on the replevy bond. *Hudson v. Morris*, 1 Wash. 92 [71].

Indemnifying Bond—Valid—Extent of Liability.—A. having been guardian of B. and C. and B. being out of the country, and C. the younger of the wards having attained to full age, A. delivers to C. six slaves, the property of both in equal shares, and takes bond and surety from C. with condition that, if B. returns to the country, or in any manner claims his proportion of said slaves and their heirs, and receives satisfaction from C. then the obligation to be void, etc. *Held*, C. and his surety are bound by this bond though B. die without ever returning to the country, to indemnify A. against the claim of B's representatives. *Lamb v. Harrison*, 2 Leigh 525.

Attachment Bond—Judgment—Elements of Damage.—Where a party is engaged in the performance of a contract on a railroad, using his teams and utensils in removing dirt at so much per cubic yard, and his teams and utensils are seized and sold under an attachment wrongfully sued out against him, whereby he is prevented from the performance of his contract, the profit of the contract, which he has thus been prevented from realizing, is a proper element of damage in an action upon the attachment bond, where such profit can be readily ascertained. *State v. Andrews*, 39 W. Va. 35, 19 S. E. Rep. 385, 45 Am. St. Rep. 884.

An attachment bond given by the plaintiff in the attachment conditioned "to pay all costs and damages which might be rendered against him or sustained by any person by reason of his suing out the attachment," covers no damages for taking property, which the attachment does not command to be taken. The undertaking of the obligors is that the attachment is properly sued out and the claim of the plaintiff well founded. They do not undertake that the officer will commit no trespass in its execution. *Davis v. Com.*, 13 Gratt. 139; *Mitchell v. Chancellor*, 14 W. Va. 22.

Forthcoming Bond—Judgment—Damages.—If the defendant appeals from a decree of the high court of chancery, pronounced on a forthcoming bond, the court of appeals may allow ten per cent. damages for his retarding the execution of the decree. *Skipwith v. Clinch*, 3 Call 76 [86].

Forthcoming Bond—Excess of Interest—When Error Immaterial.—A forthcoming bond is taken for a greater sum than is due upon the *Acti facias*; but this appears by computation in court upon a motion for award of execution, and does not appear on the face of the bond. *Held*, the court may award execution, for the true amount due. *Osborne v. Crawley*, 1 Va. Cas. 118.

Forthcoming Bond—Judgment—Excess of Interest—Release of Excess.—If a forthcoming bond be taken for more than the sum due by the execution, and the plaintiff release the excess, the bond will support a judgment. *Scott v. Hornsby*, 1 Call 35 [41].

If the forthcoming bond include an excess, and the plaintiff after judgment, but during the same term, release the excess, the defect is thereby cured; and the judgment rendered valid. *Bell v. Marr*, 1 Call 40 [47].

Replevy Bond—Judgment—Excess of Interest—Deduction Thereof.—Judgment ought not to be rendered on a 3 months' replevy bond, for interest from a day anterior to the date of the bond; but it may for interest from that date, on the rent and costs of the distress added together. And if the bond be taken, including interest from a day anterior to its date, such erroneous interest may be deducted, and judgment entered for the right sum. *Williams v. Howard*, 3 Munf. 277.

Forthcoming Bond—Judgment—Excess of Interest—Waiver of Objection.—Although the judgment on a forthcoming bond should be rendered for a larger sum than that due by the execution, yet if the execution is not made part of the record by bill of exceptions, nor any objection made in the court below, such objection cannot be sustained in the court of appeals. *Burke v. Levy*, 1 Rand. 1.

Forthcoming Bond—Judgment—Error—Correction in Lower Court.—A judgment and award of execution upon a forfeited forthcoming bond, having been entered by default, upon a day prior to that to which notice was given, the court in which the judgment and award of execution was rendered has jurisdiction on the motion of the plaintiff to set aside the judgment and quash the execution, upon reasonable notice to the defendants. Code, ch. 181, § 5, ch. 187, § 23; *Ballard v. Whitlock*, 18 Gratt. 235.

Forthcoming Bond—Judgment Reversed—When Cause Remanded.—Where a county court overrules a motion for award of execution on a forthcoming bond, on a particular ground, which renders all other defence unnecessary, and this judgment is reversed by the circuit court for error in the particular point, *Held*, the circuit court ought not to proceed to award of execution immediately, without giving defendant opportunity to make other defence, unless it appear from the record he had no other defence to make. *Anderson v. Leitch*, 1 Leigh 462.

If a judgment quashing a forthcoming bond be reversed, the appellate court will not proceed to give judgment for the plaintiff, unless it regularly appear that the defendants had legal notice of the motion, or appeared to oppose it. If, therefore, there be no bill of exceptions, making the notice, stated in the record, a part thereof, and it do not appear by the judgment itself, that the defendants had legal notice, or appeared in the court below, the cause should be sent back, to give the plaintiff an opportunity to prove his notice, and the defendants to make any defence thereto, which their case may admit of, according to law. *Beale v. Wilson*, 4 Munf. 380.

J. STATUTORY BONDS—RELIEF IN A COURT OF EQUITY.

1. JURISDICTION OF COURT.—Courts of equity may substitute a bond of indemnity for an injunction wherever the ends of justice will be promoted or the public interest demands it. *Campbell v. Point Pleasant, etc., R. Co.*, 23 W. Va. 448.

The power of a court of equity to rule a tenant for life, of slaves, or other personal property, to give security that property shall be forthcoming at his or her death, is to be exercised, not as a matter of course but of sound discretion, according to circumstances. *Holliday v. Coleman*, 2 Munf. 162.

The courts of chancery may quash executions irregularly sued out on their decrees, and forthcoming bonds taken under them, on motion made on notice, in a summary way. *Windrum v. Parker*, 2 Leigh 391 [361].

A devisee of nearly all the estate of a principal debtor, gave a bond to indemnify the estate of the surety against the debt; in which bond one of the executors of the surety bound himself, in his individual character, as surety for the said devisee. The creditor afterwards obtained a judgment, in the federal court, against the said executors; one of whom, (*viz.*, the same who was co-obligor in the bond of indemnity), paid off the judgment. The said bond being in the possession of one of the obligees, who resided out of the state, and refused to let them have it, the executors brought a suit in chancery against the said devisee (the plaintiffs and defendant being all citizens and residents of this state), to recover of him the money so paid; and the court's jurisdiction was sustained. *Cabell v. Megginson*, 6 Munf. 202.

2. WHEN EQUITABLE RELIEF GRANTED.—Where an executor confesses judgments, and gives forthcoming bonds, for debts due by his testator, under the belief that the assets of the estate are amply sufficient to pay all claims against it, but afterwards, by an unexpected depreciation of property, the amount of assets proves inadequate, the executor shall be relieved in equity. *Miller v. Rice*, 1 Rand. 438.

In an action on an indemnifying bond for the benefit of a trustee in a deed of trust, in which the property sold under the execution is embraced, the defence is that the deed was fraudulent, but a verdict and judgment is for the plaintiff. The defendant afterwards comes into equity on the ground of after-discovered evidence establishing the fraud as to some of the debts secured, but not questioning the *bona fides* of others, and asks for an injunction to the judgment, for a new trial, and general relief. *Held*, the ground of equity jurisdiction being satisfactorily made out, the court will not direct the new trial, because it would not probably afford the proper relief, but will retain the cause, and will allow the plaintiff to impeach the deed, notwithstanding his unsuccessful effort to do so at law. *Billups v. Sears*, 5 Gratt. 31.

3. WHEN EQUITABLE RELIEF REFUSED.—It is no ground for relieving in equity either the principal or the sureties in a forthcoming bond, that the principal was not the owner of the property specified therein, or had only a qualified interest. *Syme v. Montague*, 4 H. & M. 180.

Judgment on a forthcoming bond ought not to be relieved against, in equity, because the bond was forfeited, by a slave having run away, who by the condition, was to be forthcoming. *Cole v. Fenwick*, *Gilmer* 134.

A *N. fa.* being sued out by J. against M. and being in the hands of the sheriff, M. the debtor, applies to G. to join him in a forthcoming bond thereon, and represents to him, in the sheriff's presence, that the amount of the debt is about one-seventh of the real amount, which representation the sheriff does not contradict; whereupon, G. consents to become the surety, and M. and G. sign and seal a forthcoming bond, blank as to the amount of the execution and as to other material particulars, and deliver it to the sheriff, who afterwards fills up the blanks; and execution is awarded upon this forthcoming bond. *Held*, G. is not entitled to relief in equity against the obligation of the bond, upon the ground of the deception which induced him to execute it, as the creditor to whom it was taken was no party to the fraud, and the sheriff, who was party to it, was not the creditor's agent in taking the bond. *Gordon v. Jeffery*, 2 Leigh 444 [410].

4. FORM OF RELIEF.

(a) Injunction.—If an infant becomes security in a twelve months' replevy bond, a court of equity will grant a perpetual injunction, even against an assignee without notice. *Allen v. Minor*, 2 Call 50 [71].

A court of equity has jurisdiction to award an injunction against the sale of personal property under execution at the instance of any party claiming to be the owner of such property other than the judgment debtor; nor does the statute providing for the taking of an indemnifying bond by the officer levying on the property furnish an adequate remedy at law and so exclude relief in a court of chancery. *Walker v. Hunt*, 2 W. Va. 491.

If the sheriff, after taking a forthcoming bond, accept the same goods from the defendant, in discharge of his body from another execution, and prevent the surety in such bond from delivering them on the day therein appointed; a court of equity, on a bill for discovery and injunction, exhibited by the surety, will require the sheriff, and all parties concerned, to answer a charge of fraud and combination, and (whether fraud be established or not) will perpetually enjoin a judgment rendered against the surety upon the forthcoming bond, as unconscionable against him; leaving the plaintiff, in that judgment, to his remedy against the sheriff; and the sheriff to his remedy against the person who indemnified him, or to whom, by mistake, or in his own wrong, he paid the money in satisfaction of the second execution. *Lusk v. Ramsay*, 8 Munf. 417.

(b) Contribution.—Judgment is recovered, and *A. fa.* sued out against D. principal debtor, and A. and B. his sureties; the *A. fa.* is levied on the goods of D. the principal, who gives a forthcoming bond, in which A. and B. and another person E. are bound as D.'s sureties; and on execution on the forthcoming bond, E. is compelled to pay the debt. *Held*, E. is co-surety with A. and B. for D. in the forthcoming bond, not surety for A. and B. as well as D. and therefore E. is entitled only to contribution from A. and B. as co-sureties, not to full indemnity from them as principals. *Langford v. Perrin*, 5 Leigh 600 [552].

A., B. and C. are sureties for D. in a bond; judgment is recovered against D. the principal, and the sureties A. and B. but not against the other surety C. and a *N. fa.* being sued out on the judgment, and levied on the property of D. the principal, he gives a forthcoming bond, in which A. and B. and another

person join him as sureties ; execution awarded on such forthcoming bond, is levied on the goods of A. one of the sureties in the original bond, as well as in the forthcoming bond. *Held*, A. has no right to contribution from C. his co-surety in the original bond. *Langford v. Perrin*, 5 Leigh 600 [552].

If an execution against principal and surety be levied on property of the principal, and a third person, at the request of the principal, but without the consent or concurrence of the surety, intervene and bind himself as surety in a bond for the forthcoming of the property on the day of sale, and the bond be forfeited, although such third person thus becomes bound as surety for the debt, yet he is not entitled on making payment to be substituted for contribution to the original judgment against the original surety. *Sherman v. Shaver*, 75 Va. 1 ; *Givens v. Nelson*, 10 Leigh 382 ; *Garland v. Lynch*, 1 Rob. 545 ; *Stout v. Vause*, 1 Rob. 169, 180.

(c) *Subrogation*.—C. is surety on a forthcoming bond. The bond having been forfeited execution was awarded and levy made. The sale of the property levied on was enjoined and C. became surety in the injunction bond. It appeared that the property levied on under the second execution was not the property of any or either of the original debtors. *Held*, C. did not lose his right of subrogation and indemnity by becoming surety in the injunction bond. *Coffman v. Hopkins*, 75 Va. 645.

Quære, whether the purchaser of property sold under execution, can have the benefit of an indemnifying bond, given to the sheriff, on the principle of substitution? *Saunders v. Pate*, 4 Rand. 8.

A surety in a forthcoming bond who has paid the debt becomes entitled, upon equitable principles, to all the rights of the creditor against the original debtor, subsisting at the time he became so bound for the debt, and a judgment for the benefit of the surety so paying, is not regarded as extinguished, but transferred, with all its obligatory force against the principals. *Rorer v. Ferguson*, 96 Va. 411, 31 S. E. Rep. 817 ; *Hill v. Manser*, 11 Gratt. 522 ; *Cooper v. Daugherty*, 85 Va. 350, 7 S. E. Rep. 387.

A surety in a forfeited forthcoming bond is a surety for the debt; and when he pays it as such surety, he is entitled to all the rights of the creditor against the original debtor, subsisting at the time he became bound for the debt. And the judgment, for the benefit of the surety so paying, is not extinguished but transferred with all its obligatory force against the principal, and constitutes a legal lien upon his real estate owned at the date of the judgment or afterwards acquired. *Hill v. Manser*, 11 Gratt. 522 ; *Buchanan v. Clark*, 10 Gratt. 164.

The surety of a joint debtor, in a forthcoming bond, becomes, upon the forfeiture thereof, surety for the debt; and when he has discharged it, is entitled to be substituted to all the rights of the creditor against the original debtors, subsisting at the time he became so bound for the debt. *Robinson v. Sherman*, 2 Gratt. 178.

(d) *Exoneretur*.—The court in which a forthcoming bond for property levied on is taken may, in a proper case, direct an *exoneretur* of the surety, and need not require him to seek his remedy by *audita querela* or by bill in equity. *Steele v. Boyd*, 6 Leigh 547, 29 Am. Dec. 218.

5. *EQUITY TREATS THAT AS DONE WHICH OUGHT TO BE DONE*.—A forfeited forthcoming bond stands as a security for the debt, and though, while in

force, no execution can be taken out or other proceedings be had at law to enforce the original judgment, yet the bond is not an absolute satisfaction. For if it be faulty on its face, or the security when taken be insufficient, or the obligors, though solvent when the bond is taken, become insolvent afterwards, the plaintiff may, for these or other good reasons, on his motion, have the bond quashed and be restored to his original judgment. And though the bond be not quashed, if it appear that it may properly be, a court of equity, which looks to substance rather than form, and, when occasion requires, treats that as done which ought to be done, will regard the bond as a nullity, and the original judgment in full force. *Rhea v. Preston*, 75 Va. 757, 774 ; *Garland v. Lynch*, 1 Rob. 545 ; *Jones v. Myrick*, 8 Gratt. 179, 211.

Though a forthcoming bond is forfeited, and not quashed, yet in equity the lien of the original judgment still exists ; and if the obligors in the bond prove insolvent, so that the debt is not paid, a court of law will quash the bond so as to revive the lien of the original judgment. And a court of equity, having jurisdiction of the subject, will treat the bond as a nullity, and proceed to give such relief as the creditor is entitled to under his original judgment. *Jones v. Myrick*, 8 Gratt. 179.

When the obligors in a forthcoming bond, which has been forfeited and returned, though solvent when the bond was taken, become insolvent afterwards, the plaintiff may have the bond quashed and be restored to his original judgment. And though the bond be not quashed, a court of equity will regard it as a nullity and the original judgment in full force. *Cooper v. Daugherty*, 85 Va. 343, 7 S. E. Rep. 387 ; *Jones v. Myrick*, 8 Gratt. 211-12 ; *Leake v. Ferguson*, 2 Gratt. 432 ; *Robinson v. Sherman*, 2 Gratt. 182 ; *Garland v. Lynch*, 1 Rob. 545 ; *Powell v. White*, 11 Leigh 309 ; *Goodall v. Stuart*, 2 H. & M. 111 ; *Rhea v. Preston*, 75 Va. 774.

Where judgment is obtained against a principal and surety to a bond, and the latter gives a forthcoming bond, which is forfeited, the original judgment is not thereby satisfied, although any further proceedings on it will be barred, until the forthcoming bond shall be quashed. *Randolph v. Randolph*, 3 Rand. 490.

The taking of a forthcoming bond, on a judgment and execution against the obligor of an assigned bond, is not such a satisfaction of the judgment, as will preclude the assignees from having recourse against the assignors. *Smith v. Triplett*, 4 Leigh 590.

The bonds taken at sales under the act of May 28, 1870 (sep. acts 1869-70, p. 162), are in the nature of forthcoming bonds; and the creditor is not bound to receive them as so much paid on his debt. *Garland v. Brown*, 23 Gratt. 173.

An execution being levied upon the property of one defendant, and a replevy bond taken, a second execution against the other defendant cannot issue so long as the replevy bond is in force, it being a satisfaction of the original judgment. *Taylor v. Dundass*, 1 Wash. 121 [93].

K. *ACTION OF REPLEVIN ABOLISHED*.—By Va. Code 1887, sec. 2899, it is provided "no action of replevin shall be hereafter brought."

By the W. Va. Code 1899, ch. 103, sec. 4, p. 774, it is provided "no action of replevin shall be hereafter brought."

112

***Hale v. Horne & als.**

June Term, 1871, Wytheville.

1. **Deed of Trust—Equity of Redemption—Subject to Lien of Judgments.***—The equity of redemption in land conveyed in trust to secure debts, is subject to the lien of judgments subsequently obtained, in the order of their priority in date.

2. **Same—Sale of Land Subject to—Case at Bar.**—M conveys land in trust to pay specified debts, and afterwards sells and conveys it to G. G has good title to the land, subject to the trust; and when the trust is discharged, he is by operation of the statute (Code, ch. 135, § 31, p. 612) entitled to hold the land, at law and in equity, though the trustee has not conveyed it to him.

3. **Same—Judgments—Sale of Land Subject to—Case at Bar.**—M conveys land to H. in trust, to secure certain debts. After the deed is recorded, C and D recover judgments against M: and then M and H, and the principal creditor in the trust deed, unite to sell and convey the land to G; and G pays one half cash, and gives his notes in one and two years for the balance of the purchase money: all of them having notice of the judgments. H proceeds at once to pay off the debts secured by the deed, and pays the whole balance of the purchase money to M, before the notes of the purchaser are due.
HELD:

1. **Same—Same—Same—Same.**—The payment by H to M was in his own wrong, and C and D are entitled to have their judgments satisfied out of the purchase money due from G.

2. **Same—Same—Same—Same.**—C and D having filed their bill to have their judgments satisfied out of the land, to which the vendors and purchaser are parties, G may enjoin the collection of the money from him by H, and pay it into court.

3. **Appellate Proceedings—Defect of Parties.**—The judgments of D being in his name, for the benefit of J, he sues in his own name, without making J a party; but there is no objection to this in the Circuit court, and the decree is in favor of D. This is not error; but for conformity it may be amended by the appellate court and affirmed.

4. **Chancery Practice—Bill to Set Aside a Deed—Fraud.**

113 Though the bill seeks to set aside the deed for fraud, yet, as *it makes a case entitling C and D to be paid out of the purchase money of the land, and asks for general relief, though the fraud is not proved, they may have the purchase money applied to the payment of their judgments.

On the 8th day of February 1858, Wm. M. Mitchell executed a deed, by which he conveyed to Eli C. Hale a tract of land in the county of Grayson and all his personal property, to secure to Martin Hale and others, certain debts mentioned in the deed; and it was provided that Mitchell should remain in possession of the property until the 1st of the next October; and then if the debts were not paid, Hale, the trustee, might, at the request of any of the creditors secured by the deed, sell the land and personal property at public auction on the premises for cash, after advertising the sale for thirty days, and out of the proceeds of sale, pay the debts in the order prescribed in the deed; and if there was not

enough to pay all, certain debts mentioned were to be paid pro rata. This deed was admitted to record on the day of its date, in the clerk's office of the County court of Grayson.

At the February term of the County court of Grayson, which commenced a few days after this deed was admitted to record, James W. Clark recovered a judgment against Mitchell for \$120 principal, beside interest and costs, subject to a credit of \$50. Dickenson and Nuckols, for the benefit of John D. McCamant, recovered four judgments against Mitchell, two of them each for \$250, one for \$600 and one for \$75.88, of principal, besides interest and costs. At the April term of the Circuit court, Wm. R. Horne recovered two judgments against Mitchell, each for \$120 of principal, with interests and costs; and at the May term of the County court, Dickerson recovered another judgment against him for \$80. On all these judgments executions of fi. fa. were issued, which were

114 returned, no effects except such as were included in a deed of trust. *On the

11th of October 1858, Mitchell, with the concurrence of the trustee, Eli C. Hale, and of Martin Hale, who was the principal creditor secured by the deed, made a contract with Lee Nuckols and A. F. Gregory, to sell to them the land embraced in the deed, for the sum of six thousand dollars. And Mitchell and the two Hales executed a bond to Nuckols and Gregory in the penalty of twelve thousand dollars, with condition which recited that Mitchell and the Hales had sold to them the land, and that if Mitchell and the Hales made to them a good and sufficient deed, with general warranty to the said land, on or before the 1st of October 1859, then the obligation to be void.

On the same day Eli C. Hale and Martin Hale entered into another bond to Nuckols and Gregory, in the penalty of six thousand dollars, which recites the purchase of the land at \$6,000; and whereas there are judgment liens on said land in favor of John Dickenson and others, and whereas Martin and Eli C. Hale required the said Nuckols and Gregory to pay over to Eli C. Hale, as trustee in Mitchell's deed, the purchase money for the land, if the said Martin and Eli C. Hale shall pay off and satisfy the said judgments, so as to discharge the liens thereof upon the land, then the obligation to be void.

On the same day Eli C. Hale gave to Nuckols and Gregory a receipt by which he acknowledged the receipt from them of the sum of \$6,000 for the land; and also for the sum of \$175, paid by them for Mitchell's interest in about 4½ acres of land in the county of Grayson, called the mill lot. It does not appear certainly that this interest was embraced in the deed of trust. Though this receipt speaks as if the whole purchase money had been paid, in fact only \$3,000 was then paid, and Nuckols and Gregory executed their notes to Hale, each for \$1,500, one payable in twelve, and the other in twenty-four months.

115 *In November 1858, Eli C. Hale having advertised the land and personal property for sale under the deed of trust, set it up at auction, to be sold for cash, when

*See *Coutts v. Walker*, 2 Leigh 268.

Martin Hale became the purchaser of the land at the price of \$5,800. The Hales say that they were advised by counsel that this was the only way in which they could make a good title to Nuckols and Gregory, and the purpose was that Martin Hale should purchase it unless it went above \$6,000. Accordingly, on the 16th of August 1859, Mitchell and his wife, and Eli C. and Martin Hale conveyed the land with general warranty to Nuckols and Gregory. And the same day the bond to indemnify them against incumbrances was delivered up to Martin Hale, who tore off the names of the obligors.

Eli C. Hale proceeded to pay off the creditors secured by the deed of trust, and ascertaining, according to his statement, that after satisfying the trust there remained a balance of the trust fund amounting to \$1,297.07; he on the 27th of January 1859, paid over this sum to Mitchell.

In February 1859, William R. Horne, John Dickenson, Creed Nuckols and James W. Clark instituted a suit in equity in the Circuit court of Grayson county, which was afterwards transferred to the Circuit court of Wythe, against Eli C. Hale, Martin Hale, Wm. M. Mitchell, Lee Nuckols and A. F. Gregory. In their bill they set out the judgments recovered by Horne and by Dickenson and Nuckols for McCamant, and the judgment recovered by Clark against Mitchell, and also the deeds of Mitchell to Eli C. Hale, and of Mitchell and the Hales to Nuckols and Gregory, and the bonds of the Hales to Nuckols and Gregory.

They charge that the deed was fraudulent, intended to hinder and delay them and other creditors of Mitchell in the collection of their debts. They charge that a portion of the debts secured by the deed were either without any consideration, or were created for the fraudulent purposes of the deed, at

116 *or about the time of its execution; that Mitchell was allowed to retain possession of the property, and made way with much of it, and pocketed the proceeds; that the Hales promised to pay the debts of Horne, Clarke and Dickenson; that by these promises and assurances the plaintiffs were prevented from taking steps to enforce their judgments. That Eli C. Hale had returned to the clerk's office a list of the sales, and that list is \$375 less than the actual sales: that throughout every transaction Mitchell and his brothers-in-law, Eli C. and Martin Hale, have acted in concert, and with a mutual understanding of each other's intentions; and the purpose and effect of the deed has been to squander an estate valued at seven or eight thousand dollars; and they make no pretension to the payment of more than \$4,000 of Mitchell's debts. That Eli C. Hale has recently paid to Mitchell about \$1,000 out of the proceeds of the sale of the trust property; and that this was done with a full knowledge of the plaintiff's judgment liens and in the face of his promises. They call upon the defendants to answer fully all the charges in the bill, and that Martin Hale be required to state particularly what was the consideration for the debt of \$1,517.54, secured by the deed

to him, and how that was created. And they pray that the court may set aside the deed of trust, and direct a resale of the property for the satisfaction of the plaintiff's debts; that if deemed necessary the court will direct an account to be taken to ascertain what disposition has been made of the trust fund, and for what amount the trustee has rendered himself liable; and for general relief.

Eli C. Hale answered the bill. He denies the fraud imputed to him. He says it is true Mitchell is the brother-in-law of himself and Martin Hale, and that they had a strong desire to sustain him in his difficulties. He denies that the deed of Mitchell

was intended to hinder, delay or defraud the plaintiffs or any other creditors

117 *of Mitchell; but that on the contrary, it was intended to secure honest debts, and all the debts therein specified were honestly due from Mitchell. He denies he ever made the promise charged in the bill. They approved Mitchell's sale of the land, because they thought it a good bargain; and more than it would have brought if sold under the deed. The charges of fraud in the sale of the trust property are false and groundless, as are also the respondent's complicity in Mitchell's supposed waste and misapplication of the trust property. He says it is true the land was set up at public auction and was cried off to Martin Hale; but this was done under the advice of counsel, that this was necessary to give validity to the sale made by Mitchell. He denies that he had any notice that any execution in favor of the plaintiffs or either of them was in force against Mitchell at the time of the sale, and therefore protests against his liability to satisfy their claims. He insists the funds in his hands after paying the trust debts was a personal fund belonging to Mitchell, upon which judgments were no liens; and says that this fund being the property of Mitchell, and no steps having been taken to subject it in respondent's hands, he paid it over to Mitchell.

Martin Hale also answered. He refers to the answer of Eli C. Hale, and adopts it in so far as its statements and denials are applicable, and he especially denies all fraud and intention to hinder, delay and defraud the complainants or any other creditors of Mitchell. He says, that while it is not in his power to state with absolute precision, every item of claim comprising the debt of \$1,517.54, due from Mitchell, and secured by the deed of trust, yet every dollar of that amount was justly due him for full and fair consideration, and he will try to mention the principal matters, to wit: a cow, three wagon-loads of corn, a quantity of oats, a debt of upwards of \$150 due respondent's mother from Mitchell, 118 *and paid at his request by respondent; a sum of about \$275 loaned by respondent to Mitchell, and debts paid to several persons by respondent for Mitchell at his request. That part of the money, as much as \$300 at one time and nearly as much at another time, was loaned to Mitch-

ell to pay purchase money of the land mentioned in the deed of trust. That Mitchell had never paid him anything on account of these advancements or loans, and that they were all counted up and included in the bond when the deed was given; and he avers that there never was a debt more justly due to any man than was every dime of that debt due to him from Mitchell. He denies that he promised Horne to pay his debt, but on the contrary, told him that he did not think the property would bring enough to pay his debt.

In September 1860, the commissioner who had been directed to take an account of the trust fund made a report which, stating the price of the land at \$5,800 and the personal property at \$256.65, making \$6,056.65, showed that the trustee had paid out the whole amount; the last item being \$1,297.07 paid to Mitchell on the 27th of January 1859. The commissioner further reported, that Mitchell had sold certain articles embraced in the deed, amounting to \$236.25, and that the trustee had applied \$151.11 to satisfy, as was stated, certain executions in the hands of a constable when the deed was made; though the commissioner did not see the executions. The whole amount of the trust fund thus omitted, including \$200 on the price of the land, the commissioner stated at \$577.36.

In April 1860, whilst this cause was pending, A. F. Gregory filed his bill in the Circuit court of Grayson, which was afterwards transferred to the Circuit court of Wythe, in which he referred to the papers and proceedings in the case of Horne & als. v. Hale & others, and stated that he had purchased

the interest of Lee Nuckols in the land sold to them by *Mitchell and the Hales. That Eli C. Hale had brought a suit on the last bond given for the purchase money; that Dickenson and the other plaintiffs had given him notice not to pay the money to Hale. He made Hale and the plaintiffs in the first suit defendants, and asking that Hale might be enjoined from proceeding to enforce his judgment, and that he, Gregory, might be permitted to pay the money into court. The injunction was granted; and upon the same day, Gregory was directed to pay the amount due upon the judgment to Eli C. Hale, as receiver of the court. This was done, and the amount received by Hale was \$1,557.22.

Hale answered the bill of Gregory, insisting that the only valid sale of the land was that made at public auction to Martin Hale. That he had fully settled up that trust. That the plaintiff in the first suit had no lien on the land of Gregory, and the money due from Gregory was Hale's own money, upon which the creditors of Mitchell had no claim.

The two causes came on to be heard together, on the 8th day of October 1869, when the court made a decree fixing the amount of the plaintiffs respective judgments, and settling the order of priority among the plaintiffs according to the date of their judgments; and that Eli C. Hale, out of

the fund in his hands as receiver of the court, should pay to the plaintiffs in the order stated in the decree the said sum of \$1,557.22, with legal interest thereon from the 28th day of June 1860 till paid, or so much thereof as may be necessary to satisfy their judgments, with interest and costs as aforesaid, in the order in which they were recovered and mentioned in the decree, within one hundred and twenty days from that day. And if the money was not paid in that time, the plaintiffs were authorized to sue out executions upon the decree. And should the executions prove unavailing, liberty was reserved to them to apply to the court for further proceedings to enforce this decree against said *Hale and his surety in the receiver's bond. And it was further decreed that the sale of land by Mitchell to Nuckols and Gregory be confirmed; and that Hale be perpetually enjoined from all further proceedings on the judgment recovered by him against Nuckols and Gregory, and that the same is declared to be paid and satisfied. Costs were given to the plaintiffs in the first suit, but none was given in the second. From this decree Eli C. Hale obtained an appeal to this court.

Richardson and Jno. A. Campbell, for the appellant.

Gilmore, for the appellee.

ANDERSON, J., delivered the opinion of the court.

The appellees are judgment creditors of Wm. M. Mitchell. Before they obtained their judgments, the debtor conveyed his land and other property to the appellant, in trust to secure other creditors. Before a sale made under the deed of trust, the grantor, with the assent and co-operation of the trustee, and the principal creditor secured by the deed of trust, sold the lands to Lee Nuckols and A. F. Gregory for \$6,000, payable one half in cash, and the residue in two equal payments, in one and two years. On the 16th of August 1859, William M. Mitchell and wife, and Eli C. Hale and Martin Hale, executed a deed conveying said lands, with general warranty, to the said Andrew F. Gregory and Lee Nuckols. On the 27th of January 1859, Eli C. Hale, having paid off all the debts secured by the deed of trust, paid over, as he claims, the surplus to Wm. M. Mitchell. In February 1859, Wm. R. Horne, John Dickenson, James W. Clark, and Dickenson and Nuckols, judgment creditors of said Wm. M. Mitchell, and appellees here, filed their bill in this suit against Eli C. Hale, (the appellant), Martin Hale, William M. Mitchell, A. F. Gregory and Lee Nuckols, to set aside the deed of trust as fraudulent in its inception and administration, and to subject the said *lands of Wm. M. Mitchell to the satisfaction of their judgments, and for general relief.

In the progress of this suit A. F. Gregory filed his bill against his co-defendants and the plaintiffs, alleging that he had bought

out the interest of his joint purchaser, Lee Nuckols, in the said lands, and had taken upon himself the payment of their joint bonds for the deferred payments of the purchase money; that they have been sued upon one of those bonds, which showed upon its face that it was given for the lands they bought of Mitchell; that a judgment would be rendered against them at the then present term of the court; that he had been notified by some of the judgment creditors, that they claimed a lien upon the said lands to satisfy their judgments, and forbidding him to pay to Mitchell or Hale the balance of the purchase money due from him; and that this suit was instituted for the purpose of subjecting his said lands to satisfy the said judgments, which he prays may be made a part of his bill, and that he be permitted to pay the money into court, to be applied as the court may determine was right and proper; and that Eli C. Hale be perpetually enjoined from proceeding to execute the said judgment. The injunction was granted, and the money ordered to be paid into the hands of Eli C. Hale, who was appointed the receiver of the court, upon his giving bond and security according to law. He gave the bond, and the money was paid to him, and is now in the custody of the court.

What interest had William M. Mitchell in the lands after he gave a deed of trust? Whatever interest he had was liable for his other debts. The whole of a man's property is liable for his debts. A mortgage is regarded in equity as a mere security for the debt, and only a chattel interest. And until a decree of foreclosure, the mortgagor continues the real owner of the fee; and may lease, sell, and in every respect, deal with the mortgaged premises as owner.

122 The equity of redemption *is descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an absolute estate of inheritance at law. 4 Kent Com. 157, 159, 160; Hutchins v. King, 1 Wall. U. S. R. 53. It was entirely competent, therefore, for Mitchell, after the conveyance of his land in trust for the payment of debts, to make an absolute conveyance of them to Nuckols and Gregory. And his deed was good to pass title to them, subject, however, to the incumbrance of the deed of trust. And after the payment of the whole of the debts secured by the deed of trust, the grantor and his vendees, by operation of the statute, are entitled to hold the land, at law or in equity, notwithstanding a conveyance has not been made by the trustee. Code, chapter 135, sec. 21, p. 612. But the purchase of these vendees is subject, not only to the incumbrance of the deed of trust, but also to the lien of the judgment creditors, of which they had notice when they purchased. The judgments being subsequent to the date of the deed of trust, they would be postponed until the deed of trust was satisfied. Their lien attached only to such interest as the grantor, their debtor, retained in the lands, after executing the deed of trust; that is

to his equity of redemption. "It is a settled rule," says J. Green, in *Haleys v. Williams*, 1 Leigh, p. 140, "in respect to the satisfaction of judgments, and other liens upon an equitable fund, that all are to be paid according to their priority in point of time; 'qui prior est in tempore, potior est in jure.'" In that case the fund was equitable so far as the judgment creditors were concerned; the legal title being in trustees, for the security of other creditors, who had thereby a priority over the judgment creditors: which is precisely this case.

In *Michaux's Adm'r v. Brown*, 10 Gratt. 612, 619, J. Allen says: "Although this equity of redemption could not be taken in execution at law, it was upon the general principle of a court of equity, bound in 123 equity, as it *would have been bound at law if it had been a legal estate. And in equity the judgment is a lien upon the whole of the debtor's equitable estate.

It is perfectly clear, that whatever interest Wm. M. Mitchell had in these lands, after he had conveyed them in trust, was subject to the lien of his subsequent judgment creditors; and that his vendors, who purchased with notice of those judgments, purchased subject to the judgment liens, and that whatever portion of the purchase money remained, after satisfying the incumbrance of the deed of trust, was liable to satisfy the judgments; and the land in the hands of the vendees, is bound for the payment thereof to the judgment creditor. Hence, it follows, that their bond for the purchase money, in the hands of Mitchell, or of the trustee, remaining after the trust creditors were satisfied out of the trust fund, was liable to the judgments; and no one could release the vendees, or the land they had purchased, from the judgment lien, except the judgment creditors themselves. This fund is now in the custody of the court, being claimed on the one hand by Eli C. Hale, who held the bond of the purchaser, and on the other hand, by the judgment creditors. The Circuit court held, that the judgment creditors were entitled to it; and decreed that it should be applied in satisfaction of their judgments, according to their priority. The judgment creditors not having released their lien, upon what ground can this fund be claimed for Eli C. Hale? It is contended, by his counsel, with great earnestness and ability, that his duty as trustee only required him to pay the debts secured by the deed of trust; that he was not required to take notice of any outside claims; but by the express and imperative terms of the statute, Code, ch. 117, sec. 6, p. 563, after paying the debts secured by the deed of trust, he was required to pay the surplus to the grantor. I cannot agree

with counsel in this construction of 124 the statute. I cannot *think that it was the intention of the legislature to require or even to authorize the trustee to pay the surplus fund into the hands of an insolvent grantor, when other creditors, outside of the deed of trust, were entitled to it, as against the grantor or his assignees;

of which the trustee had notice. This provision of the statute imposed no new obligation or duty upon the trustee, and conferred no new or cumulative right upon the grantor. Previous to the statute, and independent of it, I apprehend, after the payment of the whole sum, or the accomplishment of the whole purpose, for which the deed of trust was given, it was the duty of the trustee to pay over to the grantor any surplus which remained in his hands, even when there was no express provision in the deed requiring it, and it was a right which the grantor could demand and enforce in a court of equity. But if it was known to the court in such proceeding, that there were judgment creditors who had a lien upon the fund, it would not compel the payment to the grantor, but would inhibit the trustee from making payment to him. I do not think it was the design of the legislature to make any change in the rights and obligations of the grantor and trustee; but as they stood before the statute, they remain. The terms of the statute are, shall pay to the grantor or his "assigns." There might be a party claiming the fund, under an assignment from the grantor, and adversely to him, of which the trustee had notice. Will it be contended that the trustee would be justified in ignoring the assignee, and paying the fund over to the grantor? Does the assignee occupy any higher ground than the judgment creditor, who is invested with the right to it by operation of law? Besides, it does not seem to have been designed by the legislature, that all deeds of trust should conform to these provisions of this statute, or derive their efficacy from them. The contrary intention plainly appears from the eighth section, which provides, "that any deed,

125 or part of a deed, which shall *fail to take effect, by virtue of this chapter, shall nevertheless be as valid and effectual, and shall bind the parties thereto, so far as the rules of law and equity will permit, as if this chapter had not been enacted." The fifth section merely gives a formula for a deed of trust to convey the property to the grantor, in trust for the security of debts or the indemnity of sureties: and there it stops. It seems not to contemplate directions in the deed to the trustee for the execution of the trust. The sixth section provides for that, and prescribes a general rule for the direction of the trustee in the execution of such deeds of trust. But where the deed provides how the trust shall be executed by the trustee, as deeds of trust universally did before these sections were enacted, and as was done in this case, such deed derives no efficacy from those sections of the statute, which have no application to it; and the trustee, in the execution of the trust, must be governed by the instructions contained in the deed, and by the rules of law and equity which are applicable. And although the deed in this case provides how the trustee shall apply the fund, it contains no provision directing him to pay the surplus to the grantor, so

that if there should be a surplus, he must dispose of it according to the rules of law and equity.

But, if the trustee paid over the surplus of the purchase money to the grantor, how is it that he is now claiming it himself? The truth is, at the time of his alleged settlement of his administration of the trust fund, the deferred payments of the purchase money were not due; and the trustee, to accomplish his ends, whether rightful or wrongful, seems to have deemed it necessary to resort to indirection. The principal actors on the arena were himself, his brother Martin, who appears as the principal creditor secured by the deed, and Wm. M. Mitchell, his brother-in-law, the failing debtor. The execution of the deed may have been all fair. But it is a little remarkable, that the debt claimed by

126 Martin *Hale had grown from between five and six hundred dollars, from the time he informed a witness, Robert Vaughn, that Mitchell was owing him that amount, to \$2,158.37, at the time of payment by the trustee. And it is also remarkable, that in so short a time from the date of that conversation, until the execution of the deed of trust, the period in which the most of this account accrued, he was unable in his answer to give the items of his account. There is another fact to which I must avert in this connection. It is that the trustee, as appears from the commissioner's report, on the day of sale sold a part of the trust property, to satisfy, as he alleged, executions in the hands of R. Vaughn, a constable, to the payment of which he applied \$151.11 of the trust fund, of which no entry is made in his account as trustee. The commissioner states that he had not seen the executions, and could not say whether they were valid. The witness, Robert Vaughn, to whom I have already referred, is of the same name, and I take him to be the same person. He says in his deposition, that he had claims against Wm. M. Mitchell, to the amount of \$150 (very nearly the amount which Eli C. Hale paid him out of the trust fund), and that he was informed, that provision had been made for it in the deed of trust, by adding it to Martin Hale's debt, who was to pay him. That some time afterwards, he saw Martin Hale and named the case to him; and Martin Hale said yes, that was the case, but Wm. M. Mitchell had teased him out of the money. How is this! Martin Hale incorporates the debt due from Mitchell to Vaughn with his debt, and assumes to pay Vaughn. And the whole is secured to him by the deed of trust, and is paid to him out of the trust fund; and instead of paying Vaughn according to his own account, he pays it to Mitchell; and Vaughn's debt, which Hale was bound to have paid out of his own pocket, is paid out of the trust fund. Was

127 this dealing fairly towards the judgment *creditors? If the facts be so, it was a palpable fraud upon them, and throws discredit, upon the bona fides, of the whole transaction. But the sale to

Nuckols and Gregory was not made in the way, and upon the terms, prescribed by the deed of trust; which required the sale to be made on the premises, to the highest bidder, for ready money, after advertising the sale for at least thirty days, &c. It was made privately, for half cash, and the residue in equal payments of one and two years. This does not invalidate the sale, it being made by the grantor, with the consent and active co-operation of the trustee and the principal trust creditor, and the acquiescence of the others, and was a good sale; and there is nothing in the record to show that it was not fair and bona fide. But the trustee deems it necessary to resort to indirection, in order to give validity to that which was valid. He goes through the form of offering for sale to the highest bidder, at public auction, the same land, which he had previously united with Mitchell and his brother in selling to Nuckols and Gregory, and for the title to which, they had bound themselves in a penalty of \$12,000; and had the same cried out to his brother at the price of \$5,800. In this, nothing wrong was intended; but it was only an ostensible sale, and made, as admitted by Eli C. Hale in his answer, and proved by the evidence in the cause, only because it was thought to be necessary, to comply with the form of the deed of trust to give validity to the real sale, which had been made to Lee Nuckols and A. F. Gregory.

It seems that the real purchasers had made the hand payment to the trustee, in paper and money, and had given their two joint bonds to Eli C. Hale for \$1,500 each, payable in one and two years, for the residue of the purchase money; and that Eli C. Hale, thereupon, satisfied the trust debts, and paid over to the grantor, what he claims to have been the surplus, and retained the vendees' bonds for the residue of the purchase money, *as due to him individually, in consideration of the advances which he had made. And he contends, that inasmuch as the statute imperatively required him to pay over the surplus to the grantor, and he had advanced the money out of his own pocket, he is entitled to the bonds of the vendees for the residue of the purchase money.

We have seen that such a pretension as to the effect of the statute is untenable. But upon no construction did the statute require him to advance his own funds in order to pay the surplus to the grantor. It could be construed by no one, to require him to do more than to pay over the surplus of the trust fund, to wit, the bonds of the vendees, for the deferred instalment of purchase money. It was not incompatible with the sincerest desire to obey the law, and to discharge his trust, that he should have kept his own money, and turned over to the grantor the bonds of the vendees. By advancing his own money, as he asserts he did, to pay over the surplus to the grantor, and taking the vendees' bonds to himself, he exposed himself to the imputation, though it might be unjust, of seeking to

hinder and defeat the judgment creditors in the enforcement of their liens. But there are other circumstances which cannot be overlooked. He gave a receipt to Lee Nuckols and A. F. Gregory for \$6,000 in full of the purchase money for the tract of land on which William Mitchell then resided; and to A. F. Gregory for \$175 in full of the purchase money of Wm. Mitchell's interest, in what was called the mill tract; thus to appearance discharging the liens. And instead of paying off the judgment creditors, and discharging the liens, as far as the trust fund would enable him to do, and as he had by his solemn obligation bound himself to Nuckols and Gregory, in the penalty of \$6,000, to do, he procures the surrender of that obligation by A. F. Gregory to Martin Hale, upon a pretext which must be characterized as flimsy, and the *names of the obligors were torn off in his presence by Martin Hale. Thus by his contrivance the land was, in appearance, discharged of its liability to the judgment creditors by the evidence which he furnished the vendees of their payment in full of the purchase money, and the destruction of the irrefragable evidence of his and the vendees' knowledge of the judgment liens, and of his obligation to discharge them. He may have then felt himself safe in paying over the surplus to an insolvent grantor, and in advancing the money for the purpose before the purchase money was due. But can such a contrivance, if so designed, deprive the judgment creditors of their right to satisfaction out of the purchase money which remained after the deed of trust was satisfied? I think not.

But it is contended that the decree is for too much; that the surplus, after paying the trust debts, was only \$1,297.07. This sum is much less than it should be.

The judge then proceeded to examine the evidence, and made a statement of the proceeds of the property and the debts properly paid by the trustee, showing a larger amount which should have been in the hands of the trustee than was decreed against him. He then proceeded:

The next objection made to the decree, which I shall notice, is, that it is not consistent with the case made by the bill, and the relief asked. The bill sets out the plaintiffs' judgments, which were liens upon Mitchell's land, subject to the incumbrance of the deed of trust, and charges that the deed of trust was fraudulent, and made to hinder, delay and defraud the plaintiffs in obtaining satisfaction of their several judgments; and that frauds were practiced to their prejudice in its administration; and they ask that it may be set aside, and that the land may be resold for the payment of their judgments, and for other and further relief, as the nature of their case requires, &c. The Circuit court being of opinion that the allegation of fraud was not proved, and that the sale ought not to be *set aside, but that the plaintiffs had liens upon the land, subject to the trust debts, and that the surplus of the trust fund, after paying the

trust debts, was the purchase money due from Nuckols and Gregory, which had been paid into court, pursuant to the prayer of the bill filed by A. F. Gregory in connection with this cause, and which was amalgamated with it; and that said fund was liable to the plaintiffs' judgments; perpetually enjoined Eli C. Hale from proceeding to execute his judgment against said Nuckols and Gregory; and decreed that the said sum be paid in satisfaction of plaintiffs' judgments, according to their priority. I am of opinion that there is no error in the decree on that ground, and that the said objection must be overruled.

The only other objection, which I deem it necessary to notice, is the want of proper parties; because John D. McCamant, for whose benefit the judgments in favor of Dickenson and Nuckols were recovered at law, is not made a party. The said judgments are set out in the bill as having been recovered at law, for the benefit of said McCamant. Dickenson and Nuckols, who were the parties plaintiffs in the court of law, which rendered the judgments in their favor, are parties plaintiffs in this proceeding, to obtain satisfaction of those judgments; and we are of opinion, that as it does not appear from the record, that their right to recover is controverted by the said McCamant, it does not appear that he was a necessary party to this suit. If it was a matter which concerned the appellant, that he should be a party to this proceeding, he ought to have raised the question by plea in the court below. Prima facie, in a suit in equity by a judgment creditor to reach the property of his debtor, and subject it to the satisfaction of his judgment, it is competent for the court to decree in favor of the plaintiff in whose behalf the judgment was rendered; and payment by the debtor to him, in satisfaction of the decree, would be as effectually a discharge of the debt, and an acquittance to the debtor, as the payment of the judgment would have been; and it is not necessary, that the person for whose benefit the suit at law was brought, and the judgment was rendered, should be a party in the suit in equity, he not having been a party in the suit at law, unless it should appear that he controverted the plaintiffs' right of recovery; and that could only be made to appear by plea. But, for conformity, the decree may be amended so as to make the payment to these plaintiffs, for the benefit of John D. McCamant, in accordance with the judgment. Upon the whole, I am of opinion, that there is no error in the decree, to the prejudice of the appellant, and that it should be affirmed.

Decree affirmed.

132

***Caldwell v. Craig.**

June Term, 1871, Wytheville.

Contracts—Sale of Land—Case at Bar.—By a contract in writing, R C sells to N C, "his tract of land on Smith's creek and Gasper creek, in the county of

W. except the church and one acre of ground, which R C reserves." After stating the consideration, being \$6,500, and N C's tract of land of one hundred and fifty acres, it says: "R C's tract supposed to contain one thousand acres more or less." **HELD:**

1. Same—Same—Contract of Hazard—Evidence.—

The language of the contract in reference to the quantity of land in the tract, is mere matter of description. And parol evidence is admissible to show what was the intention of the parties; that they intended to be governed by the estimated quantity, and that it was a sale in gross.

2. Sale in Gross—No Abatement.—The sale being a sale in gross, N C is not entitled to any abatement of the purchase money, though the tract contained, in fact, but eight hundred acres.

3. Action at Law—Equitable Set-Off.—R C having sued N C at law on the bonds given for the purchase money, and N C having set up the defence of equitable set off, for the value of the deficiency in the quantity of the land, the rules governing in an equitable forum must apply, and the plaintiff be permitted to rebut the claim by any evidence which would be considered appropriate to his defence, had the defendant elected to proceed by bill in equity.

4. Sale of Land—Bonds—Currency—Quære.—The bonds given for the purchase money, which are of the same date with the agreement, and are payable in one, two and three years with interest from date, promise to pay the amount named "in currency at its specie value." These words are not in the agreement. *Quære:* Is N C bound to pay the amount named, in currency at its specie value at the date of the bonds, or is he to pay the full amount named in currency, or its value in specie at the maturity of the debt?

***Contracts of Hazard—Presumption.**—The principal case is cited by several subsequent cases as sustaining the proposition that contracts of hazard are not regarded with favor; that the presumption is against them, and this presumption can be repelled only by clear and convincing proof. See *Watson v. Hoy*, 28 Gratt. 704; *Camp v. Norfleet*, 83 Va. 381, 5 S. E. Rep. 374; *Grayson v. Buchanan*, 88 Va. 254, 13 S. E. Rep. 457. See also, *Hundley v. Lyons*, 5 Munf. 342; *Nelson v. Carrington*, 4 Munf. 333; *Blessings v. Beatty*, 1 Rob. 303; *Keyton v. Brawford*, 5 Leigh 48; *Benson v. Humphreys*, 75 Va. 196; *Triplett v. Allen*, 26 Gratt. 721, and *foot-note*.

Therefore there is a presumption that a contract for the sale of land is not a contract of hazard, but that a sale by the acre was intended. *Watson v. Hoy*, 28 Gratt. 698, and *foot-note*.

†Sale in Gross—No Abatement.—See *Allen v. Shriver*, 81 Va. 183; *Jones v. Tatum*, 19 Gratt. 720, and *foot-note*.

Sale of Land—Contracts of Hazard—How Determined.—In *Benson v. Humphreys*, 75 Va. 196, CHRISTIAN, J., lays down the principles, extracted from the numerous decided cases, by which to determine whether a contract for the sale of land is for a sale in gross or a sale by the acre. See also, an elaborate opinion by JUDGE BURKS in *Watson v. Hoy*, 28 Gratt. 698, where many cases are collected.

New Trial—Verdict Contrary to Evidence—Evidence Conflicting.—In *Powell v. Tarry*, 77 Va. 260, the court cited the principal case; *Grayson's Case*, 6 Gratt. 712; *Vaiden's Case*, 12 Gratt. 721; *Bull's Case*, 14 Gratt. 618; and *Blosser v. Harnsberger*, 21 Gratt. 215, as

In June 1867, R. C. Craig instituted two actions of covenant in the Circuit court of Washington county, *against N. E. Caldwell; one on a bond for \$2,000, and the other on a bond for \$2,500, both of them executed by Caldwell to Craig. The actions were consolidated; and defendant pleaded "payment," and a special plea of "set off." This special plea averred that the bonds were given by the defendant in consideration of a tract of land sold to him by the plaintiff; and that at the time of the sale the plaintiff represented to the defendant that the tract of land contained one thousand acres, more or less, and by reason of said representation the defendant was induced to buy the land. And he avers that the tract only contained eight hundred acres; whereby he sustained damage to the amount of \$2,000.

Upon the trial the plaintiff introduced in evidence the two bonds. Both are dated the 23d of June, one payable in twelve months, and the other at two years; and the language in other respects is substantially the same, viz: \$2,500. Twelve months after date I bind myself, heirs, &c., to pay R. C. Craig twenty-five hundred dollars, in currency at its specie value, with interest from date. The second bond, payable at two years, provides that the interest shall commence at the end of twelve months from its date.

The defendant then introduced the agreement, which was under the hands and seals of the parties, for the sale and purchase of the land for which the bonds were given. This agreement states that R. C. Craig sells to N. E. Caldwell, his tract of land on Smith's creek, and Gasper creek, in the

authority for the proposition that when the evidence is conflicting the court may refuse to certify the facts proved.

In *Valley, etc., Assoc. v. Teewalt*, 79 Va. 428, the court said: "A motion for a new trial was also made and overruled by the court, but as there is no proper certificate, either of evidence or of facts, it cannot be considered. The court, indeed, certifies that the evidence was conflicting upon nearly all the matters in controversy, but does not undertake to set out the evidence. In such a case the appellate court cannot, as a general rule, set aside the verdict. *Grayson's Case*, 6 Gratt. 713; *Caldwell v. Craig*, 21 Gratt. 136."

In *Michie v. Cochran*, 93 Va. 646, 25 S. E. Rep. 884, the court said: "It is peculiarly the province of the jury to weigh the evidence submitted to it, and to determine from the evidence the facts which it proves; and the rule is well established by repeated decisions of this court that, when there is a conflict of evidence, this court will not set aside a verdict where the court which tried the cause and heard the witnesses concurs with the jury, and has refused a new trial. *Caldwell v. Craig*, 21 Gratt. 136; *Brugh v. Shanks*, 5 Leigh 598; *Grayson's Case*, 6 Gratt. 724; and *Grayson v. Buchanan*, 88 Va. 255, 13 S. E. Rep. 457." See also, *foot-note* to *Richmond, etc., R. Co. v. Snead*, 19 Gratt. 354; *Hill v. Peyton*, 22 Gratt. 550; and *foot-note*. *Read's Case*, 22 Gratt. 924; and *foot-note*; monographic note on "Bills of Exceptions," appended to *Stoneman v. Com.*, 25 Gratt. 887.

county of Washington, except the church and one acre of ground, which Craig reserves; the deed to be made whenever the purchase money is paid. N. E. Caldwell is to give R. C. Craig \$6,500, to be paid as hereafter stated, and the tract of land on which said Caldwell now lives, containing one hundred and fifty acres; each to make to the other a good deed; Craig's tract supposed to contain one thousand acres, more or less.

134 *N. E. Caldwell is to pay Craig one thousand dollars in six months from date, two thousand five hundred dollars in one year, two thousand dollars in two years, and one thousand dollars in three years; the interest on two thousand dollars for one year to be remitted. The date of this agreement was the same as that of the bonds.

The defendant also introduced in evidence a survey and plat of the land sold by Craig to him, made under an order in the cause; from which it appeared that the tract contained but eight hundred acres.

The plaintiff then offered in evidence the deposition of Reuben B. Fickle. This deposition related to a conversation with Caldwell, made after his purchase of the land, as to the terms upon which he purchased. The witness stated that Caldwell told him that he was to take Craig's land by the boundary. That Craig told him (Caldwell) he did not know exactly how many acres were in the tract, as he had bought it in several parcels; it might run out a thousand acres or less; and he, Caldwell, took it by the boundary and not by the acre. To the introduction of this deposition the defendant excepted; but the court overruled the objection and admitted the testimony; and the defendant excepted.

In the progress of the trial, the defendant insisted that upon the face of the papers, the plaintiff was not entitled to recover the amount named in them, viz: \$2,500 with interest on the one, and \$2,000 with interest on the other; and moved the court to construe the bonds and instruct the jury what was their true construction; and thereupon, the court instructed the jury, that according to the face of the bonds, the plaintiff was entitled to recover the amount named in each with interest. To this ruling of the court, the defendant excepted. This is marked as the defendant's 3d exception.

The jury found a verdict in favor of the plaintiff for \$1,902.59 with interest from the 5th of September 1868, the date of the verdict, till paid. And thereupon, the

135 *defendant moved for a new trial; but the court overruled the motion and the defendant excepted. This exception is marked as the 2d. After referring to the written evidence and the deposition of Fickle, it gives the testimony of two other witnesses who testify to conversations with Caldwell, after the purchase of the land, in which he stated that he bought by the boundary, or as he expressed it to one of them, by the bunch, for one thousand acres more or less; and it also gives the testi-

mony of the defendant, who said when he bought the land he believed it contained one thousand acres, and understood the plaintiff to guarantee that quantity; and if he had not believed it to contain one thousand acres he would not have purchased it; that he could have got a bond from the plaintiff for eleven hundred and fifty acres.

The court rendered a judgment for the plaintiff in accordance with the verdict; which seems to have been for the balance due upon the bonds after allowing credits for payments; though there is nothing in the record to show how this sum was arrived at by the jury. To this judgment, Caldwell obtained a supersedeas from a judge of the District court of appeals at Abingdon; from whence it was transferred to this court.

Baxter and R. B. Johnston, for the appellant.

John W. Johnston and John A. Campbell, for the appellee.

STAPLES, J. I do not deem it necessary to consider the question so elaborately discussed at the bar, whether or not this is a contract of hazard. In the view I take of this case, that question is not before this court for determination. It appears by the second bill of exceptions, that on the trial in the Circuit court, the plaintiff offered evidence tending to prove that by the terms of the contract, the defendant was to take upon himself the risk of a deficiency

in the land purchased by him, and consequently *he could have no claim for a deduction of the purchase money. On the other hand the defendant, being introduced as a witness, proved that when he made the purchase he believed the tract to contain one thousand acres; and he understood the plaintiff as guaranteeing that quantity. Upon this evidence and the written agreement, the jury rendered a verdict for the plaintiff; and thereupon a motion was made for a new trial, and overruled. In such case this court is not authorized to interfere by granting a new trial. Upon familiar principles, recognized and approved in numerous cases, when there is a conflict of evidence an appellate court will never set aside a verdict where the court which tried the cause and heard the witnesses, concurs with the jury, and has refused a new trial. *Brugh v. Shanks*, 5 Leigh, 598; *Coleman v. Moody*, 4 Hen. & Mun. 1, 18; *Grayson case*, 6 Gratt. 124.

It has been said, however, that allowing the evidence all the weight claimed for it, conceding that it proves every fact it tends to establish, still the verdict is clearly erroneous. The argument in support of this view is, that although the defendant may have purchased the tract by the boundary, it does not necessarily follow that his purchase is a contract of hazard; that in his estimate of the value of the land, he was necessarily influenced by his estimate of the quantity, and a deficiency so gross and extraordinary as is exhibited here, is proof

of a clear mistake of the parties, or of mistake on one side, and fraud or gross negligence on the other.

It is difficult to imagine a case where the purchaser, in the price he agrees to pay, is not influenced by his estimate of the quantity. And if a mistake of this sort affords ground for equitable relief, it is clear there could no longer be a contract of hazard. We know, however, that such contracts, when fairly made and clearly established, are uniformly enforced by the courts. Nor

is there any injustice in this principle of equitable *jurisdiction. If the vendee encounters the hazard of a deficiency, the vendor incurs that of an excess; and it is impossible to say that this very hazard did not constitute an important element of the price. For whether the case be one of excess or deficiency, the mistake is not in the substance of the contract, but in relation to the very risk in the contemplation of the parties.

In the present case, it was in proof on the trial, that before the sale, the plaintiff informed the defendant that he (the plaintiff) did not know how many acres the tract contained, as he had bought it in several parcels; it might run out a thousand acres or less. And further, that the defendant on several occasions and to various witnesses, admitted he had purchased the land by the boundary and not by the acre; to use his own language, "he had bought by the bunch for one thousand acres more or less." It is also worthy of remark the contract contains no provision for a survey; nor was any ever made or required, until after the institution of this suit, although two years had elapsed since the date of the sale.

It is true that the deficiency here is very considerable, but it is not greater than other cases of like character have exhibited, in which compensation has been refused by this court. Thus in *Tucker v. Cocke*, 2 Rand. 51, the lands fell short more than two thousand acres of the quantity they were supposed to contain. And in *Russell v. Keeran*, 8 Leigh, 9, the deficiency amounted to one hundred acres in a tract supposed to contain four hundred and five acres. *Pendleton's ex'ors v. Stewart*, 5 Call, 1, and *Hull v. Cunningham*, 1 Munf., 330, are also cases in which a gross deficiency appeared, and yet the application for relief was denied. The principle upon which all these cases were decided, is, that where the real contract is to sell a tract of land as it may contain more or less, fully understood to be so, the purchaser takes the tract at the risk of gain or loss by deficiency or *excess in the number of acres contemplated. 2 Lomax Dig. 63.

Under all these circumstances, I think the jury was well justified in finding that the defendant assumed the risk of a deficiency in the tract of land. It only remains to inquire whether the parol evidence upon which the finding is based was properly admitted. That evidence consists chiefly of

the admissions of the defendant after the sale, that his contract was for the purchase of the tract by its boundary and not by the acre. Many cases have been before this court involving the doctrine of compensation upon contracts for the sale of real estate. In many of them, parol evidence was received of the true understanding of the parties, whether a sale in gross or by the acre was intended, notwithstanding the existence of written articles evidencing the contract. In *Jolliffe v. Hite*, 1 Call 262; in *Quesnel v. Woodlief & al.*, 6 Call 218; in *Fleet v. Hawkins*, 6 Munf. 188; and in *Grantland v. Wight*, 2 Munf. 178, such evidence was admitted without objection. In the first case, Judge Pendleton said, "a court of equity will not be bound by the expression 'more or less' contained in deeds, but will resort to the real contract to ascertain what was the intention of the parties." In *Russell v. Keeran*, 8 Leigh, 9, the vendor executed a title bond conditioned to make a good and sufficient deed to "a certain plantation containing four hundred and five acres, be the same more or less." Upon a bill by the heirs of the vendee claiming compensation for a deficiency in the tract, the question arose, whether the sale was by the acre or in gross. Evidence was taken of the admissions of the vendee, that the sale was of the latter character. Judge Brockenbrough thought the evidence admissible on the ground of ambiguity in the terms of the title bond. The other judges expressed no opinion on the point, but concurred however, in holding that the vendee was not entitled to any abatement of the purchase money,

139 *although the tract, upon an actual survey, turned out to be about 100 acres less than the estimated quantity.

The only case I have seen in which a doubt is expressed of the propriety of receiving parol testimony in this class of cases, is that of *Beirne v. Erskine*, 5 Leigh, 59. There the contract was for the sale of a tract of land containing one hundred acres, for the sum of two thousand dollars. Judge Carr said it would be wrong to let in parol evidence to explain or alter the written agreement, which must be taken uninfluenced by such evidence. The principle on which this case was decided, is obvious. There was no question of mistake; the terms employed were not merely descriptive of the land, but constituted a positive representation of quantity, which the vendor was bound to make good. Parol evidence showing that no such representation was in fact made or intended, would have been contradictory of the deed in its very terms and according to its legal effect.

It has been said that *Blessing's Adm'r v. Beatty*, 1 Rob. R. 287, overrules the earlier decisions upon the subject of relief in cases of excess or deficiency. That case does not enunciate any new principle that I have been able to perceive. It certainly establishes no new doctrines in regard to the admissibility of parol testimony in controversies of this character. No such ques-

tion arose in that case; nor was it discussed, or even alluded to. The decision was based solely on the language of the deed of conveyance. If parol testimony was offered with a view to establish some other contract de hors the deed, the record does not disclose the fact.

The opinion of Judge Baldwin has, however, in another view, an important bearing upon the question now being considered. He announces with great clearness, the principles which control courts of equity in decreeing compensation in this class of cases. The sole foundation for such jurisdiction is said by him to be that of

140 mistake, or mistake *on one side with gross deception or fraud on the other.

Now when a party invoking this principle, seeks relief in a court of equity, why should not the defendant be permitted to show first that there was no fraud nor deception, and second, that although a mistaken estimate of the quantity was made by the parties, each agreed to encounter the hazard of such mistake, and to waive all right to compensation in any event. If the written agreement contains no guarantee or positive affirmation of quantity, it is difficult to perceive in what respect it is varied or altered by parol evidence establishing these facts.

In the present case the contract is for the sale of a tract of land "supposed to contain one thousand acres, more or less." Such language cannot, upon any fair and reasonable construction, be understood as a positive affirmation of quantity. That it is to be regarded as mere matter of description, and not of itself giving the character of the contract is settled by the case of *Russell v. Keeran*, before cited, and *Keytons v. Brawford*, 5 Leigh 48; *Stebbins v. Eddy*, 4 Mason's R. 414; *Pendleton's Ex'or v. Stewart*, 5 Call 304; *Winch v. Winebeck, &c.*, 1 Ves. and Bea. R. 375. Had the plaintiff intended to affirm that the tract contained one thousand acres, or to give any warranty of quantity, he would have used language expressive of such intention. He did not know how many acres the tract contained; his purpose was to sell it as he had purchased it; he was, therefore, careful to use terms which would exclude the idea of any such warranty. No doubt he "supposed" the tract to contain the number of acres mentioned; and the defendant honestly believed the same thing; and each was influenced, doubtless, by this estimate in fixing the price to be paid. And if this were all, the transaction would present a clear case of mutual mistake, requiring the

interposition of a court of equity in

141 behalf of the *injured party. For it

is well settled that the employment of the words "more or less," or "containing by estimation so many acres, more or less," will not relieve the vendor or vendee, as the case may be, from the obligation to make compensation for an excess or deficiency beyond what may be reasonably attributed to small errors from variations of instruments or otherwise, unless indeed there

be evidence to show that a contract of hazard was intended. In the absence of such evidence, it is to be presumed that the parties contract with reference to quantity. It is an important element in every agreement and prima facie must be intended to have influenced the price. It is, however, a mere presumption, which may be met and overthrown by proof that the parties agreed to be governed at all events, by the estimated quantity. Such proof does not contradict or vary the deed, in any particular, in the case supposed; it merely establishes an understanding collateral to the written contract; and makes it clear that no such mistake was made as furnishes ground for relief in equity.

In the present case, the defendant did not resort to a court of equity. He has thought proper to submit to a jury his claim to an abatement of the purchase money. In such case, the rules governing in an equitable forum must apply, and the plaintiff permitted to rebut the claim, by any evidence which would be considered appropriate to his defence, had the defendant elected to proceed by bill in equity. It has been said, however, that it devolved on the court, and not the jury, to construe the written agreement of the parties. If the defendant desired the court to construe the instrument, he could have effected his object by the appropriate motion. He did not do so, however. He offered the deed in evidence to the jury, in support of his plea, thus invoking their consideration of its provisions. If any error was committed in this, the defendant has no just cause of complaint.

142 *But the court did substantially construe the contract, in admitting the parol evidence adduced by the plaintiff. The court, in effect, declared that the title bond did not contain any warranty of quantity; that the language used therein was mere matter of description, and that parol evidence might properly be received of the real contract of the parties. In this respect, I think, the court was clearly right, for the reasons already given.

The third error assigned, is in the instruction given to the jury, that, according to the face of the bonds in suit, the plaintiff was entitled to recover the nominal amounts thereof, with interest from their respective dates. As the court is equally divided upon the proposition involved in this instruction, I shall content myself with a very brief consideration of the question. One of the bonds bears date 23d June 1865, and is for the payment, twelve months after date, of twenty-five hundred dollars in currency, at its specie value, with interest from the date. The other bond is payable two years after date, with substantially the same provisions. It is insisted that, according to the true intent and meaning of the instrument, the obligor is only required to pay twenty-five hundred dollars in currency, at its specie value, when the bonds were executed. There are several objections, I think, to this construction. It is

a settled rule, that where the language of the deed or covenant is obscure and uncertain, its provisions are to be taken most strongly against the grantor or covenantor. The proposition now insisted on, violates this rule in construing the covenant most strongly against the covenantee. It violates another principle, equally well settled and approved, in estimating the value of the currency or commodity, as of the date of the contract, rather than the period of payment. *Dearing's Adm'x v. Rucker*, 18 Gratt. 426; *Beirne v. Dunlap*, 8 Leigh, 814.

It is impossible, looking alone to these bonds, to ascertain what the parties intended. The language is *not susceptible of a plain and satisfactory explanation. I think the safest rule, is to construe the covenant as a contract to pay twenty-five hundred dollars in currency at all events, or to pay its value in specie at the maturity of the debt, at the option of the debtor. This construction derives support from the language of the written articles of agreement executed at the same time, and providing for the payment of the purchase money, by the same instalments as specified in the bonds, omitting, however, the stipulation as to the "specie value" of the currency. It is a rule of the courts, where there are two instruments between the same parties, made at the same time and constituting the same transaction, they may explain and control each other, though they do not expressly refer to each other. 2 Lomax Dig. 29, see page 540; *Parson on Contracts*, 593. It is difficult to believe that the parties intended to make two different contracts in regard to the payment of the purchase money. If it was understood that the obligor might pay more or less than the nominal amount of the currency according to its fluctuations in market, so important a provision would scarcely have been omitted in the written agreement for the sale of the land. As the language in the one instrument is plain, and in the other obscure, that which is plain should be adopted. Construing the two instruments together, I think the above is to be regarded as a contract to pay twenty-five hundred dollars in currency at all events, or to pay in specie a sum equal to that amount, if the debtor preferred it. Upon his failure to do so, the creditor was entitled to recover the entire amount of currency stipulated.

I am, therefore, of opinion the court did not commit an error in the instruction given to the jury, and the judgment should be affirmed.

ANDERSON, J. I would construe the contract, from the face of the bond, to mean that the medium of payment 144 *was currency, but at a fixed value, as of its specie value at the date of the contract. Upon any other construction, the terms "at its specie value" have no meaning. If you say those words relate to the time of payment, it seems to me they are utterly unmeaning. The contract is for the

payment, twelve months after date, of \$2,500; expressly to be paid in currency. What does it matter to either party, what was the specie value of currency at that time—the time of payment—whether it was 20 per cent. below par, or 50 per cent., or at par, it mattered not. It had no bearing upon the contract; it was solvable by the payment of \$2,500 in currency. The contract would be precisely the same if those words were stricken out. With them, or without them, the contract was solvable by the payment of \$2,500 in currency; and they are words, inserted in the contract, without meaning. This construction would violate a well established rule—that a deed should be construed so that every part may stand together; “*Ut res valeat majis quam pereat.*” It cannot be presumed that these important words were inserted by the parties, without meaning. It seems to me that they can have no meaning unless you construe them as having relation to the date of the contract; and with that construction, they have a very important meaning. It means that the obligee was willing to take, and the obligor was willing to give, \$2,500 in currency, at its then specie value. But if currency became less valuable, the obligee was not willing to take \$2,500 in currency; and if it appreciated, the obligor was not willing to pay \$2,500 in currency.

It implies, also, that as the contract was not solvable for twelve months, and was not a specie contract, but solvable in currency, neither party was willing to risk the fluctuations of the currency; which are well known to have been very great, before and after the 23d of June 1865, the date of this obligation. Nothing, perhaps, was more

uncertain at that time, than what
145 would be the *state of the currency twelve months or two years hence; and the parties wanted something more stable. The obligor was not willing to give a bond solvable in specie; and the obligee was not willing to take one, solvable in currency, without qualification. But one was willing to give \$2,500 in the currency of the country, at its then specie value; and the other was willing to take it. They must be presumed to have known what was the specie value of currency at the date of the contract; and they concluded to make that the standard, so that it would not be a contract of hazard, on either side. If currency was then at a depreciation of 50 per cent., and twelve months after that date, was of the same specie value, the contract would be solvable by the payment of \$2,500 in currency. But if currency had depreciated, say for illustration, 10 per cent., then the contract could only be solvable by adding 10 per cent. to the \$2,500. If it had appreciated 10 per cent. it could be solvable, by the payment of \$2,500, less 10 per cent. In either case, the obligee would receive, and the obligor would pay, in currency, the same value, specie being the standard. I can give no other construction to this contract which will give any meaning or force to the words, “at its specie value.” And

this construction gives effect and harmony to the whole instrument, and to every word, and comports with what is known to have been the fluctuating character of currency at the date of the contract, and the great uncertainty as to what would be its value in future. I am, therefore, of opinion, that there is error in the instructions given by the court to the jury, as shown by the third bill of exceptions.

As to the second bill of exceptions, I think the construction of the article of agreement was a question of law, and if the jury, by their verdict, put a construction upon it which the instrument does not
146 warrant, it was *proper for the court and its duty, to set aside the verdict and award a new trial.

Upon a fair construction of the article of agreement, are the words, “supposed to contain 1,000 acres more or less,” merely descriptive of the Craig tract of land, or designed to represent the quantity. I do not think they can be taken as descriptive. The land had been before described as Craig’s “tract of land, on Smith’s creek and Gasper creek, in the county aforesaid, except the church and one acre of ground,” which he reserves. Now this language is sufficiently descriptive. Craig’s tract of land, on certain creeks, in a certain county, upon which the church is situated. The tract, with the exception of the church and lot of one acre, was to be conveyed to Caldwell whenever the purchase money was paid. The articles then set out what Caldwell was to give for it, \$6,500, and the tract of land on which he lives, containing 150 acres, each to make to the other a good deed. It is then added, “Craig’s tract supposed to contain 1,000 acres more or less.” Are these words of description, or words of representation as to quantity? That they were intended to give Caldwell some idea of the quantity of land he was to get, for the consideration he had agreed to give, I think there can be no doubt. They were not necessary to be put there, as words of description. And it is difficult to perceive how they are descriptive. “Supposed to contain 1,000 acres more or less,” does not describe any thing, and does not describe this tract, for it contains only 800 acres.

I do not regard it as a guaranty, that there are 1,000 acres in the tract. But I regard it as a representation made by the seller to the buyer, that there is near about 1,000 acres in the tract. And such a representation made by the owner of the land to the buyer, doubtless had an influence on the mind of the latter in computing the value of it.

I do not, however, regard it as a
147 guaranty of any certain *quantity; and if there had been a small deficiency of twenty or even fifty acres, I should not be disposed to disturb the verdict on this ground. But where the deficiency is so great, amounting to one-fifth of what it was computed, or supposed to contain, it seems to me that even in a case where there is no fraud, it is such a mistake as a court

of equity ought to correct; and that the purchaser was entitled to some abatement of price, or compensation for it.

As to the parol testimony, I will only remark, that such testimony ought not to weigh as a feather, if in conflict with the written agreement. The uncertainty of memory, and the liability to misapprehension, as to what a party really said in a casual conversation, does not entitle such testimony to much weight; and to none at all when in conflict with the written agreement. And in this case it would not have been admitted if it was regarded as in conflict with the written agreement. I do not regard it as contradicting the written agreement. But the whole of this testimony may be true, and the defendant's special plea also true. Admitting that Caldwell made the representations attributed to him, that he had bought by "boundary," or "by the bunch," yet, the averments of the plea may be true, "that the plaintiff represented to the defendant that the tract of land contained 1,000 acres, more or less, and by reason of said representations, the said defendant was induced to buy the said tract of land." I will go further, and maintain, that if the article had expressly declared that the sale was in gross, and not by the acre, still the averments of the plea may be true. And they are true. They are not contradicted by the parol evidence; and they are proved by the highest evidence; evidence which is necessarily true, and, therefore, conclusive. Those averments of the plea are proved by the article of agreement, which evidences the contract between the parties, under their hands and seals. It appears

148 upon the face of *that deed, that the representation averred in the plea, totidem verbis, was made at the time of making the contract; and there is not a particle of the parol evidence to the contrary; and if there was, it would have been inadmissible. It is easy to conceive that one may purchase a tract of land in gross, and may be induced to give the price for it agreed upon, because he believes it contains such an area; and if that belief is induced by the representations of the seller, even by mistake, and without fraud, and it turns out that he was mistaken, and that there was a great deficiency in quantity, or if there was a mutual mistake, a court of equity will relieve against the mistakes, by vacating the contract, or abating the price. Or if the defence is made by equitable plea in a court of law, a jury may give compensation in damages. And in this case, the other averment of the plea, that the tract of land, which was represented to contain about 1,000 acres, contained only 800 acres, is proved beyond all question, by the best evidence the case could admit of—an actual survey.

I am of opinion, therefore, whether the jury erred or not upon the question of law, as to the construction of the contract, their verdict is clearly contrary to the evidence in the cause; and that it ought to have been set aside, and a new trial awarded.

I am, therefore, for reversing the judgment.

The other judges concurred in the opinion of Staples, J., except upon the last point considered by him, on which the court was divided.

Judgment affirmed.

149

*Dungan v. Henderlite.

June Term, 1871, Wytheville.

Pleading—Bond Payable in Fixed Quantity of a Commodity—Action of Debt.—On the 14th September 1862, H binds himself by bond to pay to D, twelve months after date, \$800 for the purchase money of land, describing it, "payable in the currency of Virginia and North Carolina money." This is a promise to pay this sum in the currency named; and an action of debt cannot be maintained upon it.

This was an action of debt in the Circuit court of Smythe county, brought in June 1867, by William P. Dungan against George W. Henderlite, to recover the sum of eight hundred dollars, the amount of the bond declared upon. The defendant cravedoyer of the bond and demurred to the declaration; and the plaintiff joined in the demurrer. The Circuit court overruled the demurrer and rendered a judgment for the plaintiff for the amount of the bond. Henderlite then obtained a supersedeas to this judgment; and it was reversed by the District court of appeals at Abingdon; and Dungan thereupon obtained a supersedeas to this court. The bond is set out in the opinion of the court.

Gilmore and John A. Campbell, for the appellant.

J. W. Sheffey and Baxter, for the appellee.

***Pleading—Bond Payable in a Fixed Quantity of a Commodity—Action of Debt.**—See *Beirne v. Dunlap*, 8 Leigh 514.

Contracts Payable in Paper Currency—Time to Estimate Value of.—In *Caldwell v. Craig*, 22 Gratt. 344. BOULDIN, J., said that no principal of law is better established than that where there is a contract to pay or deliver paper currency, or any commodity on a particular day, and the day passes without payment, the day on which the contract is to be fulfilled, is the time to fix the value of the currency or commodity. As authority for this statement, the court said: "In *Beirne v. Dunlap*, 8 Leigh 514, which was a case of a covenant to pay United States bank notes, the court say: 'Paper may rise or depreciate in value before the day of payment; and if the day passes when the contract is to be fulfilled, the measure of the obligee's rights and the obligor's liabilities is the value of the notes on that day, to be ascertained by the verdict of a jury and awarded in damages.'"

"This language was quoted and approved as law by the whole court in the recent case of *Dungan v. Henderlite*, 21 Gratt. 149, and the principle was affirmed as settled law, by JUDGES STAPLES and CHRISTIAN in the case now before us, on its former argument. *Caldwell v. Craig*, 21 Gratt. 132. See also,

CHRISTIAN, J., delivered the opinion of the court.

This is a supersedeas to a judgment of the late District court for the 7th judicial district, reversing a judgment of the Circuit court of Smythe county. It was an action of debt, brought upon the following written obligation:

150 *"\$800. Twelve months after date, with interest from date, I bind myself, my heirs, &c., to pay William Dungan eight hundred dollars, being for the purchase money of two hundred and eighty-six acres of land lying on the east fork of Staly's creek in Smythe county, Va., and known as the Sitsford and Manies tracts, formerly belonging to Wm. Robin, payable in the currency of Virginia and North Carolina money. Witness my hand and seal this 14th day of September 1862.

G. W. Henderlite, [Seal]."

The plaintiff declared in debt, treating it as a writing obligatory for the payment of eight hundred dollars. The defendant tendered his demurrer to this declaration and cravedoyer of the writing; the plaintiff joining in the demurrer. The said Circuit court overruled the demurrer, and rendered a judgment against the defendant, for the sum of eight hundred dollars, with interest from the 13th day of September 1863; sub-

Dearing v. Rucker, 18 Gratt. 426, and the numerous cases there cited by JUDGE JOYNES in his learned and able opinion."

Contracts Payable in "Current Funds"—Amount of Recovery.—*Wrightsmen v. Bowyer*, 24 Gratt. 438, was an action of covenant on a bond in which B promised to pay W three years after date \$2,000 "in funds current in the state of Virginia." The question was raised whether, upon a contract payable in "current funds," the obligee was entitled to recover the face of the bond. ANDERSON, J., delivering the opinion of the court, said, that the point could hardly be regarded as an open question since it had been raised and decided by two cases, and in both decided in the same way: in *Beirne v. Dunlap*, 8 Leigh 514; and in the principal case. The court then, after a presentation of the facts and decisions of these two last named cases, said: "It seems to me that under these two decisions of this court the principle ought no longer to be questioned, and that it should be regarded as *res adjudicata*. To hold that the obligee is entitled to recover the face of the bond in this case would be to go beyond what was held in *Boulware v. Newton* (18 Gratt. 708), and to overturn the decisions of this court in the two cases (*Beirne v. Dunlap*, and the principal case) which I have cited. If the principle of those cases is applied to this, the obligee was entitled to recover only the value of \$2,000 in funds current at the maturity of the obligation; and the verdict of the jury has ascertained that to be \$1,360.54. * * * I am of the opinion, therefore, both upon reason and authority, that the judgment should have been for \$1,360.54." MONCURE, P. and CHRISTIAN, J., concurred with ANDERSON, J., in reversing the judgment; but they would have given a judgment for the whole amount. STAPLES and BOULDIN, Js., concurred in the opinion of ANDERSON, J.

See generally, monographic note on "Bonds."

ject to a credit of one hundred dollars paid on the 9th September 1864. Upon a writ of error to the District court, that judgment was reversed; and that court proceeding to enter such judgment as the Circuit court ought to have rendered, sustained the demurrer and dismissed the suit. A writ of error and supersedeas to that judgment, brings the case before this court. The only question which the record presents is, whether the action of debt can be maintained upon such an obligation as the one before us.

The action of debt will not lie where the amount of recovery, in money, must be ascertained by evidence of value and the intervention of a jury. The action of debt only lies for money, and the plaintiff recovers the sum in numero, and not a compensation in damages; they being merely nominal. Bank notes, though they pass generally by common consent as money, and answer the purposes of money, are 151 not money in a legal sense; *unless, indeed, they be made a legal tender in payment of debts.

The obligation upon which this suit is brought, promises to pay eight hundred dollars, "payable in the currency of Virginia and North Carolina money." Is this an obligation to pay money, or is it in substance as well as form, a stipulation to pay bank paper, at that time currently passing as a substitute for money, and which is numerated as dollars and cents? This is the question we have to consider.

It is argued by the learned counsel for the appellant, that this is a bond for the payment of money with a condition. They contend that the liability of the obligor under such a contract is to pay eight hundred dollars in money, but with the privilege of liquidating that amount on the day named, with Virginia and North Carolina bank notes; and if not paid on the day when due, that privilege ceases, and then the obligation becomes one to pay money.

They insist that the construction of the obligation sued upon, is to be governed by that class of cases which hold, that where the obligation is to pay money with the mere privilege to the obligor to pay in some other article on or before a certain day, then the action of debt may be brought upon such obligation. They confidently rely in support of this position upon the following cases, decided by this court: *Crawford v. Daigh*, 2 Va. Cases, 5,215; *Lewis v. Long*, 3 Munf. 136; and *Butcher v. Carlyle*, 12 Gratt. 520.

In *Crawford v. Daigh*, the note was for the payment of sixty-four dollars in good state bank paper, payable one day after date. The court was of opinion that state bank paper was not here mentioned as contra-distinguished from money, but from other paper in circulation, then less valuable than money. Payment was to be made in a currency of equal value to money, and one day after the date of the note.

152 The contract in that *case was, manifestly, to pay in money or its equiva-

lent value in good state bank paper. See Judge Moncure's opinion in *Butcher v. Carlyle*, 12 Gratt. 524.

In *Lewis v. Long*, 3 Munf. 136, the note was for \$250, "to be paid in trade such as to be had; deer-skins, furs, flax, snake root, beef, pork, bacon," &c. In that case the question as to the form of action was neither raised by the pleadings nor in argument, nor decided by the court. The only question raised was whether (inasmuch as the recovery was only forty-six dollars, though the amount claimed was over one hundred dollars), the appellate court had jurisdiction; that jurisdiction being then limited to cases where the amount in controversy was over one hundred dollars. It was evident, however, that upon such a contract the liability of the obligor was to pay money, with the privilege of paying in trade, &c., when the payment was due; and in default of his paying in the mode stipulated, the obligee had the right to demand money; and the action of debt would therefore lie.

In *Butcher v. Carlyle*, 12 Gratt. 520, a case much relied on by the learned counsel for the appellants, the obligor bound himself to pay on or before the 25th March 1842, the sum of \$816.05, with interest, &c.; "which sum may be discharged in notes or bonds due on good solvent men residing in the county of Randolph, Virginia." The question was raised by demurrer, the defendant craving oyer of the obligation, whether the action of debt could be maintained on such a contract. The court held, that an action of debt would lie in such a case, because the obligation was for the payment of a sum of money, with a mere privilege to the obligor to discharge it in notes or bonds of the description mentioned on or before the day on which it became payable; and having failed so to discharge it, he is liable to an action of debt for the money. The promise to pay was absolute

and the form of expression, "which sum may *be discharged, &c.," indicates mere permission or privilege. The obligee had only a right to demand money. He had no right to demand the notes or bonds. The obligor had a right to pay either in money or in notes or bonds, provided he paid them before the day fixed for payment.

Judge Moncure delivering the opinion of the court in this case, takes pains to distinguish it from *Beirne v. Dunlap*, 8 Leigh, 514 (which, in my opinion, controls the case at bar), and so far from assailing the authority of that decision, expressly approves it as the settled law respecting such obligations. He says, p. 522: "when the obligation is to pay money in a fixed quantity of some other article, as in so many bushels of wheat, or in wheat at a certain price per bushel, or in bonds, bank notes or other choses in action, of a certain nominal amount, the authorities all seem to agree, that the meaning and effect of the obligation is the same as if it had been in the simple form of an obligation to deliver

the article; and that covenant is the proper remedy." An obligation to pay a sum in bank notes, is for payment in an article of which the quantity is ascertained. This arises from the peculiar nature of the article "which is enumerated in dollars as specie is." *Campbell v. Wister*, 1 Litt. R. 30.

Beirne v. Dunlap (supra), is a case exactly in point, and its authority is not in the least degree shaken by the cases relied upon by the learned counsel for the appellants. In that case the obligation was to pay "the sum of \$813.79, in notes of the United States Bank, or either of the Virginia banks." In that case it was held by the unanimous opinion of the court, that the action of debt would not lie; but that covenant was the proper remedy. Parker, J., says, "To pay \$100 in bonds or bank paper, means bonds or notes calling for that sum which the obligors or banks are bound for. It is the same thing in law as an

engagement to pay the \$813.79 in 800 154 bushels *of wheat, or in any other commodity whose quantity is ascertained, as the amount of bank notes, in this case, is ascertained. And if so an action of debt will not lie, unless it would lie upon a promise to pay a fixed quantity of any commodity of fluctuating value. In this respect there is no difference between bank paper and any other commodity. Paper may rise or depreciate in value before the day of payment; and if the day passes when the contract is to be fulfilled, the measure of the obligee's rights and the obligor's liabilities is the value of the notes on that day, to be ascertained by the verdict of a jury and awarded in damages."

In the case at bar, the obligation was to pay \$800, "payable in the currency of Virginia and North Carolina money." Now whatever general rules may be adopted as means of ascertaining the intention of the parties, the end in view, in every case, is to ascertain the intention from the contract; and when so ascertained, effect will be given to it, if lawful. Is then the writing obligatory before us, an obligation for the payment of money with a condition, or, in other words, for the payment of a sum certain, with the mere privilege to the obligor to pay in currency of a certain kind on or before a certain day? Or is it an obligation, in substance, as well as in form, to pay bank paper, then currently passing as money, and which is enumerated in dollars and cents as specie is?

In seeking to ascertain the intention of the parties from the contract itself, it is not improper to consider the circumstances which surrounded them at the time it was entered into.

The writing obligatory was executed on the 14th day of September 1862, and was payable twelve months after date; and the amount to be secured was the purchase money of a tract of land. At that time gold and silver had been driven from the channels of circulation as currency, and Confederate States treasury notes and

155 state *bank notes were the only currency in circulation. Both were depreciating, but the former much more rapidly than the latter. The obligor was not willing to pay in gold, and the obligee was not willing to accept Confederate currency in payment for his land. They, therefore, to avoid the payment of gold on the one hand, and the receipt of Confederate money on the other, entered into the obligation before us, in which the obligor bound himself to pay, and the obligee to receive, Virginia and North Carolina bank notes. This is, I think, the true construction of the contract between the parties. It was substantially a mere contract to pay Virginia and North Carolina bank notes to a certain specified amount, expressed in words as appropriate as any other, to signify how much bank paper was to be paid; and is equivalent to an engagement to pay bank notes amounting to 800 dollars, or so many bank notes as on their face will nominally make that sum.

But it is insisted by the learned counsel for the appellant, that the promise to pay \$800 is absolute; and the form of expression, "payable in Virginia and North Carolina currency," &c., indicates mere permission or privilege to pay in such currency. This is not a sound view. In this case the quantity of the Virginia and North Carolina currency is fixed, and the insertion of the words "eight hundred dollars" has no reference to current coin, but to an amount of bank notes which represents so much coin; the same term being always used in the enunciation of both currencies. In cases of indeterminate quantity there can be no other measure of damages than the named sum, and the intervention of a jury is unnecessary. The named sum must necessarily be the amount of the debt, which is then precisely ascertained. But where the named sum is to be paid in any determinate quantity of a collateral article subject to fluctuation in its market price, the value of that article is the thing due, and as it may be more or less than

156 the named *sum for which the creditor is willing to take the article, it must be estimated in damages by a jury. See Judge Parker's opinion in *Beirne v. Dunlap*, 8 Leigh, 518.

It is also insisted that the words "payable" in this obligation, are equivalent to the words "may be discharged" in the note under consideration, in *Butcher v. Carlyle*, and only indicated a permission or privilege. This would be a forced construction, and would do violence to the ordinary significance of the word, when used in all contracts. Payable means to be paid, not may be paid. It imports an obligation, and not a mere privilege. A contract to pay a sum of money, by which that sum is made payable at a certain place, or on a certain day, always imports an obligation to pay at that place or on that day, and a failure to pay at the place or on the day stipulated is a violation of the contract. And so, a contract to pay a sum of money, which by its

express terms is made payable in a certain kind of currency, imports an obligation on the part of the obligor to pay, and of the obligee to receive, that currency. Suppose the obligation was, that the obligor promised to pay on the 1st January 1863, \$1,000, payable in Confederate treasury notes, could it be possibly maintained before any court that if the obligor failed to pay on that day, then the obligee might demand gold, and that the judgment should be for \$1,000 in gold, when by the express stipulation of the parties, it was payable in Confederate currency? And yet, this result inevitably follows if the view of the learned counsel be correct. I am of opinion that in this case the obligation of the defendant was to pay, and of the plaintiff was to receive, Virginia and North Carolina state bank notes, and the commodity being of a determinate quantity, subject to fluctuation in its market price, the value of that currency is the thing that is due, and that can only be estimated in damages by a jury. I am,

therefore, of opinion that an action of 157 debt will not lie upon such an *obligation, but that covenant is the proper remedy; and that the judgment of the District court should be affirmed.

Judgment of the District court affirmed.

158

*Wright v. Rambo.

June Term, 1871, Wytheville.

Absent, ANDERSON, J.

1. **Attachments—Abatement of—Sufficient Cause—Burden of Proof.**—Upon a motion by the defendant to abate an attachment which had been sued out against his property by the plaintiff, the onus is on the plaintiff to show that the attachment was issued on sufficient cause, and he may, therefore, be required to introduce his evidence first.
2. **Appellate Proceedings—No Jury—Error in Order of Hearing Evidence.**—Where a case is heard by the court without a jury, an appellate court will not reverse the judgment, though the court below may have erred in requiring the plaintiff to introduce his evidence first. In such a case, it is a matter of perfect indifference in what order the evidence is heard.
3. **Attachments—Abatement of—Evidence—Declarations of Wife of Debtor.**—Upon a motion by the defendant to abate an attachment which has been sued out against his property by the plaintiff, the admissions and declarations of the wife of the defendant are not admissible in evidence for the plaintiff to prove the intention of the defendant to move with his property from the State, unless they were a part of the *res gestæ* of an act which was evidence, and which they might reasonably tend to explain.
4. **Same—Same—Same—Declarations of Debtor after Date of Attachment.**—Upon such a motion, the defendant's intention and declarations as to leaving the State after the date of the attachment, are not admissible as evidence.

*For further authority for the proposition that the *onus probandi* that attachment was issued on sufficient cause rests on the plaintiff, see the principal case approved in *Sublett v. Wood*, 76 Va. 820; *Burruss v. Trant*, 88 Va. 981, 14 S. E. Rep. 845.

On the 28th of June 1869, Robert Wright instituted an action of assumpsit against J. C. Rambo; and on the same day, upon an affidavit that Rambo was justly indebted to him to the amount at least of five hundred dollars, and that he believes that the said Rambo intends to remove his estate, or a material part thereof, out of this commonwealth, so that process of execution on a judgment in his suit, when

159 obtained, will be unavailable, *he sued out an attachment against the estate of Rambo; which was levied on certain real and personal property mentioned in the return.

At the next term of the court, held in September, Rambo moved the court to abate the attachment; and neither of the parties requiring a jury, the court after hearing the evidence rendered a judgment that the attachment be abated.

In the progress of the trial the plaintiff took several exceptions to the rulings of the court; and also excepted to the judgment; and all the evidence is set out in the bill.

Before any evidence was heard by the court the plaintiff insisted that the onus was upon the defendant to prove that the attachment had been improperly sued out, and should therefore be required first to introduce his testimony. But the court overruled this motion, and required the plaintiff to introduce his evidence first. And to this ruling the plaintiff excepted.

After the plaintiff had proved that the defendant, about two months before the suing out of the attachment, had offered to sell to the plaintiff his (the defendant's) lands, stating that he desired to sell out and remove from Virginia to the West, and also that about the same time defendant had on various occasions repeated to others that if he could sell his property at a fair value, he desired to remove from the State, proposed further to prove that Mrs. Rambo, the wife of the defendant, had on more than one occasion within two or three months next preceding the issuing of the attachment, announced to various persons, that her husband and herself intended to remove with their family from the State of Virginia to the West as soon as they could make ready, and were desirous to go before hot summer weather, if they could get off. But the defendant objected to the introduction of this testimony; and the court sustained the objection: and the plaintiff excepted.

160 *The plaintiff further offered to prove that, since the issue of the attachment, the defendant had entertained an intention to sell off his property, and leave the State as soon as practicable, and had so declared, on more occasions than one, since the said attachment was issued. To which evidence the defendant objected; and the court sustained the objection: and the plaintiff again excepted.

It appears that, after the plaintiff had proved the defendant's proposition and declaration to him, as before stated, he further proved that defendant had, about the same

time, said to another person, that if he could sell his property, he would leave the State and go West; and he also proved by defendant's brother, and another witness, that defendant had, prior to the 1st of May 1869, and about that time, declared to each of them, individually, that if he could sell out his property at a fair value, he would leave the State; qualifying the declaration to his brother, by saying he did not believe he could get a fair value for it.

The defendant proved, by his own evidence as a witness, that, at the time of suing out the attachment, he entertained no intention of removing of himself or his property beyond the limits of the State of Virginia; and further, that according to his present recollection, he had neither entertained an intention to remove his property, nor declared such intention, as proved by the other witnesses. That prior to the month of May 1869, when he repaired his mill, he had designed, if he could judiciously sell his property, to remove from the State; but had no such intention afterwards. And he further proved by two witnesses, with whom he is and has been in regular and intimate intercourse, that they had never heard him, at the time of the suing out of the attachment, or previously, talk of removing himself or his property from the State. Upon this evidence the court rendered the judgment

161 abating the attachment: the *plaintiff thereupon excepted, and applied to this court for supersedeas; which was awarded.

J. T. Campbell, for the appellant.

Jno. A. Campbell, for the appellee.

MONCURE, P., delivered the opinion of the court.

The court is of opinion that the Circuit court did not err in refusing to admit evidence of the conversations and declarations of the wife of the defendant in regard to his removal from the State, as mentioned in the first bill of exceptions. The case comes within the general rule, that a wife's declarations and admissions are inadmissible evidence against her husband, and not within any exception to that rule. The conversations and declarations which were offered in evidence in this case were not admissible as part of the *res gestæ*, for they did not accompany any act which was itself evidence and which they might reasonably tend to explain.

The court is further of opinion, that the Circuit court did not err in excluding evidence of defendant's intention and declarations as to leaving the State since the date of the attachment, as mentioned in the second bill of exceptions. The fact in controversy is the existence, at the time of suing out the attachment, of an intention on the part of the defendant to remove out of the State. The existence of such an intention formed afterwards is not material, and not a sufficient ground for suing out

an attachment. Declarations of the defendant made since the date of the attachment, as to his then existing intention to remove from the State, are not, in themselves, evidence tending to prove the existence of such an intention at the time of suing out the attachment. They might, perhaps, be made so recently after that time, or have connection with, or make such reference to it as to tend to show the existence of such intention at that time; and thus become admissible evidence. *But then the special circumstances making them admissible, must be affirmatively shown and set out in the bill of exceptions by the party who offers the evidence; otherwise, they will not be presumed by the appellate court to have existed.

The court is further of opinion, that the Circuit court did not err in refusing to require the defendant to introduce his testimony first, and requiring the plaintiff to introduce his evidence first, as mentioned in the third bill of exceptions. The Code, chapter 151, § 22, page 650, declares that "the right to sue out any such attachment may be contested; and when the court is of opinion that it was issued on false suggestions, or without sufficient cause, judgment shall be entered that the attachment be abated." The attachment in such a case as this is issued on *ex parte* affidavit, as prescribed by the Code, ch. 151, § 2. But the defendant may contest the right to sue it out, as above mentioned. In other words, he may deny the right to sue it out. And thus there is an issue made up between the parties, on the question of right. Of that issue the plaintiff has the affirmative, and the defendant the negative; and the general rule is that the party having the affirmative must begin, and especially when such party is the plaintiff.

But the court is further of opinion, that even if the Circuit court erred in this respect, it was not an error to the prejudice of the plaintiff, or for which the judgment ought to be reversed. The case was tried by the court without the intervention of a jury. All the evidence on both sides was heard, and the order in which it was heard, seems to be a matter of perfect indifference.

The court is further of opinion, that the Circuit court did not err in abating the attachment, as mentioned in the fourth and last bill of exceptions. The preponderance of evidence, all of which is set out in that bill, is decidedly in favor of the defendant. But, even if there had been a preponderance the other way, yet the bill, 163 *being a certificate of evidence merely, and not facts, and the evidence being conflicting, and the defendant's evidence, if true, proving that at the time of the suing out of the attachments he did not intend to remove from the State, the court would have to regard the bill as a demurrer to the evidence, and to affirm the judgment, according to the doctrine settled by this court in the cases of *Mitchell, &c. v. Baratta, &c.*; and *Same v. Riviera, &c.*, 17 Gratt. 445.

The court is, therefore, of opinion that there is no error in the judgment; and that it be affirmed.

Judgment affirmed.

164

**Mitchell v. Thorne & al.*

June Term, 1871, Wytheville.

Absent, ANDERSON, J.

1. **Public Roads—Change of—Order—Form of.**—Upon application for the change of a road, the order directs the viewers to view the proposed alteration of the road (describing it), and to return to the court a report of such view in the manner prescribed by law. It would have been more formal, and therefore better, to follow the terms of the law in the order; but the order is substantially and sufficiently conformed to it.
2. **Same—Same—Statute—Viewers Need Not Be Sworn.**—Under the present law, Code, ch. 52, § 6, the viewers appointed to view the alteration proposed in a road, and report to the court, are not required to be sworn. And though the order appointing them directs them to be sworn, it need not be done.
3. **Same—Same—Statute—Sufficient Compliance with.**—What is a sufficient compliance by the viewers in their report with the directions of the 2d and 4th sections of the act, Code, ch. 52.
4. **Same—Same—Writ of Ad Quod Damnum—Objections.**—The writ of *ad quod damnum*, issued in such a case, is defective for not directing any enquiry as to "damage to the residue of the tract beyond the peculiar benefits which will be derived in respect to such residue from the road." And the inquest taken on such writ, not making this enquiry, is defective. And for this defect both the writ and inquest will be quashed, if the motion to quash is made at the proper time.
5. **Same—Same—Same—Same—Waiver of Objections.***—In such a case the defendant not having made any motion to quash the writ and inquest in the County court, but going to trial on the merits, he waived the objection to the writ and inquest; and it is too late to move to quash them or any other of the proceedings in the Circuit court.
6. **Same—Same—Proceedings Irregular—Exceptions in Appellate Court.**—Although in such cases there is an appeal as of right, and *viva voce* testimony is heard in the Circuit court on such appeal, yet, as a general rule, a party must make any objections he may have to the proceedings in the court of original jurisdiction; and if he permits such proceedings, to progress to the final trial of the case, without making the objections, he will be held to have waived them, and cannot make them for the first time in the appellate court.
- 165 *7. **Same—Same—Appellate Proceedings—"Right to Begin."**—In such a case on appeal by the defendant, it is his right and duty to begin; the judgment of the County court being *prima facie* right.
8. **Same—Same—Damages Insufficient—Objections to Inquest.†**—The regular mode of objecting to the in-

*See *Jeter v. Board*, 27 Gratt. 916, and cases cited.
 †**Condemnation Proceedings—Damages—Report of Commissioners—Presumption.**—In *Cranford, etc., Co. v. Baum*, 97 Va. 503, 24 S. E. Rep. 906, the principal

quest of the jury on account of the small amount of the damages assessed. 'Is, by a motion to quash the inquest; on which motion evidence will be heard to prove the damage assessed is insufficient. Until this is shown the inquest is conclusive on the question of damages.

9. **Same—Same—Same—Same.**—This objection may, however, be made on the hearing; and evidence may be then introduced by either party, to show the damages assessed are either adequate or inadequate.

10. **Same—Same—Same—Introduction of Evidence in Appellate Court.**—So in such case upon appeal by the defendant, he is entitled to introduce evidence in the Circuit court to prove the inadequacy of damages assessed by the inquest.

11 **Same—Same—Damages—How Assessed.**†—In assessing the damages in such a case, the defendant is entitled to have the value of the land taken for the road, without deduction, and such further damage as the residue of his tract will sustain beyond the peculiar benefits which will be derived to said residue from the road.

This was a proceeding in the County court of Carroll county, by Wm. C. Thornton and James B. Crockett, to have a change made in the route of a public road in that county. The route as proposed passed through the lands of A. H. Mitchell. The case is fully stated by Judge Moncure in delivering the opinion of the court.

Tipton, for the appellant.

Walker, for the appellee.

MONCURE, P., delivered the opinion of the court.

This is a supersedeas to a judgment of the Circuit court of Carroll county, affirming a judgment of the County court of said county, establishing an alteration in a public road. The proceedings in the case were, in substance, as follows:

On the 5th of October 1868, on motion of William C. Thornton and James B. Crockett,

case was cited as authority for the proposition that the report of commissioners is to be regarded as conclusive on the question of damages until it is shown to the satisfaction of the court to be insufficient.

And in *Neale v. Farinholt*, 79 Va. 50, the court said: "All acts are presumed to be rightly done until the contrary appears, and are consequently to be affirmed. See *Markham v. Boyd*, 22 Gratt. 544; *Forrer v. Coffman*, 23 Gratt. 871-2; *Mitchell v. Thornton*, 21 Gratt. 164; *Broom's Leg. Max.* 729."

†**Same—Damages—How Assessed.**—See the proposition laid down in the eleventh headnote approved in *Bailey v. Com.*, 78 Va. 23; *City of Norfolk v. Chamberlain*, 89 Va. 243, 16 S. E. Rep. 730; *Watts v. Norfolk*, etc., R. Co., 89 W. Va. 200, 19 S. E. Rep. 522.

In *Railroad Co. v. Foreman*, 24 W. Va. 678, the principal case was cited as authorizing the proposition that the benefits to be considered in reduction of damages in condemnation proceedings are confined to such as are direct and peculiar to the owner of the land, excluding those which he shares with other members of the community whose property is not taken.

viewers were appointed by the County court, to view the proposed alteration and return their report to the court.

166 *On the 6th of January 1869, the viewers returned their report; and it appearing that A. H. Mitchell, through whose lands said road will pass, if altered as proposed, objected to the location of the same through his lands, and claimed damages therefor, it was ordered that he be summoned to appear on the first day of the next term to show cause why such alteration should not be made; which summons was accordingly awarded and executed.

On the 1st of February 1869, said Mitchell appeared in obedience to the summons, and entered himself as contestant to the application; and on his motion, a writ of ad quod damnum was awarded.

The writ was accordingly issued, and an inquest was taken and returned in a pursuance thereof; in which inquest, the jury stated that the proposed alteration would be of no damage to said Mitchell if his land were taken therefor as proposed.

On the 4th of August 1869, the case came on to be heard, and sundry witnesses being examined, and the court having fully considered, as well the report of the viewers and the inquest of the jury, as the evidence adduced, was of opinion, that the said alteration should be made and established; which was accordingly ordered: and the applicants, Thornton and Crockett recovered their costs of Mitchell. Whereupon, the said Mitchell took an appeal, as of right, from the said judgment of the County court to the Circuit court.

On the 27th day of the same month, August 1869, the cause was docketed in the Circuit court, and continued; and on the 9th of September 1870, it came on to be heard in that court. But before the opening of this case upon its merits, sundry motions were made by the appellant, Mitchell, and overruled by the court. He moved as follows, to wit:

1st. To quash the order made by the County court appointing viewers.

167 *2dly. To quash the report of the viewers.

3rdly. To quash the writ of ad quod damnum, and the inquest of the jury returned in obedience to the same.

4thly. To set aside the verdict of the inquest, upon the ground that the same was made and founded in mistake and misapprehension; and also upon the ground that one of the jurors was related to the wife of Crockett, one of the appellees: and the appellant offered witnesses to prove these facts. This motion, with the others, was overruled, on the ground that the record showed no objections to either the order, report of viewers, or the inquest of the jury, having been made in the County court. Thereupon, the parties announced themselves ready; and the court held that the appellant should begin his case; and a witness was introduced by him, and the question asked, "what damage the appellant would sustain if the alteration of the road was established as

proposed?" Upon objection, this question was not permitted by the court to be answered; on the ground that the inquest of the jury was conclusive on the question of damage. The appellant then moved the court to set aside the inquest of the jury, on the ground of evidence discovered since the appeal was granted; and introduced a witness to sustain the motion; but the court overruled it, and refused to hear the witness. And, thereupon, came sundry witnesses for each party, who being sworn and fully heard, and all the circumstances being considered, the court was of opinion that there was no error in the judgment of the County court, and affirmed the same with costs. And the court certified that all the testimony heard was upon the question of the convenience or inconvenience, to the public as well as individuals; and that the court refused to hear a testimony on any other question, in reference to establishing said alteration, and excluded all the testimony offered by the appellant to prove that

168 he sustained damage by such alteration, and *refused to permit him to prove that he sustained such damage. This certificate was given, that it might have the effect of a bill of exceptions taken by the appellant.

To this judgment of the Circuit court, a supersedeas was awarded by a judge of this court, on the petition of the said appellant, Mitchell; and that is the case we now have to decide.

In the said petition there are several assignments of error, which we will now proceed to consider in the order in which they are assigned. These errors, in the words in which they are assigned, and our views in regard to each of them, are as follows:

1st. "The court erred in refusing to quash the order of the County court appointing viewers."

The Code, ch. 52, § 6, directs viewers to be appointed "to view the ground and report to the court the conveniences and inconveniences that will result, as well to individuals as the public, if such road, &c., shall be as proposed; and especially whether any yard, garden, orchard, or any part thereof, will in such case have to be taken."

The order in this case was, that the persons named as viewers, "being first duly sworn for that purpose, do view a proposed alteration of the Dry Spur road" (describing it,) and "return to the court a report of such view in the manner prescribed by law."

It would have been more formal, and therefore better, to follow the terms of the law in the order. But we think the order substantially and sufficiently conforms to the law. In directing the viewers "to return to the court a report of such view in the manner prescribed by law," the terms of the law seem, in effect, to be embodied in the court order.

"2d. The court erred in refusing to quash the report of the viewers, and overruling appellant's motion to do so."

The duties of the viewers are prescribed in ch. 52, § 6 of the Code, providing 169 for their appointment as above *mentioned. The 7th section, which speaks only of "the commissioner acting under the preceding or the 4th section," may also be applied to viewers, so far as it is properly applicable to them. It directs, among other things, that the commissioner "shall particularly report the facts and circumstances in his opinion useful in enabling the court to determine the expediency of establishing or altering the road," &c. "He shall report the names of the land owners on such route, and state which of them require compensation, the probable amount thereof, and any other matter which he may deem pertinent. A map or diagram of such route shall be returned with his report."

Two objections are made to the report of the viewers in this case: 1st, that it is not made on oath, although the order of court appointing them expressly required it to be so made; and 2dly, that it is defective in not stating all the circumstances connected with the alteration. "It simply says it will shorten the distance; but whether the road will pass over a precipice, a swamp, or any thing else, it is altogether silent."

As to the 1st objection, though the former law, 2 Rev. Co. of 1819, ch. 231 § 1, which was in force when the present Code took effect, required the viewers to be sworn, the present law does not. It is argued that the former law was not intended to be changed in this respect, and that we must construe the present law as requiring the viewers to be sworn. We do not think so. There is not in the new law a mere change of the phraseology of the old, or a mere omission of immaterial words used in the old; but material words used in the old, are omitted in the new law; and we think a corresponding change of intention is thus plainly indicated. That the order appointing the viewers uses the words, "being first duly sworn," can make no difference if the law does not require them to be sworn. The

170 order, no doubt, followed the form of the old law. *As to the case of Fisher v. Smith, 5 Leigh, 611, cited by the counsel for the plaintiff in error, it is sufficient, for the present, to say that it was decided under the old law. As to the second objection, that the report does not state all the circumstances connected with the alteration. It does not appear that there were any other, material to be stated, than those which are stated. It states that "the proposed alteration will not pass through any yard, garden or orchard, and will be of great convenience to the public, especially in the west and southwest portion of this county, and will be of no inconvenience to any individual. The proposed road will pass through the lands of A. H. Mitchell, Esq., who objects to its location, and claims damages to the amount of \$300. One of the main conveniences to be derived from the proposed change is, the shortening

of the distance from the point at which said change will start, to the intersection with the turnpike, which will be reduced to about one-third of the distance that the public are now required to travel, as will be seen by reference to the annexed diagram." We think the report sufficiently complies with the requisition of the law.

"3d. The court erred in overruling appellant's motion to quash the writ of *ad quod damnum*, and the inquest of the jury."

The Code, ch. 52, § 10, directs that "such writ shall command the sheriff to summon and impanel a jury of twelve freeholders of the vicinage, not related to either party, to meet on the lands of such proprietors or tenants as may be named in the order and writ, at a certain place and day therein also specified, of which notice shall be given," &c.

The writ which was issued in this case, commanded the sheriff to summon and impanel twelve able and discreet freeholders of the vicinage, no ways related to either party, to meet at some certain place, on the ground through which the proposed alteration is intended to pass,

171 *on the 18th day of the present month, (the day named in order awarding the writ), which freeholders, taking nothing, &c., shall be charged by you, impartially and to the best of their skill and judgment, to view the land through which the proposed alteration is to be conducted, and say to what damage it will be of to the said A. H. Mitchell, taking into estimation as well the use of the land to be laid open for said road, as the additional fencing which will thereby be rendered necessary, &c. This writ seems to pursue the form which was used under the old law, the draftsman not advertg to the change which had been made in the terms of that law by the present Code. It is proper, of course, always to adhere as closely as possible to the terms of the existing law; though if its directions be substantially complied with, it will generally be sufficient. Now here we observe, that the directions of the Code in regard to the form of the writ are very simple and few, and the writ issued in this case fully complies with those directions. But it does something more, and directs the jury, in ascertaining the damage, to take "into estimation as well the use of the land to be laid open for said road as the additional fencing which will thereby be rendered necessary," &c.

The inquest of the jury conforms to the writ in regard to "taking into estimation, as well the use of the land which will be laid open for said road, as the additional fencing which will thereby be rendered necessary," and states that the "said freeholders, being so empanelled, sworn and charged in upon the said lands through which the said alteration is proposed to be made, and having viewed the same, upon their oaths do say, 'that it will be of no damage to the said A. H. Mitchell, if the said lands are taken as proposed.'"

The next section, to wit: section 11 of

chapter 56, prescribes the duty of the jury, and declares, among other things unnecessary to be mentioned, that "the jury,

after being duly sworn by the sheriff, shall view *the lands of the proprietors and tenants so named, and ascertain what will be a just compensation to each proprietor and tenant so named, for the land of his proposed to be taken, and for the damage to the residue of the tract beyond the peculiar benefits which will be derived in respect to such residue, from the road."

Now, if a motion had been made by Mitchell in the County court to quash the writ of *ad quod damnum* and the inquest of the jury, for not directing or making any enquiry as to "damage to the residue of the tract beyond the peculiar benefits which will be derived in respect to such residue, from the road," it would have been proper to have sustained that motion. But no such motion was made in that court; no doubt because there was no such damage, or rather because the said Mitchell was satisfied that the enquiry directed by the writ and made by the jury, which conformed to the old law, was sufficiently extensive to embrace all the damage to which he was entitled; and he went to trial upon the merits. Whereupon, sundry witnesses being sworn and examined, and the court having fully considered, as well the report of the viewers, and the inquest of the jury, as the other evidence adduced, the judgment was, that the proposed alteration of the road should be made and established as recommended by the viewers. And the said Mitchell, thinking himself aggrieved by the said judgment, took an appeal of right therefrom.

We hold that it was too late for the appellant to make a motion, for the first time, in the appellate court to quash the writ and inquest. By not making it in the County court, but going to trial there without objection to the writ or inquest, he waived any such objection. And the same may be said in regard to his motions, made for the first time in the Circuit court, to quash the order appointing viewers, and to quash the report of the viewers, which subjects we have already considered. Besides the reasons before assigned for sus-
173 taining the *judgment of the Circuit court in those respects, the failure to make such motions in the County court was, in itself, a sufficient reason for that purpose.

It is true that when the law gives an appeal of right, the appeal is "upon the facts as well as the law; and *viva voce* testimony is heard in the Circuit court. In cases of this kind, the record of the County or Corporation court contains no statement of the evidence; and even though the whole should be set forth, the appellant may introduce evidence in the Circuit court which was not before the County or Corporation court. Hence arises the impossibility of determining upon a petition for a writ of error or supersedeas, whether there

is error in fact in any such case." 1 Rob. Pr., old ed., p. 27.

But it is also true, as a general rule, that a party must make any objections he may have to make to any of the proceedings in such a case, in the court of original jurisdiction; and if he permit such proceedings to progress to the final trial of the case, without making any such objections, he will be held to have waived them, and will have no right to make them, for the first time, in the appellate court. There can be no necessity for such a right, as there is for his right to be heard *de novo* on the merits of the case; and it would be productive of the greatest inconvenience and hardship to the adverse party, and be unreasonable in the last degree, to suffer him to waive these objections in the lower court, and take his chances there for a favorable decision, and, on being dissatisfied with the decision and appealing from it, to avail himself of such objections in the appellate court, and thus have the judgment reversed at the expense of his adversary. Whereas, by making the objections at the proper time and in the proper court, the error, if any, could be corrected at once, and with little or no expense to the parties. The correctness of this view is self-evident, and is sustained by the cases cited by the counsel for the defendants in error. Bohn

174 v. Sheppard, 4 Munf. *403; Lewis v. Washington, 5 Gratt. 265; Muire v. Falconer, 10 Ib. 12.

Indeed, the counsel on both sides seem to agree that, to some extent, a party must make such objections in the court below, or will be held to have waived them, and not be allowed to make them, for the first time, in an appellate court. They only differ as to the extent to which the rule goes. The counsel for the defendants in error contending that it goes only to the extent of allowing the appellate court, *ex officio*, to reverse a judgment on a ground not taken by the appellant in the court below, where the public is concerned, or where such uncertainty exists in the proceedings as to prevent the appellate court from rendering a correct final judgment in the case; while the counsel for the plaintiff in error contends that the rule goes to a greater extent; but to what precise extent he does not show, though he maintained that it goes far enough to embrace the grounds of objection taken by his client in this case, for the first time, in the appellate court. The cases he relies on to sustain his view are Eppes v. Cralle, 1 Munf. 258; Kownslar v. Ward, Gilm. 127; and Fisher v. Smith, 5 Leigh, 611. These cases go no further than to sustain the exception to the extent to which it is admitted to exist by the counsel for the defendants in error. Without stating the cases, it is sufficient to say that they are unlike this case, and do not require us to decide that the objections made for the first time in the Circuit court, when they might just as well have been made in the County court, and no reason existed for not making them there, were made in time.

The general rule before referred to, is well established, and applies to the case, unless it can be shown that it comes within some special exception thereto. It does not appear to come within any such exception. Whatever exception, if any, the cases relied upon may establish, it does not apply to this case.

175 *We therefore think the third assignment of error is not sustained.

"4th. The court erred in overruling appellant's motion to set aside the verdict of the jury, because the same was founded in mistake and misapprehension, and because one of the jurors was a relation of the wife of the appellee Crockett."

The answer to this objection is, that it might and ought to have been made, if made at all, in the County court; but was not made there, and was made for the first time in the Circuit court. Several months elapsed between the return of the inquest and the trial of the case in the County court; during which period the plaintiff in error had an ample opportunity of informing himself as to the facts on which this motion was founded; and it does not appear that he was not fully aware of them when the verdict was rendered in the County court.

"5th. The court erred in ruling appellant to begin, and forcing upon him the necessity of proving a negative."

This is a practical question, and the court would be averse to interfering, if at all, with a judgment of an inferior court on that ground, at least, unless it plainly appeared that a party was prejudiced thereby. The "right to begin," is generally esteemed a valuable right, especially in the trial of questions of fact. The plaintiff in error in this case seems to have regarded it as a burden. We think he had the right, or that it was his duty "to begin," the judgment of the County court which he complained of as erroneous, being *prima facie* right. At all events, we think there is no error in the judgment of the Circuit court in this respect, to the prejudice of the plaintiff in error.

"6th. The court erred in holding the inquest of the jury conclusive on the question of the damages; and in excluding testimony offered by the appellant to prove the *damages he would sustain by the proposed alteration. It was also error to hold that no question was before the court, or could be heard, but that of the convenience or inconvenience of the alteration."

The regular mode of objecting to the inquest of the jury on account of the small amount of the damage assessed, is, no doubt, by a motion to quash the inquest; on which motion, of course, evidence will be heard to prove that the damage is insufficient; and until it is shown to the satisfaction of the court to be insufficient, the inquest will be regarded as conclusive on the question of damages. But the objection, instead of being made in that way, may be made when the court comes to de-

termine, upon the report, inquest and other evidence, if any, whether the road shall be established or altered as proposed. Section 13, of ch. 52, of the Code, expressly authorizes the court to hear other evidence; and that evidence may be introduced by either of the contesting parties, and may relate to the adequacy or inadequacy of the damages. In fact, the subject of damages is generally the chief subject which then engages the attention of the court: for the question whether public convenience requires the establishment of the road or alteration proposed, is passed upon by the court in awarding a writ of ad quod damnum on the report of the viewers; although, on the return of the inquest under that writ, the question is again considered and finally determined, upon the report, inquest and other evidence, if any. And the amount of damage which the county will have to pay for the road, as compared with the public or private convenience thereof, is generally a material element in the formation of the judgment of the court on the question, whether, upon the whole case, the road shall be established or not. The appellant then had a right to introduce evidence, on the final hearing of the case in the County court, to prove that he would sustain damage by the alteration of

177 said road as proposed, *and the amount of such damage, for which he would be entitled to compensation according to law; and if that court, upon such evidence, had been of opinion that such damage would in fact be sustained, it would have been the duty of that court to have determined upon the whole case, either that the road should not be established or altered as proposed, or that the writ of ad quod damnum and inquest of the jury should be set aside, and the case be remanded to the County court, with directions to award another writ of ad quod damnum, and for further proceedings to be had therein. Thus the introduction of evidence on the final hearing has, in some respects at least, the effect of a motion to quash the writ and inquest.

We are therefore of opinion that the Circuit court erred in not permitting to be answered, the question propounded by the appellant to a witness introduced by him, "what damage the appellant would sustain if the alteration of the road was established as proposed;" and in refusing to hear testimony on any other question in reference to establishing said alteration, than the question of the convenience or inconvenience to the public as well as individuals of said alteration; and in excluding all the testimony offered by the appellant to prove that he sustained damage by such proposed alteration, and in refusing to permit the appellant to prove that he sustained damage by said alteration.

We will therefore have to reverse the judgment of the Circuit court on that ground, and remand the cause to that court for a rehearing to be had thereon, on which rehearing, the evidence offered by the ap-

pellant and refused or excluded by the said court, shall, if again offered by the appellant, be heard by the court. And if, on such rehearing, the said court shall be of opinion, upon the report, inquest and other evidence, that he would sustain damage by the alteration of the said road as proposed, then the said court shall reverse the judgment of the County court, quash the said writ and inquest, and remove

178 *the cause to the County court, in order that a new writ of ad quod damnum shall be awarded to the appellant, and further proceedings had therein, unless the opinion of the said County court shall then be against establishing the proposed alteration of said road; in which case the said court shall adjudge accordingly.

To prevent unnecessary expense and delay to the parties, and to avoid the danger of another appeal in this case, it may be proper for this court to express its opinion in regard to the legal principles which seem to apply to the assessment of damages in such a case. The law provides that the jury shall view the lands of the proprietors so named (in the writ) and ascertain what will be a just compensation to each of them for the land of his proposed to be taken, and for the damage to the residue of his tract, beyond the peculiar benefits which will be derived in respect to such residue from the road. Code, ch. 52, § 11. The proprietor is entitled to receive as compensation, at least the value of the land proposed to be taken for the road, or rather the value of the use of the land for the road, which is generally equal to the full value of the land. The freehold of the land, subject to the public easement of the road, still remains in the proprietor, who is entitled to any minerals under it which may be taken from it without injuring the road or interfering with the use of it by the public. In addition to the value of the land, or of the use of it, the proprietor is entitled to be compensated for the damage to the residue of his tract beyond the peculiar benefits which will be derived in respect to such residue from the road. If the damage to the residue of the tract exceed the value of the peculiar benefits which will be derived in respect to such residue from the road, then the proprietor will be entitled to be compensated for such excess. But if the damage to the residue of the tract fall short of such peculiar benefits, then the deficiency is not to be charged to the proprietor, nor

179 is *entitled on account of the land proposed to be taken for the road as aforesaid. And the peculiar benefits referred to in this law, are such as particularly and peculiarly affect the particular tract of land, a portion whereof is proposed to be taken for the public use, and not such benefits of a general nature as may be derived to the owner in common with the county at large. *Jas. River & Kan. Co. v. Turner*, 9 Leigh, 313.

In this case the jury in their inquest say, "that it will be of no damage to the said

A. H. Mitchell if the said lands are taken as proposed." The quantity of the land of Mitchell proposed to be taken for the road is said to be about three acres: whatever it may be, the land would seem to be of some value, however small that value may be; and he is entitled to be compensated for that value, if his land be taken for the public use. That no damage was allowed for it by the jury, cannot well be accounted for, except by supposing that they set off against the value of the land proposed to be taken for the road, the value of the peculiar benefits which they considered he would derive in respect to the residue of his tract, over and above any damage which might be done by the road, to such residue.

Of the two remaining assignments of error it is unnecessary to take any notice.

We are of opinion that in the respect, and for the reasons aforesaid, the said judgment of the Circuit court is erroneous, and ought to be reversed, and the cause remanded to the said court to be further proceeded in according to the principles above declared.

The judgment was as follows:

The court is of opinion for reasons stated in writing and filed with the record, that the said Circuit court erred in not permitting the question propounded by the appellant to a witness introduced by him, "what damage the appellant would sustain if the alteration of the road *was established as proposed;" and in refusing to hear testimony on any other question in reference to establishing said alteration than the question of the convenience or inconvenience, to the public as well as individuals, of said alteration; and in excluding all the testimony offered by the appellant to prove that he sustained damage by such proposed alteration; and in refusing to permit the appellant to prove that he sustained damage by said alteration.

Therefore, it is considered, that for the error aforesaid, the said judgment of the said Circuit court be reversed and annulled, and that the defendant in error pay to the plaintiff in error his costs by him expended in the prosecution of his writ of supersedeas aforesaid here. And it is ordered that the cause be remanded to the said Circuit court for a rehearing and further proceedings to be had therein; on which rehearing, the evidence offered by the appellant and refused or excluded by the said Circuit court on the former hearing, as stated in the certificate of said court, shall, if again offered by the plaintiff in error, be heard by the court. And if, on such rehearing, the said Circuit court shall be of opinion, upon the report, inquest, and other evidence, that the plaintiff in error will sustain any damage on account of the taking of his land proposed to be taken for the alteration of the road in the proceedings mentioned, or any damage to the residue of his tract beyond the peculiar benefits which will be derived in respect to such residue from the

said alteration; then the said Circuit court shall reverse the judgment of the said County court, quash the said inquest and the writ of ad quod damnum on which it is founded, and remand the cause to the said County court, in order that a new writ of ad quod damnum shall be awarded to the plaintiff in error, and further proceedings be had therein, unless the opinion of the said County court shall then be against establishing the proposed alteration of said road, in which case the said court shall adjudge accordingly.

Which is ordered to be certified to the said Circuit court, together with a copy of so much of the opinion of the court in this case which is "in regard to the legal principles which seem to apply to the assessment of damage in such a case;" being pages 16 and 17 of that opinion, except the first four lines at the top of page 16.

Judgment reversed.

182 *Lee County Justices v. Fulkerson.

June Term, 1871, Wytheville.

1. **Chancery Practice—Order for an Account.**—When the plaintiff offers no proof of the allegations of his bill, and they are not admitted by the answer, though if proved they would entitle him to an account, the bill should be dismissed at the hearing.
2. **Motion against Sheriff—Default of Deputy—Who Should Defend.**—Upon a motion against a high sheriff for the failure of his deputy to collect and account for the county levies, which went into his hands, of which motion the deputy has notice, it is the duty of the deputy to defend the suit, and show, if he can, that he has accounted for them.
3. **Same—Same—Right of Sheriff against Deputy.**—In such a case, judgment having been rendered against the high sheriff, he is entitled to recover a judgment for the same amount against his deputy; and the deputy cannot show upon such motion against him, that he has paid the levies to the parties entitled.

***Chancery Practice—Order for an Account.**—In *Watkins v. Young*, 31 Gratt. 94, the court said: "This court has held in *Lee County v. Fulkerson*, 21 Gratt. 182, that a court of equity will not decree an account for the purpose of furnishing evidence in support of the allegations of a bill. JUDGE STAPLES, delivering the unanimous opinion of the court in that case, said: 'This court has repeatedly decided that an account should not be ordered in any case unless shown to be proper and necessary by the pleadings and proofs in the cause.'"

This proposition has been approved by many cases which cited the principal case as their authority. See *Sadler v. Whitehurst*, 83 Va. 49, 1 S. E. Rep. 410; *Baltimore, etc., Co. v. Williams*, 94 Va. 425, 26 S. E. Rep. 841; *Beale v. Hall*, 97 Va. 388, 34 S. E. Rep. 53; *Millhiser v. McKinley*, 98 Va. 208, 35 S. E. Rep. 446; *Tilden v. Maslin*, 5 W. Va. 379; *Riggs v. Lockwood*, 12 W. Va. 141; *Lively v. Winton*, 30 W. Va. 568, 4 S. E. Rep. 459; *First Nat. Bank v. Parsons*, 42 W. Va. 144, 24 S. E. Rep. 556. See also, *foot-note* to *Watkins v. Young*, 31 Gratt. 84, and cases there cited.

In *Porter v. Young*, 85 Va. 53, 6 S. E. Rep. 808, the court admitted the soundness of the above laid

4. **Estoppel by Decrees—Case at Bar.**†—Judgment having been recovered against the deputy, he applies for and obtains an injunction, on the grounds that he had been induced to confess the judgment, upon the agreement of the high sheriff that the account should be settled by persons named, and the execution should only issue for the amount, if any, found due from the deputy: and that in fact nothing was due; and in breach of this agreement, execution had been sued out on the judgment. At the hearing, the injunction is dissolved and the bill dismissed; and this decree is affirmed on appeal. The deputy is estopped from proceeding by bill in equity against the justices of the county, to recover the amount he has paid to the county creditors, above what he has collected from the county levies.

5. **Judgment against Sheriff by Creditor of County—Substitution of Deputy to Rights of Creditor.**—The judgment recovered against the high sheriff is by a creditor of the county for money lent; the deputy sustains no such relation to the creditor as will entitle him to be substituted to the rights of the creditor against the justices of the county, to enforce the payment of so much of the debt as they have not levied for.

6. **Statute of Limitations—Case at Bar.**—The deputy sheriff pays the judgments recovered against him in 1847, and he does not institute his suit against the justices of the county until 1858. The statute of limitations is a bar to the claim.

183 *7. **Right of Deputy to Sue Justices—Quære.**—**QUÆRE:** Whether under any circumstances, the deputy sheriff could maintain a suit against the justices of a county for their failure to lay the levy; and it seems he could not.

This was a suit in equity brought in November 1858, by Jacob V. Fulkerson against the justices of Lee county, and was afterwards removed to the Circuit court of Wythe.

The plaintiff in his bill states that by an act of Assembly, passed in 1838, the County court of Lee was authorized to borrow money for certain purposes, and that under this act the County court of Lee, in May 1839, borrowed of Col. John Preston four thousand dollars, of which \$1,000, with the interest, was to be paid yearly out of the county levy; the last payment falling due in 1843. That for the years 1840 and 1841 Isham Hubbard was the high sheriff, and farmed the shrievalty to the plaintiff and one Clairborne Anderson. That Z. S. Gibson succeeded Hubbard, and he also farmed the shrievalty to the plaintiff and Anderson; but that Gibson died in 1842, and the plaintiff continued to act as deputy until the expiration of the term.

He further states that Preston not having down proposition, but considered the rule not to be applicable to the case at bar, saying that the answer in the case under consideration was not sufficiently responsive to the bill to bring the case within the rule. In that case (*Porter v. Young*), the answer set up new and affirmative matter, upon which the defence was rested, and which it was incumbent on the defendant to sustain by proof.

†**Estoppel by Judgments or Decrees.**—See monographic note on "Estoppel" appended to *Bower v. McCormick*, 23 Gratt. 310.

been paid promptly the amount due him, his assignee moved the court for a judgment against Hubbard, the late high sheriff, and the personal representatives of Gibson, for the alleged failures on their part to collect and pay over the levies made in the years 1840-'41 and '42, for the satisfaction of his claim; that to these proceedings the plaintiff was not a party; but he distinctly told the parties moved against, that he had as deputy aforesaid, during the years 1840-'41 and '42 collected and paid over all the levies for these years, and was not in arrear. Whether they made defence against said motion he does not know, but judgments were obtained against them for \$— and costs. (The bill is blank as to dates and sums.) That afterwards, Hubbard and Gibson's representatives moved against 184 the plaintiff and *Anderson, deputies as aforesaid, and their securities, for failures on their part to collect and pay over said levies, and it was proposed by the counsel for the plaintiffs in the motions, that the plaintiff and Anderson should each confess a judgment for the amount of the supposed default, upon condition that the whole subject matter should be referred to two persons named, for examination and settlement; that executions should not issue on said judgments until these gentlemen reported; and that then the executions should issue against the plaintiff and Anderson for whatever amount, if any, that they might be found in arrear; the execution against each party to be for his arrearages. To this the plaintiff objected, alleging that he was not in arrear; but upon being advised by his counsel, that if he accounted for his liabilities he would not be prejudiced by the judgment, and that it would be a speedy mode of settlement, he, in deference to his counsel, waived his objections and let the judgment go. That a day was fixed for going into the settlement, and the plaintiff then and there laid his papers before the referees; but Anderson was not ready, and the settlement was adjourned to a subsequent day, when plaintiff again appeared, but Anderson again procured a continuance. That the referees had proceeded with the settlement so far as to satisfy them that the plaintiff was not in arrear; but because of Anderson's failure to settle they were not then prepared to report; and before the third meeting the administrators of Gibson and Hubbard sued out executions against the plaintiff and Anderson. That the plaintiff and his sureties applied for and obtained injunctions to these judgments; Hubbard and Gibson's administrators answered the bills; and an account was ordered, which was taken by commissioner M. D. B. Lane, and the plaintiff was reported to be in arrear on account of county levies \$—. To this report the plaintiff filed exceptions; but upon the hearing the court overruled the exceptions, and dismissed the 185 bills. From *these decrees, the plaintiff took an appeal to the Supreme court of appeals; and that court affirmed

the decree so far as it dismissed the bills as to Hubbard's and Gibson's administrators; but reversed it as to the residue thereof; and sent the causes back with directions to consolidate them and to recommit the report with directions to settle the accounts as between the plaintiff and Anderson. That when the causes went back, they were consolidated and the account was ordered, which was taken by commissioner Crockett; and to it, there were no exceptions. By this report, plaintiff insisted it appeared that at the time of the judgments rendered against him and Anderson, he was in advance to the county upon the said levies \$461.17; and that of a levy made in 1844 to cover the deficiencies of the previous levies, he received but \$383.71; which still left a balance due him of \$77.46. He says in that case the justices of Lee county were not parties and no decree could be made against them, and when it came on to be heard it was stricken from the docket. That he was not a party to the motions against the high sheriffs; and he was prevented by the agreement before stated, from defending the motions against himself. He charges, that he not only has been compelled to pay the debt of Lee county to the amount of \$2,788.99; but he had paid another sum of \$600 towards the Preston judgment, which had not been allowed to him in Crockett's report. He calls upon the justices to answer; prays that he may be subrogated to the rights of Preston; and that an account may be directed to ascertain his liabilities as deputy sheriff for the county levies aforesaid, and further to ascertain what amount, if any, he has paid to the creditors of said county beyond his liability in the premises; that he may have a decree against the justices of the county of Lee for the amount so overpaid by him, and for general relief.

The plaintiff filed with his bill the decrees of the Court of appeals referred to by him, and the subsequent proceedings
186 *in those causes, including Crockett's report; from which it appeared that as between himself and Anderson, the latter was debtor to the plaintiff upon the adjustment of the accounts between them in the sum of \$66.86; and on the final hearing of the cause on the 8th of May 1855, there was a decree in his favor for that sum; and the causes were stricken from the docket. It appeared also that Preston's motion against the high sheriff was on the 18th of March 1845; and the decrees of the Court of appeals were on the 26th of July 1853.

The justices of Lee county appeared, and demurred to the bill; but the demurrer was overruled; and they then answered. They say that very few of the present justices were justices of the county in any of the years mentioned in the bill, and the defendants are consequently less able to explain and answer so satisfactorily the matters in the bill alleged than the justices in those days would have done; and that as to many of the facts stated in the bill they have no knowledge. They admit the law, the borrowing of the money by the county

from Preston, the high sheriffs and deputies as stated, and that Preston's assignee recovered the judgments against the high sheriff Hubbard and Gibson's adm'r in 1845; and they say it appears that these parties moved against the plaintiff and Anderson, their deputies, for the amount of said judgments, and after some delay procured judgments against each for the sum they were respectively in arrear. That these judgments were enjoined by the plaintiff on the allegation that the judgment creditors had violated some understanding or promise made by them at the time these judgments were obtained, and on the further allegation that he was in no default as deputy, as aforesaid. That when these causes came on to be heard, M. D. B. Lane was appointed a commissioner to ascertain the liability of the plaintiff to Hubbard and Gibson's administrator: and by his report, of which they exhibit a copy, it ap-
187 pears *that the plaintiff was indebted, on the 8th of April 1846, in the sum of \$1,505.92; and on the return of this report the injunctions were dissolved and the bills dismissed; and upon appeal this decree was affirmed as to Hubbard and Gibson's administrator; but, as Anderson was a party in the suits, the decrees as to him were reversed, and the causes were sent back to have the accounts between him and the plaintiff adjusted. And this action of the Supreme court of appeals the defendants insist should preclude the plaintiff from further investigation.

The defendants refer to Crockett's report, which they say was settled on an improper principle, as between the deputies and their principals, allowing them large sums which they had paid for interest and damages, as appears by Lane's report; which shows that on this account the high sheriffs had been required to pay, and had recovered from the plaintiff, \$1,505.92, and from Anderson \$182.35. That it is true that there was a deficiency in the levies for 1840, '41 and '42; but in the year 1844 there was an extra sum levied and appropriated to the benefit of the sheriffs for those years, to reimburse them for any sums which they had paid out of their own funds on account of said deficit. That Crockett's account was taken to adjust the accounts between the plaintiff and Anderson; and the defendants were not parties to the suit. They submit that the county of Lee has only to adjust accounts with her high sheriffs, and can take no notice of any transactions between co-deputies or deputies with the high sheriff; they deny that the county is indebted to Hubbard, or Gibson's administrator, or the plaintiff, on account of the alleged deficiencies of the county levies aforesaid; they deny the right of the plaintiff, by subrogation or otherwise, to anything on account of payments alleged by him to have been made for the county; and they especially deny that he paid anything
188 to Preston on account of said loan, for which a *levy was not made, except in the nature of interest, damages

and costs incurred through his delinquency, as aforesaid. And they rely upon the staleness of the claim and the statute of limitations.

The accounts were referred to a commissioner, who made a report, by which he ascertained that Fulkerson had, up to the time of this report, overpaid on account of the county levies of 1840, '41 and '42, \$2,475.68. In this report, of which all the items of credit but one are taken from Lane's report, the commissioner disallows an item, \$383.97, with which Lane charges the plaintiff as received from the levy of 1844, and he does not charge the plaintiff with any part of that levy. And he credited the plaintiff with the amount he had paid for interest, damages and costs which had been disallowed by Lane. The only other credit allowed the plaintiff is an item of \$609.94. The defendants excepted to the report, 1st, for omitting the charge of \$383.97, which the plaintiff in his bill admitted he had received; 2d, for not charging him with \$1,023.48, the amount of the levy of 1844, which they say was levied in the name of the plaintiff to cover the deficiencies in the former levies; 3d, and for allowing the credit of \$609.94, which they insisted was credited in Lane's report; it appearing there, as they insisted, in two credits making up that precise sum; commissioner Lane stating in his report, that with the exception of two items claimed by Anderson, amounting to \$61, which were disallowed, he remembers no objections made by either party to the mode of the statement or the items contained therein; 4th, and further, that though the commissioner, even upon his own statement of the account, reports the plaintiff in arrear at the time of the motion against the high sheriffs to the amount of \$533.48, he omits to charge him with the interest, costs and damages, or any part thereof, that accrued in consequence of these and subsequent motions.

The cause came on to be heard on 189 the 8th of November *1868, when the court sustained the first and fourth exceptions, but overruled the second and third; and fixing the amount of the error in the fourth exception at \$175, made a decree in favor of the plaintiff for the sum of \$2,475.68, with interest on different parts thereof from the time the commissioner reported they were due, subject to a credit for the two sums of \$383.71 and \$175, with interest from the time they should have been charged in the account. From this decree the justices obtained an appeal to this court.

Lane and Caldwell, for the appellants.

John W. Johnston and John A. Campbell, for the appellee.

STAPLES, J. It is unnecessary to decide the questions raised by the demurrer to the bill. The case may be more satisfactorily disposed of upon the merits.

The first point to be considered is, whether the complainant in the court below,

and the appellee here, was entitled to a decree for an account. The complainant offered no proof in support of his bill; no depositions were taken, or exhibits filed by him, except the account and report therewith, directed by the decree of the Court of appeals, of the transactions between complainant and his co-defendant, Anderson. These exhibits, whatever they may tend to prove, are not competent evidence against the county of Lee, or the defendants representing said county. Neither they nor the high sheriffs were parties to the suit in which that account was taken, when the decree was rendered directing such account; nor were they in any manner interested in the subject matter of controversy as it then existed. The answer denying all the material allegations of the bill, and the latter being wholly unsustained, the court ought to have dismissed it at the hearing. This cannot be questioned unless it can be maintained that a court of equity may decree an account for the purpose of furnishing 190 *evidence in support of the allegations of a bill.

This court has repeatedly decided that an account should not be ordered in any case, unless shown to be proper and necessary by the pleadings and proofs in the cause.

But conceding to the complainant the benefit of every fact appearing in the record, it is clear he is not entitled to any relief in a court of equity or elsewhere.

The motion in the name of the justices of the county of Lee, for the benefit of Preston, against Hubbard and the representatives of Gibson, the high sheriffs, was made in March 1845. This motion was based upon the delinquency of complainant and his co-defendant Anderson in failing to collect and account for the levies of 1840, 1841 and 1842. Complainant was informed of the pendency of that motion, its object and the grounds upon which it was based. He was fully aware then, of the groundlessness of the charge against him; for he told his principals (as he asserts), that he, as deputy, had collected and paid over all the levies for the years mentioned. Why then did he not defend this motion? It was in effect his suit instituted in consequence of his default as deputy sheriff.

If he was not in arrear; if, as he now claims, the object was to coerce from him the payment of large sums for levies never made, the facts were susceptible of the clearest and most convincing proof by a simple examination of the records of the county. The high sheriffs could not be presumed to know anything of the transactions, or the state of the accounts, and were, therefore, in no condition to make a successful defence.

Judgment having been rendered against Hubbard and the representatives of Gibson, upon this motion, they moved for judgment in a like amount, against complainant and Anderson, his co-deputy. Upon this motion, complainant confessed judgment. He avers 191 that he was induced to do so by the representations of his counsel, *and

the promises of the adverse party, that he would be held responsible so far only as he was actually in arrear. There is not in the record a scintilla of evidence to sustain these allegations.

It is difficult to perceive what defence he could have made. In the proceeding by the high sheriff against him, it was not incumbent upon the former to do more than produce the record of the judgment showing he had been subjected to liability in consequence of the default of complainant as his deputy; and so soon as it was established that complainant was informed of the motion against his principal, and failed to defend it, he would have been estopped to deny his delinquency or his liability.

Executions being sued out upon the judgment against complainant, he applied for and obtained an injunction from the Circuit court of Lee, stating the circumstances under which he had confessed the judgment, and alleging that so far from being in arrear to the county he was actually in advance of the levies made by the County court. In the progress of this suit, an account was taken, showing that complainant was in arrear the sum of \$1,505, upon the levies of 1840, 1841 and 1842, after allowing him all the credits claimed to the date of the account. The commissioner states that no objections were made by either party to the mode adopted in stating the account or to the items therein contained. It is true that complainant excepted to the account at the hearing; but his exceptions were overruled and the report confirmed; his injunction dissolved and the bill dismissed by the Circuit court of Lee county. Upon an appeal to the Court of appeals, that decree was in the year 1853, affirmed so far as it affected the matters in controversy between complainant and his principals, the high sheriffs.

Under these circumstances, if the complainant has any claim to the relief he asks, it can only be upon the ground that there was error in the judgment
192 against the *high sheriff, error in the judgment against him, error in the decree dissolving his injunction, and error in the decree of the Court of appeals. The bill is simply an appeal for relief, to a court of equity, from the judgment of a court of common law of competent jurisdiction; without an averment or proof of fraud, mistake, surprise, or other circumstances to justify the interposition of a court of equity.

But throwing out of view these considerations, there are strong reasons for believing that no injustice has been done the complainant. The amount paid by him after the date of Commissioner Lane's report, in discharge of the judgment against his principals was \$1,711.23; but it is to be borne in mind that this sum included interest, damages, and costs, for which complainant alone was responsible. Taking into the estimate the reported balance of \$1,505, as found by Commissioner Lane, and the additional levy made in 1844 of \$1,023.48, of which it is clear that com-

plainant received the benefit, and with only part of which he was ever charged, it appears that he had in his hands funds of the county more than amply sufficient to meet the judgments recovered against his principals.

Complainant's payments were made in 1847. Whatever cause of action he may have had against the county of Lee arose in that year. He is content, however, to wait nearly eleven years before instituting his suit; until the justices who were most familiar with the transaction had retired from the bench, and the difficulties of ascertaining the true state of accounts were greatly increased by the loss of papers and the death of witnesses. It seems to me that the statute of limitation, if not the staleness of the demand, presents an insuperable obstacle to a recovery in this case, if there were no other difficulties to be encountered.

It is insisted, however, that complainant, having satisfied the judgment in Preston's favor, is entitled to be substituted to all the rights and remedies of the latter.

193 *This pretension has scarcely a claim to serious consideration. Substitution is a remedy afforded by courts of equity to the surety, upon paying the debt of his principal. Complainant was not a surety for the county of Lee. He held in his hands funds belonging to the county, for which his principal was held liable; and the latter, to the extent of that liability, had the right to resort to complainant for indemnity. It will not be gravely maintained that complainant, upon satisfying a judgment based upon his own delinquency, could thereupon recover the amount from the party for whose benefit the judgment was recovered. The statement of the proposition carries with it its refutation.

Upon the whole it is very questionable whether there is any such relation between complainant and the county of Lee as would enable him to maintain a suit against the latter. The statute authorizes motions in the name of the county, and under certain circumstances, in the name of creditors against the high sheriff, for a failure to collect and pay over the levies; but no such motion can be made against the deputy. He is not responsible to the county or to its creditor; he is neither an officer nor an agent of the county; there is no privity between them. Whatever transactions the deputy may have with the county must be in the name of his principal; whatever remedy he would assert against it, must be also in the name of his principal. Any other rule would produce endless confusion, and impose upon counties liabilities incompatible with public interests, and the whole spirit and scope of our legislation.

For these reasons, I am of opinion the decree of the court below should be reversed, and a decree now rendered dismissing the bill with costs.

The other judges concurred in the opinion of Staples, J.

Decree reversed.

194 *Davis, Comm'r, v. Harman & als.

June Term, 1871, Wytheville.

Absent, ANDERSON, J.

1. **Commissioner's Liability—Confederate Money.**—A commissioner who, under the direction of the court, collects and disburses Confederate money, and, by order of the court, retains the balance, which is in controversy between disputing lien holders, until the rights of the parties are litigated, cannot be held personally liable for any loss that may be incurred in consequence of the fund perishing on his hands, by the result of the late civil war.
2. **Same—Fiduciaries Generally.**—For the principles upon which trustees and other fiduciaries will be held to account for the trust fund, see the opinion of CHRISTIAN, J.

In 1859 Mary Harman instituted a suit in equity in the Circuit court of Smythe county, to subject the land of her late husband, Jezreel Harman, to satisfy a decree for \$2,860 and interest, made in April 1858, which she had recovered against him. In her bill, after setting out her lien under the decree, she referred to deeds of trust on the lands which were prior liens to hers. The first of these was to Joseph W. Davis, in trust to secure a debt to Peter G. Snavelly of \$1,962.77, with interest from September 19th, 1843; the other was to secure to V. S. Morgan a debt of \$3,000.

The bill having been answered by Snavelly and taken for confessed as to the other parties, the court on the 6th of April 1860, made a decree appointing Joseph W. Davis

***Commissioner's Liability—Confederate Money.**—For the proposition, that a fiduciary who, under the direction of the court collects and disburses Confederate money, and by order of the court retains the balance in his hands, until the rights of the parties are litigated, cannot be held personally liable for any loss that may be incurred in consequence of the fund perishing on his hands, by the result of the late civil war, the principal case was cited as authority in the following cases: *Fugate v. Honakers*, 22 Gratt. 413; *Hale v. Wall*, 22 Gratt. 435; *Mead v. Jones*, 24 Gratt. 364; *Parsley v. Martin*, 77 Va. 383; *Le Grand v. Fitch*, 79 Va. 640; *Barton v. Ridgeway*, 92 Va. 172, 23 S. E. Rep. 226. See also, excusing the fiduciary from liability, *Dixon v. McCue*, 21 Gratt. 373; *Walker v. Page*, 2 Gratt. 636.

That the fiduciary must exercise good faith and act within his powers in such cases, as well as in all other cases, see the principal case cited as authority in the following cases: *Mead v. Jones*, 24 Gratt. 358; *Douglass v. Stephenson*, 75 Va. 749; *Cooper v. Cooper*, 77 Va. 204; *Reynolds v. Pettyjohn*, 79 Va. 331; *Wayland v. Crank*, 79 Va. 607; *Le Grand v. Fitch*, 79 Va. 640; *Turpin v. The Chesterfield C. & I. M. Co.*, 82 Va. 78; *Jones v. Jones*, 86 Va. 852, 11 S. E. Rep. 426; *Barton v. Ridgeway*, 92 Va. 171, 23 S. E. Rep. 226; *Myers v. Zetelle*, 21 Gratt. 760. See, in accord, *Elliott v. Carter*, 9 Gratt. 559; *Elliott v. Howell*, 78 Va. 297; 2 Bar. Ch. Pr. 702; 1 Min. Inst. 448.

In *McVeigh v. Bank of O. D.*, 26 Gratt. 201, where the president of the bank collected Confederate money as agent of the bank and invested it together with his own funds in tobacco intending it to be at

a commissioner to sell the land, upon the terms of a sum in cash sufficient to pay the expenses, and the balance of the purchase money to be payable in twelve, eighteen and twenty-four months. Davis reported that *he had sold the land to V. S. Morgan for \$11,600. This report was excepted to by the defendant, Harman, and he asked that the sale might be set aside for inadequacy of price. And at the September term, 1860, the cause was continued.

In April 1861 Davis made another report, stating the facts in relation to the sale; and at the April term of that year, the court overruled the exception of Harman, and confirmed the report and sale; and Davis was directed to proceed to collect the purchase money of the land as it would fall due; and that he report his proceedings to the court from time to time.

At the April term of the court for 1863, Davis made his report. He refers to the fact that this was the first regular court held since the rendition of the last decree in the case. He reports that Morgan had paid all the purchase money; and that he had paid Snavelly his debt, amounting principal and interest to \$4,163; \$3,000 of Morgan's debt, and some small sums for expenses, taxes and commissions; and leaving a balance in his hand of \$3,847.04, which was on deposit in the Abingdon bank, subject to such order as the court might make. At this time it appears that there were three persons claiming this fund beside Mrs. Harman, viz: Morgan, for the balance of his debt, \$1,246.66; John B. Straw,

his own risk, which was afterwards burned, the court, in distinguishing the principal case from this case, said: "The case is wholly unlike that of *Davis v. Harman*, 21 Gratt. 197. There the fund was in the hands of the commissioner acting under the order of the court of chancery. He did not appropriate a dollar of it to his own use; but deposited it in bank, where it perished by the fate of Confederate government. *Valden v. Stubblefield* is distinguished from the principal case on similar grounds. The principal case is also cited and distinguished in *Key v. Hughes*, 32 W. Va. 184, 9 S. E. Rep. 77, which holds that where an executor is directed by will to invest a specified sum in interest bearing bonds, and the executor applied to the cashier of a bank, who agreed to sell him U. S. bonds, but without seeing the bonds or knowing that they were in bank, paid the cashier for them with the understanding that they were to be held by the bank subject to his order. No bonds were in fact ever put in bank but the interest was paid, and upon the failure of the bank the executor was liable for the trust fund.

The principal case is cited and distinguished in *Williams v. Skinker*, 25 Gratt. 521, on the ground that the debt due to the estate being an ante-war debt, well secured on real estate, and it not being necessary for the payment of the debts of the estate, the executor, though he acted in good faith, yet exceeded his powers, and committed a *devastavit* in receiving Confederate money in November 1863 in payment of the debt without the consent of one of the devisees, and he is liable to her for the amount of her interest so received by him.

a creditor by judgment for \$1,200.27, which was contested, and Thomas M. Tate, under a deed of trust for \$474.39; and these claims not amounting to the sum in the hands of Davis, the commissioner, by \$925, the court made a decree directing him to pay to Mrs. Harman, out of the balance in his hands, eight hundred dollars; and by another decree, at the same term, he was directed to pay to Morgan the \$1,246.66 still due to him.

At the time the foregoing decrees were made, Tate was not a party in the cause; but at the next September term of the court, he was, upon his petition, made a defendant; and he filed his answer setting up his claim.

196 *At the April term 1864, the court appointed a commissioner to convey the land to Morgan, the purchaser. This was the last term of the court held before March 1866. In March 1866, Davis made another report, showing that after the payments to Mrs. Harman and Morgan, and of taxes and commissions, there was a balance of \$1,208.88 in Confederate money. He says he was anxious to pay over the balance in his hands at the time of the last decree, but owing to the contest among the creditors he was not able to do so, it not being ascertained to whom said balance should be paid. He paid the sums mentioned in Confederate money, and had the fund on deposit in the bank of Abingdon, and so reported, subject to such order as the court might make, and he still has the amount on hand in Confederate money, though he had felt it his duty under the then existing laws, to invest the fund on deposit in four per cent. Confederate certificates, which he holds subject to the order of the court. This report was excepted to by Tate, on the ground that Davis was not authorized by any decree or order of the court, to receive Confederate money from the purchaser of the land or to invest it.

At this term of the court, a commissioner was directed to ascertain and report upon the priority and amount of liens between Straw, Tate and the plaintiff, and the consideration of the exception to Davis' report was postponed. In July 1866, the commissioner reported in favor of Tate as first entitled to the amount, up to that time, of \$505.26; and next to him that Mrs. Harman was entitled.

On the 22d of November 1870, the cause came on to be heard, when the court sustained the exception of Tate to the report of Davis; and Davis was decreed to pay the sum of \$1,208.48, with interest from the date of the decree; "not charging him with interest prior to this time, as he was ordered to hold the fund to await the decision of the court:" Tate's debt to be first
197 paid, *and the balance to be paid to Mrs. Harman. And from this decree, Davis obtained an appeal to this court. For other facts in the case, see the opinion of Judge Christian.

James W. Sheffey and John A. Campbell, for the appellants.

Gilmore, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

The single question presented for our consideration, is whether, under the circumstances of the case, a commissioner, who, under the direction of the court, collects and disburses Confederate money, and by order of the court retains the balance which is in controversy between disputing lien holders, until the rights of the parties are litigated, can be held personally liable for any loss that may be incurred in consequence of the fund perishing on his hands, by the result of the late civil war.

The appellant, as the commissioner of the court, sold the tract of land in the bill and proceedings mentioned, on the 22nd May 1860, for the sum of \$11,500, and took from the purchaser three bonds, payable respectively at twelve, eighteen and twenty-four months. This sale was confirmed by the court at its April term 1861, when the court made an order directing the said commissioner "to collect the purchase money for said land as it falls due, and report his proceedings to this court from time to time for its further order," &c.

After the April term 1861, there were no regular courts held in the county of Smythe until 1863, owing to the disturbed condition of the country consequent upon the breaking out of the late civil war. No Circuit court was held between April term 1861, and April term 1863, the judge of that court being in command of a regiment in the service of the Confederate States, and was killed in battle.

At the April term, 1863, the commis-
198 sioner made his *report, by which it appeared that in accordance with the direction of the court he had proceeded to collect the purchase money, and paid out to the parties entitled thereto the sum of \$7,422.00, leaving a balance in his hands of \$3,847.04, which last named sum he reported to be "on deposit in the Abingdon bank, subject to such orders as the court may make."

Upon the coming in of this report, to which there was no exception, the court on the 6th of April 1863 entered the following decree: "Jos. W. Davis, trustee and commissioner appointed to sell the land of Jezreel Harman, under decree in this court, filed his report showing a balance in his hands of the proceeds of the sale, of \$3,847.04, after paying the amount in full of Peter G. Snively, deed of trust, and to Vincent S. Morgan the sum of three thousand dollars, the date of which payment is not stated, &c., &c., and it appearing by a statement filed in the case, that there is a balance in the hands of said Commissioner Davis of \$925.62, after paying all contested liens asserted against the fund; it is adjudged, ordered, and decreed, that the said Jos. W. Davis pay to the complainant or her attorney, out of said balance, the sum of eight hundred dollars on account of her decree; the court reserving the adjudication

hereafter, of said contested liens asserted by V. S. Morgan, John B. Straw, and Thomas M. Tate."

The decree, though not formally confirming the report of Commissioner Davis, did in effect adopt and confirm it. There was no exception to said report, and the decree above referred to was evidently based upon it; and all the directions of that decree are based upon the hypothesis that the report of the commissioner was free from objection; and it was thus in fact, though not in form, adopted and confirmed by the decree.

It appears from the record that no other decree was rendered in the cause until after the close of the war, to wit: on the 28th of

March 1866. On the 25th March 199 *1866, the commissioner, Jos. W.

Davis, filed his report showing that after performing the decree of the 3d of April, and paying certain Confederate taxes, there remained in his hands a balance of \$1,208.88, in Confederate money. He further reports that he had collected the whole proceeds of the sale of land (\$11,269.04,) in Confederate money, (which he had paid out to the parties entitled, in the same currency, none of them objecting to receiving it,) leaving the above balance in his hands subject to the order of the court; that he was ready and anxious to pay over the balance in his hands at the date of the last decree, (April '63,) but there being a contest amongst the creditors of Harman, under contested liens claimed by them, the court reserved the adjudication of these claims, and thereby prevented him from paying over said balance, it not being ascertained to whom it should be paid; that he kept this fund in bank at Abingdon ready to meet the order of the court, until he was compelled, under then existing laws, to vest the fund in four per cent. Confederate certificates, which he still holds subject to the order of the court.

On the 27th March, the appellee filed an exception to this report, to the effect, that the commissioner was not authorized by any decree or order of the court, to receive Confederate money from the purchaser of the land, or to invest it. This exception was sustained by the Circuit court, and by its decree entered on the 22d November 1870, it was decreed and ordered that the appellant pay the sum of \$1,208 48 with interest from the date of this decree. It is from this decree that an appeal is allowed to this court.

We are of opinion, that according to the well settled principles of courts of equity respecting the liability of trustee and other fiduciaries, where no mala fides can be imputed, this decree was manifestly erroneous. While the acts and omissions for which a trustee will be held responsible

for violations of the trust reposed,

200 *have not been classified or defined by the courts with such accuracy and precision as to furnish a rule without exception to be applied to the great variety of cases which grow out of this fruitful source of equity jurisprudence, yet it is easy to

extract from the cases and the opinions of learned jurists and text writers, certain general rules which seem now to be universally recognized and established. One of these general rules is this, that nothing more should be required of a trustee than that he should act in good faith and with the same prudence and discretion that a prudent man is accustomed to exercise in the management of his own affairs. *Elliott v. Carter & als.* 9 Gratt. 541, 559, 560; *Taylor & als. v. Benham*, 5 How. U. S. R. 233. In *Knight v. Earl of Plymouth*, 3 Atk. R. 480; *S. C.* 1 Dickens' R. 124, 126, Lord Hardwicke said: "If there is no mala fides, nothing wrongful, in the conduct of the trustee, the court will always favor him. For as a trust is an office necessary between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it. To add hazard or risk to that trouble, and to subject a trustee to losses he could not foresee, would be a manifest hardship, and would be deterring every one from accepting so necessary an office."

In *Thompson v. Brown*, 4 Johns. Ch. R. 619, 628, Chancellor Kent expresses his concurrence in these views; and he declares that where there is no just imputation of mala fides, and the fault is but at most an error of judgment and a want of sharp-sighted vigilance, it would have the appearance of great rigor and be hardly reconcilable with the doctrines of a court of equity to hold a trustee responsible. See also, *Hart v. Ten Eyck*, 2 Johns. Ch. R. 62.

The cases of *Wilkinson v. Stafford*, 1 Ves. Jr. R. 32, and *Vezo v. Emery*, 5 Ves. R. 141, also strongly support the proposition

that trustees acting with reason-

201 able care and prudence, *and with the best judgment they can form upon the occasion, will be protected, notwithstanding the unforeseen loss of the trust subject.

See also, *Powell v. Evans*, 5 Ves. R. 439, in which the master of the rolls says that the court should act with great tenderness towards trustees, who are called upon often to execute onerous and difficult trusts, and are entitled to great indulgence unless neglect be fully proved. In the case of *Taylor & als. v. Benham*, 5 How. U. S. R. 233, the court uses the following language: "Persons acting in a fiduciary capacity stand in the same position as it regards liability for the property intrusted to their care, with bailees and agents generally, and are only answerable for actual or constructive negligence, or wilful misconduct. They are not, therefore, responsible for a loss unless it has been occasioned by their own wrong, or when they are in default for not having interfered to prevent it." Many other cases and opinions of learned judges might be cited tending to the same conclusion; and in the language of Judge Lee, delivering the opinion of the court in *Elliott v. Carter & als.*, 9 Gratt. 559, "the fair result of the views which they present, and the reasoning they adopt, is, that where a

trustee has acted in good faith in the exercise of a fair discretion, and in the same manner in which he probably would have acted if the subject had been his own property and not held in trust, he ought not to be held responsible for any losses accruing in the management of the trust funds. It is doubtful whether a wise policy should ever require more of a trustee than that he should act in good faith, and with the same prudence and discretion that he is accustomed to exercise in the management of his own affairs.

Applying these principles of equitable jurisprudence to the case before us, we are constrained to say, that Davis, the trustee and commissioner of the court, ought not to be held responsible because the Confederate money which the court, by its decree, left in his hands, has perished, 202 *before it could be distributed by the court. In this case, there is not the slightest ground to impute to him anything like mala fides in the transaction now called in question. The amount which he collected was in Confederate money. When the bonds fell due it was notorious that there was no other currency in circulation. When he made his report to the April term 1863, the court knew and the parties knew that the balance reported in his hands was Confederate money. It is proved that the payments amounting to upwards of seven thousand dollars, were made in Confederate currency, and was received without objection by the parties entitled to receive it. The party now seeking to hold him responsible had filed his petition in the cause asking for his proportion of the fund in the hands of the trustee, knowing that it was Confederate money. And it would have then been paid but for the fact that his claim was not then adjudicated, but expressly reserved for further adjudication of disputed liens with other claimants.

The effect of the decree of the 6th of April 1863, was to direct the appellant to hold the fund until called for by the court. That such was the effect of that decree is recognized by the court in the decree of 22d November 1870, which is the decree appealed from, where the court says he is not chargeable "with interest prior to this time, because he was ordered to hold the fund to await the decision of this court," &c. Suppose he had kept the money in his pocket or in an iron safe in his own house or at his place of business, and it had remained there until the collapse of the Confederacy, when its currency perished; could it be maintained, that he ought to be held responsible to make that good, which, without any default of his, had become worthless trash by the fate of war. What boots it that he deposited it in bank instead of keeping it in his pocket or his iron chest? Does that change the case so as to affect his liability. The fund was left in his hands by the court to be held by him

203 *until called for to be distributed.

He deposited it in bank. It was certainly more safe there, especially in a time

of war when raiders and marauders were harrying the country, than it would have been, kept about his person or in his house. This was certainly not an act for which he ought to be censured. It was rather an act of prudence and forethought on his part. But the court was informed by his report that the fund was deposited in the bank at Abingdon; and the court directed no other disposition to be made of it. It is shown by the proof in the cause, that he never drew out a dollar except to pay to parties to the cause, upon the order of the court. He never appropriated a dollar of the fund to his own use, but kept it in bank until by the laws of the Confederate states he was compelled to fund it. It is true it was deposited in his own name. And it is argued by the learned counsel for the appellee, that as the fund was not deposited to the credit of the cause, but was mixed with his own funds, therefore, he must be held responsible for the loss. We would not be understood as at all disputing the authority of the cases relied upon to show, that where a trustee deposits the trust fund with a banker, or in a bank, and does not separate it from his own funds by designating it as the trust fund, and a loss occurs in consequence of such deposit, that loss must fall on the trustee; as for instance, where the bank fails, or the banker becomes insolvent. But in this case these authorities have no application. The loss here was not in consequence of the deposit.

It was not the failing of a bank, or the insolvency of a banker, but it was the sudden and irretrievable destruction of the whole currency of a country, by the termination of a civil war which had destroyed the very power that created it. The thing deposited for safe keeping, which was the thing received, to wit: Confederate money, had perished without any default, any where, but had perished with the overthrow of the government *which had spoken it into existence. Neither the authorities relied upon, nor the reason upon which they are founded, can have any application to a case like this.

It would be too rigorous and too unjust; it would be in violation of those well settled principles, founded in reason and in conscience, which control the action of courts of equity, to hold that though the appellant has been guilty of no mala fides, no misconduct, no negligence, yet he is to be held responsible for a loss which he had no part in creating and no power to prevent. But that loss, we think, ought to fall upon those who were entitled to the fund that has perished.

We are, therefore, of opinion that the decree of the Circuit court of Smythe county must be reversed.

The decree was as follows:

The court is of opinion, that the said decree of the said Circuit court is erroneous; therefore it is decreed and ordered that the said decree be reversed and annulled, and that the appellant recover of the appellee,

Tate, his costs about his appeal in this behalf expended; and this court proceeding to render such decree in the premises as the said Circuit court ought to have rendered, it is further decreed and ordered that the exceptions of said Thompson M. Tate, by his counsel, to the report of said Joseph W. Davis as commissioner, filed 26th March 1866, be overruled, and that the said report be confirmed, and the cause remanded to said Circuit court of Smythe county for further proceedings.

Decree reversed.

205 *Howard & al. v. McCall, Adm'r for, &c.

June Term, 1871. Wytheville.

1. **Bonds—Payment of.**—H executed to G four bonds for the price of land, payable respectively, September 1st, 1860, 1861, 1862 and 1863; the first for \$5,000, and the others, each for \$2,833. In January 1866, G gives to H a receipt for \$1,000, and the note of H for \$1,008, in part payment of interest on certain bonds executed by H to G. Suit is brought on the two last bonds and there are judgments thereon for principal and interest from time of payment. G assigns the second bond to M and M sues H upon it, who pleads the payment of \$2,018 upon it. Nothing appears as to the first bond; but the interest upon it up to the payment, was more than sufficient to absorb it. **Held:**

Same—Application of Payments.*—The debtor not having directed the application of the payment, it was the right of the creditor to apply it to the first bond; and if neither had applied it, the law would apply it to the first bond due; and it is to be presumed it was so applied.

2. **Same—Same.**—For the rules upon which partial payments will be applied, see JUDGE CHRISTIAN'S opinion.

3. **Evidence—Impeachment of Verdict—Jurors.**—As a general rule with few exceptions, the evidence of jurors will not be heard to impeach their verdict.

***Application of Payments.**—The debtor when he makes a payment which does not discharge the whole debt, has a right to say whether it shall be applied to the principal or the interest of the debt due; and where there are several bonds or notes evidencing the debts, he may say to which the payment is to be applied. When the debtor fails to exercise this right, then the creditor may make the application of the payment as to him may seem best. And when neither party has exercised the right, the law, in other words the court, will make the application according to the justice of the case in view of all the circumstances attending it. And where there are several debts the court will apply the payment to the first in the order of time. For the above proposition the principal case was cited as authority in the following cases: *Genin v. Ingersoll*, 11 W. Va. 559; *Chapman v. Com.*, 25 Gratt. 751; where the rule is stated more at length, *Lingle v. Cook*, 32 Gratt. 272. See, in accord, *Smith v. Loyd*, 11 Leigh 512; *Magarity v. Shipman*, 82 Va. 784. 1 S. E. Rep. 109; *Hill v. Southerland*, 1 Wash. 128.

Evidence—Impeachment of Verdict—Jurors.—See sec.

This was an action of debt in the Circuit court of Tazewell county, brought in March 1869, by Jesse McCall, adm'r of Harver George, deceased, for the benefit of Joseph Stras, adm'r of James S. Witten, deceased, against E. S. Howard and J. R. Witten, to recover the amount of a bond for \$2,833 and $\frac{1}{8}$ cents, executed on the 12th of January 1860, and payable on the 1st of September 1861. The defendants pleaded "payment" and "set off," on which pleas issues were joined; and on the trial the jury found a verdict for the plaintiff for the whole amount of the bond, with interest 206 *from the day of payment, subject to credits endorsed on the bond by James S. Witten, the intestate of Stras, one for \$170, paid the 4th of December 1867, and one for the same amount, paid 30th of September 1869. The defendants thereupon moved the court for a new trial, on the grounds—First. That the verdict was contrary to the evidence; and, Second. Because the verdict was rendered by the jury under a mistake as to its legal effect. Upon this last point it appeared that the jury brought in their verdict, simply saying: "We, the jury, find for the plaintiff;" and thereupon the counsel for the plaintiff at the bar, and in the presence of the court and jury, wrote the verdict for the jury, adding, "the debt in the declaration mentioned, subject to the credits," &c., as above; and thereupon, at the request of the counsel for the defendants, the jury were polled, and each juror, in response to the question, "is this your verdict," answered in the affirmative. The court overruled the motion; and the defendants excepted; and obtained a supersedeas to the judgment. The facts are sustained by Judge Christian in his opinion.

Richardson and Jno. A. Campbell, for the appellants.

J. W. Sheffey and Jno. W. Johnston, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

This is a supersedeas to a judgment of the Circuit court of Tazewell county. It was an action of debt brought by the defendant in error against the plaintiffs in error, to recover the sum of \$2,833, due by a writing obligatory under seal. The plaintiffs in error pleaded "payment and set off." Upon these issues, tried by a jury, a verdict was rendered for the defendant in error "for the debt in the declaration mentioned," subject to certain credits endorsed upon the said writing obligatory, to wit: the sum of \$170, paid on the 4th December 1867, and the sum of \$170. 207 paid on the 30th September *1869. A motion was made to set aside this verdict upon two grounds. First. Because the verdict was contrary to the evidence;

XII, F, of monographic note on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 733, and foot-note to *Read v. Com.*, 22 Gratt. 924.

and second, because the verdict was rendered by the jury under a mistake as to its legal effect. This motion was overruled by the court, and a judgment entered in accordance with the verdict of the jury.

The bill of exceptions sets out, as the "only evidence offered by the plaintiffs, the bond in the plaintiffs' declaration mentioned," and that the "only evidence offered by the defendants, was a receipt in the following words: 'Received January 6th 1866, of E. S. Howard, one thousand dollars, in part payment of interest due on certain bonds executed by said Howard and Jas. R. Witten to H. George for land; received also of said Howard his note for \$1,018, which (when paid) is also to be credited in payment of said interest; and moreover, if said Howard shall, and do assign me a judgment against the estate of W. O. George, which he expects shortly to obtain, I am to credit the amount of said judgment on the said note of \$1,018. Said judgment will (as is supposed) amount to some \$768. (Signed,) J. M. McCall, adm'r of H. George, dec'd.' " The bill of exceptions then sets out certain "admissions" made at bar by the counsel on both sides for the parties. It was admitted that the bond sued upon was one of four bonds executed by E. S. Howard and J. R. Witten on the 12th day of January 1860 to Harvey George, then living, for a tract of land, and that one of said bonds first due was for \$5,000, due on the 1st day of September 1860; that the other three bonds were for \$2,833.33½ each, payable respectively one on the 1st day of September 1861, one on the 1st day of September 1862, and the remaining bond payable on the 1st day of September 1863; and that these were the bonds mentioned in the receipt. It was also admitted that judgment had been recovered on two of the bonds for the sum of \$2,833.33½ each; and

that no part of the sum mentioned in the receipt of the 6th of January 1866, had been applied to the payment of either interest or principal of said bonds. It was further stated in the bill of exceptions that "there was no proof on the part of the plaintiff of the application of the money mentioned in said receipt, and that no reference was made to the \$5,000 bond during the trial of the cause, except that made by the counsel for defendants in his statement of the case to the jury, to the effect that the said \$5,000 bond had been fully paid off by the defendants, which was denied by the plaintiff who claimed that the said bond had been burned, but had not been paid off." Upon this evidence and upon these admissions, the case was submitted to the jury, who found a verdict for the plaintiff as hereinbefore set forth. I say, upon the evidence and admissions of the parties, for, of course, the statements of the counsel as to the payment or non-payment of the \$5,000 bond, could not be considered by the jury, and it is difficult to conceive why these statements were incorporated in the bill of exceptions. Separating the statements of the counsel from

the evidence and the admissions of the parties made at bar, it is manifest that the jury treated, as they were bound to treat, the \$5,000 bond as still due and unpaid. Its executions and the consideration upon which it was founded, were both admitted. No proof was offered of its payment or satisfaction in any form. It must be taken then as a conceded fact in the case, that this bond was at the time of the trial due and unpaid. Another fact is clearly proved; that at the time of the payment of one thousand dollars in cash and the execution of a note for \$1,018, to wit, on the 6th day of January 1866, not one dollar of interest on these bonds had been paid. This thousand dollars was received by the creditor in the very terms of the receipt offered in evidence, "in part payment of the interest due on certain bonds" executed by Howard and Witten to Harvey George for the purchase money of a tract of land. And *it is admitted that the four bonds, one for \$5,000 and the other three for \$2,833.33 each, are the bonds referred to in the receipt.

The money paid was on account of the interest on certain bonds. It was, manifestly, a general payment towards the interest due on the whole amount of indebtedness. The debtor did not exercise his right or designate which particular bond it should be credited upon. The right then accrued to the creditor, to apply the payment, and he could exercise the right to apply the payment, either at the time of payment or any subsequent time. I understand the well settled rule upon the subject of the application of payments to be this: The debtor, when he makes a payment which does not discharge the whole debt, has a right to say whether it shall be applied to the principal or to the interest of the debt due; and where there are several bonds or notes evidencing the debt, he may say to which the payment is to be applied. When the debtor fails to exercise this right, then the creditor may make the application of the payment as to him may seem best. And where neither party has exercised the right, the law, or, in other words, the court, will make the application according to the justice of the case in view of all the circumstances attending it. 3 Philips' Evi. 441; 4 Cranch's R. 317; Smith v. Loyd, 11 Leigh, 512. And where there is no direction by the debtor, and the right of application is not exercised by the creditor, the court will always apply the payment first to the application of the interest, in preference to the principal. And where there are several debts to which the payment may be applied, in the absence of an application by the parties, the law will apply the payment to the first debt due in order of time. 3 Philips' Evi. 337, and note with authorities there cited.

In the case at bar, the most that can be claimed for the plaintiffs in error (Howard and Witten) is, that they made a payment, which was to be applied to the payment *of interest generally "on cer-

tain bonds," without specifying the particular bonds. In the absence of any such specification, it was the undoubted right of the creditor, upon well-settled principles of law, to make the application to any one or to all of the bonds due. If he made the application to the bond first due, he had the undoubted right so to do, and did exactly what the law would have done for him, if he failed to make such election. 3 Philips' Evi. (ubi supra.)

It is earnestly insisted, however, by the learned counsel for the plaintiffs in error, that it was not shown by the evidence that the application of the amount paid, as set forth in the receipt of January 6th 1866, had been applied to the \$5,000 bond; and that it was the duty of the defendants in error to have shown that fact. Now, it must be remembered that the bond sued upon had been assigned to a third party; and the suit was not brought for the benefit of the original obligee, but for the assignee. The original obligee might have had it in his power to have shown, affirmatively, that the payment had been applied to the first bond due; but I think it was sufficient for the plaintiff in the court below, in this case, to show, as was conclusively shown by the facts proved, and the fair and legal inferences, which the jury had a right to draw from the facts proved, that there was still due from the obligors a principal sum sufficient, and more than sufficient to absorb in interest due (upon a bond of proir date to the one in suit,) the whole amount which had been paid; and that it had been properly applied to that bond. There was another fact proved, which made this apparent beyond any reasonable doubt. It is apparent, from an examination of the endorsements on the bond sued upon, that the credits are for interest on the principal sum of \$2,833; and they were paid in one and two years respectively after the receipt of January '66 was executed, and long after the bond came
211 *into the hands of the assignee.

Now it is manifest that no part of the principal or interest of that bond had been paid, and the obligors must be presumed to have known that fact, to wit, that the amount paid on the 6th January 1866, had been applied to a different bond. They also knew that it had not been applied to either of the other two bonds of \$2,833 each, upon which they had suffered a recovery of judgment by default. And therefore, the inference is irresistible, that they knew at the time they paid the interest to the assignee, and at the time they suffered a recovery on the other two bonds, that what they had paid went as a credit upon the bond first due. Certain it is that it is conclusively shown, that there is still due (there being no proof that the \$5,000 has been paid,) from the obligors, a principal sum more than sufficient to absorb in interest due the amount called for by the receipt of the 6th January, 1866. I am clearly of opinion, that upon the facts proved and the fair and legal inferences to be drawn from those

facts, the jury was right in finding a verdict for the whole amount "of the debt in the declaration mentioned," subject only to the credits endorsed on the bond; and that the Circuit court did not err in refusing to set aside the verdict upon the ground that the verdict was contrary to the law and the evidence.

The second ground of error assigned is, that the verdict of the jury "was rendered under a mistake as to its legal effect." After the trial was concluded, and the jury discharged, six of their number "severally made oath, that upon the trial of the cause it was their intention to render such a verdict as would entitle the defendants to have credit for the amount of the \$2,018 receipt offered in evidence by them, to be applied to the interest in all four of the bonds executed by said defendants to Harvey George for lands. That it was not their intention to render such a verdict as would apply the \$2,018 receipt exclusively as a credit
212 on the \$5,000 bond referred to by counsel in the argument of the cause. And that if the legal effect of their verdict is to place the said \$2,018 receipt as a credit on said \$5,000 bond, it is wrong, and is not their verdict."

Whether the testimony of jurors is admissible to impeach their verdict, is a question upon which the authorities were formerly unsettled and conflicting. It is indeed very difficult to lay down any precise rule which could be made of universal application without exception, to each particular case. In Virginia the practice was for a long time unsettled. In some few cases of mere and evident mistake, like *Cochran v. Street*, 1 Wash. 79, the testimony of jurors was received, and the verdict set aside: but the great preponderance of authority is against allowing jurors to impeach their own verdict; the courts, even in cases where it was allowed, under peculiar circumstances, always using such language as *Lord Mansfield* employed in *Vaise v. Delaval*, 1 T. R. 11; that "to meddle with the verdict of the jury upon the evidence of some of the jurors, is a delicate business, and should be proceeded in with caution, to prevent the mischief of jurors being tampered with."

But since the decision of this court in *Bull's case*, 14 Gratt. 613, 632, it may now be considered as well settled, as a general rule, that the testimony of jurors ought not to be received to impeach their verdict. Judge Moncure, delivering the opinion of the court in that case, after a most elaborate and able review of the English and American authorities on the subject, concludes, "In view of all the authorities and of the reason on which they are founded, we think that, as a general rule, the testimony of jurors ought not to be received to impeach their verdict; and without intending to decide that there are no exceptions to the rule, we think that even in cases in which the testimony may be admissible, it ought to be received with great caution. A contrary rule would hold out to unsucces-

ful parties and their friends the
213 *strongest temptation to tamper with
juries after their discharge, and would
otherwise be productive of the greatest
evils. The value of jury trial would be
greatly impaired, and the whose adminis-
tration of justice dependent upon it would
be involved in the most painful uncer-
tainty."

In the case before us here, the jury was
polled, and each juror, for himself, sol-
emnly declared it was his verdict; but after
they were discharged six of them make an
affidavit in which they state that "if the
legal effect of their verdict is to place the
said \$2,018 receipt as a credit on said \$5,000
bond, it is wrong and not their verdict."

Now the only issue which the jury was
called upon to decide (there being no ac-
count of offsets filed and none proved),
was whether the bond sued upon was paid
in whole or in part. It was their province
to find the fact; they had nothing to do
with the legal effect of their finding. I am
of opinion that this case falls under the gen-
eral rule settled by this court in Bull's case
(supra), and does not come under any of
the exceptions to it; and that the testimony
of the jurors ought not to be received to
impeach their verdict. I am therefore of
opinion upon the whole case, that the judg-
ment of the Circuit court of Tazewell ought
to be affirmed.

Judgment affirmed.

214 *Blosser v. Harshbarger.

August Term, 1871, Staunton.

1. **New Trials—Grounds for.**—For the grounds on
which new trials will be granted, see opinion of
CHRISTIAN, J.

2. **Same—Verdict Contrary to Evidence.**—A new trial
asked on the ground that the verdict is contrary
to the evidence, ought to be granted *only* in a case
of plain deviation from right and justice; not in a
doubtful case, merely because the court, if on the
jury, would have given a different verdict.

***New Trials—Verdict Contrary to Weight of Evidence.**
—For the rule, as to when the court will grant a
new trial on the ground that the verdict is con-
trary to the weight of the evidence, the princi-
pal case is cited and followed in many subsequent
cases. Pryor v. Com., 27 Gratt. 1010; Hilb v. Peyton,
21 Gratt. 392; Smith's Case, 21 Gratt. 813; Geo. Home
Ins. Co. v. Kinnier, 28 Gratt. 114; Johnson v. Com.,
29 Gratt. 820; Dean v. Com., 32 Gratt. 917; Bacciga-
lupo v. Com., 33 Gratt. 811; Powell v. Tarry, 77 Va.
260; Priest v. Whitacre, 78 Va. 158; Montague v.
Allan, 78 Va. 598; Benn v. Hatcher, 81 Va. 33; Noell v.
Noell, 93 Va. 439, 25 S. E. Rep. 242; Nicholas' Case, 91
Va. 755, 22 S. E. Rep. 507; Steptoe v. Flood, 81 Gratt.
342; Robertson v. Com. (Va.), 22 S. E. Rep. 360; Cash
v. Com. (Va.), 20 S. E. Rep. 894; Black v. Thomas, 21
W. Va. 713; Campbell v. Lynn, 7 W. Va. 672; Sheff v.
Huntington, 16 W. Va. 321; Welch v. County Court,
29 W. Va. 63, 1 S. E. Rep. 341; Gwynn v. Schwartz, 32
W. Va. 494, 9 S. E. Rep. 880.

In addition to the above cases, see *foot-note* to Bell
v. Alexander, 21 Gratt. 1, and references where
many cases in point are collected.

3. **Same—Same.**—Where a case has been fairly sub-
mitted to a jury, and a verdict fairly ren-
dered, it ought not to be interfered with by the
court, unless manifest wrong and injustice has
been done, or unless the verdict is plainly not
warranted by the facts proved.

4. **Same—Same.**—Where some evidence has been
given which tends to prove the fact in issue; or
the evidence consists of circumstances and pre-
sumptions, a new trial will not be granted
merely because the court if upon the jury, would
have given a different verdict. To warrant a new
trial in such cases, the evidence should be plainly
insufficient to warrant the finding of the jury.
And this restriction applies *a fortiori* to an appel-
late court.

5. **Bonds—Collection of—Negligence—Question for
Jury.**—A holds the bond of B twelve years old, and
she puts it into the hands of H for collection. They
are all relations, and all members of the Menonist
church, the rules of which forbid members to sue
each other. H does not collect the money; and
after the death of A, her administrator sues H for
negligence in failing to collect the money. These
are facts which may be considered by the jury on
the question of negligence.

This was an action of assumpsit in
the Circuit court of Rockingham county,
brought in August 1866, by David Blosser,
adm'r of Anna Blosser, deceased, against
Joseph Harshbarger, to recover the amount
of a bond executed by Jacob Blosser to
Anna Blosser, which was placed by her in
the hands of Harshbarger to be col-
215 lected *by him; and which he had
failed to collect. The bond bore date
the 26th of July 1842, and was for \$1,362.73,
payable with interest at the end of two
years, and was assigned to Harshbarger for
collection, on the 6th of September 1856.
There was a verdict for the defendant, and
a motion for a new trial, on the ground
that the verdict was against the evidence.
This motion was overruled; and a judgment
entered upon the verdict; and the plain-
tiff excepted; and obtained a supersedeas to
the Special Court of appeals, at Winchester,
and the case was transferred to this court.
The facts are stated by Judge Christian in
his opinion.

Woodson, for the appellant.

Fultz, for the appellee.

CHRISTIAN, J. This is a supersedeas
to a judgment of the Circuit court of Rock-
ingham county. The only error assigned in
the petition of the plaintiff in error, is the
refusal of the court below to set aside the
verdict and grant a new trial.

The rules of law under which a court is
warranted in setting aside the verdict of a
jury and granting a new trial, are too well
settled and firmly established, by the deci-
sions of this court, to admit of doubt, or
even serious discussion.

A new trial asked on the ground that the
verdict is contrary to the evidence, ought
to be granted only in a case of plain devia-
tion from right and justice; not in a doubt-
ful case, merely because the court, if on

the jury, would have given a different verdict. Where a case has been fairly submitted to a jury, and a verdict fairly rendered, it ought not to be interfered with by the court, unless manifest wrong and injustice has been done, or unless the verdict is plainly not warranted by the facts proved.

In Grayson's case, 6 Gratt. 712, 216 Judge Scott, in an *opinion remarkable for its clearness and brevity, has deduced from the decisions of this court and of the General court, the following leading principles which govern motions for new trials.

"A new trial will be granted:

"I. Where the verdict is against law. This occurs where the issue involves both fact and law and the verdict is against the law of the case on the facts proved.

"II. Where the verdict is contrary to the evidence. This occurs when the issue involves matter of fact only, and the facts proved required a different verdict from that found by the jury.

"III. Where the verdict is without evidence to support it. This occurs when there has been no proof whatever of a material fact or not sufficient evidence of the fact or facts in issue. Where some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances and presumptions, a new trial will not be granted merely because the court, if upon the jury would have given a different verdict. To warrant a new trial in such cases, the evidence should be plainly insufficient to warrant the finding of the jury." 6 Gratt. 712-4. This restriction applies a fortiori to an appellate court. For in the appellate court, there is super-added to the weight which must always be given to the verdict of a jury fairly rendered, that of the opinion of the judge who presided at the trial, which is always entitled to peculiar respect upon the question of a new trial. Brugh v. Shanks, 5 Leigh, 598.

Where a case depends upon the tendency and weight of evidence, and the jury and judge who tried the cause concur in the weight and influence to be given to the evidence, it would be an abuse of the appellate powers of this court, to set aside a verdict and judgment, because the judges of this court, from the evidence as it is

written down, would not have concurred in the verdict. *Hill's case, 2 Gratt. 594. See, also, case recently decided at Wytheville. Bell v. Alexander, supra 1.

Applying these well settled rules of law to the case before us, we cannot say, that the verdict was not supported by the evidence; or that there was such a plain deviation from right and justice in this case as to warrant this court in overruling the verdict of a jury and judgment of a court, who had the witnesses before them, who knew both parties and witnesses, and who were peculiarly competent to give just and proper influence to the evidence.

And even if the facts proved as they are

now presented upon the record, might tend to lead us to a different conclusion from that at which the jury arrived; yet there are many facts and circumstances in the case which might well justify the jury who knew the parties, and understood the peculiar relations existing between them, in finding the verdict which they have rendered. It was proved that Anna Blosser, the plaintiff's intestate, was the aunt of the obligor, Jacob Blosser, whose bond was placed in the hands of the defendant in error (Joseph Harshbarger), for collection; and that the latter was also her near relative. It was also proved that all these parties were members of the "Menonite" church, and that it was against the creed or rules of that church, for its members to sue each other. And while of course the mere relationship of the parties and their church relations or church creed could not affect their legal rights and liabilities, yet these are circumstances proper to be considered by the jury, in ascertaining what was the true understanding and agreement of the parties arising out of the receipt executed by the defendant in error. These peculiar relations of the parties, taken in connection with the receipt itself, might well warrant the jury in coming to the conclusion that it was not intended by Mrs. Blosser that her nephew, whom she had already

indulged for fourteen years, should be pressed by a suit *or other coercive means; and that no such obligation was assumed by the defendant in error. With a full knowledge of the near and intimate relations of the parties, being himself related to both, and with a knowledge too of the peculiar tenets of their church, of which he was a member also, he executed a receipt for the collection of the bond. If it had been the intention of plaintiff's intestate, that her nephew should be sued for the amount due to her, she would have placed the bond in the hands of an attorney for collection by suit or otherwise. She does not do that, but hands it to a mutual relation, to collect it of her nephew. Though she lived for years after this, and knew that no suit had been brought (for in 1860 she certainly knew the bond was still in the hands of Harshbarger), yet she never directs him to sue, nor complains that he had not put the bond in suit. After her death, her administrator brings this suit, seeking to fix liability upon him (not for any money collected upon this bond, for he never collected a dollar), for his neglect in not bringing suit. It is doubtful, upon the facts certified, whether the money could have been made even if suit had been brought upon the bond of Jacob Blosser. It is true that he had a small personal estate, and a solvent bond due to him, amounting to about five hundred dollars, which he proposed at one time to assign in part payment of his debt; but this was never done; and it would seem it was not done at the time proposed because of the failure of the defendant to produce the bond. To the extent of the amount of that bond it may be, this court,

if it had been the jury, would have held him accountable. But the whole case was one peculiarly proper to be submitted to a jury, who are the proper judges of the weight of the evidence; and the verdict having been fairly rendered, and approved by the judge before whom the case was tried, it would be a violation of the well settled principles of law so often adjudicated by the courts, as well as an
219 unwarranted abuse of the *appellate powers of this court, to set aside the verdict and judgment because the judges of this court might not concur with the verdict of the jury, upon the facts as they are certified here.

I am of opinion that the judgment of the Circuit court of Rockingham should be affirmed.

The other judges concurred in the opinions of Christian, J.

Judgment affirmed.

220 *Poague & al. v. Spriggs & als.

August Term, 1871, Staunton.

1. **Judgments—Agreement to Accept Payment in Confederate Currency.**—S has a judgment docketed for an ante-war debt, against C, the principal, and E and P his sureties, well secured by the judgment lien upon the lands of the debtors. If S, to enable C to sell his land for Confederate money, and make a good title to the purchaser, agrees, in May 1863, to accept payment of the judgment in Confederate notes or bonds, and if, in pursuance of this agreement, C immediately advertises and sells his land and receives payment of the purchaser in such money or bonds and conveys to him the land, S cannot afterwards revoke his agreement to accept such payment, but his promise is binding upon S, not only in behalf of C, but of his sureties also, and the purchaser.

2. **Same—Same—Proof of.**—In such a case, the agreement of S must be proved beyond all reasonable doubt; and in this case, it was not proved.

3. **Parol Evidence—Contents of Letter.**—The uncertain and unreliable nature of parol evidence to prove the contents of a letter, commented on by MONCURE, P.

This was a suit in equity in the Circuit court of Rockbridge county, brought in July 1866, by Joseph Spriggs against J. H. Coffman, Wm. F. Poague, Jonathan W. Eads and others, to enforce the lien of a judgment confessed by Coffman, Poague and Eads, against the land which they owned at the time of the judgment, some of which had been subsequently sold to the other defendants. The bill states the judgment confessed by Coffman, the principal, on the 29th of July 1859, and by Poague and Eads, his sureties, on the 10th of August following, for twenty-five hundred dollars with interest from the 1st of December 1858; which had been duly docketed at the time. That at the date of this judgment
221 Coffman owned a tract of land in the *county, containing fifty-five acres, on

which was located the Bunker Hill mill. That subsequently he sold and conveyed to the defendant, S. C. Burks, eight acres of this land, including the mill, and to D. C. E. Brady, forty-six acres, the balance of the tract; and the plaintiff has been informed that all the purchase money has been paid. This property was assessed at \$7,496.50. That on the 4th of June 1863, Coffman paid to Poague and Eads the sum of \$2,800 on account of said judgment, and in consideration thereof the said Poague and Eads bound themselves to pay to the plaintiff "the amount of the bond in his possession for \$5,585, in which bond they are the sureties of said Coffman;" and they also agreed "to release the lands of said Coffman from the lien of said judgment:" And he exhibits the agreement. The bill then sets out lands owned by Poague and Eads at the date of the judgment, some of which lands of Poague he had since sold to persons named, who are made defendants.

The prayer of the bill is that an account may be taken of the plaintiff's judgment, and that the said lands may be sold, and the proceeds of sale may be applied to the discharge of the judgment, and for general relief.

Poague and Eads filed a joint answer, and Brady answered separately. Coffman was a non-resident, and was proceeded against as such; and the bill was taken for confessed as to him and the defendants who did not answer. The material parts of the answers filed, and of the evidence, are set out in Judge Moncure's opinion.

The cause came on to be heard on the 24th of June 1867, when the court held that the plaintiff was not barred of the relief sought by his bill, on the grounds relied upon by the defendants Poague and Eads; and referred the cause to a commissioner to take an account of the plaintiff's judgment, and to ascertain and state what lands are bound by the judgment lien, and the order of the liability of the same; and make
222 report to the court. *From this interlocutory decree Poague and Eads applied to a judge of the District court of appeals at Charlottesville for an appeal; which was allowed; and the case was afterwards removed to this court.

Brockenbrough and Wm. J. Robertson, for the appellants.

Wm. Daniel, for the appellee.

MONCURE, P. On the 19th day of May 1863, when Coffman sold his land at public auction, Joseph Spriggs held a judgment against said Coffman and his sureties, Poague and Eads, for \$2,500, with interest thereon from the 1st of December 1858, till paid, and costs, which had been confessed in 1859, and was wholly unpaid. This judgment had been duly docketed, and was perfectly secure; being a lien upon all the lands owned by the debtors at its date, and each of them then owning land of much greater value than the amount of the judg-

ment. Spriggs had a perfect right, at any time, to enforce its full payment, in good money, out of the said lands. Confederate treasury notes and Confederate bonds had greatly depreciated in their market value; being then, as compared with gold, only of the value of about seven to one. In this state of things, Spriggs, certainly, had a right, notwithstanding this great disparity of value, to receive payment of his judgment in Confederate notes or bonds, at their par amount. He was not bound, in law or morals, to make so great a sacrifice; but he had a right to do so, upon the principle that a man may give away what is his own, or any part of it. His mere declaration or promise that he would receive payment in such a way, founded on no valuable consideration, would not, of itself, bind him. Such a declaration or promise, at most, could be no more than an unexecuted gift, which is never binding. But it would not even amount to an executory gift. It

223 would be a mere indication of his *willingness, for the time being, to accept payment of the debt in a depreciated currency, and not of his consent to do so at any future time, however much the currency may have further depreciated in the meantime. It is well known that Confederate currency was not only greatly depreciated in May and June 1863, but continued thereafter to depreciate, and sometimes rapidly, until the end of the war, when it entirely perished. And although there doubtless were some persons who, under peculiar circumstances, were willing, as late as May or June 1863, to accept payment of a well-secured ante-war debt in such a currency, provided such payment were immediately made; yet there were few, if any, who would then have consented to accept such payment at a future period, especially if remote or indefinite. Still, a promise to accept such payment might have been made under such circumstances, and in such terms as to become binding on the creditor, either as a contract founded on a valuable consideration, or as an equitable estoppel. If, for example, Jos. Spriggs, the judgment creditor in this case, to enable the principal debtor, Coffman, to sell his land for Confederate money and make a good title to the purchaser, had agreed to accept payment of the judgment in Confederate notes or bonds; and if, in pursuance of such agreement, Coffman had immediately advertised and sold his land, received payment of the purchasers, according to the terms of sale, and conveyed to them the land, it would then have been too late for Spriggs to revoke his agreement and retract his promise to accept such payment, and his promise would have been binding upon him, not only in behalf of Coffman but of his sureties also and of the purchasers of his land. It is immaterial to enquire whether this operation would be produced by considering the promise as a contract founded on valuable consideration, or as an equitable estoppel. One or the other, or both, it would certainly be. But whether

one or the other, or both, the effect would be precisely the same. Regarding it as
224 a *contract founded on valuable consideration, there would be no question as to its binding effect. Regarding it as an equitable estoppel, it would be equally binding, on the ground that it would be a fraud in the judgment creditor to retract his consent after it had been acted on by the judgment debtor and his sureties and the purchasers from him, in faith of such consent, which had been given to induce such action. Perhaps it might properly be regarded both as a contract and as an equitable estoppel. The doctrine on the subject is fully laid down in the authorities cited by the counsel for the appellants, to wit: *The Duchess of Kingston's case*, 2 *Smith's Leading Cases*, Amer. ed. of 1866, and the notes, pp. 648-843, top paging; *Davis' adm'r v. Thomas*, 5 Leigh, 1; *Pettit v. Jennings*, 2 Rob. R. 676. But to produce that important effect, it certainly ought to be clearly proved that the promise was actually made, and on such consideration or under such circumstances as to make it binding on the promiser. Having made these preliminary remarks, which seemed to me to be appropriate, I now proceed to the more particular examination of the case we have before us.

The answer of Poague and Eads, the sureties of Coffman, sets out the ground on which they rely for their discharge from liability as such sureties. They say they occupied a position of perfect security after the confession of judgment by Coffman for the debt for which they were liable. That some time in the year 1863, Coffman, being from home, and doing duty in the army of the Confederate States, and being anxious to sell his mill property, addressed a letter to the complainant through his friend Sanders, and enquired whether he would accept Confederate money or bonds in discharge of the judgment debt due to him by Coffman as principal debtor, and by the respondents as sureties. That complainant replied to the letter, and consented to accept Confederate bonds in
225 payment of his judgment; *and, in consequence of this consent, Coffman, with the assent of the respondents, sold the real estate described in the bill to the two parties therein named, and \$2,800, part of the proceeds of the sale, were paid over to the respondents for the purpose of investment in Confederate States bonds for the benefit of the complainant. That they did actually invest the amount for the benefit of the complainant, at their earliest convenience after receiving the money, and the said bonds have been in possession of the respondent Eads ever since. That no formal tender of said bonds was ever made to the complainant, he having subsequently waived the necessity of such tender, by announcing that he would not accept them. That some time after the sale, and the execution by the respondents of the receipt and obligation marked Ex. B, and filed with the bill, the complainant addressed a second let-

ter to Sanders, saying that he had changed his mind, and concluded not to accept the Confederate bonds in payment of his debt. That they have made the most industrious efforts to get possession of these letters of the complainant, but without success, and therefore rely on secondary proof of their contents. That they were alone induced to consent to the sale by the promise of the complainant to accept Confederate bonds in satisfaction of his debt; and they insist that the formal, deliberate consent of the complainant thereto, and the action of Coffman and these respondents based upon it, estopped the complainant in equity from shifting his ground, by withdrawing his consent, and that he has thereby released in equity his judgment lien upon the said respondents.

The only other answer filed in the case, is that of Brady, a purchaser of a part of the land of Coffman at the sale aforesaid. He did not, it seems, know of the existence of the judgment until after the sale: hearing then that the judgment constituted a lien on the land, he declined to pay his purchase money, until the said land
226 *was released from or protected against the said judgment lien. He says that Eads and Poague, the sureties of Coffman, and for whose protection the said judgment was confessed by the said principal and his sureties without the knowledge of complainant, accordingly met on the 4th of June 1863, and executed the paper filed with the bill as exhibit B, by which they acknowledge the receipt from Coffman of \$2,800, the amount of said judgment; released his land from the lien of said judgment, and obliged themselves to pay the same and protect his vendees from the lien thereof; upon the faith of which, the said vendees paid the purchase money, and on the same day received deeds for the land. And he insists, that the said land is thus released from the lien of the said judgment; and if not, that the lands of the sureties, which are ample for the purpose, are bound for the satisfaction of the said judgment in exoneration of the land of Coffman by virtue of the release and obligation executed by the sureties as aforesaid.

I think neither of these answers, of the sureties or of the purchaser, states such a promise of the judgment creditor as would operate, either by way of contract or of equitable estoppel, to prevent him from enforcing his judgment lien on the land, as claimed in his bill. It is not pretended that he was present at the sale when it was made, or that he was even in the county in which it was made, either at that time or for a long time before or afterwards. In fact, it appears that he was in a distant county, engaged in the discharge of his duties as a minister of the Methodist church. The only application made to him on the subject was by letter sent by mail, addressed to him by Sanders in behalf of Coffman, enquiring whether he, Spriggs, would accept Confederate money or bonds in

discharge of the judgment debt. Spriggs replied to the letter of Sanders (as stated in the answer of the sureties), and consented to accept Confederate bonds, in payment of his judgment. And in consequence

227 *of this consent, Coffman, with the assent of his sureties, sold the real estate described in the bill to the two parties therein named, and the \$2,800 mentioned in the exhibit marked B, part of the proceeds of sale, were paid over to the sureties, for the purpose of investment in Confederate bonds for the benefit of the complainant. It does not appear that anything was said in the letter from Sanders to Spriggs about the sureties of Coffman, or the judgment lien, or any release of it by the sureties. It does not even appear that anything was said in that letter about a sale of the land by Coffman. The only subject of the letter, as stated in the answer of the sureties, seems to have been a simple enquiry of the complainant, "whether he would accept Confederate money or bonds in discharge of the judgment debt." And the only subject of the complainant's reply to that letter was, that he "consented to accept Confederate bonds in payment of his judgment." He did not say that he would come under any obligation to accept such payment, even at that time, much less at a future or indefinite time. All he meant to say was, that, as then advised, he was willing to accept such payment. But he might change his mind at any time, and nothing was more natural or probable than that he would change it in a very short time, as Confederate securities were rapidly, and almost daily depreciating. He would no doubt have refused, if he had been requested, to bind himself, even for a day, to accept such payment. The wonder is that he was then willing to accept it. He had no reason to believe that there would be any definite action by Coffman or his sureties, founded on the faith of his willingness to accept Confederate bonds in payment of the judgment. He no doubt expected that there would be no sale, and, still more, no release of the judgment lien, without his presence and co-operation, in person or by special agent. Such is the case made by the answer of the sureties. The case made

228 by the answer of Brady, *the purchaser, is still less strong against the complainant. The purchase was made without knowledge, even of the existence of the judgment lien. And though its existence was known to the purchasers when the purchase money was paid, yet such payment was made, not upon the faith of any promise of the complainant to accept Confederate bonds in payment of his judgment, and to release the lien thereof, but upon the faith of the release of such lien by the sureties, and of their covenant of indemnity against it. In fact, the answer of Brady shows that he regarded the sureties, as being, in effect, the owners of the judgment, and having a right to release it, as it was confessed, for their benefit;

and at all events, that he relied on the judgment lien on the lands of the sureties as ample indemnity against the said lien on the land of Coffman, purchased by him.

But even if the answers, or either of them, state a good ground of defence, either by way of a promise founded on valuable consideration, or of an equitable estoppel let us now see whether it is sustained by the evidence, which, as we have seen, ought to be strong and clear to have that effect.

It is unfortunate, in the last degree, for the defence in this case, supposing it to be well founded in fact, that the answer of Spriggs to the first letter alleged to have been written him by Sanders, and his answer to the alleged second letter of Sanders, had not been preserved and exhibited as evidence in this cause; and it is very strange that Sanders, Coffman, the two sureties, Eads and Poague, and the two purchasers, Brady and Burks, or some one or more of them, did not feel such a deep sense of the importance of those answers, as to be induced to preserve them carefully, and especially the first of them. Instead of that, both of these answers are alleged to have been lost, and secondary evidence of their contents is offered, and that evidence of the most uncertain nature, being

the vague recollection of witnesses
229 after the lapse of several *years; such witnesses being either interested parties, or so connected with the transaction as to be in danger of being strongly biased in giving an account of it. Such testimony of such witnesses, however honest they may be (as the witnesses in this case no doubt are), is almost sure to be highly (though it may be insensibly) colored in favor of the side on which it is offered, and it is a very unsafe foundation for the judgment of a court. A mistake as to a date, or a single word, may cause a wrong decision and produce the grossest injustice. And it would be dangerous to found a decree on such testimony, however express, and positive, and uncontradicted by other evidence it might be. But when it is denied by the testimony of the opposite party (who is also examined as a witness), and is inconsistent with clearly established facts in the case, it is certainly insufficient to warrant a court in rendering a decree which would adjudge that party to have given up for nothing, seven-eighths of an admitted and undeniable debt, secured by the best possible security. How does the case stand upon the evidence?

Five witnesses were examined whose evidence is material to this enquiry; four of them against the claim of the judgment creditor, and one only in its favor. Of the four against it, one of them, Sanders, was the brother-in-law of the principal debtor, Coffman, and son-in-law of the surety, Eads, and was also the agent of Coffman in writing the first alleged letter to Spriggs, and it seems the agent of the surety, Poague, in writing the second alleged letter to Spriggs. Another of them, Mrs. Lauck,

was the daughter of said Eads. And the remaining two were the said Eads and Poague themselves. The witness on the other side was the plaintiff himself, the judgment creditor, Spriggs. The character for veracity of none of these witnesses is impeached, and it seemed to be admitted in the argument of counsel on both sides, that they are all persons of good general character. There is nothing in what

230 they say, nor in *their manner of giving testimony, so far as it appears upon the record, which at all indicates that any of them intended to make a misstatement. And the only ground on which any of the testimony can be impeached or questioned is, defect of memory of witnesses testifying to what occurred several years before, and the great danger of their having been insensibly biased in giving their testimony, by their interest in the transaction involved, or connection with it and with the parties interested therein. Certain it is that if the testimony of the plaintiff, Spriggs, is to be believed, there is no ground whatever to sustain the defence relied on. And if it be conceded that the testimony on the other side, standing by itself, would be sufficient for that purpose, still it might well be questioned whether the court would be warranted in deciding against the plaintiff in such a case of conflicting testimony, even though a majority, in number, of the witnesses giving such testimony, might be on the side of the defendants. In this case, however, I think it will be found that there are facts and circumstances, not dependent on the loose and vague recollection of witnesses, which decidedly turn the scale in favor of the plaintiff.

The theory of the defence is, that before the sale of the land of Coffman, or at all events before the purchase money was paid and before the sureties, Eads and Poague, released the judgment lien upon the land and bound themselves to indemnify the purchasers against it, a letter was written by Sanders in behalf of Coffman to Spriggs to enquire if he would take Confederate money or bonds in discharge of the judgment, and Spriggs replied to that letter that he would take Confederate eight per cent. bonds; and upon the faith of that reply, the sale of the land was made, the purchase money paid, and the release and bond of indemnity aforesaid executed. The facts on which this theory rests, are all, as we have seen, denied by the testimony of the plaintiff.

231 *Now, when this letter of Sanders' was written, what was its precise purport, when the answer of Spriggs thereto was received, and what was its precise purport, are all very important elements in the defence relied on. Sanders is the only witness in the case who testifies as to when his letter was written, or what was its purport; and he testifies alone from memory, and nearly four years after the letter is alleged to have been written. Being asked, in his examination in chief, to "state as near as

you can, the contents of your letter of enquiry to Mr. Spriggs?" he answered: "I believe about the substance of it was this, that I addressed him a note at the request of Mr. Coffman, to know if he would take Confederate money or bonds in liquidation of this judgment, to which Poague and Eads were security, and if so, to answer by return mail, or as early as possible; that Coffman wanted to sell his property and pay his debts." And being further asked, "How soon afterwards did you receive his answer?" he replied: "About a week; I received the letter by mail, as soon as it could be expected to come." The account which he gives of the contents of this alleged letter of Spriggs is, that the writer said "he would take Confederate eight per cent. bonds; and further remarked, that if Confederate bonds were not good, he did not consider anything in the shape of property good; that if the yankees whipped us, all would go up together." Eads in his testimony says, he saw this letter of Spriggs, and that its purport corresponded with the account of it in the testimony of Sanders. Both of them say this letter was received before the sale, and Eads thinks it was received before the land was advertised, which was on the 22d of April 1863.

I have already remarked upon the importance of every word of these letters, and of the danger of entirely altering their sense by misstating, from defect of memory alone, a single word of their contents.

232 Spriggs says: "I never consented to take Confederate money for that judgment. I did say to my family, and perhaps to some of my friends, that if they would give me eight per cent. bonds at par I would receive them; they were then at a premium of eight per cent. I do not recollect whether this was before the 19th of May or 4th of June 1863. I think it was after I had received Sanders and Coffman's letters of the 21st and 25th days of May 1863. I think I heard through a friend that the property had been sold, but these letters contained the first direct information that I received. I was not consulted about the sale of the Bunker Hill mills or land before the sale was made." "I never said to Jas. R. Sanders in a letter to him, that I recollect of, that I was willing to take eight per cent. bonds at par for that judgment." "I would have received eight per cent. Confederate bonds at any time before they commenced depreciating." "I never had any of them—never dealt in them, and never had any offered to me. It was suggested to me in the Sanders letter, and the conversation with my family and friends was after I received that letter, and I expressed myself willing to take those bonds in order to settle up the matter. Although I expressed this willingness to my family and friends, not having been in Rockbridge but once during the war, I had no opportunity of saying the same thing to Mr. Sanders, or to any of these parties. I did not mention it in my answer to Mr. Sanders, because I had not matured my thoughts on the sub-

ject. That letter was written very soon after I received his. I do not mean to say, positively, that I did not make that offer in my letter to Mr. Sanders, but I have no recollection that I did." He produces the only letters he admits ever to have received on the subject, being the two letters received from Sanders and Coffman of the 21st and 25th of May 1863, as before mentioned, which will be presently more fully noticed. Having preserved those letters, he would no doubt also have preserved any other letter written *him by Sanders on the same subject. And if he had preserved it, no one can read his testimony and doubt that he would have produced it.

The two letters produced by Spriggs are of the utmost importance in this case, as they were written at the time of the transaction by two of the chief actors in it, and were two very material links in the chain of that transaction. There can be no doubt of the accuracy of the facts which they state, and they throw much light on those facts to which the parol testimony refers. They furnish tests to be applied to what is stated by witnesses on loose and vague recollection, and will enable us to detect, to some extent, the mistakes into which those witnesses, or some of them, have no doubt fallen.

Both of these letters were written after the sale of Coffman's land, which was on the 19th of May 1863, but before the purchase money was paid, and before the release and covenant of indemnity was signed by the sureties, which was on the 4th of June 1863, just sixteen days after the sale. One of these letters is from Coffman, and is in these words:

"Fairview Hospital, May 21st, 1863.

"Rev. Jos. Spriggs, Dear Bro.,—I just concluded the sale of Bunker Hill mills, and write to you to say that the money is ready for you, and I shall be very glad if you would make arrangements immediately to bring or send your note over here for collection. I have money, and don't want to pay interest on it any longer. By early attention to this, you will much oblige,

Yours, &c., J. H. Coffman."

The other is from Sanders, and is in these words:

"Sanders' Store, May 25th, '63.

"Rev. Joseph Spriggs, Dear Sir,—At the request of W. F. Poague, I drop you these few lines to say to you that Mr. J. H. Coffman has just sold the Bunker Hill mill, and that Mr. Coffman is ready to pay you off, provided you will take Confederate money or bonds. I *would say that the bonds draw eight per cent., and I prefer them to any other bonds. Mr. Poague says if you do not receive the payment, you will have to release him. You will answer this as soon as it comes to hand. You will address me. We are well. I hope this may find you the same. Your friend,

Jas. R. Sanders."

This letter was written six days after the sale, and twelve days before the purchase

money was paid, and the release of the judgment lien by the sureties was executed. It seems to me that these letters, and especially the latter, are plainly inconsistent with the idea that a letter had, two or three weeks before, as alleged, been received by Sanders from Spriggs agreeing to receive eight per cent. Confederate bonds in discharge of the judgment, or containing such a promise to that effect as would be binding on Spriggs, or could have warranted the sureties, on the faith of such promise, in giving a release of the judgment lien on the land of Coffman. Neither of these letters make any reference whatever to any such promise, as they would certainly have done if any such promise had been given. They do not even refer to any letter at all as having been recently received from Spriggs. Though if a letter had been received from him intimating that he might, or probably would, be willing to receive eight per cent. Confederate bonds in discharge of the debt, but reserving the right to do so or not at the time of the sale, as might well have been the case, there would seem to have been nothing in the receipt of such a letter inconsistent with the terms of these two letters of Coffman and Sanders, or either of them. But, on the supposition that a letter had been received from Spriggs, as alleged, containing a binding promise on his part to receive eight per cent. Confederate bonds in discharge of the judgment, or any promise on which the sureties had any right or reason to rely, in releasing the judgment lien without any further
 235 action or consent on *the part of Spriggs, it is utterly unaccountable that no reference whatever is made to such a letter, or such a promise, in either of the two letters from Coffman and Sanders as aforesaid. Had such a letter been received from Spriggs, containing such a promise, Coffman and Sanders, in their letters of the 21st and 25th of May '63, would, after informing him of the sale, and of the readiness of Coffman to satisfy the judgment, have enquired, when, where, and to whom, the eight per cent. Confederate bonds could be delivered in payment of the judgment, according to such promise. Instead of that, Coffman, in his letter, says: "I write to you to say, that the money is ready for you, and I shall be very glad if you would make arrangements immediately to bring or send your note over here for collection. I have money, and don't want to pay interest on it any longer." Now, here is no reference to the judgment lien, or judgment at all; nor to eight per cent. Confederate bonds, or any promise of Spriggs to receive such bonds. The writer speaks merely of a debt due by note, which he requests the creditor "to bring or send over here for collection," and says, "the money is ready for you." It is not pretended by any of the witnesses, that Spriggs, in the alleged letter to Sanders, or otherwise, ever promised to receive Confederate treasury notes in discharge of the debt. The most that any of those witnesses say is, that he promised in that letter to re-

ceive eight per cent. Confederate bonds. And Sanders, in his letter, says: "Mr. Coffman is ready to pay you off, provided you will take Confederate money or bonds. I would say that the bonds draw eight per cent., and I prefer them to any other bonds." Would he have used this language, or anything like it, if, just two or three weeks before, he had received a letter from Spriggs agreeing to receive eight per cent. Confederate bonds in discharge of the judgment, such agreement having been made, as alleged, to enable Coffman to sell his land, and if, on the faith of such
 236 agreement, Coffman *had accordingly made the sale, and received the purchase money? "Coffman is ready to pay you off, provided you will take Confederate money or bonds." Does not that language necessarily imply that Spriggs had still a right at his election, notwithstanding any letter he may have previously written, either to accept Confederate money or bonds, or to command good money in payment of the judgment? It seems to me there can be no room for doubt on this subject.

If such a letter, as is alleged, had been received from Spriggs before the sale, why was it not exhibited at the sale for the satisfaction of purchasers? The purchasers knew nothing, even of the judgment, until after the sale when they investigated the title. Why was not the letter exhibited when the release of the judgment lien was executed by the sureties? Steele, the attorney who drew that release did not see or hear of such a letter. The sureties undertook to give the release because they considered themselves entitled to do so, the judgment having been confessed at their instance and for their indemnity, without the knowledge of the creditor. And the purchasers were willing to pay the purchase money on the execution of this release, because they thought the sureties had a right to give it for the reason aforesaid, and chiefly because the covenant of the sureties was considered as an ample indemnity against the lien of the judgment if it continued to exist after the intended release. It is obvious that the purchasers placed no reliance on any letter of Spriggs, if they ever heard of such a letter. And it is also obvious, I think, that the release was not executed by the sureties on the faith of such a letter, as containing a binding promise on the part of Spriggs to accept Confederate bonds in payment of the debt. Although it may have been executed by them on the belief derived from some letter of Spriggs to Sanders, or otherwise, that such a payment
 would be accepted. When the letter
 237 of the 25th of May '63 was *written by Sanders to Spriggs, at the request of one of the sureties, Poague, the sureties could not have believed that any binding promise had been made by Spriggs to accept Confederate bonds, and they obviously then intended to await the answer to that letter for his determinate conclusion on the subject. "You will answer this as soon as it comes to hand," is the request of Sand-

ers in his letter to Spriggs, written at the instance of Poague. Why Poague did not wait till this answer was received, does not appear. Sanders says it was duly received, or received in due course of mail. At that time, no doubt, communication by mail was slow and irregular. But, unfortunately for the sureties, about ten days after the letter was written, and a few days before the answer was received, the sureties executed the release of the judgment lien, and the purchasers paid the purchase money and received deeds for the property. The parties were, no doubt, anxious to close the transaction without further delay, and the sureties, no doubt, were assured by Sanders and others, and believed, that Spriggs would accept eight per cent. Confederate bonds; and they determined to run the risk. They received \$2,800 in seven per cent. Confederate bonds from Coffman, which they knew they could hold for their indemnity, in case Spriggs should refuse to accept the eight per cent. bonds. And though they would of course have greatly preferred to apply the bonds they received to the discharge of the debt to Spriggs for which they were bound, yet if Spriggs should be unwilling to accept payment in that way, they might still have been willing to close the transaction at once and hold the bonds for their ultimate indemnity. Their only security was the land of Coffman, which may have been bound for other judgments also. It was certainly bound for one other judgment, in favor of Wadsworth, Turner & Co., which was arranged in a similar way, to wit: by a covenant of indemnity, executed by Coffman and Eads, his surety, on

238 *the same 4th of June 1863. Spriggs did not want his money and was willing to wait for it, being well secured. There was surely as much reason why the sureties should be willing to accept Confederate bonds in lieu of a judgment lien on Coffman's land for their indemnity, as that Spriggs should be willing to accept such bonds in payment of a debt secured by a judgment on the lands of Coffman, Poague and Eads, each one of whom owned land more than enough to pay the debt.

The course pursued by the sureties after they were informed that Spriggs was unwilling to accept Confederate bonds in payment of the debt, as they were by the answer of Spriggs to the letter of Sanders of the 25th of May '63, received a few days after the release was executed by the sureties, is confirmatory of the view that they did not then regard Spriggs as bound to accept such payment. Why, if they did, did they not procure the eight per cent. bonds, which alone they now allege he promised to accept, and tender them to Spriggs in payment of the debt? Why did they leave the matter in such a state of doubt and uncertainty, when the case required the greatest possible certainty, and when the proper course to be pursued was a very plain one? Why did they not, at least, inform him that they considered him bound to accept eight per cent. Confederate bonds, according to his

alleged promise, and that they would hold the \$2,800 in seven per cent. Confederate bonds at his risk? Why did they not then inform him of what had been done on the faith of such promise, and that he would be held responsible for all the consequences? Why did they not thus afford him an opportunity to investigate and litigate the transaction when the facts were fresh, and to take such means as might be deemed expedient to alleviate his loss, if it should turn out that he was liable? Why did they remain silent and quiet till the war was over, and the seven per cent. Confederate bonds had perished in their hands, and then, for

239 the first *time, deny the liability as sureties, and claim to be discharged by reason of this alleged promise of Spriggs in April or May 1863? These questions can, reasonably, be answered only in one way, and that is, that there was in fact no such promise of Spriggs as bound him to accept Confederate bonds in payment of this debt, and that the sureties were of that opinion when the transaction was fresh, and all the facts were well remembered.

The arguments of the learned counsel for the appellants were certainly very able and ingenious, and need only one thing to make them conclusive; but that is an all important thing—a good case. I concur, in the main, in the able opinion of the learned judge of the Circuit court. I think, with him, that there was a letter written by Spriggs to Sanders, indicating the willingness of Spriggs, at the time of such writing, to take eight per cent. Confederate bonds in payment of the debt; that that letter was written immediately on the receipt by Spriggs of Sanders' letter of the 25th of May 1863, and in answer thereto; that it was written by Spriggs under the impression produced by what was said in the letters of Sanders and Coffman, that the sale had been made and the purchase money received, and the only question then was, whether Spriggs would receive Confederate money or bonds in payment of the debt due to him; that he had no idea when he wrote that letter, that it could have any effect upon any action of the purchasers or of the sureties in the matter; that though he was then willing to take eight per cent. Confederate bonds, "in order to settle up the matter," and may have so expressed himself in that letter, yet he had not then, as he says, matured his thoughts on the subject, and did not, (if he could possibly have done so,) express his willingness in such definite and positive form as to be binding upon him, even for the time being, much less for any future period; that he obviously intended, notwithstanding that

240 letter, to retain the right to accept the bonds or not, according *to his pleasure, at any time at which they might be tendered; and such intention must have appeared upon the face of that letter, especially when viewed in connection with all the surrounding circumstances; that when the sureties executed the release and covenant of indemnity on the 4th of June

1863, they did not regard that letter as binding Spriggs to receive eight per cent. Confederate bonds in payment of the debt, though they hoped and believed, from the tenor of it, that he probably would do so; that that is the letter to which Sanders and Eads refer as having been received before the sale of the land, they having obviously forgotten the date of its receipt and the substantial purport of the letter; that when the subsequent letter was received from Spriggs, announcing his determination not to accept Confederate money or bonds in discharge of the debts, the sureties were satisfied that they had no right to insist on his doing so, and they therefore proceeded no farther in their preparation for payment, but continued to hold the \$2,800 in seven per cent. bonds for their indemnity. This, I believe, is the true theory of the transaction; and it is consistent with all the facts and evidence in the case, making due allowance for some mistakes into which some of the witnesses have, quite naturally, fallen, from lapse of memory and lapse of time. But whatever the true theory may be, I am well satisfied that the sureties have not succeeded in showing that the judgment lien has been released by the creditor, or that they are entitled to be discharged from liability for the debt.

I am, therefore, of opinion that the decree ought to be affirmed.

The other judges concurred in the opinion of Moncure, P.

Decree affirmed.

241

*Carter v. Allan & als.

August Term, 1871, Staunton.

Sale of Lunatic's Land—Case at Bar.—C, committee of D, a lunatic, files bill for sale of D's land. There is a decree for a sale, and S, the commissioner, sells and reports J the purchaser, and returns his bonds with C as his surety. The report is confirmed, and S reports that he has collected the purchase money and paid it to C, the committee, and returns the receipts of C with his report. This report is confirmed, and a commissioner is directed to convey the land to J, or as he shall direct; and the commissioner, by direction of J, conveys it to C. Afterwards, C and his wife, who is a sister of D, conveys the land to G, in trust to secure a large debt to B. After the death of D and of C, J and S, the widow of C, one of the heirs of D, files her bill against the administrator of C, and the trustee G and B, to set aside the sale and conveyances to C and G, on the ground that C was in fact the purchaser, which was forbidden by the statute. She does not allege in her bill any error on the face of the proceedings, or after-discovered evidence; nor does she allege or prove notice of the fact she relies on, by G or B; and they demur and deny notice. **HELD:**

1. **Bill of Review—Grounds of.***—The bill is fatally defective as a bill of review, for failing to show

***Bill of Review—Grounds of.**—It seems well settled that the only proper grounds of a bill of review are errors of law apparent on the record, or newly-

defect in the proceedings, or to allege that she had discovered evidence since the decree, that she could not by reasonable diligence have ascertained before.

2. **Impeachment of Decrees—Fraud.**—It is fatally defective as a bill to impeach the decree for fraud, as against B for failing to charge him with notice of the fraud.

3. **Purchaser for Value—Latent Equity.**†—A purchaser for value without notice, actual or constructive, having obtained a conveyance, will not be affected by a latent equity, whether by lien, or incumbrance, or trust, or fraud, or any other claim.

discovered evidence. See the principal case cited as authority on this point in *Amiss v. McGinnis*, 13 W. Va. 393. See also, in support of this proposition, *Hill v. Bowyer*, 18 Gratt. 375; *Triplett v. Wilson*, 6 Call 47; *Quarrier v. Carter*, 4 H. & M. 243; *Elzey v. Lane*, 2 H. & M. 593; *Heermans v. Montague* (Va.), 20 S. E. Rep. 899; *Diamond, etc., Co. v. Rarig & Co.*, 93 Va. 601, 25 S. E. Rep. 894; *Hill v. Maury*, 21 W. Va. 162; *Middleton v. Selby*, 19 W. Va. 167.

Same—After-Discovered Evidence—Nature of.—To sustain a bill of review on the ground of after-discovered evidence three things must concur: *first*, the new matter must be relevant and material and such as if known might probably have produced a different determination; *second*, the new matter must have first come to the knowledge of the party after the time when it could have been used in the cause at the original hearing; *third*, the matter relied upon must not only be new, but it must be such as the party by the use of reasonable diligence could not have known before.

This rule, laid down in the principal case, was sustained in *Douglass v. Stephenson*, 75 Va. 758; *Harman v. M'Mullin*, 85 Va. 191, 7 S. E. Rep. 349; *Tate v. Tate*, 85 Va. 216, 7 S. E. Rep. 358; *Nichols v. Nichols*, 8 W. Va. 185; *Dingess v. Marcum*, 41 W. Va. 757, 24 S. E. Rep. 626. See also, in accord, *Barnett v. Smith*, 5 Call 98; *Campbell v. Campbell*, 22 Gratt. 639, and *foot-note*; *Connolly v. Connolly*, 23 Gratt. 639, and *foot-note*; *Reynolds v. Reynolds*, 88 Va. 149, 13 S. E. Rep. 395.

Same—Affidavit.—The bill must not only set forth the discovery of new matter which was discovered after the decree, but it must be accompanied by an affidavit that the new matter could not be produced or used by the party claiming the benefit of it in the original cause. And the affidavit must also state the nature of the new matter, in order that the court may exercise its judgment upon its relevancy and materiality. *Carter v. Allan*, 21 Gratt. 345; *Norfolk, etc., Co. v. Foster*, 78 Va. 420; *Armstead v. Bailey*, 83 Va. 245, 2 S. E. Rep. 238; *Corey v. Moore*, 86 Va. 781, 11 S. E. Rep. 114; *Dingess v. Marcum*, 41 W. Va. 753, 24 S. E. Rep. 626; *Kern v. Wyatt*, 89 Va. 535, 17 S. E. Rep. 549; *Whitten v. Saunders*, 73 Va. 508; *Trevelyan v. Loft*, 83 Va. 141, 1 S. E. Rep. 901.

See generally, monographic note on "Bills of Review" appended to *Campbell v. Campbell*, 23 Gratt. 649.

†**Purchaser for Value—Latent Equities.**—As authority for the proposition that a purchaser for value without notice will not be affected with latent equities, see the principal case cited in *National Bank v. Harman*, 75 Va. 609; *Rorer, etc., Co. v. Trout*, 83 Va. 415, 2 S. E. Rep. 713; *State Bank v. Blanchard*, 90 Va. 27, 17 S. E. Rep. 742; *Moorman v. Arthur*, 90 Va. 485, 18 S. E. Rep. 869; *Throckmorton v. Throckmorton*,

The case is stated by Judge Christian, in his opinion.

Leake and Michie, for the appellant.

Robertson, for the appellees.

242 *CHRISTIAN, J. This is an appeal from a decree of the Circuit court of Albemarle county. The record discloses the following facts: James C. Carter was the committee of Elizabeth Davis, a lunatic. In May 1851 he filed his bill in the Circuit court of Albemarle, in which he set forth that the said lunatic was entitled to certain real estate, the rents and profits of which were inconsiderable; that the land, if it continued to be rented, would greatly depreciate in value, and that it was manifestly to the interest of the said lunatic, that the land should be sold and the proceeds invested in an interest bearing fund. The heirs of the said lunatic were made defendants to this bill, who answered it; the infants by a guardian ad litem; and such regular and proper proceedings were had in the cause, that at the October term, 1851, of said court, a decree was entered directing a commissioner to sell the said real estate at public auction upon certain terms therein named. This decree was executed by the commissioner (as to the land now in controversy,) on the 8th day of November 1852, and one James E. Chapman became the purchaser. He paid in cash such sum as was required by the decree of the court, and executed his bonds with James C. Carter, the committee, as security, payable at such times as said decree prescribed. These bonds, as they became due, were collected by the commissioner, and paid over to Carter, the committee, and the receipts are filed by the commissioner, and signed by Carter, showing upon the face of the receipts, that the bonds of Chapman had been paid in full to the commissioner, and by him paid over to the committee, James C. Carter; and this fact is reported to the court, in a written report signed by the commissioner, who files said receipts with his report.

To this report there was no exception; and the court, at its May term, 1858, "fully approved and ratified" said report, and directed that a commissioner appointed for that purpose, should "convey by deed, 243 with special *warranty, to the said James E. Chapman, or to whom, or in such way as he may direct, at his costs and charges, all the estate, whether in law or in equity, held by the lunatic, Elizabeth Davis, in and to the tract of land in the proceedings herein mentioned, containing 325 acres," &c.

The record further shows, that the commissioner conveyed this land under the di-

rection of Chapman, the purchaser, to James C. Carter, the committee. On the 14th day of July 1860, Carter conveyed this land, together with other real estate, to a trustee to secure a debt of about \$15,000, to Nelson Barksdale; and in that deed the appellant, who was then his wife, united. In November 1866, a bill was filed by Mrs. Carter, after the death of James C. Carter, (the commissioner, Southall, and the purchaser, Chapman, being also dead,) in which she claims that as the heir at law of Elizabeth Davis, the lunatic, she is entitled to the land sold by Commissioner Southall, upon the ground that said sale was null and void, because the said James C. Carter was in fact the purchaser, and not James E. Chapman; that though the report of the commissioner states, that the purchase money was paid by Chapman to him, and by him to the committee Carter, in point of fact no money was paid, but receipts were simply passed between the commissioner and Carter, to conceal the fact that he was the real purchaser. That being positively prohibited by special provision of the statute law, from becoming the purchaser of the land of his lunatic, either directly or indirectly, the deed made and delivered to Carter under the decree of the Court is null and void, and that the said Carter acquired no title whatever to said land; but that the legal and equitable title remained in Elizabeth Davis during her life, and at her death descended to her heirs at law.

After setting forth in detail, the proceedings in the suit referred to above, she 244 prays that these proceedings *may be reviewed, and that the decree confirming the pretended sale to Chapman may be set aside, and that the deed to James C. Carter from the commissioner of the court, may be declared null and void. To this bill the administrators of Nelson Barksdale, the administrators of J. C. Carter, the other heirs of Elizabeth Davis, and the trustee in the deed of trust securing the debt due to Nelson Barksdale, are all made parties.

The defendants all answer this bill except the heirs of Elizabeth Davis; and the administrators of Barksdale both answer and demur to the bill. At the October term, 1867, certain proceedings were had which it is unnecessary to notice here, but which resulted in a motion to dismiss her bill without prejudice; which motion was granted by the court.

In February 1868 the same bill in *totidem verbis* was filed at rules. A demurrer to this bill was also filed at rules by Barksdale's administrators and Garrett, trustee; and at the May term, 1868, the cause came on to be heard upon the bill taken for confessed as to all the defendants except Barksdale's administrators, Ira Garrett, trustee, and upon their demurrer to said bill, and the court treating the bill as a bill of review, sustained the demurrer and dismissed the bill, upon the ground that the bill was filed without leave of the court. Thereupon, the plaintiff asked leave of the court to file the said bill; which the court refused, and dismissed

91 Va. 47. 22 S. E. Rep. 162; Snyder v. Grandstaff, 96 Va. 473. 31 S. E. Rep. 647; Ellison v. Torpin, 44 W. Va. 429. 30 S. E. Rep. 188; Turk v. Skiles, 45 W. Va. 87, 30 S. E. Rep. 236. See also, in accord, Tompkins v. Powell, 6 Leigh 576. See the principal case distinguished in Davis v. Tebbs, 81 Va. 604.

the bill; the court being of opinion, that the plaintiff was not entitled to the relief sought as against the administrators of Nelson Barksdale. It is from this decree that an appeal was allowed to this court.

The bill filed by the appellant in this case, (one of which was filed by leave of the court, and afterwards dismissed on her motion without prejudice, and the other filed at rules,) are treated as bills of review, by the court below. But neither was a bill

of review, either in form or substance. 245 Neither alleged error of *law apparent on the record, or newly discovered evidence, which are alone proper grounds of a bill of review. Story's Eq. Pl. § 404; Hill & als. v. Bowyer & als., 18 Gratt. 364.

It is not alleged nor pretended in either bill, that there was any error of law apparent on the face of the proceedings; but on the contrary, the proceedings are, as stated in the bills, regular and in perfect accordance with the requirements of the law. Nor was there alleged the discovery of new matter such as would give the bill which was dismissed by the court below the necessary characteristics of a bill of review. Such a bill must not only set forth the discovery of new matter which was discovered after the decree, but it must be accompanied by an affidavit that the new matter could not be produced or used by the party claiming the benefit of it, in the original cause. And the affidavit must also state the nature of the new matter, in order that the court may exercise its judgment upon its relevancy and materiality. Story's Eq. Pl. § 412; Cooper's Eq. Pl. 91.

In the first place, the new matter must be relevant and material, and such as if known, might probably have produced a different determination. In the next place, the new matter must have first come to the knowledge of the party after the time when it could have been used in the cause at the original hearing. Another qualification of the rule, quite as important and instructive, is, that the matter relied upon must not only be new, but it must be such as the party by the use of reasonable diligence could not have known. *Livingston v. Hubbs*, 3 John. Ch. R. 124; *Pendleton v. Fay*, 3 Paige R. 204.

In the bill under consideration, none of these necessary requisites, which under the rules of equity pleading, always govern bills of review, are to be found. And though the bill was treated and acted upon as a bill of review in the court below, both by the counsel and the court, it was not such a bill either in form or substance. 246 *But it must be regarded as it was treated here, by the learned counsel for the appellant, as an original bill impeaching the decree, as one that was obtained by fraud, that is, fraud in law if not in fact.

If the bill could be treated only as a bill of review, and was filed only as such, it is manifest, from what has already been said as to the nature and requisites of such a bill, that there was no error in the Circuit court

refusing the leave to file it. But the bill was filed at rules; and a demurrer was filed at rules. This demurrer was sustained; and afterwards the same bill was presented, and leave asked to file it as a bill of review; and the leave refused.

Treating it now (as it must be, from its nature,) as an original bill, impeaching the decree sought to be set aside, the question recurs, was there error in the decree of the court sustaining the demurrer? The material allegation in the bill of the appellant, by which she seeks to impeach the decree, is the fact that James C. Carter (her late husband), and the committee of Elizabeth Davis, the lunatic (who was her sister), was in fact the purchaser of the land at the sale made by the commissioner of the court; that the pretended purchase by Chapman was a mere sham; that, in point of fact, no money passed, and that Commissioner Southall simply passed receipts with Carter, and that he (Carter) was in fact the purchaser; and that, inasmuch as he was positively prohibited by special provision of the statute law from becoming the purchaser of the land of his lunatic, either directly or indirectly, therefore the conveyance by the commissioner to him was null and void, and no title passed; but that the legal and equitable title to said land remained in Elizabeth Davis, and at her death descended to her heirs at law.

She admits that she united in the deed which her husband executed to Garrett, trustee, to secure the debt to Barksdale.

But she does not pretend to allege, in 247 any *form, in a bill of unusual length, that either Garrett or Barksdale had any notice of the fact upon which she relies to impeach the decree, to wit: that Carter, and not Chapman, was the real purchaser; and that under the statute the sale was therefore void. No notice to them, actual or constructive, is charged in the bill. Nor is there anything in the proceedings or decree which she seeks to impeach, which could possibly bring home to them knowledge of the alleged legal fraud. The decree was based upon regular and proper proceedings. The report of a commissioner (that commissioner being a lawyer of high personal and professional character) informs the court that Chapman had become the purchaser, and he returns Chapman's bonds for the purchase money. He afterwards collects the bonds, and files with his second report the receipts of Carter, the committee, for the balance in full of the purchase money collected from Chapman. So that there was nothing even to put him on the enquiry as to the title of Carter.

Barksdale, therefore, stood on the high and impregnable position of a purchaser for valuable consideration, without notice, who had paid the purchase money, and secured the legal title. Admitting, then, all the allegations of the bill to be true, it is necessary to allege and prove notice of the alleged fraud, before the land in the hands of a bona fide purchaser for value

can be made liable to the claim of the appellant. In this case the bill fails to allege notice, either actual or constructive, and for that reason, if no other, the demurrer ought to have been sustained, and the bill dismissed. The doctrine that courts of equity will not grant relief against bona fide purchasers, without notice, has always been adhered to as an indispensable muniment of title. It is founded upon a general principle of public policy to protect and quiet lawful possessions, and strengthen such titles. It is wholly immaterial of what nature the equity is, whether it is founded

on a lien, or incumbrance, or
248 *trust, or a fraud, or any other claim;

for a bona fide purchase of an estate for a valuable consideration, without notice, purges away the equity from the estate, in the hands of all persons who may derive title under it, with the exception of the original party, whose conscience stands bound by the violation of his trust and meditated fraud. 1 Story's Eq. Jur. § 410; 9 Versey R. 24; 1 John. Ch. R. 219. Courts of equity act upon the conscience, and as it is impossible to attach any demand upon the conscience of a man who has purchased for a valuable consideration, without notice of any claim or demand against the estate, such a purchaser is entitled to the peculiar favor and protection of a court of equity. 2 Sugden on Vendors, 295. To so great an extent has equity favored purchasers bona fide without notice, that where the equitable title of the purchaser (who had got in the legal estate), depended upon a forged will, he was held entitled to the protection of the court. In Jones v. Powles, 3 Mylne & Keene, 581, 10 Eng. Ch. R. 310, cited in 2 Eq. L. C. 37, Sir John Leach, M. R., said: "Upon full consideration of all the authorities, and the principle upon which the rule is grounded, I am of opinion that the protection of the legal estate is to be extended, not merely to cases in which the title of a purchaser for a valuable consideration, without notice, is impeachable by reason of a secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor, or those under whom he claims, where such asserted title is clothed with possession, and the falsehood of the fact asserted could not have been detected by reasonable diligence."

In Boyce's ex'x v. Waller, 2 B. Mun. R. 91, it was held that a bona fide purchaser under a fraudulent conveyance, without notice of the invalidity of the deed, will be protected against defrauded creditors. See also Griffith v. Griffith, 7 Paige Ch. R. 315; and Galatian, &c. v. Erwin, Hopk.

249 R. 48. In the last named case, *where a guardian had purchased the estate of his ward, under a decree of sale fraudulently obtained (a case exactly in point), a purchase from the guardian, without notice of the defect, was held valid.

Authorities might be multiplied to any extent. It is sufficient to say that it has been the uniform course of decision in this

State, as well as in the other States of the Union, to hold that the bona fide purchaser of a legal title is not affected by any latent equity founded on a trust, fraud or incumbrance, or otherwise, of which he had not notice, actual or constructive. Moore v. Hunter, 1 Gilman's R. 317; Love v. Braxton, 5 Call 537; Basset v. Nosworthy, 2 Eq. Lead. Cas. 1, 22, and note, and cases therein cited. It is equally well settled, that the party seeking the aid of a court of equity for relief against a bona fide purchaser, must allege and prove notice. 2 Lead. Cas. in Eq. 55; Carr v. Callagan, 3 Littel R. 365.

Whatever hardships may sometimes result from these well settled doctrines of equity, founded upon a wise public policy to insure the security of titles, the claim of the appellant in this case does not appeal to the favorable consideration of a court of equity. She is seeking to set aside a deed made under a decree which she in effect alleges was fraudulently obtained by her husband; and yet admits that she united in that very deed with her husband, to an innocent purchaser who paid down \$15,000. And after the death of her husband, after the death of Chapman, the purchaser at the judicial sale, after the death of Southall, the commissioner, who sold the land to Chapman, after the death of all these, the only parties to the original transaction, she asserts her claim as heir at law against the land in the hands of a bona fide purchaser to whom she had united in conveying it, without the slightest allegation that he had ever had any notice of any defect in his title, actual or constructive. Equity will not lend its aid to enforce such a demand, but will
250 *always afford its protection to the innocent bona fide purchaser.

I am of opinion that the Circuit court did not err in sustaining the demurrer and dismissing the bill, and that its decree should be affirmed.

The other judges concurred in the opinion of Christian, J.

Decree affirmed.

251 *Pidgeon v. Williams' Adm'rs.

August Term, 1871, Staunton.

1. Attorney and Client—Liability for Money Collected.*—Attorneys at law are liable as ordinary bailees for money collected for their clients.
2. Same—Same—Confederate Currency.†—An attorney receiving in February 1862, Confederate currency, which was then the only currency, and very little depreciated, is not liable to his client for receiving such money, he not having forbade it.
3. Same—Collections—Deposited as "Collection Account"—Liability.‡—An attorney having received

*See generally, monographic note on "Attorney and Client" appended to Johnson v. Gibbons, 27 Gratt. 632.

†See Hale v. Wall, 22 Gratt. 433 et seq.; Douglass v. Stephenson, 75 Va. 751.

‡See Douglass v. Stephenson, 75 Va. 753; Parsley

Confederate currency for a debt due to his client, deducts his fees from the amount, and deposits the balance in a bank in good credit, not in his own name but to "collection account," an account in which he deposits all moneys collected by him for his clients, and on the book of the bank, the name of the client is written opposite the sum deposited for him. The client not calling for his money until the end of the war, when the bank has failed, the attorney is not liable for it.

4. **Same—Notice of Collection—Excused.**—The client living in Maryland, but the place of his residence being unknown to the attorney, though the client comes to the town where the attorney lives occasionally during the war, when the Federal forces have possession of it, but does not call upon the attorney or let him know he is there; the attorney is not liable for failing to give him notice that the money has been collected.

5. **Parol Evidence—To Prove Contents of Book.**—Though parol evidence of the contents of a book has been admitted, though objected to, without excuse for failing to produce the book, yet, if after exception has been taken, evidence is introduced showing good reason why the book cannot be produced, the error is thereby cured.

This was an action of assumpsit in the Circuit court of Frederick county, brought in January 1866, by Sam'l L. Pidgeon against Philip Williams, surviving partner of Barton & Williams, and on the death of Williams revived against his administrators. The object of the suit was to recover the sum of \$932.95, which Barton & Williams had collected for the plaintiff as
252 his attorneys. *Upon the trial the defendant introduced a witness who had been an officer in the bank at Winchester, in which the money collected by Barton & Williams was deposited, to prove an entry on the books of the bank called the "scratcher," of the deposit of the money with the name of Pidgeon written opposite to it; to which testimony the plaintiff objected, because the scratcher was not produced, nor its absence accounted for by the witness stating it was in Richmond; the court being under the erroneous impression that it had been proved or not questioned, that said scratcher was then among the records of the Circuit court of the United States at Richmond. But the court overruled the objection; and the plaintiff excepted.

After the foregoing exception was taken, and the witness had left the stand, the defendant, to account for the non-production of the scratcher referred to by the witness, offered evidence to prove that the said scratcher was in the hands of the Circuit court of the United States in Richmond, in the office of the commissioner in equity in that court. To which evidence the plaintiff objected, because the evidence does not sufficiently account for the non-production of the scratcher; and because, if it does, it should have been introduced before the con-

tents were proved. But the court overruled the objection; and the plaintiff again excepted.

There was a verdict for the defendant; and, thereupon, the plaintiff moved the court for a new trial, upon the ground that the verdict was contrary to the evidence. But the court overruled the motion; and the plaintiff again excepted; and on his motion the court certified on the record the facts proved on the trial. These are sufficiently stated in the opinion of the court. Pidgeon thereupon obtained a writ of error to the District court of appeals at Winchester; and the case was from thence transferred to this court.

253 *Arnett and Shields, for the appellant.

Conrad & Son, for the appellees.

ANDERSON, J., delivered the opinion of the court.

This cause is brought here by the plaintiff in error, who was plaintiff in the court below, upon a writ of error to the judgment of the Circuit court of Frederick county. The case is briefly this: The plaintiff placed in the hands of Barton & Williams, attorneys practicing law in the town of Winchester, large claims against one John Jolliffe, who resided in the city of Cincinnati, to be placed by them in the hands of other attorneys for collection. The debtor proved to be insolvent in Ohio, and the claims were returned. Barton & Williams were then employed by the plaintiff, in the latter part of 1860 or early in 1861, to collect for him as much of said claims as could be made by attaching a legacy left to the debtor in this State. For this purpose they sued out from the Circuit court of Frederick county, in the name of the plaintiff, a foreign attachment, returnable to April rules, 1861, and summoned Joseph Jolliffe, executor of Rebecca Jolliffe, as garnishee; who came forward and admitted liability to the said John Jolliffe, under the will of his testatrix, for the sum of \$1,000; and on the 21st of February 1862, paid to Barton & Williams, for the plaintiff, in Confederate States treasury notes, \$1,028.50. Barton died in 1863, and this suit was brought against Williams, the survivor, on the 25th of January 1866, for \$932.95, which he claimed out of the sum aforesaid, collected by his attorneys Barton & Williams. Upon the trial, the jury found a verdict for the defendant, upon which the court, overruling a motion for a new trial, rendered judgment against the plaintiff.

Barton & Williams deposited their client's money for him, in the Bank of the Valley of Virginia, at Winchester; which was then solvent. The bank afterwards
254 *failed, and the money was lost. The question is, are they liable?

It is well-settled law, that the responsibility of attorneys is that of ordinary bailees. If they have acted to the best of their skill, and with a bona fide and ordi-

v. Martin, 77 Va. 883. See principal case distinguished in McVeigh v. Bank, 26 Gratt. 202; Gregory v. Parker, 87 Gratt. 458, 12 S. E. Rep. 801.

nary degree of attention, they will not be responsible.

In this case there is no complaint of want of attention or skill in prosecuting the claim against Jolliffe, and in recovering so large a part of the debt against an insolvent debtor. But the complaint is, that they received payment in Confederate currency, and deposited it in a bank, of which they gave the plaintiff no notice, which afterwards became insolvent, and the money was lost.

Let us examine these several grounds of complaint. And first, as to receiving Confederate money. The proof is, that at the time the money was received, Confederate treasury notes were worth only ten per cent. less than gold, including exchange. That it was almost the only currency of the country, as good as any, and better than greenbacks, and that it was received and paid out by the banks, and was the currency generally, if not universally used, in all the transactions of life. That gold had ceased to be a currency, and was sold as a commodity; and that the attorneys could not have collected the debt at all, if they had refused to receive Confederate currency. The claim had been placed in their hands for collection, and it was their duty to collect it. They had not been instructed by their client not to receive payment in Confederate currency; and we are of opinion that it would be unreasonable to hold them responsible, under the circumstances, for having done so.

But if any liability had attached to them because of their receiving Confederate money in payment, which we do not think can be maintained, they were relieved from it, by depositing the money in a solvent bank, for their client. The bank by
255 its charter was bound to pay *the deposit in specie; and though that obligation was suspended by act of Assembly, it was still bound to pay in bank notes. So that it was a matter of indifference, what sort of currency the attorneys had received for their client. We think there is nothing in this objection.

But it is contended on behalf of the plaintiff in error, that the attorneys, by making this deposit in bank, ceased to hold the relation of bailees to their client, and thereby became his debtors; and in that character, liable to them now for the amount so deposited. And in support of this position, they rely upon the case of *Robinson v. Ward*, 12 Eng. Com. L. R. 28. In that case, C. J. Abbott says: "There are three modes which a person may adopt, when the money of others is placed in his hands: 1st. To keep it in his own house." If he does so, and does not mix it up with his own money for his own use, he is liable only as bailee. "2nd. To pay it in to his bankers, on his general account;" in which case he is liable, because there is no ear-mark, or anything to indicate that it is deposited as the clients' money. On the contrary, such a deposit imports a deposit of his own money on his own account; and 3rdly,

which the Chief Justice says is the correct mode, "to open a new account, in his own name, for this particular purpose." In this case he says, "he should have paid the money into a banker's hands, by opening a new account in his own name, for the credit of Robinson's estate, and so to ear-mark the money as belonging to that estate. Then it would have been kept separate."

It is unquestionably true, that a fiduciary is liable only as bailee if he keeps the money which is in his hands for another, at his house, or in his pocket, separate from his own, and not mixed up with it. But the Chief Justice says, that is not the best way. The right way is, to deposit it with a banker, in the name of the fiduciary, for the credit of his client. It is better that he should deposit it in a solvent bank
256 than to keep it at his own *house, because, in general, it is safer there. The law, we think, is correctly laid down by C. J. Abbott, in the case cited.

Let us apply it to the case in hand. The attorneys, the same day they collected the money, made an entry on their collection journal, stating accurately the amount received, and for whom; namely, "Pidgeon," the name of their client, the plaintiff. They deducted their commissions and fees, and the balance, \$932.95, they enter, "deposited February 21, '62." The proof is, that the same day they deposited \$932.95, not the whole amount they had collected, but Pidgeon's part of it, separated from their own, in the Bank of the Valley of Virginia, at Winchester. Not on their private account; (each of them had private accounts in said bank), but to the credit of "collection account." And that this amount, so deposited, was entered upon the bank book, called the scratcher, and marked "Pidgeon." This, it seems to me, comes substantially up to the requirement of the rule, as laid down by Chief Justice Abbott. They evidently did not appropriate a dollar of their client's money to their own use, by mixing it up with their own. They separated their own from it, as entered upon their collection journal, and set apart their client's money to itself, which they deposited in bank, in their own name, for their client, ear-marked "Pidgeon:" thus showing their purpose not to mix up this money with their own, but to set it apart from their own, and to deposit it in a safe and solvent bank, as their client's money. The proof is, that the bank in which they made the deposit was in as good, if not better condition, than any bank in the United States; that they kept their individual, private accounts in it, and had on deposit, to the credit of their general collection account, some \$15,000, when the war ended, and the bank failed.

But it is contended for the plaintiff, that, inasmuch as the money so deposited,
257 was mixed up by the bank with *its other moneys, the attorneys who had made the deposit, by this act of the bank, ceased to hold the relation of bailees to their client, and became his debtors, and

are consequently liable to him for the whole amount. It is not easy to perceive how their relation of bailees ceased, when there was no mixture of their client's money with their own for their use; or how the bank, by mixing up the money deposited by the attorneys, as their client's money, could change the relation of the attorneys as bailees to that of debtors. If an attorney deposits his client's money in bank, as his client's money, in a way that precludes him from demanding a return of the identical dollars or bank notes, or other notes of circulation, constituting currency, we cannot perceive how he thereby ceases to be the bailee of his client, and becomes his debtor. The whole difficulty is resolvable into this question, can an attorney only make a special deposit in bank of his client's money, for his client, without making himself liable as debtor? We can perceive no reason why a general deposit, any more than a special deposit, by an attorney of his client's money, if deposited as his client's money, can terminate the relation of bailee, and constitute him the debtor of his client. It is not the mixing up of the money by the bank with its own money, so that the identical dollars or notes deposited cannot be ascertained, which terminates the relation of the depositor as bailee of the person whose money he has deposited, and constitutes him his debtor; but it is the conversion or appropriation of the money to his own use which changes the relation. When money is deposited by a bailee for his bailor, the bank becomes debtor to the depositor for the amount deposited, in dollars, and in general it would be advantageous to the person for whom the money was deposited, that it should be so mixed up with other moneys of the bank that the identical notes deposited could not be ascertained, and that the deposit

258 should have been so made *that the bank would not be entitled to return the identical money deposited. For as we have seen, this bank is, by its charter, bound to pay its deposits in gold. But whether a general deposit be most to the advantage of the client or not, the attorney depositing cannot be held liable as debtor to his client unless he has made the deposit as his own money, or in a way evidencing an appropriation to his own use; as he does when he mixes the money with his own, or deposits in bank upon his private account, as his own money. But when he deposits it as the money of his client, not upon his private individual account, indicative of an appropriation to his own use, but upon his general collection account, indicating that he has not appropriated it to his own use, and has an entry made upon the book of the bank denoting that it is the money of his client, in such case, he cannot be regarded as the debtor of his client, because he has not converted or appropriated his money to his own use; and there is no consideration to constitute the relation of debtor and creditor. The client's money is there on deposit in bank, ready for him whenever

called for. We are of opinion, therefore, that the deposit of the plaintiff's money in bank, by Barton & Williams, his attorneys, as his money, does not evidence an appropriation of the money to their own use, and which it is evident from their whole transaction, they had no purpose to do; and did not, therefore, constitute them debtors to their client, nor change their relation of bailees.

But it is further contended, that they have not discharged their duties as bailees, and have thereby become liable for the money which was in their hands. And this is claimed upon the ground, that they deposited the money in bank, and did not notify the plaintiff that it was there on deposit; and by reason thereof it remained in bank until the bank failed, and the money was lost. It is not pretended that the attorneys derived any profit from it; or that they 259 are chargeable with mala fides; *but that they were guilty of such gross negligence as would make them liable.

We are of opinion, that it is undoubtedly the duty of attorneys, when they have collected money for their clients, to give them notice, and to pay it over to them promptly, whenever called for or demanded. But if the client has notice of it, it is unnecessary for the attorneys to go through the unmeaning ceremony of giving him notice of what he was already informed. And even when the client is not informed of the fact, circumstances may excuse the attorney for the failure to give notice; as, for example, if his client has left the country, or his whereabouts is not known to the attorney, or he has not the means of communicating with him by reason of a state of war, the relations of one being with one of the belligerents, and of the other with the other belligerent, so that intercourse and intercommunication between them is interrupted. Now it seems that at the very time this money was received by the attorneys and deposited in bank, their client was out of the State, and the attorney knew not where, though he was in the State of Maryland. Of course the notice could not then be given him. It is also a fact of public history, that from that time until the failure of the bank, the district of country in which both of these parties resided was the theatre of a devastating war between the States; and that it was sometimes under the dominion of one of the belligerents, and sometimes under the power of the other. It seems that the plaintiff was passing from Virginia to Maryland, and from Maryland to Virginia, according as one or the other belligerent was in the ascendant in the district of country where he and the defendant resided. When the Federals were in the ascendant, he was frequently in Winchester, was marketing there, and was frequently in the vicinity of Mr. Williams' office and dwelling. There is no evidence in the cause that Barton or Williams ever saw him after the money was collected, or had any notice 260 *or information of his return from Maryland, where he was when the

deposit was made in bank, so that they could give him notice. But if they were aware of his return, they had every reason to believe that he was informed of the collection and deposit of the money for him; especially as it was the general usage in that section for clients who lived in the neighborhood of Winchester, and whose business or other relations frequently brought them there, to call upon their attorneys to enquire about claims which had been placed in their hands for collection. He having employed the agency of this firm to have these claims collected in Ohio, which proved unavailing on account of the insolvency of his debtors, and afterwards, as early as sixty-one, having employed them to proceed by foreign attachment to subject a legacy due his debtor in Virginia, it is natural that his attorneys should presume, in this state of the case, from his not coming to enquire about it, either that he was already informed of it and did not wish to take the money out of bank, or that he continued out of the country. But this was a question of fact properly cognizable by the jury; and it was proper for them to consider the facts and circumstances, and to decide what weight should be attached to them.

The fact that the executor of Rebecca Jolliffe had funds in his hands belonging to his debtor, was known to the plaintiff; and he employed Barton & Williams, his attorneys, to institute a foreign attachment to subject them to his debt. And he was doubtless aware that they sued out an attachment in his name for that purpose. How far the motives and principles which usually actuate and govern men would have prompted the plaintiff to enquire as to the result of that proceeding, if not of his attorneys, of others who could inform him; and having had so many opportunities, by walking a few steps, to enquire of his attorneys in relation to it, how far his not

having done so would justify the conclusion that he *knew all about it, and needed no further information, and that he did not call for the money because he did not want it, and preferred to wait until the troubles of the country were over before he called for it, we are of opinion that all these facts and circumstances and enquiries properly belonged to the province of the jury, and that it was for the jury to weigh them and to draw their conclusions from them; and we cannot say that their conclusions were erroneous. On the contrary, we are of opinion that their conclusions were just and right, and that they do raise a presumption, amounting almost to moral certainty, that the plaintiff was informed as to the state and condition of his debt.

The only remaining question is as to the admissibility of evidence, which was excepted to by the plaintiff. We think it would have been competent for the defendant to have proved by oral testimony, that when he deposited the money in bank, he instructed the bank officer to credit it to

Barton & Williams' general collection account, for Pidgeon, and that it was so entered on the book of the bank called the "scratcher;" and that the witness might refer to the book before, or at the trial, to refresh his memory.

But it seems that the witness' memory was not revived by referring to the book, and that he spoke not from memory but from the entry, which he had seen in the book at a previous trial, and which he knew to be in his hand writing. The book itself was the best evidence to prove its contents; and secondary evidence was incompetent to prove it, unless the non-production of the book was satisfactorily accounted for; which ought to have been shown before the evidence of its contents was given to the jury. But it seems that this was not done until afterwards. The judge admitted the evidence, under an erroneous impression, that the fact which was relied on to excuse its non-production, had been proved, or admitted. The error was soon discovered, and the judge then heard *the

preliminary evidence, after the evidence in chief had been given to the jury; to which the plaintiff excepted. And the question now, is, was this error? After the error was discovered, either party might have moved the court to exclude it, and after it was excluded from the jury, it would have been competent for the defendant then to offer the preliminary evidence to account for the absence of the book; and this being satisfactory to the court, he might then have introduced the same evidence in chief of the contents of the entry, which it would not have been error in the court to admit. What the court did was substantially, and in effect the same. We are, therefore, of opinion that there is no substantial error in the ruling of the court, as shown by the second bill of exceptions, which cured the previous error, that the court, it seems, had fallen into from misapprehension.

For the foregoing reasons, we are of opinion to affirm the judgment of the Circuit court.

Judgment affirmed.

263 *Coffman v. Sangston & als.

August Term, 1871, Staunton.

1. Appellate Practice—Decree by Default—Reversal—Notice of.*—There is a decree by default against the defendant, and he gives notice to the counsel of the plaintiff that he will move the judge in vacation to reverse the same, and to make such order in the cause as might be deemed just and proper. This notice is not served on the plaintiffs, but on their counsel in the cause. The judge may properly

*Appellate Practice—Decree by Default—Reversal—Notice of.—The proposition in the first head-note of the principal case, that a motion in vacation to reverse a decree by default will not be entertained on the ground that the notice was too vague, was quoted with approval in Board & Co. v. Parsons, 22 W. Va. 311, citing the principal case.

In Laidley v. Bright, 17 W. Va. 801, the principal

refuse to entertain the motion, on the ground that the notice was too vague and indefinite to warrant the court to amend or reverse the decree, and also because it had not been served on the plaintiff. And for the same reasons the appellate court may dismiss the appeal as improvidently allowed.

2. Chancery Practice—Plaintiff No Interest in Subject Matter.—If it appears from the bill that the plaintiff has no interest in the subject matter of the suit, the objection may be made by demurrer. If this does not appear on the bill, the objection may be taken by plea, or at the hearing of the cause. But if the objection is not taken until the hearing, if it appears from any part of the record that the plaintiff has an interest in the subject matter of the suit, the appellate court will not reverse the decree because such interest is not stated in the bill.

case it seems was doubted. The court said: "The fourth ground of error assigned in the notice of this motion was, that this writing or note was not payable at a particular bank. On the face of the writing it was payable at the Bank of Huntington; and there is apparently no basis for this assignment of error. But in argument before this Court it is insisted, that the Bank of Huntington is an unincorporated bank, and though there is no evidence of this in the record, and the evidence on which the court acted, when it entered the original judgments, does not appear, yet it is said, that this court knows judicially what banks have been incorporated in this State, and thus judicially knows, that the Bank of Huntington is not an incorporated bank.

"In answer to these positions it is urged, that the notice of said motion did not inform the parties fairly, that this fact, that the Bank of Huntington was not a chartered bank, would be urged as a reason for reversing said judgment, nor does the record show, that it was relied on, when the motion was acted on by the circuit court, and that unless a party, who asks a court to reverse a judgment by default on notice and motion under the statute, specifies in his notice a particular ground of objection, he cannot rely upon such ground before the circuit judge or in the Appellate Court.

"The case of *Coffman v. Sangston*, 21 Gratt. 263, strongly supports these views. I am however not satisfied in my own mind, that the views taken by the court in that case are sound. And if it was necessary in this case to consider this alleged error and several others, which were not mentioned in the notice except as included under the phrase 'errors apparent on the face of the record,' I would consider the point, whether this court has a right to look into such errors apparent on the face of the record, but which were not specifically mentioned in the notice. But this is itself an important question, and as it is really unnecessary for us to consider any of these alleged errors not specifically named in the notice, we will not do so, as our right to do so may be regarded as questionable."

For the proposition, that a decree rendered on a bill taken for confessed may upon appeal be dismissed as improvidently allowed, for the reason that no proper motion was made and overruled by the court below; but inasmuch as the parties have submitted the case upon its merits and a decision here will terminate a protracted controversy, it is deemed most advisable to decide various questions presented by the record, the principal case is cited and followed in *Com. v. Levy*, 23 Gratt. 31.

3. Same—Addition of Parties—Amended Bill.*—When the plaintiff has an interest in the subject matter of a suit, the bill may be amended, and other persons having the same interest, may be joined as co-plaintiffs.

4. Same—Same—Same.—S sues C in equity. In the bill he describes himself as secretary of the B society, and says that he placed in the hands of C certain debts for collection, some of which C had collected; and that C refused to pay over the money or account with S. It may be presumed from these averments that S had an interest in the subject matter of the suit; and the bill may be amended making other members of the society co-plaintiffs, and averring the interest of S and the other plaintiffs in the subject.

5. Chancery Jurisdiction—Unincorporated Association.†—B society is a voluntary society, composed of between four and five hundred members. Some of them may sue C in equity for the benefit of all, for an account and for payment of the money collected, and the return of the evi-

dences of debts unpaid. And the court has jurisdiction on the ground, either of discovery or from the difficulty of proceedings at law.

6. Same—Accounts—Agents.‡—Courts of equity have jurisdiction in matters of account involving the transactions and dealings of trustees and agents, wherever it appears that a discovery is necessary, or there are mutual accounts between the parties.

***Chancery Practice—Addition of Parties—Amended Bill.**—The principal case is cited, for the following proposition, when the plaintiff has an interest in the subject matter of a suit, the bill may be amended and other persons having same interest may be joined as co-plaintiffs, in the following cases: *Burlew v. Quarrier*, 16 W. Va. 142; *Belton v. Apperson*, 26 Gratt. 222. See, in accord, *Sillings v. Bumgardner*, 9 Gratt. 273.

†Chancery Practice—Unincorporated Association.—As authority for the proposition laid down in the fifth head-note of the principal case, that one member of a voluntary association may sue in equity for the benefit of himself and all the other members, the principal case was cited and fully approved in *Perkins v. Seigfried*, 97 Va. 449, 34 S. E. Rep. 64; *Sangston v. Gordon*, 22 Gratt. 764. See also, *Berkshire v. Evans*, 4 Leigh 223.

‡Chancery Practice—Accounts—Agents.—For the proposition that courts of equity have jurisdiction in matters of account involving the transaction and dealings of trustees and agents, wherever it appears that a discovery is necessary, or there are mutual accounts between the parties, or the remedy at law is not plain, simple and free from difficulty the principal case is cited in the following cases: *Merchant's Bank v. Jeffries*, 21 W. Va. 508; *Yates v. Stuart*, 30 W. Va. 130, 19 S. E. Rep. 425; *Penn v. Ingles*, 83 Va. 71; *Vilwig v. B. & O. R. Co.*, 79 Va. 455; *Simmons v. Simmons*, 33 Gratt. 456; *Huff v. Thrash*, 75 Va. 546. See, in accord, *Berkshire v. Evans*, 4 Leigh 223; *Zetelle v. Myers*, 19 Gratt. 62, and *note*; *Salamone v. Keiley*, 80 Va. 86; *Hickman v. Stout*, 2 Leigh 6; *Sturtevant v. Goode*, 5 Leigh 83; *Tyler v. Nelson*, 14 Gratt. 214; *Thornton v. Thornton*, 31 Gratt. 212; *Lafever v. Billmyer*, 5 W. Va. 33; *Petty v. Fogle*, 16 W. Va. 497; *Richmond, etc., R. Co. v. Kasey*, 30 Gratt. 218; *Tillar v. Cook*, 77 Va. 477; *Segar v. Parrish*, 20 Gratt. 680. See the principal case cited and distinguished in *Goddin v. Bland*, 87 Va. 709, 13 S. E. Rep. 145.

or the remedy at law is not plain, simple and free from difficulty.

7. Appellate Practice—Taking Depositions—Presumption of Notice of.—Though the notice for taking depositions, and taking the account by the commissioner, is not filed, yet, as the record says the depositions were taken pursuant to notice, and it appears that the defendant claimed commissions before the commissioner, it will be presumed in the appellate court, in the absence of proof to the contrary, that notice was given.

8. Same—Report of Commissioner—Presumption of Regularity.*—The report of a commissioner having been completed on the 10th of April 1869, and the decree made on the 22d of October following, in the absence of anything showing the contrary, it will be presumed by the appellate court, that the report and account were returned and acted on according to the requirements of the statute.

This was a suit in equity in the Circuit court of Rockingham county, brought by Lawrence Sangston against Samuel A. Coffman. The bill stated that Lawrence Sangston, secretary of the Baltimore Agricultural Aid Society, about the 18th of July 1866, placed, for collection, in the hands of S. A. Coffman of the county of Rockingham, certain debts owing by parties in said county, a list of which he files as an exhibit. That Coffman had collected a portion of these debts, but to what amount, or of which of the debtors, the plaintiff was not informed. That plaintiff had repeatedly applied to Coffman and requested him to come to an account for the money he had collected upon the said debts, and pay over to the plaintiff the amount he had received, and to deliver to him all the bonds and notes not collected; but that Coffman had not complied with his request, and refuses to do so. And making Coffman a party defendant, he calls upon him to answer; he asks for an account, and for payment of the amount collected, and the delivery of the other bonds and notes not collected to the plaintiff.

265 *This bill was taken for confessed in June 1868. In July 1868, Lawrence Sangston, George S. Brown and seven others filed an amended bill in the cause. After setting out the statements of the original bill, and that it had been taken for confessed, they state the plaintiff, Lawrence Sangston, was secretary of the Baltimore Agricultural Aid Society, and a

member thereof, and was invested with full authority to collect the debts due the said society, for the benefit of said society; though in fact the debts placed in the hands of Coffman were due to the members of the society, who are very numerous, numbering some four or five hundred. That the society was organized for the purpose of furnishing to the people of the Southern States farming implements, seeds and other necessities for agricultural purposes; that the funds were raised by voluntary subscriptions; that the society was never incorporated; that local agents were appointed in different counties to endorse and forward applications for such articles as were ordered, and to receive, collect and remit to the plaintiff, Lawrence Sangston, secretary of the society, the notes of the individuals who purchased such implements, for the payment of the price thereof; the proceeds of which sales were for the benefit of the members of said society. That Coffman had failed to pay over the moneys collected by him, or to account or deliver the notes; and as the members of the society are too numerous to sue in their own names, the plaintiffs sue for themselves and all other members of the society. The prayer was the same as in the original bill.

In September 1868, the cause was referred to a commissioner to settle the account of Coffman as agent for the collection of the debts in the bill mentioned, and to ascertain what money, if any, he has collected, and what remains uncollected; and the commissioner was authorized to examine any of the parties under oath.

On the 10th of April 1869, the commissioner returned his report. From this report it appeared that there had been placed in the hands of Coffman for collection, bonds amounting to, of principal money, \$6,041.38. That he had collected, after allowing him all his credits, \$4,563.79; and the bonds and notes remaining uncollected amounted to \$2,045.67, of principal. One of the bonds placed in the hands of Coffman was that of John P. Brock and Joseph Layman, for \$3,816.38. Brock, in his deposition, taken before the commissioner, says that he had paid to Coffman about \$3,700, as near as he can state; but he will furnish the commissioner with an aggregate statement of the amount, to be taken as a part of his answer to this question. That statement does not appear on the record, nor is there any reference to it. Coffman is charged with the \$3,700. The other collections by Coffman, and with which he is charged, are proved by the parties to the bonds who made the payments.

No notice of taking the depositions is filed, but the commissioner returns them, with his report, and says in the caption, depositions taken pursuant to notice; and he refers the question of commissions upon his collections, made by Coffman, to the court; and it appears from the decree as well as from the bonds themselves, that Coffman had filed the bonds he had not col-

*Chancery Practice—Report of Commissioner—Exception in Court below.—It has been uniformly held by this court that objections to a decree for errors in the report of a commissioner, not appearing on the face of it, cannot avail here unless founded on exceptions taken to the report in the court below. *Simmons v. Simmons*, 33 Gratt. 451; *Liberty Savings Bank v. Campbell*, 75 Va. 534; *Peters v. Neville*, 26 Gratt. 549; *Coffman v. Sangston*, 21 Gratt. 263; *Cole v. Cole*, 28 Gratt. 365; *Wimblish v. Rawlins*, 76 Va. 48; *Ashby v. Bell*, 80 Va. 811; *Nickels v. Kane*, 82 Va. 309; *McComb v. Donald*, 82 Va. 908; *Cralle v. Cralle*, 84 Va. 198, 6 S. E. Rep. 12; *Morrison v. Householder*, 79 Va. 627; 2 *Robinson's Old Pr.* 383; *Shipman v. Fletcher*, 91 Va. 490, 22 S. E. Rep. 458.

lected with the commissioner. The deposition of Sangston was filed in the cause, and it sustains the allegations of the bill. This deposition was taken under a commission, and the notice is returned with it.

The cause came on to be heard on the 22d of October 1869, when the amended bill was taken for confessed, and the court made a decree that the complainants recover against Coffman the sum of \$4,378, with interest from the date of the receipt, upon the sums received by him respectively, with costs.

On the 30th of November Coffman addressed a notice to the counsel for the plaintiffs, which was served upon
267 *them on the same day, in which he says, that on a day specified, he will submit a motion in chambers, at Winchester, Va., before the judge of the Circuit court of Rockingham county, for the reversal of the decree above mentioned, and to have such order made therein as may be deemed meet and proper by the judge. The notice does not specify any errors in the decree. On this notice the motion was made, and overruled by the judge, on the ground that there was no error apparent on the record, for which the decree ought to be reversed. Coffman then applied to a judge of the District court of appeals at Winchester for an appeal; which was allowed: and the case was afterwards transferred to this court.

Leggitt and Harris, for the appellants.

Woodson and Harnsberger, for the appellees.

STAPLES, J. This is an appeal from a decree of the Circuit court of Rockingham county, in a cause wherein the appellees were complainants, and the appellant was defendant. This decree having been rendered on a bill taken for confessed, the defendant, in vacation, moved the judge of said court to reverse the same, and to make such order in the case as might be deemed just and proper. The notice of this motion was not served upon either of the parties plaintiff, but upon the counsel in the cause. It did not specify the errors complained of, nor in any manner disclose the character of the decree the defendant desired. Although the motion was overruled upon the ground there was no error apparent on the record, the judge of the Circuit court might properly have refused to entertain the application, upon the ground the notice was not served upon the proper parties, or was too vague and indefinite to warrant the interposition of the court either in reversing or amending the decree.

And this court might now dismiss
268 the appeal as improvidently *allowed, for the reason that no proper motion was made and overruled by the court below; but inasmuch as the parties have submitted the case upon its merits, and a decision here will terminate a protracted controversy, it is deemed most advisable to decide the various questions presented by the record.

The first ground of error assigned is, that

the plaintiff in the original bill showing no interest in the subject matter of the suit, could not sue at all; and this defect could not be cured by filing an amended bill in the name of other parties. It is stated in the original bill that the plaintiff placed in the hands of the defendant for collection the various debts which constituted the matter in controversy; that the defendant had collected a large portion of them, to what extent was not known; that the defendant had failed to render any account of his transactions, although repeatedly required so to do by complainant. The court might justly presume from these averments taken as confessed, that the plaintiff was individually interested in these debts; and such presumption would not be repelled because complainant describes himself as "Secretary of the Baltimore Agricultural Aid Society."

It is averred in the amended bill, that the plaintiff Sangston is a member of this society, and that the said debts were due to the members of said society: which averment must also be taken as true. According to the well settled rules of equity pleading, if the fact of the plaintiff having no interest appears on the face of the bill, advantage should be taken of it by demurrer. If it does not appear on the bill, the proper mode of making the objection is by plea: and it may be made even at the hearing. If, however, the cause proceeds to a hearing without such objection, and it appears in any part of the record that the plaintiff is interested in the subject matter of the suit, certainly an
269 appellate court would not *reverse the decree because such interest is not stated in the bill.

It is insisted, however, that an amended bill cannot be filed in the name of parties plaintiff not mentioned in the original bill. It is the constant practice of the courts of chancery to allow amendments of bills by the introduction of new plaintiffs, where the purposes of justice require it. In *Maughan v. Blacke*, 3 Ch. Appeal Cases, 32, leave was given at the hearing to amend, not only by adding the true parties as co-plaintiffs, but by inserting allegations to show that the first plaintiff had a beneficial interest in the debt which was the foundation of the suit. And in *Sillings & als. v. Bumgardner*, 9 Gratt. 273, this court held, that, although a suit could not be maintained by a plaintiff having no interest, and in such case the objection could not be removed by the introduction of other parties having interests, yet, if it appears that the plaintiff has an interest, though in a different character from that in which he sues, the descriptive words may be stricken out, and the suit may proceed in his name, and that of his co-plaintiffs brought before the court by an amended bill. It would seem that these authorities are decisive of this question.

Another ground of error is, that the plaintiffs have a plain and adequate remedy at law, by action of assumpsit; and there

is not the slightest pretext for resorting to an equitable forum. The jurisdiction of courts of equity in matters of account involving the transactions and dealings of trustees and agents, is now well established. Not that the bare relation of principal and agent justifies the interference of the court in every case; but wherever it appears that a discovery is necessary, or there are mutual accounts between the parties, or the remedy at law is not plain, simple and free from difficulty, the equitable jurisdiction attaches. In *Hemings v. Pugh*, 9 Jur. N. S. 1124, it was held, that if the defendant, as

270 agent, has received sums of money for the plaintiff, the *particulars and amount of which are unknown, a bill praying discovery and account will be maintained. In *Berkshire v. Evans*, 4 Leigh, 223, a bill was filed on the part of the members of a private unchartered company, carrying on the business of a bank, against their agent and cashier, charging that he had appropriated part of the funds, and praying an account of the agency: and the jurisdiction of the court was distinctly recognized and affirmed. In the present case, it is alleged that the members of the society are too numerous to sue in their own names, numbering from four to five hundred. In an action at law all these members must have joined as plaintiffs. The difficulties in the way of properly ascertaining their names, and of carrying on the suit, when so ascertained, are too palpable to require argument or illustration. The practice, however, in courts of equity, of permitting one or more persons to represent, in one suit, all who have a community of interest, removes these difficulties, and enables the court, in the present case, speedily to adjudicate the rights of the parties, without the slightest danger of injustice.

Another ground of error assigned is, that the court rendered its decree upon depositions taken and a commissioner's report made without notice to the defendant; and which does not appear to have been returned to the court thirty days before the term at which the decree was rendered. It is stated in the record, that the depositions were taken pursuant to notice; and there is nothing to show to the contrary. It also appears that the defendant was apprised of the taking of the account; at least it is to be so inferred, as he seems to have claimed his commissions before the commissioner charged with the settlement of the account; and he also surrendered certain bonds which he claimed not to have collected. The report was completed on the 10th of April 1869, and the decree was rendered on the

271 22d of October thereafter. It is therefore to be presumed, in the *absence of evidence showing otherwise, that the report and account were returned and acted on according to the requirements of the statute. But whatever force there might have been in these objections if urged in the court below, no rule is better established than that they cannot be successfully made

for the first time in this court. See *Stephoe v. Read*, 19 Gratt. 1; *Hill & als. v. Bowyer & als.* 18 Gratt. 364.

Another ground of error assigned is, that the defendant is improperly charged with thirty-seven hundred dollars, part of the Brock and Layman bond, because there was no satisfactory proof of the payment of that sum. The objection is founded on a misapprehension of the testimony. The obligor, Brock, expressly states that about \$3,700 of the bond were paid to the defendant, and he was ready at any time to pay the balance due. The defendant surrendered other bonds and evidences of debt as uncollected; if the charge was improper, it was easy to have surrendered this one also, and thus show the amount uncollected.

The last and only remaining assignment of error is, that the bill shows upon its face that the defendant had no power to fill the blanks in the bonds or notes with the name of the payee; and that said power alone vested in Sangston, and it had not been exercised by him. I cannot see the force of this objection. The defendant is only charged with the sum of \$4,378, the amount actually collected, exclusive of the credits to which he was entitled. Having received the money of the plaintiffs, he is bound to account for it; and it cannot be a matter of the slightest importance whether he did or did not have the power to fill the blanks in the bonds; nor can he be heard to say that the transaction for that reason did not constitute an agency.

I have thus noticed the various objections suggested to the proceedings and decree of the Circuit court. Many of them would have been wholly unavailing if 272 *urged in that court. Others might have been readily obviated, if there made; and, consequently, cannot be considered by this court. It can make no difference that the decree is by default. The defendant can derive no advantage from his own contumacy and neglect in failing to appear and take care of his interests. Being admonished of the institution of the suit by the service of process, it was his duty to appear and defend it. I do not mean to assert that the defendant cannot take advantage of palpable errors apparent on the face of the proceedings: It is clear that he may, notwithstanding his failure to appear. It is equally clear, that if the averments contained in the bill are not distinct and positive, the plaintiff is required to establish his demand by satisfactory evidence. Should he fail to furnish such evidence, the defendant may avail himself of the objection in an appellate court, notwithstanding the bill has been taken for confessed.

In this case it is true the bill contained no specific allegations as to the amount collected by the defendant; but an account was taken; the certainty requisite to a proper decree was afforded by the proofs; and the defendant rendered liable for the amount ascertained to be due. In any aspect of the case, it does not appear that

any injustice has been done him. For these reasons, I am of opinion the decree should be affirmed.

The other judges concurred in the opinion of Staples, J.

Decree affirmed.

273 *Stover, Assignee, v. Hamilton & al.

August Term, 1871, Staunton.

Bonds—Payable on Demand—Case at Bar.*—On the 15th of November 1862, H executed his bond to S, for \$600, payable on demand, it being for money borrowed, upon a condition, inserted at the instance of H, that no interest will be required until the money is demanded, and then a reasonable time to be given to pay; interest to run from the demand. The loan was in Confederate money. **HELD:**

1. **Same—Same—When Debt Can Be Paid.**—H had the right to pay the debt at any time, though S made no demand.
2. **Same—Payable in Confederate Currency.**—It was a debt payable in Confederate currency, and therefore not usurious.
3. **Same—Time of Scaling.**†—It is payable by H at any time after its date, and therefore the date is the proper period at which to fix the scale of depreciation.
4. **Same—Secret Intention of Obligee—Effect of.**—Though S had a secret intention not to make a demand for the money until there was a better currency, as H had the right to pay at any time, this secret intention of S cannot change the construction and effect of the bond.

This was an action of debt in the Circuit court of Augusta county, brought in June 1866, by Abram Stover, assignee of Jacob

***Bonds—Payable on Demand.**—In McClung v. Ervin, 22 Gratt. 524, the principal case was cited as authority for the proposition that a contract to pay when the "seller demands the same" is, in legal effect the same as to pay on demand. See also, Bowman v. McChesney, 22 Gratt. 611.

In Moon v. Richardson, 24 Gratt. 221, the court said: "We think there can be no doubt about the law of the case. It has been plainly settled by recent and repeated decisions of this court, and is no longer open for discussion, that a bond payable 'on demand' is payable presently without demand; that the right of the obligor so to pay it, and the duty of the obligee to receive the payment, is not at all impaired by restrictions on the obligee's right to immediate payment imposed for the benefit of the obligor, either on the face of the bond or by contract *de hors* thereto: that in all such cases it is at the option of the obligor either to avail himself of the restrictions or to pay the debt at any time after date, as if there were no restriction; and that such bond, if given for a loan of, and solvable in Confederate States treasury notes, must be scaled as of its date. This is now the settled law of this court. Stover, Assignee, v. Hamilton & al., 21 Gratt. 273; Omohundro's Ex'or v. Omohundro, 21 Gratt. 626; Bowman v. McChesney, 22 Gratt. 609."

†**Same—Time of Scaling.**—See *foot-note* to Moon v. Richardson, 24 Gratt. 219.

See generally, monographic note on "Bonds."

Stover, against John E. Hamilton and John Hamilton, to recover the amount of a bond for six hundred dollars, executed by the Hamiltons to Jacob Stover on the 15th of November 1862. The defendants pleaded usury in the bond, and also that the writing was given for a loan of Confederate treasury notes by the plaintiff's assignor to John E. Hamilton, which notes at the date of the loan were not worth more than one-third or one-fourth of six hundred dollars. On

these issues the case was tried; and 274 the parties dispensing *with a jury, submitted the whole matter of law and fact to the court. And the court rendered a judgment for the plaintiff for two hundred and forty dollars, the value of the Confederate notes at the date of the bond, and interest thereon from the 17th of October 1865, the date of the demand of payment. The plaintiff thereupon excepted to the opinion of the court, and on his motion the evidence was certified upon the record; and the plaintiff obtained a supersedeas.

The bond on which the action is founded, is as follows: \$600. On demand, we or either of us, bind ourselves, our heirs, &c., to pay Jacob Stover the just and full sum of six hundred dollars, without interest, it being for money borrowed on the following conditions, that no interest will be required until the money is demanded, then a reasonable time will be given by said Stover to pay the above sum, when interest will begin and continue from the demand till paid. Given under our hands and seals, this 15th day of November 1862.

Jacob Stover and John E. Hamilton were the only witnesses. In November 1862, Stover was a farmer living in Augusta, over the military age, and the defendant, John E. Hamilton, was a young man, and a soldier in the Confederate army. Stover having Confederate notes in his possession, which he had taken for hay, which he had sold, and in which he had no confidence; and Hamilton having borrowed some Confederate money which he wished to return, and learning that Stover had some money which he wished to lend, Hamilton applied to Stover to borrow it; and Stover agreed to lend it in Confederate notes. But Hamilton being in the army, feared that Stover might call on him when it would not suit him to pay, and therefore declined to borrow unless Stover would agree to charge no interest until he demanded the money, and to give him a short or reasonable time after demand, to raise the money; and to this

Stover agreed; and this provision of 275 *the bond was inserted at Hamilton's instance. Hamilton says he received Confederate money, and expected to pay it in a short time in the same currency; but nothing was said by either party, as to the kind of currency in which the borrowed money was to be returned. Stover says he did not expect to get gold or specie, but did not intend to make a demand until the Confederacy failed, or until Confederate notes ceased to circulate, and until good money should prevail; though he did not

communicate this intention to Hamilton. At the time he took the bond he intended to take a bond upon which he could demand good money to the same amount of the \$600 of Confederate treasury notes; which at the time he knew to be worth only \$200 in gold. He demanded payment of the money on the 17th of October 1865; and in May 1866 Hamilton offered to pay him in legal tenders, what he supposed was the true value of the bond, viz: \$200 in gold, converted into legal tender currency; amounting to between \$275 and \$300, which Stover refused to receive.

Fultz, for the appellant.

Cochran, for the appellees.

ANDERSON, J., delivered the opinion of the court.

On the 15th day of November 1862, the defendant, John E. Hamilton, borrowed from the assignor of the plaintiff, six hundred dollars in Confederate States treasury notes, for which he and his father, John Hamilton, gave their joint and several bond. On the 30th of June 1866, the plaintiff in error brought suit against the defendants, upon this bond, in the Circuit court of Augusta, and obtained judgment for \$240, with interest from the 17th of October 1865, and costs. And the cause is brought here by the plaintiff upon a writ of error to that judgment.

The plaintiff insists that the Circuit
276 court erred in *rendering a judgment for less than the face of the bond. He contends that although the consideration of the bond was depreciated Confederate currency, worth at the time in relation to gold as a standard of value, only one dollar for three, upon the authority of *Boulware v. Newton*, 18 Gratt. it was a contract of hazard, and he is entitled to the sum nominated in the bond in good money.

The defendants insist that it was not a contract of hazard; and contend that if it was a contract not solvable in Confederate money, but for good money, as the face of the bond imports, and the plaintiff claims, it is usurious, and they were entitled to judgment upon the issue made by their plea of the statute of usury. But they say it was a Confederate contract and liable to be scaled.

The first question then which we have to consider is was it a contract of hazard? Does it so appear from the face of the bond? The first clause imports an obligation to pay presently. It is in these words, "On demand we or either of us bind ourselves, our heirs, &c., to pay Jacob Stover the just and full sum of six hundred dollars, without interest, it being for money borrowed." If this were all, if the instrument contained nothing more, it is clearly an obligation to pay six hundred dollars in *praesenti*; and the obligee could, immediately after the execution of the bond, have demanded payment; and the obligors could have made payment, whether demanded or not. But

the bond does not stop there. It proceeds in these words, "On the following conditions, that no interest will be required until the money is demanded, then a reasonable time will be given by said Stover to pay the above sum, when interest will begin and continue from the demand till paid." What is meant by this provision? Evidently it was intended to subject the obligors to interest after the obligee specially demanded payment; that is when he gave them notice that the money was wanting; which I think is the meaning. It

was also intended to inhibit the
277 obligee *from immediately pressing the collection, and to allow the obligors reasonable time after such notice was given, to make payment; they being chargeable with interest from the date of the notice.

Does it limit or negative the right of the obligors to make payment, at any time, before it is demanded by the obligee? I think not. It is very plain from the language, that it was not intended to be restrictive of the rights of the obligors, but that was intended for their benefit, and was only restrictive of the rights of the obligee except as to interest. The right of the obligors to make payment an hour, a month, a year, or at any time after the obligation was given, was not changed by this provision; the correlative obligation rested upon the obligee to receive payment whenever they tendered it, whether before or after he made a special demand for it. Such we think is the meaning of the written instrument; such is the natural import of its terms. Is it varied by the parole evidence which has been introduced by permission of the statute in such cases? From that it appears that John E. Hamilton, when this loan was negotiated, belonged to the army; and fearing that the plaintiff might call on him when it would not suit him to pay, declined to borrow the money unless the lender would agree to charge no interest until he demanded the money, and to give him a reasonable time, after demand made, to raise the money. To this the obligee agreed; and those conditions were put in the bond at the instance of the defendant, and for his benefit. It is obvious that the lender knew that it was for this purpose they were proposed by the borrower. But it seems that he had, at the time he acceded to them, a secret intention (for it was confined to his own breast), to use them for another and a very different purpose. He intended not to make demand until the Confederacy failed, or until Confederate treasury notes ceased to circulate, and until
278 good money prevailed; vainly imagining that the provision *which had been proposed by the defendant for a purpose so different, might be construed to limit his right to make payment until he had demanded it, and thus to get from the defendant \$600 in good money for the Confederate money he loaned him, which he knew to be worth at the time only \$200 in gold; and this intention he concealed from

the defendant. But in this he deceived himself; for, as we have seen, the provision will not bear the construction which he secretly gave to it; but imports what was really the intention of the borrower when he proposed it, and what the lender knew to be his intention when he acceded to it. The parole evidence does not, therefore, conflict with the construction and effect which we give to the language of the bond, to wit: that the obligee could not limit and restrict the right of payment by the obligors, by delaying demand of payment. But, on the contrary, the parole evidence shows that those provisions were inserted for a different purpose, and were not designed to limit the obligors in their right to make payment whenever they chose; and are therefore entirely consonant with the language of the bond.

This case is, therefore, not analogous to *Boulware v. Newton*. In that case the obligation was to pay "on demand, after three months' notice to pay." In this, it is to pay on demand;" with condition, only restrictive of the right of the obligee to press the collection until a reasonable time after he had given notice that payment was required. In that case it is expressly stipulated that the obligee "shall not be required to receive the money, except at his pleasure." He had, therefore, the unqualified right to fix the time of payment, and could wait until there was a better currency, or until the war closed, though it lasted for ten years or longer, before he made it payable. And it being payable "in current funds," by its express terms, it was held, that he could demand payment in

the currency which prevailed at the
279 time *he elected to make it payable, whether Confederate or Federal, accordingly as the war might result; it being a necessary implication, that such was the evident intention of the parties in the contract. But in this case, as we have seen, the obligee was bound to receive payment whenever offered, whether before, or after, it was specially demanded by him. We do not think, therefore, that the decision in *Boulware v. Newton*, which turned upon the construction to be given to the terms of the contract in that case, has any application to this.

We are also of opinion that the contract in this case was entered into, with reference to Confederate notes as a standard of value, and was solvable in the same kind of currency, and that, therefore, it is not subject to the statute of usury, which is pleaded. And that, as the defendants could have paid at the date of the obligation, according to its terms, and legal effect, the scale should be applied as of that date. This seems to have been the purpose of the court below, though it is forty dollars in excess of what the plaintiff understood the scaled value to be. That being the ascertained value by the learned judge of the Circuit court, who had all the evidence before him; and the error, if any, not being to the prejudice of the plaintiff, this court

will not disturb the judgment on that ground.

Upon the whole, we are of opinion that there is no error in the judgment of the court below, for which it ought to be reversed; but are of opinion to affirm it.

Judgment affirmed.

280

**Moffett v. Bickle.*

August Term, 1871, Staunton.

Joint Action against Several Defendants—Judgment—Statute.*—In an action of debt by the holder of a negotiable note, against the maker and four endorsers, upon the plea of usury by the endorsers, the jury found that the note was endorsed by the first three endorsers, for the accommodation of the maker, and was sold by him to the fourth endorser, at a usurious rate of interest; who afterwards and before it became due, endorsed it to the holder for value. Upon this verdict the court should render a judgment in favor of the maker and the first three endorsers, and against the fourth endorser, under the act Code, ch. 17, § 19, p. 733.

This is a supersedeas to a judgment of the Circuit court, reversing a judgment of the County of Augusta, rendered in a joint action of debt against the maker and endorsers of a negotiable note. The maker confessed judgment. The endorsers, four in number, the last of whom was Robert G. Bickle, besides pleading the general issue, put in also the plea of usury; on which issue was joined. The jury found a special verdict; from which it appeared, that the note was drawn by the maker, and endorsed by the first three endorsers, for the accommodation of the maker, and was sold by the maker to the last of the said four endorsers, Bickle, at a usurious rate of interest; that Bickle, afterwards, and before the maturity of the note, endorsed it to the plaintiff, Moffett, for a valuable consideration; that the plaintiff, at the time he took the note from Bickle, had no notice of the usury, and is a bona fide holder thereof for value; that at the maturity of the note demand for the payment thereof was duly made and

was refused; that said note was duly
281 protested for non-payment; and *that notice of the protest was duly served upon all the endorsers. Upon this special verdict, the County court rendered judgment in favor of the plaintiff against the last endorser, Bickle, but against the plaintiff in favor of the maker and the other endorsers. Bickle applied to the said Circuit court for a supersedeas to the judgment of the County court against him, which was accordingly awarded; and thereafter the Circuit court reversed the judgment of the County court, and rendered judgment in favor of Bickle against Moffett. To this judgment of the Circuit court, Moffett applied for a writ of supersedeas to the late District court holden at Charlottesville,

*See *Steptoe v. Read*, 19 Gratt. 31, and *foot-note*; *Bush v. Campbell*, 26 Gratt. 403, and *foot-note*.

which writ was accordingly awarded by a judge thereof in vacation, and the case, being pending in that court when it ceased to exist, was transferred by law to this court for decision.

Baldwin and Hanger, for the appellant.

Fultz and Echols, for the appellee.

MONCURE, P., after stating the case, proceeded:

It is a rule of the common law, that upon a joint contract the action must be against all the joint contractors, and, as a general rule, the judgment must be against all or none of them. But that is not a universal rule. Where a defendant in such an action pleads matter which goes to his personal discharge, such as bankruptcy, infancy, or any matter that does not go to the action of the writ; or pleads or gives in evidence a matter which is a bar to the action as against him only, and of which the others could not take advantage, judgment may be given for such defendant and against the rest. 1 Rob. Pr., old edition, pp. 400-402, and the cases there cited, viz: *Cole v. Pennell, &c.*, 2 Rand. 174; *Walmsley v. Lindenberger & Co.*, Id. 478; *Tooker v. Bennett, &c.*, 3 Caines R. 4; *Hartness, &c., v. Thompson, &c.*, 5 Johns. R. 160; *Morton v. Croghan*, 20 Id. 106.

282 *Such was the common law when the act was passed authorizing an action of debt to be brought against the drawer and endorsers of a foreign bill of exchange jointly, or against either of them separately. 1 Rev. Co. 1819, p. 485, § 2. This act was extended from time to time to all bills or notes negotiable at banks or their offices of discount and deposit, or the place of business of a savings institution or bank, &c., until it assumes the form in which it now stands in our Code of 1860, ch. 144, § 11, p. 629. The remedy given by this act, as Judge Green well remarked in *Taylor v. Beck*, 3 Rand. 316, 328, was perfectly novel in all respects, since it authorized a joint action upon several contracts; and such an action of debt even against one only, as was not known to the common law. 1 Rob. Pr. old ed. 48. Though the contracts of the drawer and endorsers are several, yet where the action is brought against them jointly, the parties are subjected to all the consequences flowing from the settled rules of the common law governing joint actions. One of those consequences is, that the judgment also must be joint; and that a failure as to one of the defendants, is a failure as to all of them. This rule is as applicable to a joint action upon a joint and several bond, as to any other action; and of course it equally applies to a joint action against the drawer and endorsers of a foreign bill of exchange, &c. Id. *Taylor, &c. v. Beck*, 3 Rand. 316. There are some cases, as before stated, in which a judgment may be given for one, and against another defendant in a joint action, as where a verdict is found for one

defendant upon a plea of infancy, or other matter which goes to his personal discharge, without affecting the liability of the other. But cases of this kind constitute exceptions to the general rule. Id. Opinions in S. C. by Green, J., p. 334, and Cabell, J., p. 360. 1 Rob. Pr. sup. 49.

Such was the state of the common law as modified by the act aforesaid when the 283 provision contained in the *Code, chapter 177, § 19, p. 733, which will be presently set out and commented on, was enacted. If, in that state of the law, Moffett had brought this joint action against the maker and endorsers of the negotiable note aforesaid, there can be no doubt, I presume, on the authorities before referred to, and principles before stated, he would have failed in his action, and as judgment was properly rendered against him in favor of some of the defendants, it would have been necessary to render judgment against him in favor of the defendant Bickle also.

But, even in that state of the law, if Moffett had brought a several action against Bickle upon his endorsement, there can be no doubt, I presume, but that the plaintiff would have been entitled to judgment against the defendant, notwithstanding the usury in the transaction between the defendant and the other endorsers and maker of the note. The contract of endorsement on which the action in that case would have been brought, is entirely several and independent of the contracts of the maker and of the prior endorsers, and is wholly unaffected by the usury which taints those contracts. That they are usurious and void, is a good reason why the plaintiff would have been entitled to recover in such an action, instead of being a reason why he should not recover. The contract implied by Bickle's endorsement was that the note should be duly paid at maturity; and his liability is none the less when the note has not only not been duly paid, but is infected with usury between him and the prior endorsers and maker, so that an action cannot be maintained against such prior endorsers and maker. Indeed, the endorser impliedly undertakes by the contract of endorsement, if the endorsee be a bona fide endorsee for value and without notice, such as Moffett is, that the note is a valid and subsisting note, free from usury or any other stain that would avoid it. The learned counsel for Bickle seems to admit that he is liable to

Moffett, in some other form of action, 284 for *the money paid by the latter for the note, but not that he is liable on his endorsement. I can see no reason for this distinction, and am of opinion that Moffett would have been entitled to recover, if he had brought his action against Bickle alone, on his several contract of endorsement.

If there were any doubt upon this question, I think it would be removed by the case referred to by the learned counsel of the plaintiff in error, of *Edwards v. Dick*, decided by the court of King's Bench in 1822, and reported in 4 Barn. & Ald. 212;

6 Eng. C. L. R. 405. Abbott, C. J., and Bayley, Holroyd and Best, JJ., composed the court, and were unanimous. Such a decision of such a court, is entitled to the highest respect. But the reasons assigned by the learned judges command more of our respect in weighing its authority, than does their high judicial character. The decision was, that in an action against the drawer of a bill, it is no defence that the bill was accepted for a gaming debt, if it be endorsed over by the drawer for a valuable consideration to a third person, by whom the action is brought. The judges delivered their opinions seriatim. All of what they say is as pertinent to this case as to that. That, it is true, was a case in which the question arose as to the statute of gaming; while here, the question arises in regard to the statute of usury. But the statute of gaming is very broad and sweeping in its terms, just as much so as the statute of usury. And indeed Abbott, C. J., in his opinion, places the case upon the same ground with that of usury, and says "there is no case upon the statute of usury, where a drawer, having parted with a bill for a good consideration, can afterwards set up as a defence, an antecedent usurious contract between himself and the acceptor. For, if so, a court of justice would enable him to commit a gross fraud upon an innocent party." There are other passages in

his opinion, and those of his associates, *which are very strong and appropriate, but I will not quote them, as the case itself is very accessible to the profession.

The action in this case, however, is not several, against the endorser Bickle, upon his endorsement only, but joint, against the maker and all the endorsers; and the question is, can a several judgment be rendered against Bickle in such an action, when judgment is rendered in favor of the other defendants on account of usury in the transaction between the maker and Bickle?

I think we would have had to decide that question in the negative, on the authority of the case of Taylor, &c. v. Beck, 3 Rand. 316, if the law now were as it was when that case was decided.

But another law is now in force, and was when this action was brought, which seems to have a material bearing on the enquiry now in hand; and that is, the provision before referred to in the Code, ch. 177, § 19, p. 733; which is in these words: "In an action founded on contract, against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants against whom he would have been entitled to recover if he had sued them only." Now, this section seems to suit this case precisely, and to have been made for the very purpose of covering such cases. The case is within the literal terms of the section. It is a case in which the action is "founded on contract against two or more defendants;"

and, "although the plaintiff may be barred as to one or more of them," as he is in this case by the defence of usury applicable only to them, "yet he may have judgment against any other or others of the defendants against whom he would have been entitled to recover if he had sued them only;" and we have seen he would have been entitled to recover against the defendant Bickle if an action had been brought against him only, on his endorsement. The

286 *case is also within the plain spirit of this section, which was to avoid unnecessary delay and expense produced by a mere technicality: and that has long been the general course of our legislation on such subjects. It was admitted in Taylor, &c. v. Beck, that, though a joint action is given in the case, and the contract must be considered joint for the purpose of the remedy, yet the action is in fact upon several contracts, and the statute only gives a new remedy, without affecting or varying the substantial rights and responsibilities of the parties. 3 Rand. 328; 1 Rob. Pr. 48. Now, the section we are considering gets rid of the difficulty, which, in the opinion of the court in that case, arose from the nature of the remedy by a joint action. Why should the plaintiff be turned around to a new action, when one is already pending, in which perfect justice may be done without injuring anybody? The legislature thought he should not be so turned around, and therefore enacted the section aforesaid to provide for this and other like cases. Formerly, the practice was, when one of several joint contractors was discharged on the ground of infancy, to require the plaintiff to discontinue his action, and bring a new one against the adult defendants. But the good sense of courts, without the aid of legislation, has long since changed the rule, and now the practice is, to proceed to judgment in the same action in which the infant is discharged, against the adult defendants. 2 Rand. 179, 478; 5 John. R. 160; 20 Id. 106; 1 Rob. Pr. 400. Here the statute comes in to our aid; in part no doubt, if not chiefly, in consequence of the decision in Taylor, &c. v. Beck.

The statute is, in itself, I think, as plain as it well could be. But, if we look to one or more of the sources from which it seems to have been derived, its meaning may perhaps appear more plainly. One of those sources seems to be, an act passed March 12, 1838, Sess. acts 1838, p. 74, ch. 96; the second section of which declares 287 *"that in all actions on contracts against two or more defendants, if one or more of them shall be acquitted or discharged by the verdict of a jury or otherwise, the plaintiff shall nevertheless be entitled to proceed to judgment against the other defendant or defendants in like manner as if the action had been instituted against him or them, without joining the party or parties who may have been acquitted or discharged; but the last mentioned party or parties shall be entitled to

recover his or their costs of the plaintiff." Another of those sources seems to be an act passed April 3, 1838, entitled, "An act amending the statute of limitations;" Id. p. 73, ch. 95; the 1st section of which provides, "that in actions, to be commenced against two or more such joint contractors, &c., if it shall appear, at the trial or otherwise, that the plaintiff, though barred by the before recited act or this act, as to one or more of such joint contractors, &c., shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given, and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

There is nothing in the decision of this court in *Stephoe v. Read, &c.*, 19 Gratt. 1, which is at all in conflict with the views I have presented. On the contrary, what is said by Judge Joynes in that case, in whose opinion the other judges concurred, strongly sustains those views. The only question in that case which can have any bearing upon this, was, as to the competency of one of two defendants who were sued as parties in an action of assumpsit, as a witness for his co-defendant on the trial of the general issue. He was clearly incompetent because the decision of the issue against the plaintiff would have been conclusive of the case in favor of both defendants. "Under the

plea of non-assumpsit," says Judge
288 Joynes, "it was competent to the

defendant to defeat the action upon grounds going to the entire foundation of the contract." "Quarles would have been incompetent to prove any such defence for Steptoe, because, if the defence was sustained, the judgment would have been for both defendants. It is no answer to say that Quarles was not offered as a witness to prove any such defence, but only to prove that Steptoe was not a party to the contract, which was a defence personal to Steptoe."

And the learned judge then proceeds to cite authorities to show that when a witness is competent at all he may be examined upon every matter upon the record, and that when he is sworn, he is not sworn to answer particular questions, but to give evidence on all the matters in dispute between the parties. And he concludes: "If, therefore, Quarles had been put upon the stand as a witness, there was nothing to prevent his giving evidence to establish a defence going to the foundation of the entire contract, though called only for the special purpose of proving that Steptoe was no party to the contract." That view of the case seems to concede that if it had been proved by competent evidence that Steptoe was not a party to the contract, there might have been a judgment in his favor and against the other defendant; which certainly would have been going further than it is necessary to go in this case to maintain the correctness of the judgment of the County

court. In that case there would have been an apparent difficulty, though it may have been merely technical, on the ground of variance. A judgment would have been rendered against one of the defendants upon a several contract, in an action upon a joint contract. But here there is no room even for such a technical objection. There is no variance in the case. The case proved is precisely the case stated in the declaration. The note was in fact drawn and endorsed as therein charged. But it was proved, and the jury found that the note and all the
endorsements but the last were usu-
289 rious, and that the *last was free from usury. Judgment was therefore rendered against the last endorser, but in favor of the prior endorsers and the maker. Here the latter were discharged upon a ground of defence personal to them, and not extending to the last endorser. It did not go to the foundation of the entire contract. The action, though joint in form, is in fact founded, as we have seen, on several contracts; and it is found that while all of these contracts were in fact made as averred, only one of them is valid and the others void. Where is the difficulty in rendering judgment against the defendant who is bound by the valid contract? If the statute does not apply to this case, it is difficult to conceive one to which it will apply, and the statute will be of no value. There is no need of applying it to the case of a joint action or contract against several defendants, one of whom is entitled to his personal discharge on the ground of infancy, bankruptcy, &c. Cases of this kind, we have seen, constituted exceptions to the general rule requiring judgment to be rendered against all or none of the defendants in a joint action *ex contractu*.

I am for reversing the judgment of the Circuit court and affirming that of the County court.

The other judges concurred in the opinion of Moncure, P.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the judgment of the Circuit court is erroneous, and that there is no error in the said judgment of the said County court; therefore, it is considered that the judgment of the Circuit court be reversed and annulled, and that the plaintiff recover against the defendant his costs by him expended in the prosecution of his suit aforesaid here; and

this court, proceeding to give such
290 judgment as the Circuit court *ought to have given, it is further considered that the judgment of the County court be affirmed, and that the plaintiff recover against the defendant damages according to law and his costs by him about his defence in said Circuit court expended; which is ordered to be certified to the said Circuit court of Augusta county.

Judgment of the Circuit court reversed.

291

*Walker v. Christian.

August Term, 1871. Staunton.

1. Parol Evidence—To Explain Contents of Writing.*—

"Bought of Maj. J. W., twenty-seven head of cattle weighing 38,152 pounds, at six and a half cents—\$2,479.88. Mr. W. M. T., you will please settle with Maj. W. the above account. J. C." In assumpsit by W. against C. to recover the amount; the paper being of doubtful meaning, C. may introduce parol evidence to show that T. was chief commissary for the district in the Confederate States service, and that C. was his agent, and as such bought the cattle of W., who knew he was buying as such agent.

2. Liability of Agents—How Ascertained.†—The principles on which the liability of agents, both private and public, will be ascertained and fixed, considered by MONCURE, J.

This is a supersedeas to a judgment of the Circuit court of Augusta county, in an action of assumpsit founded on a paper in the words and figures following, to wit:

"Bought of Maj. James Walker, twenty-seven head of cattle, weighing thirty-eight thousand one hundred and fifty-two pounds, at six and half cents.

"38, 152—6½—\$2,479.88.

"Mr. Wm. M. Tate—You will please settle with Maj. Walker the above account.

John Christian."

The action was brought by James Walker against John Christian. It was brought in the County court of Augusta on the 29th of August 1862, and on the 30th day of August 1866, on motion of the plaintiff, by counsel, it was removed to the Circuit court of said county. The declaration contained two counts. The first was a special count treating the said paper as an order drawn by the defendant on William M. Tate in favor of the *plaintiff, and averring that it was duly presented for acceptance and payment to said Tate, who refused to accept and pay the same; of all which the defendant had due notice. The other was a common count for goods sold and delivered, and upon account stated. The case was tried by a jury on the general issue, and a

*In Dinwiddie County v. Stuart, 28 Gratt. 526, the court said: "As to the first position upon which counsel claim that these contracts cannot be enforced, viz: that the contracts were made under the pretended authority of an unlawful and usurped government, it is sufficient to say that the Richmond government (so called), as well as the Confederate government, of which it formed a part, have been repeatedly recognized by this court, by the supreme court of the United States, and by the legislature of the restored government, as at least having all the attributes of a government *de facto*. Walker v. Christian, 21 Gratt. 291, 302; Walker v. Pierce, 21 Gratt. 722; Newton v. Bushong, 22 Gratt. 628; Ruckman v. Lightner's Ex'ors, 24 Gratt. 19; Texas v. White, 7 Wall. U. S. R. 702, 733; Thorington v. Smith, 8 Wall. U. S. R. 1.

See also, foot-note to Newton v. Bushong, 22 Gratt. 628.

†See generally, monographic note on "Agency" appended to Silliman v. Fredericksburg, etc., Railroad Company, 27 Gratt. 119.

verdict was found for the defendant; on which judgment was rendered accordingly. A bill of exceptions was made a part of the record; from which it appears, that on the trial of the case the plaintiff, to maintain the issue on his part, introduced and read to the jury a paper which is set out in the bill of exceptions, being the same paper on which the action was founded as aforesaid. And thereupon the plaintiff was introduced as a witness on his part, and "testified that the paper aforesaid was delivered to him by the defendant, John Christian, on the day of May 1862, and that within a short time thereafter, that is, after the said day of May 1862, which was the true time of the making and delivery of said paper, he, the witness, presented the said paper to Wm. M. Tate, the person named therein, and that the said Wm. M. Tate refused to accept or pay the amount specified in said paper, and that within a few days thereafter witness addressed a letter to the defendant informing him of such refusal. And the plaintiff here resting his examination-in-chief, the defendant, by counsel, asked the question: 'Who was it that bought the cattle, named in the paper, in the words aforesaid—Bought,' " &c. To which question the plaintiff objected, on the ground that "it was illegal, as tending to vary and contradict the written instrument on which the action was founded, and in violation of the ruling of the District court at Charlottesville in a similar case; and thereupon the counsel for the defendant informed the court that it was their purpose to follow up the question with evidence tending to prove that in fact the contract of purchase was for and on account of the said Wm. M. Tate as principal, and *that the defendant was acting as mere agent of the said Wm. M. Tate, and that the plaintiff had due notice of such agency; and further, that said Wm. M. Tate was a major in the service of the government of the Confederate States of America, and chief commissary in the district in which the cattle referred to in said paper were purchased. That the defendant was the purchasing agent of said Wm. M. Tate, commissary as aforesaid, and that the plaintiff well understood and knew in what character the defendant acted—that is, as government purchasing agent under said Maj. Wm. M. Tate; and further, that the contract had been made before said paper writing was delivered; and that the cattle therein referred to had been previously delivered by the plaintiff's agent to the agent of said Confederate States government; and further, that said cattle were sold by the plaintiff to the defendant as agent as aforesaid, for the purpose and to the intent that the same should be used and consumed by the army of the Confederate States of America, then engaged in war with the United States, and that said cattle were, in fact, so used and consumed. And the plaintiff, by his counsel, objecting to the question propounded, and to the offers of testimony by the defendant, the court overruled said

objections and allowed the question to be put, and granted the prayer of the defendant for leave to introduce evidence in pursuance of his offers aforesaid. To which opinion and ruling of the court the plaintiff, by counsel, excepted."

To the judgment rendered in the case by the Circuit court as aforesaid, the plaintiff applied to this court for a supersedeas, which was accordingly awarded.

Fultz and Hanger, for the appellant.

■ Michie and B. Christian, for the appellee.

MONCURE, P., after stating the case, proceeded:

When a contract is made by an agent, the question *whether the principal or agent, or both, are liable, is, generally, a question of intention. The principal alone is liable if the facts are all known, and there is no special reason for holding the agent liable, or an intention to make him liable is not plainly indicated by the form of the contract or otherwise. The contract is made for the principal's benefit, is in fact the principal's contract, by the procuration of the agent, and it is just and right that the principal, and not the agent, should bear the burthen directly as he must ultimately, unless there be some good reason for the contrary. The agent is never liable unless it appear to have been intended by the parties to the contract that he should be liable: always presuming of course that the agent has strictly pursued his authority; for if he has not, he is personally liable. When the contract is by parol, an intention to make the agent liable must appear from the facts and circumstances of the case, as they are shown in evidence. When the contract is in writing, an intention to make the agent liable, must appear on the face of the writing, or from the language therein used; and if such contention so appear, parol evidence to show the contrary is inadmissible; upon the familiar principle that parol evidence is inadmissible to vary or contradict a written contract. This rule, as is well said in 1 Greenleaf on Evidence, § 277, "is directed only against the admission of any other evidence of the language employed by the parties in making the contract, than that which is furnished by the writing itself. The writing, it is true, may be read by the light of surrounding circumstances, in order, more perfectly to understand the intent and meaning of the parties; but as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it or substituted in its stead. The duty of the court in such cases is to ascertain, not what the parties may have secretly intended, as contra-

distinguished from what their words express, but what is *the meaning of words they have used." "The principle of admission is, that the court may be placed, in regard to the surrounding circumstances, as nearly as possible in the situation of the party whose written lan-

guage is to be interpreted; the question being, what did the person, thus circumstanced, mean by the language he has employed." Id. § 295, a.

Where a promissory note is made, or a bill of exchange drawn in the name of the agent, without showing the name of the principal on the face of the instrument, as a general rule the agent only, and not the principal, is liable. The intention of the parties in such a case is too plainly expressed to admit of any doubt, or to require any aid from the light of surrounding circumstances.

But this is not the case in regard to all instruments of writing connected with contract. As is further said in 1 Greenleaf on Evidence, § 305 a.: "The rule that parol evidence is not admissible to vary or control a written contract, is not applicable to mere bills of parcels, made in the usual form, in which nothing appears but the names of the vendor and vendee, the articles purchased, with the prices affixed, and a receipt of payment by the vendor. These form an exception to the general rule of evidence, being informal documents, intended only to specify prices, quantities, and a receipt of payment, and not used or designed to embody and set out the terms and conditions of a contract of bargain and sale. They are in the nature of receipts, and are always open to evidence, which proves the real terms upon which the agreement of sale was made between the parties."

In such cases parol evidence to show an intention to make the principal, and not the agent liable, is perfectly consistent with the written evidence, and is, therefore, not inadmissible upon the ground that it contradicts or varies a written contract.

Now, the case we have before us is just such a case. It is not the case of a formal promissory note or bill of exchange, or a mere note in writing.

But it is the case of an account of cattle bought of Maj. James Walker; but by or for whom bought, does not appear on the face of the paper. And at the foot of the account is written a note or order in these words: "Mr. Wm. M. Tate., you will please settle with Maj. Walker the above ac't. John Christian."

Looking at this account an order without the light of surrounding circumstances, we are in doubt as to their meaning: whether they mean that Christian bought these cattle for his own use and gave the order for payment on Tate, his debtor; or whether Christian bought them as agent of Tate, and gave the order merely to show that he had so bought them, and that the account was correct, and ought therefore to be paid by Tate. Each of these meanings is perfectly consistent with the writing, and the latter at least as much so as the former. What occasion was there for annexing the order to the account, if Tate had no interest in the account? Why was not a mere order given if Christian was drawing for payment of his own debt, out of his own money, in Tate's hands?

But the parol evidence offered by Christian, and admitted by the court on the trial, made this matter perfectly plain, and showed that in fact, the contract of purchase was for and on account of the said Wm. M. Tate as principal, and that said defendant was acting as mere agent of the said Wm. M. Tate, and that the plaintiff had due notice of such agency. The parol evidence showed still more, as will presently be shown. But what has been just stated is enough for the present purpose. It is perfectly consistent with every word contained in the writing. Indeed, it makes perfectly plain what is otherwise obscure and doubtful; and is clearly admissible on ordinary principles which have already been fully stated.

Such would be the law if this were
 297 a case of mere and *ordinary private agency. But this is a case of public agency, as to which a different and peculiar, but well settled, principle applies. Story in his work on agency has a chapter devoted to this branch of the law, being chapter the 11th, pp. 306-312. "Hitherto we have been considering," he says, "the personal liability of agents on contracts with third persons, in cases of mere private agency. But a very different rule, in general, prevails in regard to public agents; for in the ordinary course of things, an agent, contracting in behalf of the government, or of the public, is not personally bound by such a contract, even though he would be by the terms of the contract, if it were an agency of a private nature. The reason of the distinction is that it is not to be presumed, either that the public agent means to bind himself personally in acting as a functionary of the government, or, that the party dealing with him in his public character means to rely on his individual responsibility. On the contrary, the natural presumption in such cases is, that the contract was made on the credit and responsibility of the government itself, as possessing an entire ability to fulfill all its just contracts far beyond that of any private man; and that it is ready in good faith to fulfill them with punctilious promptitude, and in a spirit of liberal courtesy. Great public inconveniences would result from a different doctrine, considering the various public functionaries, which the government must employ, in order to transact its ordinary business and operations; and many persons would be deterred from accepting of many offices of trust under the government if they were held personally liable upon all their official contracts." Take one example only: every officer in the army or navy, from the commander-in-chief downwards, who should enter into any official contract, or give any orders which would involve a contract, as for supplies or provisions, or military materials, might be held personally liable thereon to his utter
 298 *official immunity and make himself personally liable on his contract in behalf of government, or such personal liability

may be implied from all the attendant circumstances. "But in cases of such implied responsibility," as Story well says, "the proofs ought to be exceedingly cogent and clear, in order to create such personal responsibility in a known public agent, and to repel the presumption of law, that he contracts only on the credit of the government." *Id.* § 306.

The principle we are considering is stated, and the authorities in support of it, are cited in 3 Rob. Pr. 55, ch. 12. There is, perhaps, no principle of the law established more firmly, or higher authority, both in England and in this country. The leading English case in support of it, is the great case of *Macheath v. Haldimand*, 1 T. R. 172, decided by the court of King's Bench in 1786, Lord Mansfield being chief justice, and Willes, Ashurst and Buller his associates. The judges delivered their opinions seriatim, and all of them clearly and forcibly state the principle and the reasons on which it is founded. They were unanimous. The leading American case in support of the same doctrine is the equally great case of *Hodgson v. Dexter*, 1 Cranch's U. S. R. 345, decided by the Supreme court of the United States in 1803, Marshall, chief justice, delivering the unanimous opinion of the court. That opinion is remarkable, no less for its precision and its force, than for its brevity. "It is too clear to be controverted," say the court, "that when a public agent acts in the line of his duty, and by legal authority, his contracts, made on account of the government, are public and not personal. They enure to the benefit of, and are obligatory on the government; not the officer. A contrary doctrine would be productive of the most injurious consequences to the public as well as to individuals. The government is incapable of acting otherwise than by its agents, and no prudent man would
 299 consent to become a *public agent, if he should be made personally responsible for contracts on the public account. This subject was very fully discussed in the case of *Macheath v. Haldimand*, cited from first term reports; and this court considers the principles laid down in that case as consonant to policy, justice and law." After the decision of these two great leading cases, the courts in England and in this country have had little to do but to follow them in cases of the like kind subsequently occurring.

The principles settled in them directly and plainly apply to this case, if the Confederate government, in behalf of which the contract in question was made, can be considered as a government within the meaning of the rule. The evidence offered by the defendant tended to prove not only, as before stated, "that, in fact, the contract of purchase was for and on account of the said Wm. M. Tate, as principal, and that said defendant was acting as mere agent of the said Wm. M. Tate, and that the plaintiff had due notice of such agency;" but, "further, that said Wm. M. Tate was a

major in service of the government of the Confederate States of America, and chief commissary in the district in which the cattle referred to in said paper were purchased. That the defendant was the purchasing agent of said Wm. M. Tate, commissary as aforesaid, and that the plaintiff well understood and knew in what character the defendant acted, that is, as government purchasing agent, under said Major Wm. M. Tate; and further, that the contract had been made before said paper writing was delivered; and that the cattle therein referred to had been previously delivered by the plaintiff's agent to the agent of said Confederate States government; and further, that said cattle were sold by the plaintiff to the defendant, as agent as aforesaid, for the purpose and to the intent that the same should be used and consumed by the army of the Confederate States of America, then *engaged in war with the United States, and the said cattle were, in fact, so used and consumed."

Then, can the Confederate government be considered as a government, within the meaning of the rule, is the question we now have to answer.

It is immaterial to enquire whether the said government was one *de jure*, or *de facto* only; and if *de facto* only, for what purposes and to what extent it was a *de facto* government. That it was at least such a government, to a considerable extent and for many purposes, if not entirely and for all purposes, cannot be denied. Indeed, it has been expressly so decided, even by the Supreme court of the United States, in *Thorington v. Smith*, 8 Wall 1, in which Chief Justice Chase delivered the unanimous opinion of the court. It matters not that this "government was never acknowledged by the United States as a *de facto* government," in a general sense, nor that it was not "acknowledged as such by other powers." *Id.* p. 9. It is admitted, indeed, cannot be denied, "that the rights and obligations of a belligerent were conceded to it in its military character very soon after the war began," by the United States; *id.* p. 10; but whether "from motives of humanity and expediency," or otherwise, is immaterial. "The whole territory controlled by it," say the Supreme court, "was thereafter held to be enemies' territory, and the inhabitants of that territory were held, in most respects, for enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned." It is a great mistake to regard this government as a mere temporary and local outbreak or insurrection. It was not so regarded by the Supreme court of the United States, even as early as the second year of the war. In the *Prize cases*, 2 Black. U. S. R. 635, 673, decided in 1862, Mr. Justice Grier used this language:

"Hence, in organizing this rebellion,

to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal government. Several of these States have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is now being decided by wager of battle. The ports and territory of each of these States are held in hostility to the general government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force. South of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile and belligerent power." Suppose the decision by this wager of battle had been different from what it was, as it well might have been; how would this case then have stood? Could it then have been said that the Confederate government was not a government within the meaning of the rule in question, when the debt involved in this case was created? Suppose this suit had been tried during the war, would it have been then held that the Confederate government was not such a government? Can the disastrous result of the war to the Confederate cause, pending the suit, make any change in the law by which the question in controversy is to be determined? The Confederate government was perfectly organized and exercised supreme power over the vast territory within its limits during the four years of its existence. Its lawful authority was universally acknowledged by all persons who were under its control, and most of them not only professed to be, but actually were, devoted to it, and anxious for its success. The plaintiff and the defendant in this action both appear to have been of that number. The defendant was an agent of the government to purchase supplies for the vast army employed in fighting its battles, and the plaintiff voluntarily

*sold cattle to the defendant as such agent for the purpose of affording food for that army. Can the plaintiff now say that the Confederate government was not a lawful government, and therefore the defendant, the mere agent in buying the cattle for that government, is personally liable for the purchase money? As to these parties, and for all the purposes of this case, the Confederate States must be regarded as a government, either lawful or actual, when the purchase of the cattle was made; and the defendant did not become personally responsible, unless it was plainly intended by the parties that he should be so. It is a question of intention merely, and in order to make the agent liable, the intention must be very clearly proved, all the presumptions of law and fact being the other way.

But suppose it be admitted that the cattle were purchased to feed an army engaged in a mere rebellion or insurrection, and the act was therefore unlawful and treasonable

—What then? Does it follow that the defendant is therefore personally liable to the plaintiff for the purchase money of the cattle? By no means. The plaintiff, having voluntarily sold the cattle for the purpose aforesaid, is, in that view, a participant in the unlawful act, at least as guilty as the purchasing agent, and would be barred from his recovery in this action against such agent by one of the best settled principles of the law; that, in *pari delicto*, *potior est conditio defendentis*.

I am therefore of opinion that there is no error in the judgment of the Circuit court, and that it ought to be affirmed.

The other judges concurred in the opinion of Moncure, P.

Judgment affirmed.

303 *Pharis v. Dice—Three Cases.

August Term, 1871, Staunton.

1. *Statutes—Adjustment Acts.**—By the act of March 3d, 1866, and that of February 28th, 1867, two modes of adjusting Confederate contracts are provided. 1st. By reducing the nominal amount contracted to be paid to its gold value. 2d. In cases of sales of property or renting or hiring, giving the value of the property sold, or the value of the rent or hire, at the time of such sale, renting or hiring.

2. *Same—Same—Constitutionality of.*—These acts do not change the contracts of the parties, but provide a mode of ascertaining the value of the Confederate money contracted to be paid; and they are constitutional.

3. *Same—Same—Construction.*—The proviso annexed to the 1st section of the act of March 3, 1866, as amended by the act of February 28, 1867, will be considered as annexed to § 2 of the first act as amended by the second, so as to carry out the obvious intention of the General Assembly.

These were three actions of debt in the Circuit court of Rockingham county, brought in May 1867, by P. M. Dice against Philip Pharis, Jr., upon three bonds given for the purchase money of real estate. The bonds bore date on the 30th of December 1862, and were payable, the first

**Statutes—Adjustment Acts.*—That the adjustment Acts of March 3, 1866 and February 28, 1867 are constitutional, see the principal case cited and approved in *Sanders v. Branson*, 22 Gratt. 367; *Sexton v. Windell*, 23 Gratt. 539; *Poague v. Greenlee*, 22 Gratt. 737. See also, *Meredith v. Salmon*, 21 Gratt. 762; *Kraker v. Shields*, 20 Gratt. 377.

On the question of adjustment under the above named statute the principal case is also cited in *McClung v. Erwin*, 22 Gratt. 531; *Puryear v. Cabell*, 24 Gratt. 268. In *Merewether v. Dowdy*, 25 Gratt. 235 and *Compton v. Major*, 30 Gratt. 187, it is held that there is no fixed rule on this subject nor can one be laid down by which every case is to be measured. Each case must rest on its own peculiar facts.

In *Bierne v. Brown*, 10 W. Va. 764-767 the principal case is cited and criticised. It is also cited in *Jarrett v. Nickell*, 9 W. Va. 353.

one day, the second one year, and the third two years after date. The only question in the cases arises on the instructions refused and given by the court. The cases are stated in the opinion of the court delivered by Judge Christian.

Woodson, for the appellant.

Fultz, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

These cases are before us upon writs of supersedeas to judgments of the Circuit court of Rockingham county. Involving precisely the same questions of law, between the same parties, they were heard together in this court.

They were actions of debt upon three several bonds falling due at different times, one for \$1,000, payable one day after date, and the other two for \$1,750 each, payable one twelve months after date, and the other two years after date, and all bearing date 30th December 1862.

The defendant in each case pleaded payment, and insisted upon scaling the amount of his obligation in each case in accordance with the recognized scale of depreciation of Confederate treasury notes as compared with gold as a standard of value. There was a verdict and judgment in each case for the amount of the bonds respectively, with interest from the respective days of their maturity.

A motion was made by the defendants "to set aside the verdicts and judgments;" which motion was overruled. But no bills of exception were taken to the judgment of the court overruling said motions, and there were no certificates of facts proved on the trials made by the court.

The only bill of exception taken in each case, was the following: "Be it remembered, that after the jury were sworn to try the issue joined, the plaintiff, to maintain the issue on his part, gave in evidence to the jury the single bill in the plaintiff's declaration mentioned, in the words and figures following, to wit:" and then follows a copy of the bonds respectively sued upon: and then the plaintiff rested his case. And thereupon, the defendant, to maintain the said issue on his part, gave evidence to the jury, tending to show that, in the year 1862, he had purchased from the plaintiff a certain property in the county of Rockingham, known as the Bellefont Mill property, for \$7,000; that he paid on the 30th December 1862, the sum of \$2,500, in Confederate

States treasury notes, and on the same day gave his single bills for the deferred payments, to wit: one for \$1,000, payable one day after date, one for \$1,750, payable twelve months after date, and one for \$1,750, payable two years after date, with interest from their respective dates; and also evidence tending to show that the property was worth, at the time of sale, about \$4,000.

Defendant also gave in evidence to the

jury, to show that the said sale was for Confederate States treasury notes, and that the said single bills were to be paid in Confederate States treasury notes.

Whereupon, the counsel for the defendant moved the court to instruct the jury as follows: "If the jury believe from the evidence, that, according to the true understanding and agreement of the parties, the bonds on which these suits are brought were to be paid in Confederate States treasury notes, or were entered into with reference to such notes as a standard of value, they shall reduce the nominal amount of said bonds to their true value, at the time they were made or entered into, or to their value at such other time as the jury may think right." But the court refused to give this instruction, and in lieu thereof gave to the jury the following instruction: "If the jury believe from the evidence, that the bonds in question were executed for the purchase of land, and that such contract was according to the true understanding and agreement of the plaintiff and defendant, to be fulfilled or performed in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value, the same shall be liquidated, by reducing the nominal amount due and payable under such contract, to its true value at the time they were respectively made and entered into, or at such other time as to the jury may seem right in the case. Or if the jury believe, under all the circumstances, the fair value of the property sold,

306 recovery, they may adopt such *value as the sum which the plaintiff is entitled to recover; but the jury cannot find an amount greater than claimed in the plaintiff's declaration." To the refusal of the court to give the instruction asked by the defendant, and the giving in lieu thereof the instruction above recited, the defendant excepted. This is the only error assigned in the petition for a supersedeas; and this bill of exception involves the true construction of the first and second sections of the act passed 3rd March 1866, providing for the adjustment of liabilities arising under contracts made between the 1st day of January 1862, and the 10th day of April 1865, and the amendments to that act, passed February 28th, 1867.

It will be observed that the instruction given adopts the precise language of the amended act; while that asked for by the defendant's counsel is confined to the original act. The one is propounded upon the theory that where the contract is to be paid in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value, the only measure of recovery (whether the consideration was for the purchase, or renting, or hiring of property or not) is the reduction of the nominal amount to its true value according to the gold standard. The other (the instruction given by the court), asserts the proposition that the gold standard is not the only measure of recovery. But if

the consideration of the contract was property, then the value of the property sold might be adopted as the sum to be paid, if under all the circumstances the jury shall believe that to be the most just measure of recovery.

Which one of these two propositions is right, depends upon the construction to be given to the act referred to, and the amendments to that act.

The preamble to the first act expresses in forcible language the urgent and manifest necessity for its passage, and affords a safe light to guide us in its construction. It is

in these words: "Whereas a depreciated currency, *known as Confederate States treasury notes, constituted the only or principal currency in the greater part of this State during the late war; and whereas the result of said war involved the total destruction of said currency; and whereas there are many contracts which were made, or obligations which were incurred, before the termination of said war, predicated on said depreciated currency, still remaining wholly or partially unadjusted, in respect to which great uncertainty exists, perplexing alike to debtor and creditor, as to the present measure of their liabilities and rights respectively; and it thus appearing useful that some uniform and equitable rule should be established for the adjustment of such mutual demands and liabilities, therefore be it enacted," &c.

The first section of the act then provides that where the contract between the parties was made and entered into between the first day of January 1862, and the 10th day of April 1865, it should be lawful for either party to show by parol or other relevant testimony, what was the true understanding and agreement of the parties in respect to the kind of currency in which the contract was to be fulfilled, or performed, or with reference to which, as a standard of value, it was made and entered into.

The second section of said original act provides that whenever it shall appear that the contract, according to the true understanding and agreement of the parties, was to be fulfilled or performed in Confederate States treasury notes, or was made and entered into with reference to said notes, as a standard of value, the same shall be liquidated and settled by reducing the nominal amount to its true value at the time they were respectively entered into, or at such other time as to the court may seem right in the particular case.

Such was the act as originally framed and passed. But experience soon proved, that in many cases, the mode herein adopted was an inequitable adjustment of the mutual rights and liabilities growing out of such contracts. *In all cases where there was a borrowing and lending of Confederate money, the rule of adjustment adopted by the Legislature, in the original act, was equitable, and without exception. But numerous cases arose in the courts, where the contract grew out of a sale, or renting or hiring of property, when it be-

came manifest that the adjustment of the rights and liabilities of the parties by scaling the obligation from its nominal to its real value in gold, did not meet the plain object of the act, and the requirements of justice and fair dealing. It was found in many cases of this class, where possession and title of the property had been delivered and transferred upon an obligation to pay Confederate money, that the nominal price, when reduced to its real value, was so inadequate as compared with the value of the consideration received, as to shock the conscience and work the grossest injustice. This grew out of the fact that the purchasing value of Confederate money was much greater than its value as compared with gold, which had ceased to be a circulating medium, and was indeed a commodity; and in many cases parties were found in the possession of real and personal property for which they had never paid a dollar, but had only given their obligations solvable in Confederate currency; or entered into with reference to that currency as a standard of value. If the legislative rule of adjustment was to prevail in all cases, by simply reducing the nominal value to its real value in gold, the defendant would be permitted in such cases, to retain possession of property, and have the title confirmed in him, by paying often times, one-tenth part of its real value at the time the contract was entered into. It was to prevent this injustice, so apparent, and so shocking to every sense of right, that the Legislature amended the original act by the act passed February 28th, 1867. In this last act they introduced what experience had everywhere made manifest, as a more equitable mode of adjustment, and a better criterion of the measure

309 *of recovery; and that was that where the cause of action grows out of a sale, or renting, or hiring of property, real or personal, if the court or the jury (if it be a jury case) shall think that, under all the circumstances, the value of the property shall be the most just measure of recovery, it may adopt that value as the measure of recovery, instead of the expressed terms of the contract. So that, as the law now stands, there are two modes of adjusting rights and liabilities under Confederate money contracts; two modes, in other words, of ascertaining the value of Confederate money; one, by reducing the nominal value to the real value in gold, according to the scale of depreciation of Confederate States treasury notes, and the other by taking evidence of the real value of the thing, which the amount of Confederate States treasury notes, agreed to be paid, purchased at the time of the contract. Did a certain amount in such currency purchase a horse, or tract of land, or other property real or personal? Then that amount was worth the value of that horse, or that tract of land, or that other property, real or personal, whatever it may be at the time of the purchase and delivery of the property. Which of these modes is the "most just measure of

recovery" will depend upon the circumstances of each particular case. And it is for the court (or the jury, if it be a jury case), to adopt the one or the other, according to the circumstances of each case, which will best promote the ends of justice and fair dealing. Both are modes of ascertaining the value of Confederate money. Where the consideration of the contract is the borrowing and lending of Confederate currency, then the only mode of ascertaining its value is the reduction according to the scale of depreciation, of the nominal value, to its real value in gold. But generally, where the consideration of the contract is property sold and delivered, rented or hired, then the best mode of adjustment, and the

best mode of ascertaining the value 310 of the Confederate currency *agreed to be paid, is the fair value of the property which that amount of Confederate currency bought, rented or hired at the time the contract was entered into.

This, we think, is a fair construction of the two acts under consideration. It is proper to notice (and this will fully answer one of the positions taken by the learned counsel for the plaintiff in error), that the amendment contained in the proviso to the 1st section was manifestly intended to be an amendment to the 2nd section of the original act.

This was no doubt a clerical error in appending the proviso containing the important and radical amendment, to the 1st instead of the 2nd section. It ought properly to have been inserted in the eleventh line of section 2nd, after the words "in the particular case," in order to carry out the manifest legislative intent, and the scheme of adjustment adopted. In construing statutes the leading object will always be to carry out the manifest legislative will and intent, and if it be necessary for that purpose the courts will not only transpose sentences, but re-arrange sections. This has been done even in criminal cases, by this court, in the construction of statutes regulating criminal trials, where the greatest strictness of construction is required. Matthew's case and Garner's case, 18 Gratt. 989.

It is only necessary to read the act amending the act of March 1866, to conclude that the amendment referred to was intended as a proviso to the second section, and not to the first, where it has been incorporated manifestly by mistake. The proviso referred to is not applicable to the 1st section, because that section simply authorizes the introduction of parol or other relevant testimony, to show what was the true understanding and agreement of the parties in respect to the kind of currency in which the contract was to be fulfilled or performed, but makes no provision as 311 to the measure of recovery, *or mode of adjustment. This latter is provided for in the 2nd section; and the proviso containing the amendment, must be read as if incorporated in the 2nd section instead of the first. Reading the amendment as ap-

plied to the 2nd section, it carries out the manifest intention of the Legislature in providing another mode of adjustment, and measure of recovery, which experience demonstrated to be necessary; to wit, the actual value of the property.

But it is insisted by the learned counsel for the appellee, that the construction of the two acts of the legislature would be "to enable the jury to make a new contract, to fix a new price and a new standard of value for the parties, while they were contracting with reference to Confederate notes as a standard of value." We do not think the objection is well taken. It must be remembered that, in the abnormal and perplexing condition of things in which the close of the war found the people of this State, legislation was absolutely necessary to adjust the rights and liabilities of creditors and debtors growing out of dealings with respect to a currency which perished with the fall of the Confederacy. For four years and more the Confederate States treasury notes were the only currency of the country. Contracts during that period were for the payment of that currency, or were predicated on that currency, which had greatly depreciated. Many of these contracts remained unadjusted at the close of the war, when that currency had perished; and the perplexing and all-important question was, how were they to be adjusted.

The legislative department of the government, directly representing the people, and knowing their wants, presented a plan of adjustment in the act of the 3rd March 1866. It being found by experience that this plan of adjustment, while it settled upon equitable principles many cases arising during the war, did not in others meet the full measure of justice and equity
312 between the *contracting parties, the amendment referred to, passed February 28th, 1867, was adopted. It has been acted upon by the courts ever since, and in the opinion of this court presents the very best and most equitable plan of adjustment that could be adopted. It does not make a new contract for the parties. The literal performance and fulfillment of a contract to pay Confederate currency would be to produce that currency, now worthless trash. That would violate not only manifest principles of justice, but the intention of the parties; and that would indeed be a new contract for them, for they intended to pay and receive some value. What is the measure of that value the legislature has declared in the act we are now considering. So far from making a new contract, it simply provides (in the unprecedented condition of things growing out of the utter annihilation of the whole currency of the country) a just and equitable mode, by which such contracts, made with reference to a currency that has perished, may now be fulfilled and performed.

In the case before us the facts are not certified, and we have no means of ascertaining which of the two modes indicated by the statutes we have been considering

would be the most just measure of recovery in this particular case; but we are constrained to say that there was no error in the instruction given by the court, which was couched in the very language of the statute.

We are therefore of opinion that the judgment of the Circuit court of the county of Rockingham ought to be affirmed.

Judgments affirmed.

313

*Zollman v. Moore & als.

August Term, 1871, Staunton.

Judicial Sales—Case at Bar.—In March 1863 M., the widow, and R. and others, adult children of S., deceased, file their bill against the infant heirs of S., for the sale of land. The bill says the land was conveyed by W., the father of M., to S. and M.; that M. is entitled to one half the land, and the other plaintiffs and the defendants are entitled to the other half. There is a decree for the sale, a sale for Confederate money, to Z., the report confirmed, and a decree appointing a receiver to collect the money, and distribute it, and convey the land to Z. This is done and report confirmed. Afterwards M. files a bill of review, and claims that under the deed from W., she having survived her husband S., is entitled to the whole of the land, and asks that the sale may be set aside, and the land restored to her. **HELD:**

1. **Equitable Relief—Mistake of Law.***—The mistake of M. as to her rights, was a mistake of law, and a court of equity will afford no relief in such case.
2. **Judicial Sales—Deed Passes Title of All Parties.**—The prayer of the bill being for a sale of the land, and the decree and sale being of the land, and the deed conveying it, the title of all the parties to the suit passed by the deed.
3. **Same—Same.**—Z. was not bound, as against the parties to the suit, to enquire whether their title to the property was such as stated in the bill.
4. **Same—Confederate Money.**—Under the circumstances of this case it is to be presumed that the intention of the decree was that the sale should be for Confederate money.
5. **Same—Bona Fide Purchaser.**—Z. is a *bona fide* purchaser for value without notice, and having the legal title, M. is not entitled to recover against him.

On the 18th of March 1863, Mary L. Moore, widow of Samuel R. Moore, Wm. A. Ruff and Mary E. his wife, who was Mary E. Moore, and the other adult children of Samuel R. Moore, deceased, brought their suit in equity in the Circuit court
314 of Rockbridge county, *against Samuel Wilson and two others, the infant children of Virginia W. Wilson, a deceased daughter of Samuel R. Moore, asking for the sale of a tract of land in said county. The bill sets out that Samuel R. Moore died

*See principal case cited as authority on this point in *Martin v. Lewis*, 30 Gratt. 684; *Webb v. City of Alexandria*, 33 Gratt. 176; *Throckmorton v. Throckmorton*, 91 Va. 50, 22 S. E. Rep. 162; *Shriver v. Garrison*, 30 W. Va. 478, 4 S. E. Rep. 672.

intestate, leaving a tract of about two hundred and forty-three acres of land in the county of Rockbridge. That this tract was conveyed by Robert Wilson, deceased, and his wife, the father and mother of the plaintiff, Mary L. Moore, to the said Samuel R. Moore and his wife, the plaintiff, Mary L., by deed, which is recorded in the office of the clerk of the county court of Rockbridge. That this tract, one-half of which, they are advised, belongs to the plaintiff, Mary L. Moore, is incapable of being divided amongst the heirs of the said intestate, and all the heirs except the children of the deceased daughter, Virginia W. Wilson, being of age, they are desirous of having the said land sold, and their share of the proceeds paid over to them; and they believe it would be better for the infants that the land shall be sold, and their interests in the proceeds invested for their benefit. The prayer is for a sale of the land, and for general relief.

A guardian ad litem was appointed to defend the infants, who filed an answer for them, submitting their interests to the protection of the court; depositions were taken; and the cause was heard on the 13th of April 1863, when the court made a decree appointing Wm. A. Ruff, one of the plaintiffs, a commissioner to sell the land at public auction, after advertisement, as directed in the decree, for four weeks, for so much cash as would pay the expenses of sale and of the suit, and on a credit of six, twelve and eighteen months, as to the residue; taking bonds, &c.

The commissioner proceeded to advertise the sale of the land as directed by the decree, and he reported that it was sold on the 29th of May 1863, to Adam Zollman at \$14,000. He gave a statement showing 315 the sum of \$100 *paid in cash, and three bonds each of \$4,633.33 taken, which were returned with the report. These bonds show on their face that they are to be paid in Confederate money or bonds, and they bore interest from the date.

On the 14th of September 1863, the cause came on again to be heard, when the court confirmed the sale, and Ruff was appointed a commissioner to convey the land, with special warranty, to the purchaser, when the purchase money was paid; and he was authorized, as receiver, after executing a bond, with security, in the penalty of \$28,000, conditioned for the faithful discharge of his duty as receiver, to withdraw the bonds of the purchaser and collect the same as they fell due, or sooner if the purchaser should elect to pay them before maturity, and after paying the costs, pay over the residue to the heirs and distributees of S. R. Moore, deceased.

Ruff executed the bond as directed, and one of his sureties was Mrs. Mary L. Moore; and having received from Zollman the whole amount of the purchase money, he, by deed dated the 14th of December 1863, conveyed the land to Zollman with special warranty; and put him into possession.

It appears that a commissioner, under an

order in the cause, made a distribution of the proceeds of the sale of the land; and treated Mrs. Moore as only entitled to dower in it. His report is dated March 16th, 1864, and there being no exception to the report, it was on the 14th of April 1864 confirmed by the court.

In September 1866, Mrs. Moore, by leave of the court, filed a bill of review and supplement, in which she alleged that on the 8th day of February 1827, Robt. Wilson, and Elizabeth, his wife, the father and mother of the plaintiff, conveyed by deed of gift, to Samuel R. Moore, and Mary, his wife (the plaintiff), the tract of land which had been sold in the cause, which deed was 316 duly recorded in the clerk's office of the county of Rockbridge: *and she exhibits a copy of it. That Samuel R. Moore departed this life on the 24th of January 1863, leaving surviving him, his widow, the plaintiff, and the children and grandchildren, who were parties in the said suit, his heirs at law. That she is advised that the said tract of land having been conveyed jointly to the said Samuel R. Moore and his wife, the same, under the laws of the land, did not descend to the heirs of said Moore, but passed to her as the survivor, and became hers absolutely in fee simple.

The plaintiff states the bringing the suit by herself and the heirs of Samuel R. Moore, praying for a sale of the land. She says that although she was a nominal plaintiff in the suit, she had no active agency in bringing or prosecuting it. She never saw the bill, never heard it read, and was totally ignorant of her legal rights in the premises. She supposed she had only a dower estate in the land, and never supposed that she was the owner of one-half of the land as alleged in the bill, or of the whole absolutely, as appears to be the case. That so supposing that she had only such dower right, she acquiesced in a sale, which was wished by some of her children; but had she been advised of her legal rights, and known that she was the absolute owner in fee simple of the land, she never would have consented to a sale during the war, when the currency was in so unsettled a condition.

The bill further sets out the decree for the sale of the land, its sale to Zollman, and the subsequent proceedings in the cause; and charges that the commissioner varied the terms of sale by taking from the purchaser bonds payable in Confederate currency or bonds; whereas the decree implied that only such bonds should be taken as were payable in legal tender currency. And it charges that the commissioner's report of the distribution of the fund was confirmed before thirty days had elapsed 317 after its return. It is insisted that the sale *having been made within six months from the decree, the purchaser was bound to look to the title of the land. Had he done so, he would have seen that Samuel R. Moore derived his title from the deed aforesaid, and that by his

death the land became the absolute property of the plaintiff, and that there was no right to sell said land in said suit, for partition among the heirs of Samuel R. Moore. It is further insisted that the sale was illegal and void, because it was not made in accordance with the terms of the decree, and that a subsequent confirmation thereof, inadvertently by the court, did not cure the defect. And making Zollman and the heirs of Samuel R. Moore defendants, she prays that the sale may be annulled, all the proceedings and decrees based thereon may be set aside, the said land restored to the plaintiff, and Zollman be required to render an account of rents and profits, and for general relief.

Zollman answered the bill at great length. He avers that the sale was made upon the terms publicly announced by Ruff, the commissioner, previous to the bid made by the respondent, that the purchase money was to be payable in Confederate States treasury notes; and that respondent's bid and purchase was made upon this express understanding; and his bonds given for the purchase money so expressly stated on their face. These bonds were referred to in and made part of the report of the sale made by Ruff, the commissioner; and at the September term, 1863, of the court, this report was confirmed, on the motion of the counsel who represented Mrs. Moore. He refers to the fact that a few days after this decree confirming the sale and appointing Ruff a receiver to collect the purchase money, Mrs. Moore signed his bond as one of his sureties. That having heard of no objection from Mrs. Moore or any other party, to the terms of the sale, he paid the purchase money, and received a deed for the land from Ruff, the commissioner: and

318 *money the plaintiff further testified her knowledge and approval of the sale, by accepting from the receiver \$2,732 of the money paid to him by the respondent.

He further says that he had no notice or information of the plaintiff's title to the whole of the land, until within the last six months. He made no investigation of the title; but knowing that the sale had been decreed by the court, and publicly advertised for many weeks, and hearing no objection from any quarter, he presumed, and had good grounds to presume, that said proceedings were all in proper legal form. He insists that mere ignorance of the law is no ground of relief in equity: and that the plaintiff is estopped by her action and acquiescence in the proceedings of the suit and the sale of the land. And he concluded by demurring to the bill.

Depositions were taken, which showed that the sale of the land was fairly conducted; that there were a number of bidders, and the price at which it sold was reasonable. Before the war the land was assessed at \$6,168.75.

The cause came on to be heard on the 25th of April 1867, when the court overruled the demurrer to the bill, and made a decree,

in which it was held, that there was gross error apparent on the face of the record in the original suit, in relation to Mrs. Moore's right to the land, she being in fact entitled to the whole; that the construction of the deed from Wilson and wife to Moore and wife not having been raised by the plaintiffs, the decree of the court ordering a sale was not such an adjudication of the question of the title as relieved the purchaser from enquiry as to the title he was buying; that the sale having been within six months after the decree, Zollman was not protected; that the decree directing the sale did not authorize the commissioner to take Confederate notes, and the purchaser was bound to take notice of its provisions in this regard; and that the report of the commissioner, who, to this extent, was the

319 *agent of the purchaser, not having specially called the attention of the court to the departure from the decree in the terms of sale, the order of the court confirming the sale was not necessarily to be construed as giving validity to the purchaser's title under such sale; that if not previously notified of the error in the proceedings, or bound to take notice of the same, the defendant, Zollman, was bound to take notice of the provisions of the deed executed to him by the commissioner, Ruff, which by its recitals and express reference to the recorded deed of Wilson and wife to Moore and wife, and reference to the character in which Mrs. Moore was a party to the suit, as well as by the act of the defendant in accepting such conveyance, and by the admissions and allegations of this answer, it appears he, as well as the plaintiff, was laboring under the same mistake as to her title to the property, and a court of equity will relieve the plaintiff upon the ground of mutual mistake; and the plaintiff is not estopped by being a party to the original suit from asserting her title to the whole land, unless it was shown by proof that she acted so as to throw the defendant off his guard, that there was no evidence of fraud or misconduct on the part of the plaintiff, or of her more than nominal participation in the suit, or of any act of hers designed or calculated to mislead the defendant; but there was evidence of total ignorance on her part of the transactions connected with the suit, as well as of carelessness in the proceedings during the turmoils of the war.

But it was held further that the plaintiff was not entitled to have the sale wholly set aside; the title passing by the proceedings in the original suit to one half of the land, and to the value of her dower in the other half; the defendant to account to her for rent and profits, and that the defendant was entitled to a decree over against the heirs. And Zollman was authorized to sur-

320 render the purchase and take a decree against the parties according *to their supposed interest, for the true value of the nominal amount paid by him for said land, and account for rents and profits. It was therefore ordered and decreed that a

copy of this decree be served upon the defendant, Zollman, within thirty days from the rising of the court; and that unless within sixty days from that time said Zollman should file in writing his agreement to surrender the said purchase, he should be deemed to have refused to make such surrender, and thereupon one of the commissioners of the court were to take an account according to the principles of this decree.

Zollman filed a petition for the rehearing of this decree, and a commissioner of the court made a report in pursuance thereof, to which there was no exception; and on the 26th of September 1868, the cause came on to be heard upon the petition and also upon report, when the court made a decree and dismissed the petition, and affirmed Mrs. Moore's right to one half of the land; and in her favor for the amount due to her as stated in the report, and against the heirs in favor of Zollman, for the amount reported to be due them respectively. From this decree Zollman obtained an appeal to the District court of appeals at Charlottesville; from whence it was transferred to this court.

Brockenbrough, Baldwin and Cochran, for the appellant.

H. W. Sheffey, for the appellee.

STAPLES, J. The distinction between mistakes of law and of fact, as a foundation of equitable relief, is well established. This distinction is said to be one of expediency and policy, rather than of principle. Upon reasons of natural justice, the claim to such relief would seem to be as strong in the one case as in the other. The courts, however, proceed on the idea that, if parties were permitted to take advantage of mere
321 mistakes of law, the grossest fraud and injustice might be perpetrated, and, in the language of Lord Ellenborough, there is no saying to what extent the excuse of ignorance might not be carried. It is, therefore, an established rule of the courts that ignorance of the law will not affect the contracts of parties, or excuse from the legal consequences of their acts. It is not to be denied that in the English courts there has been some contrariety of decision on this subject, and the authority of great names is not wanting in support of various modifications of this rule. It will be found on examination, however, that these decisions are based on family agreements, or compromises of doubtful rights, or on cases in which no other rights have intervened, and the parties can be reinstated, or of surprise, imbecility, or fraud and undue influence. Wherever the question has turned upon a pure mistake of law, without the admixture of other elements, it is believed that few cases can be found, even in the English courts, in which relief has been afforded. This holds true more particularly where the party against whom the interposition of the court is invoked occupies the position of a bona fide purchaser for valua-

ble consideration. In *Bowen v. Evan*, 1 I. & L., 264, Chancellor Sugden said that, in his opinion, whether the purchaser has the legal or only an equitable interest, he may, by way of defence, avail himself of the character of a purchaser without notice, and is entitled to have the bill dismissed, though the next hour he may be turned out of possession by the legal title. Whatever may be the modifications of this rule, as laid down by Chancellor Sugden, in cases of mere equitable interests, it is clear that, when the purchaser is clothed with the legal title, he is beyond the reach of a court of equity; and this upon the principle that where there is equal equity the law shall prevail. As the defendant has equal claim to the protection of the court for his title

as the plaintiff has to maintain his,
322 the court declines to interfere in behalf of either party. And, so far is this principle carried, that, if the purchase is originally of an equitable title without notice, and the party afterwards purchases with notice, the legal title to support his equitable right, he will be protected. In *Culpeper's case*, cited in 2d Leading Equity Cases, 52, where a person had bought gavelkind land of the eldest son, and paid his purchase money without knowledge that it was gavelkind, and afterwards, for a song, bought in the titles of the younger brothers, who were ignorant of their titles, it was yet held they could not afterwards be relieved in equity: for it was said that the purchaser having honestly paid his money without notice, might use what means he could to fortify his title. Lord Hardwicke fully recognized the same principle in *Malden & wife v. Merrill & als.*, 2 Atk. R. 8, in deciding that a purchaser having given full value for an estate, the mistake or ignorance of some of the parties to a conveyance, of their claim under a marriage settlement, should not operate to the prejudice of such purchaser. *Teasdale v. Teasdale*, Sel. Ch. Cases, 59, 170; and *Sturge v. Starr*, 2 Mylne & Keene R. 195, 7 Eng. Ch. R. 195, sustain the same doctrine. These authorities abundantly establish, that under the rule of the English courts, the aid of a court of equity cannot be successfully invoked against a purchaser for valuable consideration without notice, upon the ground of ignorance of title originating in a mere mistake of law.

In the States, according to Mr. Justice Story, the general rule that mistake of law cannot affect the contracts of parties, has been recognized as founded in sound wisdom and policy, and proper to be upheld with a steady confidence; and hitherto the exceptions to it will be found not to rest upon the mere foundation of a naked mistake of the law, however plain and settled the principle may be, nor upon any ignorance of title founded upon such mistake.

He further declares the present dis-
323 position of courts of equity is to narrow rather than enlarge the exceptions. Chancellor Kent has repeatedly given his sanction to the same doctrine. In

Lynn v. Richmond, 2 John. Ch. R. 60, he said the courts do not undertake to relieve parties from their acts and deeds fairly done, though under a mistake of law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind. In *Crosier v. Acer*, 7 Paige R. 137 and 143, Chancellor Walworth announced the same views in language equally emphatic and unmistakable.

When the case of *Hunt v. Rousmanier*, reported in 8 Wheaton, 174, was for the first time before the Supreme court of the United States, that court then said: "Although we do not find the naked principle that relief may be granted on account of ignorance of the law, asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake is beyond the reach of equity." But when the case was before the court a second time, 1 Peters. U. S. R. 1, Mr. Justice Washington, speaking for the court, said, "We hold the general rule to be that mistake arising from ignorance of the law is not a ground for reforming a deed founded on such mistake. And whatever exceptions there may be to this rule, they will be found to be few in number, and to have something peculiar in their character, and to invoke other elements of decision. In the *Bank of the United States v. Daniel*, 12 Peters. U. S. R. 32, these principles were fully sustained.

It is not necessary, however, to rely alone upon the decisions of foreign courts. In *Brown v. Armistead*, 6 Rand. 594, this court announced the doctrines held by the Supreme court of the United States. Judge Carr, after exhibiting in the clearest light the dangers of a contrary rule, said, "Mistake of fact where it is plain, palpable, and

324 affects the very substance of the subject matter of *the contract, is sometimes a ground of rescission, but a simple mistake of law never. There are some of the elder cases, certainly, which have given relief in a few instances of very gross mistake of law, but the great weight of authority, indeed I believe I might say all the late cases, are to the contrary."

I think, therefore, it may be safely assumed as a well established rule of the courts, that ignorance of the law with full knowledge of the facts, furnishes no ground to set aside the solemn contract of parties. I do not mean to assert the rule as absolute and inflexible in all cases, but in the language of Judge Story, it may be affirmed that the real exceptions to it are very few, and generally stand upon some very urgent pressure of circumstances.

The case of *Irick and wife v. Fulton's ex'ors*, 3 Gratt. 193, has been relied on as furnishing a contrary rule. A slight examination will show that this is a total misconception. Irick and wife sold and conveyed their interest in a tract of land to Fulton, both parties supposing that Mrs. Irick was entitled only to one undivided interest therein. It was afterwards ascer-

tained that Mrs. Irick was the owner of the entire tract. This court set aside the sale and conveyance upon the ground that the parties only sold and purchased, and only intended to sell and purchase, such undivided interest. The vendee supposed he was merely purchasing a part, and in point of fact only paid for such part. It would therefore have been grossly unjust to permit him to retain the whole. In this case the entire tract was sold, the purchaser believed he was buying and actually paid for the whole.

Strong reliance has also been placed upon the case of *Lammot v. Bowly*, 6 Harris & John. R. 500, decided by the Supreme court of Maryland. The court says "the question presented for the decision of this court, is simply this, whether a man having a legal title to a parcel of land, but who is ignorant of his right, forfeits his title

325 *to the land by concealing his right when he knows that another is about to purchase it from a third person, and so the court hold that he is not estopped to assert his title." It must be borne in mind, in that case no conveyance of the legal title was executed by the owner; nor does it appear that he encouraged the sale. Now, I take it, there is a wide distinction between mere silence or acquiescence on the part of the owner, and an active participation in an arrangement for the sale of his property to a third person. In the former case all the authorities show that the true owner must at the time be acquainted with his rights, and must have wilfully and culpably concealed them. It is impossible to say that a man is guilty of a fraud in withholding information of his title when he is ignorant of its existence; and as he is still clothed with the legal title, equity will not interpose to divest him of it. But when the owner encourages the sale, when he concurs in it by participating in it, it becomes his own act, and he will not be permitted to allege that he was under a misapprehension of his rights as to their extent or nature in point of law. *Proctor v. Keeth*, 12 B. Mon. R. 256, and other cases cited in *Second Leading Cases in Equity*. This is the doctrine of equitable estoppel recognized by the uniform current of authorities. If, however, the owner not only concurs in the sale and encourages the purchase, but also unites in a conveyance of the legal title, he must encounter at the threshold of his application for relief, not only the equity but the legal title of the purchaser. In such case, the purchaser has not only a superior equity, but the law on his side. It is difficult to perceive any ground which would warrant the interposition of a court of chancery against him.

Apply these principles to the case under consideration. Let us suppose no application had been made to the court to sell the land, but that one of the heirs had gone to Zollman, proposing to sell the entire tract, representing *that Mrs. Moore was the owner of one moiety, and the heirs the other, and that she was willing to

unite with them in a deed conveying the property; and Mrs. Moore being called on, had expressed her approval of this arrangement, and had actually united in the deed, which was accepted by the vendee, and the purchase money thereupon paid; will it be maintained that Mrs. Moore could be afterwards heard to say she was mistaken as to her rights, that she was owner of the entire tract, and that the sale should be set aside because an error was committed in paying one-half the principal money to the heirs, instead of the whole amount to herself. It would be an unprofitable consumption of time to discuss such a proposition. What is the difference between representations of this kind directly made to the purchaser, and such as are made through the medium of a court of justice? May not the purchaser rely upon them as implicitly in the one case as in the other? Having the sanction of a judicial sentence, they are better calculated to create confidence than when privately made in the country. The original bill upon which the decree of sale was obtained, was filed in the name of Mrs. Moore in conjunction with her children. It professed to be her bill, as well as theirs. It represents that she is the owner of one-half the tract, and her children the owners of the other half; that it would be better for the infant heirs that the tract should be sold, and their share of the proceeds invested; and the court was asked to render a decree for such sale. The prayer of the bill was granted, and the sale made. Was the purchaser to discredit these statements? Was he to be wiser than the court and the parties? When they stated they were joint-owners of the tract, was it incumbent upon him to make investigations of title, employ counsel, and search records to ascertain whether perchance one of the plaintiffs was not the owner in severalty of the entire tract? Suppose he had examined the deed, as is insisted, it would not

327 *follow that he understood the law better than Mrs. Moore and her advisers. He might well say I was equally ignorant as herself and friends of the decision of the Supreme court under which she was entitled to the whole tract. Let it be conceded he was correctly advised as to her rights in the premises. I will venture to assert, that counsel would have advised him, that as Mrs. Moore herself had asked for the sale, and the court had decreed it, he might purchase with absolute safety.

It is true that in Virginia the maxim caveat emptor strongly applies, in judicial sales; but it only applies as between the purchaser and third persons who are not parties to the suit. Their interests are not affected by any proceedings that may be had, and the purchaser must always incur the risk of losing the estate by some superior title. But the court does undertake to sell the title of the parties to the suit. Whatever that may be, the purchaser acquires it. He must take care that the sale is made in accordance with the decree; but he is not bound to see to the proper appli-

cation of the purchase money; nor is he responsible for any error the court may commit in any of the subsequent proceedings. These are matters over which he has no control, and as to which he cannot be heard. He has the right to suppose that the court, under whose sanction the sale is made, will distribute the funds according to the respective interests of those entitled; and if an error is committed in this respect the remedy is not against him; but by an appeal to a higher court to correct the distribution. Previous to the decree of confirmation the purchaser has only an inchoate contract with the court; but after the confirmation, the purchase money paid and the deed executed, he has a complete and perfect contract, which can only be set aside upon grounds which would vacate any other executed contract. Let it once be established that judicial sales may be annulled at any length of time for errors

328 or mistakes not disclosed by *the record, and the laws authorizing such sales will become a dead letter upon the statute book. Who would venture to purchase under such circumstances, except at ruinous losses to the owner, or to improve property so acquired? Who would incur the hazard of buying from a purchaser at such sale: for, if the original purchaser is not protected, neither is his vendee. Under the rule asserted, into whatever hands the property may pass, it is still subject to the equity of the original owner. It is no doubt true that Mrs. Moore would never have brought the suit, or permitted it, had she known she was the owner of the estate. In such case there would have been no necessity, and, indeed, no ground for an application to the court. But the suit being brought, and a sale decreed, the essential error was in the decree directing a distribution of the proceeds of sale; an error which might have been corrected, and the mischief in some degree remedied, by the exercise of reasonable diligence on the part of Mrs. Moore in a better investigation of her title. Whatever may have been the haste exhibited in obtaining the decree of sale, (and with that the purchaser has no concern,) the purchase money was not paid until more than six months had elapsed; and within that period the mistake might have been discovered and corrected; probably even against the purchaser.

It is not to be denied that the greatest injustice was done Mrs. Moore in allowing her only the value of a dower interest in the proceeds of sale. Whether this was the result of inadvertence, or an entire misconception of her legal rights, we have no means of ascertaining. That, however, is a matter between her and her children, with which Zollman has no concern. It cannot possibly affect the decree, or the sale made under it.

It was argued, however, that as the suit proceeded on the assumption of a right of property in the children, the effect of the decree and sale is simply to vest in

329 the *purchaser such title as they had,

leaving the rights of Mrs. Moore unaffected. This view is based on an entire misconception of the effect of the sale, its confirmation, and the operation of the deed made under the order of the court. The prayer of the bill was for a sale of the tract of land; the decree directed a sale accordingly; the commissioner reported that he had sold the tract; and this sale was confirmed, and the commissioner directed to convey the tract to the purchaser; and this was done by the deed executed 4th January 1864. It is therefore too clear for argument, that the effect of these proceedings was to convey the land to the purchaser, and to clothe him with the title of all the parties to the suit. If this were not so, it is obvious that Mrs. Moore would not encounter the slightest difficulty in maintaining her action of ejectment against the purchaser, and consequently she could have no claim to relief in equity.

It is not pretended that Zollman was guilty of any fraud, misrepresentation or other unfair conduct, or that he was apprised of the mistake or delusion under which Mrs. Moore was acting with regard to her title. He therefore occupies the impregnable position of a purchaser for a valuable consideration without notice. How is it possible for a court of equity, consistent with well established principles, to disarm him, to deprive him of an advantage honestly and fairly obtained. In this respect Zollman occupied a much higher ground than that of the purchaser in *Storrs v. Barker*, 6 John. Ch. R. 169. There a feme covert seized of land, devised it to her husband, and died leaving her father as heir at law; and the husband, as devisee, took possession of the land, and continued to occupy and improve it; and afterwards sold the land for a valuable consideration, by the advice of the father, who disavowed any claim to the land as heir to his daughter. The father having brought his ejectment, upon a bill by the purchaser to stay the action, Chancellor

Kent, after an elaborate review of all
330 *the authorities, held that the declaration of the father of his ignorance of the invalidity in law of his daughter's will, if well founded in point of fact, was no sufficient defence against the equitable bar to his legal title arising from his acts and admissions; inasmuch as with knowledge of all the facts, he was bound to inform himself of his own title before he undertook to advise and encourage the sale and purchase of the same land by others; and he accordingly perpetually enjoined the defendant from prosecuting his action at law. It seems to me that these views and the authorities cited effectually dispose of this branch of the case.

It only remains to notice two other grounds taken in the argument. It is insisted that Zollman was not a purchaser for valuable consideration; that the fourteen thousand dollars in treasury notes, paid by him, were at the time of the sale of the value of two thousand dollars only in gold, and at the period of payment, of the value

only of eight hundred and seventy-six dollars in gold; while the assessed value of the land was over six thousand dollars. There is nothing in the record to impugn the fairness of the sale; it was publicly made; it was conducted by the son-in-law of Mrs. Moore, who had the strongest motives to obtain the highest price, and at number of substantial citizens of the county were present actively bidding for the property. No complaint was made, no intimation ever given that the land did not command a fair price in the then existing currency. And now, after the lapse of three years, this court is asked to reduce the nominal amount of the purchase money to its gold value, and by that standard to declare the price inadequate. It is unnecessary to repeat what has been so often said, that real estate after the year 1861 did not command in Confederate currency its estimated value before the war, nor is it necessary to assign the reasons for this condition of things. If

this sale can be set aside for inade-
331 quacy of consideration, *there is scarcely a contract for the sale of real estate made during the existence of the struggle, which may not be vacated on the same grounds. Besides all this, it is too late to make such an objection after the confirmation of the sale.

Another position taken is that the decree did not authorize a sale for Confederate currency. A simple statement of the facts is a sufficient answer to this proposition. The suit was brought in 1863, when Confederate money was exclusively in circulation; the bill, in asking for a sale, also asked that the proceeds should be paid to the complainants, and invested for the benefit of the infants according to their respective interests. The bonds were payable in Confederate currency, in instalments of six, twelve and eighteen months; with the privilege to the purchaser, of discharging them before maturity; they were returned by the commissioner and filed with his report, and the sale confirmed without objection. Mrs. Moore at the time resided with her son-in-law, who acted in the double capacity of receiver and commissioner. She was one of the sureties in the bond executed by him as receiver, by which he was authorized to withdraw the bonds and collect the purchase money. The proceeds of sale were collected in November 1863, and immediately distributed among those entitled; Mrs. Moore receiving the amount of her supposed interest. It is impossible, in view of all these circumstances, to suppose that either of the parties regarded the decree as requiring a sale for coin or United States currency. Such a sale would have resulted in a ruinous sacrifice of the property. And if the decree had required it, it is now too late to insist upon it, as no such objection was made either before or after the confirmation; nor before or after the payment of the purchase money, and its distribution among the parties before the court. It has been suggested that complete justice might be done in this case by returning to

332 the purchaser the value of the *Treasury notes advanced by him. And I was at one time inclined to the opinion that possibly Mrs. Moore might be relieved by an arrangement of that sort. But a little reflection has satisfied me that this is not only impracticable but unjust. In the first place, this court cannot say that the specie value of the currency was a fair equivalent for that currency, or a just compensation for the land. We know neither the source from which Zollman derived his money, nor the sacrifices he made to obtain it; nor the uses to which he might have devoted it but for this purchase. He might, and doubtless would, have invested it in the purchase of other real estate upon terms equally beneficial to himself. Courts of equity decree specific performance even where the price is grossly inadequate, if the purchaser is in no default. Certainly they do not undertake to set aside the contracts of parties except under very peculiar and extraordinary circumstances. Nothing of the kind is shown here to justify the interference of a court of equity. But a more serious difficulty in the way is that Zollman is not seeking the assistance of this court for any purpose. He stands upon his legal and equitable rights. As he asks nothing, no terms can be imposed on him. He is simply beyond the reach of a court of equity.

I have thus attempted to notice the principal points presented in the argument. I have done so because the peculiar hardship of this case has been strongly pressed upon us. The case is a very hard one, I am free to admit: hard that this poor widow should be stripped in her old age of the little estate derived from the bounty of her friends. But the struggle through which we have passed is a history of afflicting calamities; a vast maelstrom in which were engulfed the fortunes of countless human beings. It has been the misfortune of the present court to be compelled to apply the severe rules of law to many cases which might well excite

333 the commiseration of the hardest hearts. We are required, *however, to act upon fixed principles. We have no power of superseding or modifying the law, or of enforcing the charities flowing from natural equity and justice. It is better there should be individual instances of suffering and loss, than that established principles should be violated, and chaos and confusion produced in the administration of justice. These views render it unnecessary to consider the other questions so elaborately discussed by counsel.

For the reasons stated, I am of opinion the decree of the Circuit court should be reversed, and the bill dismissed as to the appellant Zollman.

The other judges concurred in the opinion of Staples, J.

The decree was as follows:

The court is of opinion, for reasons stated in writing, and filed with the record, that

the said decree is erroneous: Therefore, it is decreed and ordered, that the same be reversed and annulled; and that the appellee, Mary L. Moore, pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here; and this court, proceeding to pronounce such decree as the said Circuit court ought to have pronounced, it is further decreed and ordered, that the bill of review and supplemental bill of the said appellee be dismissed, and that she pay to the appellant his costs by him about his defence in the said Circuit court expended; which is ordered to be certified to the said Circuit court of Rockbridge county.

Decree reversed.

334

**Michie v. Jeffries & al.*

August Term, 1871, Staunton.

1. **Bonds—Confederate Contracts—Case at Bar.**—J lent to G \$5,000. and took his bond for the amount, dated April 17, 1862, payable five years after date, with interest, and a deed of trust on land to secure the debt. The money loaned had been deposited in bank in January 1861 to J's credit, and she gave G a check upon the bank for the amount in the usual form. This was not a Confederate contract, and is not liable to be scaled.
2. **Same—Same—Same.**—G afterwards sells the land, covered by the deed of trust, to M. and leaves in M's hands enough of the purchase money to pay the debt due to J; and M undertakes to pay it. On the 30th November 1864, J enters into an agreement with M, by which J agrees to take \$2,000 in gold in full of the bond, provided it is paid in two months from the date of the agreement. M pays \$865 within the two months, and he pays \$413 in February, after the two months is out; and he pays no more during the war. M not having fulfilled the agreement, it is not binding on J, and M must pay the balance due upon the bond; crediting the gold payments at 2½ for one; that being the ratio agreed upon by the parties in their agreement.
3. **Same—Usury—Personal Defence.***—The bond and deed of trust are not tainted with usury: but if they were, it could not be set up for the first time in argument in the appellate court; nor could M set it up at any time; it being G's debt, and M having received the money to pay it.

***Usury—Personal Defence.**—In *Dickenson v. Bankers, etc., Co.*, 93 Va. 502, 25 S. E. Rep. 548, the court said: "Where land subject to an usurious deed of trust is conveyed to a grantee, who assumes the payment of the debt named therein as a part of the consideration for the conveyance, he cannot set up the usury as a defence to a sale under the deed of trust. He has received a consideration for his undertaking to pay the debt, and will not be permitted to get rid of its payment by relying upon a defence which is personal to the original debtor, and which he has waived. *Crenshaw v. Clark*, 5 Leigh 69 (side page 65); *Spengler v. Snapp*, *Id.* 519 (side page 478); *Michie v. Jeffries*, 21 Gratt. 334; *Christian & Gunn v. Worsham*, 78 Va. 100."

See generally, monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 698.

4. Injunction—Dissolution of—Equity Jurisdiction.*—

There being no doubt as to the balance due upon the bond, the injunction granted to the sale of the land by the trustee, might have been dissolved, and the bill dismissed. But the court may retain the cause, and have the sale made by the trustee under its directions.

5. Deeds of Trust—Decree for Sale of Land—Decree Embodies Provisions of Deed.—The deed being in the form given in the statute, the decree directing the trustee to proceed to sell under and by virtue of the deed, upon the notice and terms stated in the decree; the decree in effect embodies in it the provisions of the deed, except in so far as they are altered by the decree: and the trustees must sell accordingly.**335 *6. Same—Same—What Portion of Trust to Be**

Sold.†—It is the duty of a trustee not to sell more of the trust subject than is necessary to satisfy the trust, unless the interest of the owners demand it, or they request it.

7. Same—Same—Same—Discretion of Trustee.†—It is not necessary for the court, before directing the trustee to proceed to sell, first to refer it to a commissioner to report how much and what part of the trust subject shall be sold. It is the duty of the trustee to determine that question; and if he finds difficulty in doing so, a reference to a commissioner may be made.

About the 1st of January 1861, the sum of six thousand dollars was paid into the Bank of Virginia, to the credit of Mrs. Martha R. L. Jeffries, then of Washington city, in payment of a debt that had been some time due to her. Of this sum she had drawn out a thousand dollars prior to April 1862. At this date she was living in Richmond; and on the 19th of April 1862, she lent to P. J. Glover, of the county of Albemarle, five thousand dollars, giving her check upon the said bank in the usual form for the amount; the money in bank being the balance which had been deposited as stated above. For this loan Glover gave to Mrs. Jeffries his bond payable five years after date with interest payable semi-annually; and he conveyed to John R. Tucker a tract of land in the county of Albemarle, estimated to contain two hundred and twenty-eight acres, being a part of an estate known as "the Brook farm," in trust to secure the payment

of the principal and the punctual payment of the interest. This deed is in the form given in the statute.

In November 1862, Glover sold and conveyed the land mentioned in the deed of trust to J. Augustus Michie, at the price of \$45 per acre; and the trust in favor of Mrs. Jeffries was recited in this deed, and it was agreed that Michie should retain in his hands, and have a right to see to the application of, so much of the purchase money for said lands as should be sufficient to satisfy the said lien.

On the 30th of November 1864, Mrs. 336 Jeffries and *Michie entered into a written agreement, which is called in the proceedings "the gold contract." In this agreement the bond and deed of trust executed by Glover and the conveyance to Michie are recited, and it is agreed between the parties, that if Michie will pay to Mrs. Jeffries two thousand dollars in gold, within two months from this date, Mrs. Jeffries will deliver up the said bond, and acquit the said Michie from all liability on the same; the said Michie binding himself herein to make such payment within such time. And the agreement states in the conclusion of it, that Michie has paid to Mrs. Jeffries \$328 in gold, as payment in part on that day in pursuance of the agreement.

On the 29th of December, Michie made a further payment in gold of \$537; and on the 21st and 22d of February 1865, after the sixty days had expired, he made two payments, the first of \$206 and the second of \$207; both in gold. No further payments were made during the war. And after the war, Michie not having paid anything on the debt, Mr. Tucker, the trustee, at the request of Mrs. Jeffries, advertised the land to be sold under the deed of trust. The advertisement stated that the trustee would sell so much of the land as was necessary to pay the balance of the debt, such balance amounting to \$1,751.89, with interest from the 19th day of April 1865: up to which time Michie had paid the interest on November 20th, 1864, before the gold contract was entered into.

When the sale was advertised, Michie obtained an injunction from the judge of the Circuit court of Albemarle county to stop it. In his bill he set out the foregoing facts; and he says when he made the payment in December 1864, he asked Mrs. Jeffries if she required the balance to be paid within the sixty days; she replied she did not; that he might go on and pay it as soon as he could; and he went on and procured gold as fast as he could, and made the

two payments in February 1865; 337 *which left a balance due from him of \$722, as of the 30th of January 1865.

He proceeds to state an arrangement he made with Mrs. Jeffries when he made the last payment, by which he was to send at gold prices, bacon and flour to the amount of \$200 in gold, and was preparing to send negroes to Richmond to sell and make up the balance, when he was prevented by the

***Injunction—Dissolution of—Equity Jurisdiction.—**

See principal case cited in *Kinports v. Rawson*, 86 W. Va. 241, 15 S. E. Rep. 68. See also, *foot-note* to *Hogan v. Duke*, 20 Gratt. 244.

See generally, monographic *note* on "Injunction."

+Deeds of Trust—What Portion of the Trust to Be Sold—Discretion of Trustee.—In *Curry v. Hill*, 18 W. Va. 375, the court said: "It is the duty of a trustee not to sell more of a trust subject than is necessary to satisfy the trust, unless the interest of the owner demands it, or he requests it, and whether the interest of the owner requires it the trustee in the exercise of his discretion must determine. *Michie v. Jeffries et al.*, 21 Gratt. 334."

The principal case was also cited and approved, as to this point, in *Cleaver v. Matthews*, 83 Va. 805, 3 S. E. Rep. 439; *Muller v. Stone*, 84 Va. 839, 6 S. E. Rep. 223; *Morriss v. Va., etc., Co.*, 90 Va. 376, 18 S. E. Rep. 843; *Rohrer v. Travers*, 11 W. Va. 155.

raid of General Sheridan, which cut off communication with Richmond, and then by his own sickness for three months. He insists that after what had been done, Mrs. Jeffries had no right to repudiate the gold contract, and upon the most favorable construction for her, she was only entitled to recover \$722, with interest from the 30th of January 1865. And if that contract was to be repudiated the original loan to Glover was a loan of Confederate money, and should be scaled. And making Mrs. Jeffries and the trustee defendants, he calls upon her to say if the money loaned was not Confederate money, and if it was not the true understanding and agreement between herself and P. J. Glover, that the debt should be paid in Confederate money. And he asks the court to decide whether the gold contract is still in force, or if it has been repudiated. If it has been repudiated, then he insists that Mrs. Jeffries shall lose the benefit of the last payment in gold, and that he shall be credited with its value in Confederate money, at the time of the payment; which would more than extinguish the debt.

Mrs. Jeffries answered the bill. She states that the money was delivered to Glover in the manner hereinbefore stated. She denies that she ever loaned Confederate money to Glover, or in any way or shape, directly or indirectly, agreed to receive payment of her loan of \$5,000, in Confederate money. She says it was well understood at the time by Dr. Michie, that the gold arrangement was a war measure, limited to war times. She denies that at the time of the payment of the 29th

338 December 1864, she told Michie that she did not require *the balance to be paid within the sixty days named in the contract, and that he might go on and pay it as soon as he could. On the contrary, she well remembers that Dr. Michie, when he made the payments in February, or one of them, said he supposed she would not receive it, because the sixty days had run out. But this respondent did receive these payments. She did so because the war was still going on, and it was in accordance with the line of policy which prompted her to make the gold contract. But in receiving these payments in conformity with the terms of the contract, she did not, either in terms, or by implication, bind herself to receive still other payments in gold upon the same terms, especially if the war was over at the time they were proffered. She has never repudiated the gold contract; but abided by it as long as it lasted. On the other hand, she never agreed to leave this contract in force for an indefinite period, nor can her receiving the payments in February be so construed. Her receiving the payments in February 1865 was not done under the contract, for it was then at an end, but outside of it; though the payments were taken upon the same terms with those received under the contract. She further states that the balance of \$1,751.89, with the interest thereon from the 19th of April

1861 (for the payment of which amount the sale was advertised by the trustee), was arrived at by crediting the gold payments on the \$5,000 bond at two and a half times their amount, that being the ratio agreed on in the gold contract. And she sets out in detail the credits endorsed on the bond.

The evidence in the cause is sufficiently stated in the opinion of the court.

The cause came on to be heard on the 22d of May 1867, when the court held that whether the gold contract was or was not first limited to two months, it was afterwards extended without limitation;

339 but that it was afterwards *repudiated by Mrs. Jeffries, and this repudiation was acquiesced in by Michie. It was further held that the original debt was not a Confederate contract, and that the debt was not liable to be scaled. It was therefore decreed that the injunction be dissolved with costs and damages; and that Tucker should sell at public auction, to the highest bidder, as trustee, under and by virtue of the trust deed, the tract of land conveyed to him in trust by said deed; giving notice of the time and place as directed in the decree. And the terms of sale were to be; cash enough to pay expenses of the trust including the expenses of the sale, and the costs of suit; and the balance of the purchase money in three equal instalments, falling due respectively in one, two and three years from the day of sale, with interest, to be secured by the bonds of the purchaser, with approved personal security; and a deed of trust upon the land. And the trustee was directed to report to the court and return the bonds taken. Michie thereupon applied to the District court of appeals at Charlottesville, for an appeal; which was allowed: and the cause was afterwards transferred to this court.

Watson and Duke, for the appellant.

Robertson and Southall, for the appellee.

MONCURE, P., delivered the opinion of the court.

The court is of opinion that the debt in the proceedings mentioned, contracted on the 17th day of April, 1862, by P. J. Glover, with the appellee, Martha B. L. Jeffries, for the loan of five thousand dollars, payable five years after date, with interest from the date, payable semi-annually, and secured by the bond of the said Glover, and a deed of trust on real estate, was not, "according to the true understanding and agreement of the parties," payable in Confederate States treasury notes, nor contracted with reference
340 to such notes as a *standard of value; and, therefore, that the said debt is not subject to be scaled in the mode prescribed by the acts of Assembly in such case made and provided. The money loaned had been deposited by the lender in the Bank of Virginia, in December 1860, or January 1861, and remained there, on deposit, until the date of the loan, when it was drawn out

by the borrower on the check of the lender. The bank was bound to pay specie or specie funds, in discharge of the check, and the borrower was not, any more than the lender, bound to receive anything else. If he received Confederate States treasury notes in payment of the check, which is quite probable, though the fact does not certainly appear, he received them voluntarily, without any understanding or agreement to that effect with Mrs. Jeffries, and even without her knowledge, and no doubt because they suited his purposes as well as any other money; at least with the exception of specie; which could not then be gotten. Such notes were then comparatively little depreciated, and were of as much value, compared with specie, as bank notes or any other paper currency, or as legal-tender notes were when the principal of the debt became payable. The money having been deposited in bank before the war, the bank would no doubt have been willing to pay it out in bank notes, in discharge of the check, if the borrower had preferred or required it. And if he did not, it was probably because Confederate States treasury notes served his purpose just as well. The great length of time which the debt had to run, five years, confirms the view that it was not understood to be payable in Confederate States treasury notes. The parties could not then have contemplated that the war would last so long, or that such notes would be the currency when the debt would become payable. None of the parties, neither the lender, nor borrower, nor the appellant, the subsequent vendee of the land conveyed by the deed of trust, who assumed the payment

341 of the *debt as part of the purchase money, contemplated that the debt would be payable in anything but good and lawful money at the time of its maturity; at least until long after the war, when, it seems for the first time, the appellant conceived the idea that it was payable in Confederate money, and subject to be scaled. The acts and declarations of all the said parties during the war repel such an idea. The debt was treated as a debt in good and lawful money, in the sale made by Glover to the appellant, of the land conveyed by the deed of trust for its security. It is not pretended that in that transaction Glover represented that the debt was payable otherwise than in good money; but the effect of the transaction seems to have been, to leave in the hands of the purchaser, in part payment of the purchase money, so much of it as could be sufficient to pay, in good money, the amount of the said debt at its maturity, with interest in the meantime, according to the terms of the bond and deed of trust, and to impose on the purchaser the obligation of making such payments. The appellant's agreement, on the 30th of November 1864, to pay two thousand dollars in gold, within two months thereafter, in discharge of the said debt, repels the idea that he then considered it to be payable in Confederate States treasury notes.

The court is further of opinion, that the agreement of November 30, 1864, between Mrs. Jeffries and the appellant, called in the proceedings the "gold contract," being exhibit "F" referred to in the bill, is a conditional agreement, expressly limited, by its terms, to the period of two months from its date; and not having been fully performed by the appellant by the payment to her of two thousand dollars in gold within that period, she was not bound to deliver up the said bond, and acquit him of all liability on account of the same, but he remained bound for the full amount thereof,

subject to the credits endorsed thereon, 342 crediting the gold payments *at two and a half times their amount, that being the ratio agreed on between the parties in their said agreement of November 30, 1864. The state of things which existed when the said agreement was entered into, the situation of the parties at that time, and all the surrounding circumstances, concur in showing that the parties actually intended what the terms of their agreement literally express, as aforesaid, and that time is of the essence of their agreement. Mrs. Jeffries would not have agreed to receive less than one half of the amount of the debt (even though paid in gold) in full payment of it, except under the circumstances which surrounded her at the time, and on the terms and condition expressed in the agreement. It was believed by the parties that those circumstances would continue to exist for at least two months, and therefore that period was given to the appellant for the full performance of the agreement. He well knew that he was bound by the agreement to make full payment within the two months in order to be entitled to have the bond delivered up, and to be acquitted from all liability on account of the same; and therefore he thought it necessary to ask her, as he says he did on the 29th of December 1864, when he made her a payment of \$537 in gold, if she required the balance to be paid within the sixty days. She denies this allegation in her answer, and there is not sufficient proof of it to overcome the effect of such denial. But the allegation shows that he considered it necessary to procure her consent within the sixty days, to the extension of the time for the performance of the "gold contract" beyond that period.

The court is further of opinion, that the said agreement having failed of full effect by the failure of the appellant to make full payment of the said sum of two thousand dollars in gold within the said term of two months, it was not revived, nor extended to any period, definite, or indefinite, and 343 certainly not to any period *beyond the actual existence of the war, (which alone had induced the agreement,) by anything which occurred after the expiration of the said term. The appellant alleges in his bill that "on the 29th day of December 1864, your complainant paid Mrs. Jeffries \$537 in gold; at the time this payment was made, complainant asked Mrs. Jeffries if she required the balance to be

paid within the sixty days; she replied that she did not, that he might go on and pay it as soon as he could." "He proceeded as rapidly as he could to make collections of gold, and on the 21st day of February 1865, he made another payment in gold of \$206, and on the next day he paid \$207 in gold, making, in the two payments, \$413, which left a balance due from complainant of \$722, as of the 30th day of January 1865." In answer to these allegations, Mrs. Jeffries says: "Your respondent denies that at the time of the payment of the 29th of December 1864, she told Dr. Michie that she did not require the balance to be paid within the sixty days named in the contract, and 'that he might go on and pay it as soon as he could.' On the contrary, she well remembers that Dr. Michie, when he made the February payments, or one of them, said he supposed your respondent would not receive it, because the appointed time for payment (the sixty days) had run out. But in spite of this fact, your respondent did receive those payments. She did so, because the war was still going on, and it was in precise accordance with the line of policy which prompted her to make the gold contract. But, in receiving these payments in conformity with the terms of the contract, your respondent did not, either in terms, or by implication, bind herself to receive still other payments in gold upon the same terms, especially if the war was over at the time they were proffered." The appellant and respondent were both examined as witnesses in the case, and their testimony corresponds with what is stated in the bill

344 and answer respectively as *aforesaid*.

There is no other testimony on the same subject, except that of Judge Ould, which confirms that of Mrs. Jeffries. We must take the facts, therefore, to be as stated by her, and so taking them, there can be no doubt or difficulty in deciding that the right to make payments on the gold contract ended, at least with the war, if not with the said period of two months from its date. That the appellant was himself of that opinion, is conclusively shown by the fact that he made no payment nor offer of any payment on account of that contract after the payment made in February 1865, as *aforesaid*. She wrote him on the 24th of April 1866, and again on the 1st August 1867, stating her necessities for money, urging him to pay the interest due on the balance of his debt, and representing the principal of that balance to be about eighteen hundred dollars. Both of these letters were received by the appellant; and yet he answered neither of them until December 1, 1867, more than eighteen months after the date of the first, and four months after the date of the second. He then wrote to her, saying, "I must apologize for not answering the letter you wrote me last summer, by stating that I contemplated visiting Richmond in a short time, and thought it best to see you in person in regard to the money I owe you on Major Glover's bond.

I have, however, been prevented by business from taking the trip, and shall not be able to see you before the month of February, when you may rely on my paying you two years' interest on the remainder of said bond. If you would prefer making a reasonable deduction on said bond, I will make an effort to pay all of the principal that has not heretofore been paid." This letter is inconsistent with the idea that the writer then considered the gold contract as still subsisting; and the same may be said of another letter, written by him to her, dated March 2, 1868; but it is needless to state its contents.

The court is further of opinion that
345 the bond and deed **of trust* are not tainted with usury; as fully appears from what has already been said. But if they were, there are two sufficient answers to the objection: 1st, that it was not made in the pleadings, nor otherwise, in the court below, but is made now, for the first time, in argument, in the appellate court, and therefore it comes too late; and, 2dly, it comes from the wrong quarter. Dr. Glover, on whom the usury is supposed to have been practiced, has waived the objection, if it could ever have been made, and so far as he is concerned, has, in effect, paid the money. He left it in the appellant's hands for the use of the creditor, and the appellant is bound in good faith, both to the debtor and the creditor, to pay over to the creditor the money thus had and received to her use. A court of equity will not entertain him in his attempt to withhold it. He is met at the door of the court by one of its favorite maxims, that "he who asks, must do, equity." In fact he has no equity to ask. The money is not his, but Mrs. Jeffries'. He has no claim to nor interest in it. That this is the law seems to be well settled, by the Supreme court of the United States, in *DeWolf v. Johnson*, 10 Wheat. U. S. R. 367, 393; and by this court in *Crenshaw's adm'r v. Clark, &c.*, 5 Leigh, 65; and *Spengler v. Snapp*, Id. 478; all of which cases were cited in argument by the counsel for the appellees.

The court is further of opinion, that the bond of Dr. Glover, secured by the deed of trust in the proceedings mentioned, being fully due and payable, in good and lawful money, subject only to the credits endorsed thereon; and there being no doubt as to the true balance due and unpaid on account of said debt; and the trustee in the deed having proceeded, in strict pursuance of its terms, to execute the trust thereof; he was doing a lawful act, in a lawful way, when his proceedings were arrested by the injunction awarded in this case. And
346 **the court below might very well, not only have dissolved that injunction, but dismissed the bill.*

But the court is further of opinion, that while that course might well have been pursued, that court had the power, at its election, to retain the cause, and have the trust executed under its superintendence and direction; as was done in the case of

Hogan v. Duke & als., 20 Gratt. 244, cited by the counsel for the appellant. That course seems to be convenient, as it saves the expense and necessity of another suit, in case one should be necessary, and it tends to ensure a due and faithful execution of the trust. Certainly, the debtor can have no good cause to complain of such a course.

The court is further of opinion, that there is nothing in that portion of the decree of the Circuit court, which directs the trustee in the said deed of trust to proceed to make a sale under and by virtue of the same, or which prescribes the place, manner and terms of such sale, of which the appellant has any just cause to complain. The trustee, by the express direction of the decree, must pursue the terms of the deed, except so far as the decree directs otherwise, and the decree directs otherwise, only in regard to the terms of the sale; the deed adopting the form prescribed by the Code, which provides that the sale shall be for cash; while the decree provides that the sale shall be for only so much cash as may be enough to pay expenses of the trust, including expenses of the sale and costs of the suit, and on a credit of one, two and three years, as to the balance of the purchase money. Surely the appellant has no cause to complain of this change of the terms prescribed by the deed, and he does not complain of it. But he complains that the decree directs the trustee to sell the whole of the tract of land conveyed by the deed; whereas the Code, p. 562, ch. 117, § 6, which applies to this case, requires him to "sell the property conveyed by the deed, or so much thereof as may be necessary." There is no substantial variance between the Code and the decree in this respect. It was not the design of the framers of the Code to make any substantial innovation of the law in regard to deeds of trust, but merely to prescribe a general form for such deeds, where the parties do not prefer some other form. The object was, to save labor in the preparation of such instruments; and therefore the section provides that the sale shall be for cash, and of the property conveyed by the deed, or so much thereof as may be necessary. These terms were prescribed in reference to what was supposed to be suitable to a majority of cases of deeds of trust. When slavery existed, as was the case when the Code was adopted, slaves were a common subject for conveyance by deed of trust; and slaves were generally sold for cash. And, except when sold in families, were sold separately, and it was proper to sell only so many of them as were required to satisfy the purposes of the trust. The form of the deed of trust prescribed by the statute applies to "property" generally, and not to land alone. It is the duty of a trustee not to sell more of the trust subject than the purposes of the trust require, even though the deed direct him, in case of default, to sell the trust subject, without saying, "or so much thereof as may be

necessary to satisfy the purposes of the trust." That is always implied, unless a contrary intention plainly appears. The decree, therefore, in directing the trustee to sell, "under and by virtue of the trust deed," the tract of land thereby conveyed to him, is to be construed and read, as if the words, "or so much thereof as may be necessary," followed the words above mentioned. In saying, "under and by virtue of the trust deed," all the terms of the deed, and of the law on which it is founded, are, in effect, embodied in the decree, except such as are therein expressly varied. There is no ground to apprehend that the trustee will not execute his duties fairly and faithfully,

and there is no suggestion of the kind in the bill. In his advertisement of the sale under the deed of trust, he stated that he would sell so much of the land as might be necessary to pay the balance due upon the debt and he will no doubt make the same, or a similar statement, in his advertisement of the sale under the decree; but whether he will or not, it will be his duty to sell only so much of the land as may be necessary for the purposes of the trust. We do not mean to say that he must sell precisely so much as may be sufficient to satisfy the purposes of the trust and no more. It may be difficult, or impossible to do this, and it may in fact be a breach of trust to do it. He cannot so divide and sell the land as to do unnecessary injury to the owner. He is the agent of both parties, and must consult and respect the rights of both. The sale of a part of a tract of land, may injuriously affect the sale or value of the balance; and it may be the duty of the trustee to sell the whole tract, or more of it than is required for the purposes of the trust, especially if desired by the owner of the land to do so. By duly considering the rights, interests, and wishes of the parties, an intelligent and faithful trustee will rarely find any difficulty in the discharge of his trust, and when he does, he can have the difficulty removed by invoking the aid of a court of chancery for that purpose. In this case, the parties are already in court, and it will be easy to obtain that aid if necessary. There is no necessity for any preliminary reference to a commissioner to ascertain and report how much, and what part of the land should be sold. It is the duty of the trustee to determine that question, and the presumption is that he is fully competent and able to do so. Should he meet with any difficulty in doing so, it will then be time enough to ask for such a reference.

The court is of opinion that there is no error in the decree of the Circuit court, and that it ought to be affirmed.

Decree affirmed.

349 *Ramsey's Adm'rs v. McCue & als.

August Term, 1871, Staunton.

1. Bonds—Alteration—Time of—Assumption by Court.*
—Upon the question of an alteration in the bond

*See monographic note on "Bonds."

sued on, if the case agreed does not state the alteration was made after the execution of the bond, the court, in pronouncing the conclusion of law upon the facts, cannot assume that such was the fact.

2. **Same—Same—Intention—Question of Fact.**—The question as to the time when, and by whom and with what intent, an alteration, apparent upon the face of a bond, was made, is a question of fact to be ascertained by a jury, and cannot be inferred by the court.

3. **Judgment against High Sheriff—Liability of Deputy Sheriff—Case at Bar.**—There is a judgment against a high sheriff for a fine for the failure of one of his deputies to return an execution which, the record showed, had come to the hands of the deputy; and the high sheriff satisfies the judgment. In fact, the execution had been delivered to another deputy who farmed the shrievalty, who collected the money, and failed to pay it over, and to return the execution. The high sheriff may sue the last mentioned deputy and his sureties on his bond, and recover the amount he had paid.

This was an action of debt in the Circuit court of Augusta county, brought in April 1858, by Wm. Ramsey, and afterwards revived in the name of his administrators, against Moses H. McCue and three others, his sureties, upon a bond executed by McCue as deputy of Ramsey, sheriff of Augusta. There was a judgment for the defendants; and the plaintiffs obtained a supersedeas to the District court of appeals at Charlottesville; and it was transferred from thence to this court. The facts are stated by Judge Anderson in his opinion.

Fultz, for the appellants

Baldwin, for the appellees.

350 *ANDERSON, J. From the facts agreed in this case, it appears that William Ramsey was commissioned and qualified as sheriff of Augusta county, for the years 1848 and 1849; and that he farmed the shrievalty of the whole county, for his term of two years, to Moses H. McCue as his deputy; and that at the request of McCue he consented to the qualification of Thos. S. Coalter and sundry other persons that they might act as his assistants. On the 27th day of March 1848 the defendant in error, McCue, with seven others, as his sureties, executed a bond to Ramsey in the sum of \$30,000, with condition that said McCue should well and truly perform the office of deputy sheriff in such manner as to keep harmless and indemnify the said William Ramsey from all trouble and damage which may arise in consequence of the said McCue being admitted to the said office, &c. And on the — day of March 1849, the said McCue, with three others, as his sureties, his co-defendants, executed another bond to said William Ramsey, which is in all respects a transcript of the foregoing, except as to date, and the recital of the date of Wm. Ramsey's commission in the condition of the bond; the former reciting his commission as dated on "the 3d of January

1848," and this, on "the 3d day of January 1849."

At the December term of the County court of Augusta, 1856, a recovery was had against said Ramsey, at the suit of one Shelton, administrator of Thomas W. Baskins, for a fine of \$150, with interest from the 23d of December 1856, and costs, for the failure of Thomas S. Coalter, a deputy sheriff of said Ramsey, employed by said McCue, to return an execution according to law. The execution was upon a delivery bond for \$202.66, to be discharged by the sum of \$101.33, with interest and costs, which issued against H. M. Harris and others, for the benefit of said Baskins, on the 10th of September 1849, and which the records of the clerk's office show, 351 *came into the hands of said Coalter, and had not been returned according to law.

Ramsey paid the fine, and learning afterwards that Coalter had placed the execution in the hands of McCue, and that he was the party in default, he instituted this proceeding against him and his sureties, upon their bond of 1849, to recover the money he had paid on Baskins' execution; and proved that McCue had taken the execution from Coalter, collected the money upon it himself, and failed to pay it over, or to return the execution. It is further stated, that to sustain the issue on the plea of non est factum, the defendants "proved that that part of the bond sued upon, which recites the date of the commission of said Ramsey as sheriff, as is disclosed by an inspection of said bond, originally read thus: by virtue of a commission dated the 3d day of January 1848," and that the same had been altered, so as now to read "the 3d day of January 1849, instead of 1848, and that so altered, said bond was produced on the trial of the cause, from the custody of the plaintiff." Upon the case thus agreed, the Circuit court held, that the law was for the defendants, and so gave judgment.

The learned counsel for the defendants, in support of that judgment, argued, first, that the facts agreed are, in effect, that the alteration was made subsequent to the execution of the bond; and, secondly, if this is not so, the bond, being in the custody of the party who produces it, and claims under it, and the alteration being of a material part, it devolves on him to explain how it was made; and in default of such explanation the law presumes it was made by him without the consent of the obligors, subsequent to the execution of the bond: and that in either case, the instrument sued on was not the deed of the defendants.

With regard to the first point, it is a question as to what are the facts agreed.

In the clause above cited, the fact of the alteration of the bond is clearly 352 affirmed. *But when that alteration was made, whether before, or after, or at the time of the execution of the bond, I do not think is asserted. It seems to me that it may with more reason be claimed, that the previous language, in the state-

ment of facts agreed, import that the alteration was made before the execution of the bond; or that the bond was executed in its present form. The language is, "that said McCue, while in office, executed a bond with Washington Swoope," &c., "which bond is dated March 1849, and is in the words and figures following, to wit:" then recites the bond, with the condition precisely as it now reads. "This bond, dated March 1849," and reciting the date of Ramsey's commission, as of "the 3d day of January 1849," it is affirmed was executed by McCue and his sureties. But the whole statement of facts agreed must be taken together, and if this construction is in conflict with the language first cited, it might be regarded as a reason for rejecting it. But I can perceive no incompatibility in the two clauses, as I have construed them. But take them both together, the language would seem to import, that the bond as originally drawn recited the date of Ramsey's commission as of the 3d day of January 1848; but it was altered so as to read, "the 3d day of January 1849;" and after being so altered, it was executed by McCue and his sureties; that is, they executed a bond of which this, in its present form and shape, is an exact copy. This, it seems to me, is the fair construction of the language; at least it may be said with more reason, that such is in effect the facts agreed upon on this subject, than the construction contended for by the learned counsel for the defendants. If the view I have taken of the agreement of facts is correct, it is decisive of the case, on a special verdict or facts agreed, unless the judgment can be sustained upon the other issue.

But if I am mistaken in this view, and the facts agreed do not affirm that
353 the bond was executed in its *present shape, but assert that it was altered in the particular mentioned, without affirming when the alteration was made, whether at the time of its execution or before or since; how does it appear that the alteration was made subsequent to the execution? It is argued that it is a material alteration, and unexplained, and the bond being in the custody of the party who produced it and claims under it, the presumption of law is, that it was made subsequent to its execution, and without the consent of the obligors.

Whether or not it is a material alteration, I deem it unnecessary in this case to inquire. Admitting the facts as stated, to have been agreed, I cannot admit the conclusion of law as drawn from them. If such conclusion be fairly deducible from the facts stated, it is not a conclusion of law, but a conclusion of fact; and cannot be drawn by the court in a special verdict, or case agreed. And not being found, the court in pronouncing the conclusion of law upon the facts, cannot deem it to exist.

But I would not be understood as indicating an opinion that such a conclusion of fact is warranted from the facts agreed.

Upon this question there has been some contrariety of opinion. The rule of the common law seems to have been, that an alteration or interlineation in a deed, in the absence of any opposing testimony, would be presumed to have been made before the deed was finally executed; because the law will never presume fraud or forgery in any person. Co. Litt. 225 b. n. (1). *Omnia presumuntur rite esse acta*. The rule is laid down by Greenleaf thus: "Generally speaking (he says), if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument. But if any ground is apparent on the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom and the intent with which the alteration was made, as matters of fact,

354 to be *ultimately found by the jury, upon proof to be adduced by the party offering the instrument in evidence. 1 Greenleaf Ev., sec. 564. See also, 2 Pars. on Contracts, note a, p. 228. According, then, to the rule as laid down by this eminent jurist, even when there is any suspicion of unfairness upon the face of the instrument, the time when the alteration was made, by whom, and with what intent, is a question of fact to be decided by a jury, and consequently cannot be inferred by the court upon a statement of facts agreed. Also in note 1 to the text which I have quoted, it is said that, "it is generally agreed, that inasmuch as fraud is never to be presumed, therefore, if no particular circumstances of suspicion attach to an altered instrument, the alteration is to be presumed innocent, or made prior to its execution. And numerous authorities are cited in support of the doctrine as stated. But it is unnecessary that this point should now be decided. I deem it proper to state, however, that there are no circumstances attaching suspicion to this instrument, or impugning its genuineness.

There is no other ground upon which it is contended that the judgment is right. It is that the recovery against Ramsey is for the default of Coalter; and that it is not competent for him now to recover against McCue for such default. It is very clear that if Ramsey had been aware of the fact that McCue was the real defaulter, and had proved it in that case, he could not have defeated the plaintiff's recovery by such proof. And in a suit by Ramsey against McCue, can the latter defend himself by pleading that the recovery was against Ramsey for the default of Coalter in not returning the execution? To such defence it would be a sufficient reply, that McCue took the execution from Coalter, collected the money on it himself, and kept both the money and the execution; and

355 that Ramsey had to pay the money to the creditor, which McCue, *and not Coalter, had collected and used. I do not think there is anything in this objection. But, if there was, it could not

avail the defendants in error, under the pleadings in the cause. The fifth assignment of breach in the declaration alleges the facts as proved. And the defendants having taken issue upon the allegations, they could not object to the proof. I am of opinion, therefore, that the judgment of the Circuit court is erroneous, and ought to be reversed.

The other judges concurred in the opinion of Anderson, J.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said judgment is erroneous: Therefore, it is considered that the same be reversed and annulled, and that the plaintiffs recover against the defendants their costs by them expended in the prosecution of their writ of supersedeas aforesaid here; and this court, proceeding to render such judgment as the said Circuit court ought to have rendered, it is further considered that the plaintiffs recover against the defendants thirty thousand dollars, the debt in the declaration mentioned, and their costs by them about their suit in the said Circuit court expended. But this judgment is to be discharged by the payment of one hundred and fifty-five dollars and eighty-three cents, that being the amount of damages sustained by reason of the breaches assigned in the declaration, of the condition of the writing obligatory therein mentioned, as appears by the case agreed, with interest thereon, to be computed after the rate of six per centum per annum from the 23d day of December 1856, till payment, and the costs last aforesaid; which is ordered to be certified to the said Circuit court of Augusta county.

Judgment reversed.

356

***Green & Suttle v. Massie.**

August Term, 1871, Staunton.

1. **Chancery Practice—Bill of Discovery—Time of Filing.***—If a discovery from the plaintiff is necessary to enable the defendant to make his defence at law, he must file his bill for the discovery before the judgment has been rendered against him. And he cannot go into equity for discovery and relief against the judgment, after it has been rendered.

***Chancery Practice—Bill of Discovery—Time of Filing.**—See *foot-note* to *Haseltine v. Brickey*, 16 Gratt. 116.

Equitable Relief—New Trial—What Applicant Must Show.—In *Adams v. Hubbard*, 25 Gratt. 132, the court said: "The rules governing courts of equity in awarding new trials in actions at law are well settled. The party applying for relief must show that he has a good defense, of which either he had no knowledge until after judgment, or that he was prevented from making it by fraud or accident or some act of the adverse party, unmixed with negligence or fault on his part. 2 Rob. Prac. 213; *Green & Suttle v. Massie*, 21 Gratt. 356."

See also, principal case cited as authority on this

2. **Chancery Practice—Bill without Equity—No Objection Made.**†—If at the hearing of a cause, the case made upon the pleadings and proofs, is one of which a court of equity has no jurisdiction, the bill should be dismissed; though the defendant has made no objection to the jurisdiction, either by demurrer, plea or answer, but has defended himself on the merits. And in such a case, an appellate court will reverse a decree in favor of the plaintiff, and dismiss the bill, though no objection to the jurisdiction was taken in the court below.

This is an appeal from a decree of the Circuit court of Warren county, in a suit pending therein, in which Thomas B. Massie was plaintiff, and Green & Suttle, partners, were defendants. The bill alleges that Massie, in November 1856, was the accommodation endorser of John W. McKay, upon a negotiable note in the Farmers' Bank of Alexandria, for the sum of nine hundred dollars, discounted for the benefit of Green & Suttle. That McKay, expecting to get indulgence upon said debt, obtained from Massie his endorsement upon a number of printed forms of negotiable notes signed by McKay, blank as to sums and dates, for the sole purpose of being used for the renewal of this note of \$900, according to the usages of the bank. That the debt was afterwards reduced to \$600; which sum was due at the death of McKay, on the 24th of May 1857.

point in *Ayres v. Morehead*, 77 Va. 588; *Corey v. Moore*, 86 Va. 738, 11 S. E. Rep. 114. See also, *foot-note* to *Haseltine v. Brickey*, 16 Gratt. 116.

†**Chancery Practice—Bill without Equity—No Objection Made.**—The proposition advanced by the principal case that, where the case made on the pleadings and proof is one of which a court of equity has no jurisdiction, the bill should be dismissed even though the defendant has made no objection to the jurisdiction and has defended himself on the merits, has met with approval in *Salamone v. Kelley*, 80 Va. 95; *Poindexter v. Burwell*, 82 Va. 512; *Graveley v. Graveley*, 84 Va. 151, 4 S. E. Rep. 218; *Buffalo v. Town of Pocahontas*, 85 Va. 225, 7 S. E. Rep. 238; *Morehead v. De Ford*, 6 W. Va. 321; *Slack v. Jacob*, 8 W. Va. 655. See, in accord, *Hudson v. Kline*, 9 Gratt. 379.

But, though a bill on its face may not state a case proper for equitable jurisdiction, yet other matter appearing in the progress of the cause may supply the defect, the defendant not having demurred to the bill. See the principal case cited as authority in *Salamone v. Kelley*, 80 Va. 95; *Graveley v. Graveley*, 84 Va. 151, 4 S. E. Rep. 218. In *Salamone v. Kelley*, 80 Va. 95, the court said: "This view (the one above laid down last) is countenanced by the case of *Green & Suttle v. Massie*, *supra*, where it was held that, 'if at the hearing of a cause the case made upon the pleadings and the proofs is one of which a court of equity has no jurisdiction the bill should be dismissed,' thus indicating that the court considered that, there being no demurrer, a defective bill may be supplemented by the answer and the evidence."

See also, in accord, *Ambler v. Warwick*, 1 Leigh 195.

Indeed the objection, that the case does not present proper grounds for equitable interference,

357 *It is further alleged in the bill, that after the death of McKay, and after his estate was ascertained to be insolvent, Green & Suttle claimed to hold two other negotiable notes of McKay, endorsed by Massie; one dated the 8th of May 1857, for \$610.97, and the other dated the 22d of May 1857, for \$162.49; both payable at said bank. That suit was brought upon these notes, and judgments rendered against Massie. He charges that these notes are two of the blank notes endorsed by him for the renewal of the note of \$900; that the blanks had been filled, as to dates and sums, by Green & Suttle after the death of McKay, and to cover some liabilities on his part to Green & Suttle, other than the debt of \$900. He avers that he had no means of proving these facts in the suit at law, and he was therefore compelled to submit to a judgment. He charges that the said notes are two of the blanks endorsed by him for McKay for the renewal of the note for \$900, which were placed by McKay in the hands of Green & Suttle for that purpose and no other; and that they, without any authority from McKay or the plaintiff, and in violation of the understanding of the parties, filled up the blanks in them with sums of money to cover other indebtedness of McKay to them; and this was done after the death of McKay, and after it was ascertained that he was insolvent. And making Green & Suttle defendants, he calls upon them to answer; and prays for an injunction to the judgments, and for general relief.

Suttle answered the bill. He denies that the blanks were placed in the hands of Green & Suttle for the purpose of renewing the note of \$900; but says that said notes, for said purpose, were deposited singly, and not long in advance of the time of renewal. He denies that the note of \$610.97

may be made for the first time in the appellate court: and the appellate court will reverse a decree in favor of the plaintiff and dismiss the bill if the cause appear by the record to be not proper for the court of equity, though no objection to the jurisdiction was made in the lower court. *Green v. Massie*, 21 Gratt. 356; *Buffalo v. Town of Pocahontas*, 85 Va. 225, 7 S. E. Rep. 238; *Witz v. Mullin*, 90 Va. 807, 20 S. E. Rep. 783; *Slack v. Jacob*, 8 W. Va. 655.

In this last case (*Slack v. Jacob*) it was insisted by the defendants in their argument before the appellate court that the bill did not on its face show sufficient matter to give a court of equity jurisdiction of the matters and things therein alleged. But the plaintiff's counsel maintained that the question of jurisdiction could not be considered by the appellate court at that late hour, since there had been no demurrer to the bill nor objection taken to the jurisdiction in the court below by plea or answer.

But the court said: "We think, upon the authority of the cases of *Hudson v. Kline*, 9 Gratt. 379; *Armstrong's Adm'r v. Pitts*, 13 Gratt. 243; *Jones v. Bradshaw*, 16 Gratt. 355, and *Green & Suttle v. Massie*, 21 Gratt. 356, that the plaintiff's objection is not well taken."

See also, in accord, *Morgan v. Carson*, 7 Leigh 238; *Tapp v. Rankin*, 9 Leigh 478.

was a note deposited by McKay for the renewal of the note of \$900, or that it was put into their hands for any other purpose than the one to which it was applied; and he states the consideration of the 358 *note. He also says that the note for \$162.49 was delivered to Green & Suttle by McKay in his lifetime; and he states the consideration of that note. He admits the blanks in the notes were not filled up until after the death of McKay; but avers that they were filled up with the amounts agreed upon with McKay, and for which he was their debtor. He denies all the allegations of the bill not admitted to be true.

Green also answered, stating that he did not live in Alexandria, and was not an active member of the firm, and he refers to and relies upon the answer of Suttle.

The cause came on to be heard on the 26th of August 1867, when the court made a decree perpetuating the injunction: and Green & Suttle obtained an appeal to the District court of appeals at Winchester; from which it was transferred to this court.

The case was elaborately argued on its merits by Williams & Son, Conrad and H. W. Sheffey, for the appellants; and Robert Johnston and Giles Cook, for the appellee: but it was decided by the court upon a preliminary question.

STAPLES, J. Courts of equity relieve against judgments at law, upon the ground that the party injuriously affected thereby has a defence of which he could not have availed himself in a court of law, or of which he might have availed himself, but was prevented by fraud or accident, unmixed with any fault or neglect on his part. If the facts upon which the application for relief is based, are known to the party at the time of trial in the Law court, it is his duty to bring them to the consideration of that court, or furnish some reasonable and satisfactory excuse for his failure to do so.

If they can be established only by an appeal to the conscience of the adverse party, it is his duty to file a bill of 359 *discovery; and obtain a stay of the trial at law until the discovery is obtained.

The cases fully establish, that after a trial at law a party to entitle himself to have a new trial granted by a court of equity, must show that he has been guilty of no laches; that he has done everything that could be reasonably required of him to obtain relief at law. Without such excuse, which is to be judged of according to the circumstances, he cannot get relief in equity. 2 Rob. Prac. 213, and cases cited; *Brooke President in Faulkner's adm'r v. Harwood*, 6 Rand. 133.

And so a defendant who suffers judgment to go against him by default, without an effort to procure the attendance of witnesses in his behalf, or an appeal to the conscience of the adverse party, where that is necessary, can have no better claim to the assistance of a court of equity than a defendant who submits his case to a jury

without the exercise of due diligence in preparing for his defence.

Although the earlier decisions, in some instances, may have relaxed these rules, they are now the established doctrines of courts of equity; as will be apparent by a reference to some of the adjudicated cases. In *Barber v. Elkins & Simpson*, 1 John. Ch. R. 465, Chancellor Kent held that where a defendant in an action at law has not used due diligence in applying to a court of equity for a discovery to assist his defence at law if necessary, he cannot, after a verdict against him, obtain the aid of a court of equity to stay the proceedings at law, or have a new trial. *Duncan v. Lyon*, 3 John. Ch. R. announces the same principles.

In *Brown v. Swan*, 10 Peters. U. S. R. 497, Judge Wayne, delivering the opinion of the Supreme court of the United States, uses the following language: "The general rule is that after a verdict at law, a party comes too late with a bill of discovery. There must be a clear case of accident,

surprise or fraud before equity will
360 *interfere. Such now is the established doctrine in England; and has been for a long time the doctrine of the United States." See also *Thurmond v. Durham*, 3 Yerg. R. 99; *Harrison v. Harrison*, 1 Litt. R. 137; *Alley v. Ledbetter*, 1 Dev. Eq. R. 449; *Foltz v. Powrie, &c.*, 2 Desau. R. 40.

These cases are supported by the general current of authorities in Virginia. In *Faulkner v. Harwood*, 6 Rand. 125, it was decided that bill of discovery to obtain evidence which might have been useful in a trial at law, must be filed pending the suit at law, unless some sufficient excuse is shown why it was not filed at that time. Judge Carr, quoting the observation of Lord Redesdale, that a bill of discovery is commonly used in aid of the jurisdiction of some other court, said the bill must be filed as soon as the party discovers the necessity of appealing to the conscience of his adversary. Accordingly, in that case it was held a full and decisive answer to the bill of discovery, that it was after verdict, and no reason shown why an application was not made earlier. Judge Green, speaking for the court in *Norris v. Hume*, 2 Leigh 334, expressed his entire concurrence with the views of Judge Carr. And in *Haseltine & Walton v. Brickey*, 16 Gratt. 116, it was held that a garnishee, having effects of absent debtors in his hands, could not, after judgment obtained against him by attaching creditors and assignee, file a bill of interpleader against them, to require them to litigate their respective rights to the fund; but is liable to pay both judgments. Judge Leigh, in delivering the opinion of the court, said, if the party (that is, the garnishee) discloses no reason for asking the interposition of a court of equity, and wholly fails to account for the delay to file his bill until after the judgments, he will not then be entertained, any more than a party who desires a discovery from his

adversary, but who delays filing his bill asking the same, until after judgment
361 has been *rendered against him in the law court. See also *Slack v. Wood*, 9 Gratt. 40, and *Allen, Walton & Co. v. Hamilton*, Ibid. 255. Numerous other cases might be referred to sustaining the same views; but these are sufficient for my purpose. They conclusively establish the proposition, that a court of equity will not entertain a bill of discovery after a judgment at law, unless the party seeking relief shall show some satisfactory excuse for his failure to apply for the discovery during the pendency of the action at law.

It is the right of the plaintiff in an action at law to have the facts of his case submitted to a jury according to the forms of proceeding recognized in the Law courts. Of this right he cannot be deprived, if the matter of defence upon which the defendant relies was properly the subject of adjudication in the law tribunal, and might, by the exercise of due diligence, have been brought to the attention of that court. When the defendant applies to a court of equity for a discovery in aid of his defence at law, upon the coming in of the answer he discontinues his suit, and pays all the costs to which the adverse party is subject, and the trial of the cause proceeds in the appropriate forum.

When, however, the application is after judgment at law, very different results follow. In such case, if the equity jurisdiction properly attaches for the discovery, the court proceeds to determine the whole matter in controversy. And thus the defendant, by a simple suggestion that his matter of defence is material and that he is unable to establish it save by an appeal to his adversary, may succeed in transferring a cause of purely legal cognizance to an equity forum, and delay the plaintiff with an expensive and protracted litigation, which might have ended in a few months had the defendant thought proper to apply for the discovery while the action was pending at law. It can be neither a safe nor a just rule which thus enable parties to

transfer the adjudication of their
362 *controversies from one tribunal to another, as may best suit their inclinations or their interests. It seems to me, therefore, that the principles governing courts of equity in questions of this character, are founded in sound reasons of public policy, the dictates of common sense and natural justice.

A difficulty arises, however, in this case, from the fact that the defendant answered on the merits, making no objection to the jurisdiction of the court. And the question next to be considered is, whether such objection may be made for the first time in this court.

It would seem to be well settled, that if the matter of the bill is not proper for the jurisdiction of any court of equity, the objection may be made by plea or demurrer, and it may be taken at the hearing. The plea in abatement is only necessary where

it appears that some other court of equity has jurisdiction, rather than that in which the suit is brought. *Jones v. Bradshaw*, 16 Gratt. 355.

In *Morgan v. Carson*, 7 Leigh, 238, a defendant against whom a judgment was recovered at law, filed a bill to enjoin proceedings on the judgment, alleging certain reasons for failing to defend himself at law, which, however, he did not prove to be founded in fact. The defendant in equity, however, made no objection to the jurisdiction of the court, resting his defence on the merits. The chancellor referred the accounts to a commissioner for settlement, and upon his report the judgment was perpetually enjoined. This court reversed the decree and dismissed the bill upon the ground that a court of equity had no jurisdiction of the subject.

In *Hudson v. Kline*, 9 Gratt. 379, the authorities are elaborately reviewed by Moncure, Judge, and the rule thus announced: "If a bill does not state a case proper for relief in equity, the court will dismiss it at the hearing, though no objection has been taken to the jurisdiction by the defendant in his pleadings." See also *Beckley v.*

363 *Palmer*, 11 Gratt. 625. In *Tapps adm'r v. Rankin*, *9 Leigh, 478, the plaintiff alleged that he was surprised in the trial at law by unexpected evidence; and that he was deprived of testimony upon which he relied, by circumstances stated in his bill, over which he had no control, and that a discovery from the adverse party was necessary for his protection. This court held that he ought to have filed his bill of discovery, before the trial, in aid of his defence at law; that no plea or demurrer was necessary, and the injunction should have been dissolved, even though no answer was filed. This case, it seems to me, is a conclusive authority here.

In the present case, the complainant alleges that he had no means of proving, in the suits at law, the facts upon which he relies, and he was compelled to submit to judgments. He does not pretend that these facts were not known to him during the pendency of the action; nor does he suggest any reason or excuse for his delay in filing his bill of discovery. The bill could have been filed as easily before the rendition of the judgments, as afterwards; and the defence made in a court of law now sought to be made in a court of equity. It is true the bill contains charges of fraud, which, if sustained, would have been sufficient to give jurisdiction to the court. But the charge, and all the allegations in support of it, are denied in the answer; and there is not a fact or exhibit in the record to sustain them. There can be no question, I imagine, that when a bill contains averments which save it from a demurrer, and they prove to be unfounded in fact, the bill will be dismissed at the hearing, though no objection is made in the pleadings to the jurisdiction. In *Jones v. Bradshaw*, 16 Gratt. 355, Judge Robert-

son, delivering the opinion of the whole court, said, where the bill shows on its face that a court of equity has no jurisdiction, the objection may be made at any time and in any court. Where the bill alleges proper matter for the jurisdiction, if it appears at the hearing that the allegations *are false, the result will be the same as if it had not been alleged, and the bill will be dismissed for want of jurisdiction.

If these views be correct, and of that there seems to be no doubt, it was the duty of the Circuit court to dismiss this bill at the hearing, instead of perpetuating the injunction: and it is now incumbent upon this court to render such decree as that court ought to have pronounced. It is to be regretted, indeed, that this cause is to be disposed of upon a point so little considered in the argument. The failure of learned counsel to discuss the question, has only induced this court to examine it with the greater care and deliberation. The principles which must guide our action seem, however, so simple and clear and well settled, we feel constrained to reverse the decree of the Circuit court, and dismiss the bill without regard to the merits of the original transaction.

The decree was as follows:

The court is of opinion, for reasons stated in writing, and filed with the record, that the said decree is erroneous: Therefore, it is decreed and ordered that the same be reversed and annulled, and the appellee, Thomas B. Massie, do pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here; and the court proceeding to pronounce such decree as the said Circuit court ought to have rendered: It is further decreed and ordered, that the injunction awarded the plaintiff, Thomas B. Massie, on the 20th day of June, 1860, be dissolved, and his bill dismissed; and that he do pay unto the said William J. Green and Charles F. Suttle, the defendants therein, their costs by them about their defence in the said Circuit court expended; which is ordered to be certified to the said Circuit court of Warren county.

Decree reversed.

365 *Seig, Adm'r v. Acord's Ex'or.

August Term, 1871, Staunton.

1. Statute of Limitations—Barred Claims—Promise of Personal Representative.*—A debt which is barred by the statute of limitations at the death of the

*Statute of Limitations—Barred Claims—Promise of Personal Representative.—For the proposition that a debt which is barred by the statute of limitations at the death of the debtor, cannot be revived by the promise of the personal representative to pay it, the principal case is cited and followed in the following cases: *Brown v. Rice*, 26 Gratt. 473; *Brown v. Rice*, 76 Va. 659; *Smith v. Pattie*, 81 Va. 663.

In *Switzer v. Noffsinger*, 82 Va. 524, citing the principal case, the court said: "It is not pretended

debtor, can not be revived by the promise of the personal representative to pay it.

2. **Same—Same—Same—Case at Bar.**—Where there are two joint administrators or executors, to one of whom the deceased was indebted in his lifetime, for money loaned so long before the death of the debtor, that at the time of his death it was barred by the statute, the debt cannot be revived by the admission of the other administrator or executor that the money had been loaned and was due.

John Falls, of Augusta county, died intestate in the year 1825, leaving a widow and several infant children; and Mrs. Falls and her father, Jacob Acord, qualified in the County court of Augusta, as administratrix and administrator on his estate. Acord seems to have been the acting administrator, and he settled his first administration account before commissioners appointed by the County court in 1832. The last item of credit in this account is: "Lent money to John Falls by Jacob Acord, no interest charged, \$409. He again settled his account in 1843, when the commissioner reported the estate of Falls to be indebted to him on the 1st of April 1843, in the sum of \$1,029.93.

In 1845 Acord filed his bill in the Circuit court of Augusta county, against the heirs of John Falls and Paul Seig, a purchaser of the interests of one of the heirs of Falls, to subject the land of which Falls died possessed, to the payment of the amount reported to be due him. This bill was
366 taken for confessed as to all the *defendants; and in June 1850, a decree was made directing a commissioner to take an account of the amount due to the plaintiff; and also appointing commissioners to sell the land. And in November 1848, the commissioners reported the sale at the price of \$2,900.

Paul Seig having died, Henry B. Seig, his administrator, and one of his heirs, in May 1850, filed his answer, in which he claims to surcharge and falsify the accounts of Acord, settled before the County court; and among other credits in said accounts, he objected to the item of credit for \$409, money lent; on the grounds that there was no evidence to sustain it, and that it was barred by the statute of limitations.

In October 1850, Commissioner Hendren made his first report upon the accounts of Acord. He made two statements, in one of which the credit of \$409 was allowed. This report was excepted to by Seig on this and other grounds.

In February 1853, the report was by consent of parties recommitted to Commissioner Hendren; and in September 1853 he

that there was any promise by the administrator, before the debt was barred, whereby the operation of the statute was prevented, as, according to *Braxton v. Harrison*, 11 Gratt. 30, and other cases, it was competent for him to do. Nor is it denied that a demand once barred cannot be revived by any acknowledgment thereof, as a charge against his decedent's estate, by a personal representative. Code 1873, ch. 146, § 11."

filed his report spoken of in the proceedings as No. 2. In the account stated in this report, he makes Acord creditor of Falls' estate, on the 1st of November 1850, in the sum of \$1,387.08, of which \$1,223 was principal; and the credit of \$409 is allowed in this account. The defendant Seig filed exceptions to this report, and among others to this credit for \$409. As to this credit, one of the commissioners who settled the account of Acord in 1832, testifies that the charge of \$400 was stated by Acord to have been money loaned by him to his son-in-law, Falls, to aid him in the purchase of the tract of land he had bought from the heirs of George Falls; that he had never taken his note for it, but had merely charged him with it on his books; that Mrs. Falls, who was present during the settlement of the account, and heard the statement of Mr. Acord, said that she knew

of her husband having borrowed
367 *such a sum, and that the charge was correct. The witness further stated that the voucher 37, which was for this credit, he believes was cut from the book of the plaintiff; and that that, and the admission of the administratrix, was the only evidence upon which the credit was given. The voucher referred to by the witness charges John Falls with \$400 lent him by Acord on the 26th of August 1819.

On the 9th of February 1855, the cause came on to be heard, when the court held that the right of the plaintiff to have a credit for the \$400 loaned to Falls, depended upon whether five years had elapsed from the time it was demandable to the death of said Falls; and as this did not satisfactorily appear, the cause was recommitted to Commissioner Hendren to take an account of the debts paid by Acord for Falls, or for his estate, which bound his land, and also to ascertain whether the time when the loan of \$400 was to have been returned, was or was not more than five years before Falls' death.

In June 1855, Commissioner Hendren filed his report No. 3, based upon the decree of the 9th of February 1855. He reports that the credit of \$409 was demandable more than five years before the death of John Falls, which occurred in August or September 1825; and that credit is therefore rejected from the account; and he reports the balance due to Acord on the 1st of November 1850, to be \$208, of which, \$183.39 was principal. This report was excepted to by the plaintiff.

Acord having died during the pendency of the cause, it was revived in the name of his executors, and they presented what the court calls an informal petition, for a rehearing of the decree of the 9th of February 1855; and the cause came on to be heard on the 29th of November of the same year, when the court confirmed the report of the sale of the land, allowed the petition for a rehearing to be filed; and adopting Commissioner Hendren's report No. 2,
368 decreed that the decree of the 9th *of February 1855 be set aside; that the

exceptions by plaintiffs and defendants to the report No. 2, be overruled, and the report confirmed; that the commissioner collect the purchase money and convey the land to the purchaser; and out of the money collected pay to the plaintiffs the sum of \$1,387.08, with interest on \$1,223 part thereof from the 1st day of November 1850, till paid. And, thereupon, Seig obtained an appeal to the Court of appeals.

Michie & Michie and Young, for the appellant.

Baldwin and Fultz, for the appellee.

ANDERSON, J., delivered the opinion of the court.

The only question raised upon the record, in the argument of this cause, is with regard to the credit of \$409, allowed Acord, the appellant's intestate, in the settlement of his administration account, with the estate of John Falls, deceased.

John Falls, the intestate, died in September 1825. Letters of administration on his estate were granted to his widow and Acord jointly. In 1832 Acord made a settlement of his administration accounts, with commissioners of the county court, appointed for the purpose, on his motion. In said settlement Acord was allowed to retain, out of the assets which came to his hands, his account of \$409, against the intestate, for money loaned, dated August 26th, 1819. There was no bond or note, or other evidence of the debt, except the statement or admission of the administratrix, (proved by one of the commissioners), that it was correct. It thus appears that right of action accrued upon this account more than five years before the death of the intestate, and consequently, that it was barred by the statute of limitations. The whole case is therefore narrowed down to the single inquiry, where one of two joint administrators

has an account against his intestate, 369 which was barred by the *statute of limitations before the death of the intestate, can the bar be removed and the debt revived by the statement or admission of his co-administrator, that the account is correct?

It has been a question whether the bar could be removed and the debt revived by the promise of a sole administrator, to pay an account against the intestate which was barred by the statute of limitations in his lifetime. We are of opinion that it could not. By the revised Code of 1819, vol. 1, p. 492, sec. 16, it is made the duty of the court, in a suit against a personal representative, "for the recovery of a debt upon an open account," "to cause to be expunged from such account, every item thereof which shall appear to have been due five years before the death of the" decedent. Mr. Robinson, in his new work on Practice, says, "to allow items due five years before a decedent's death to become a charge upon his estate because of an acknowledgment or promise made by his personal represen-

tative, would not have been very consistent with the legislative intent manifested" in this act. 1 Rob. Prac. (new). p. 577. In *Tunstall & al. v. Pollard's adm'r*, 11 Leigh. 1, 38, Judge Tucker says, "I incline to think an executor is always bound to make this defence; that is, the statute of limitations, unless it be waived by those who are interested." And he cites with approbation *McCulloch v. Davis*, 22 Eng. C. L. R. 385, in which J. Bailey says, "Executors have no right to waive any legal defence to such an action. And if they did, and were to pay a debt against the recovery of which there was any legal bar, they would lay themselves liable over to those who were interested in the testator's property." Also it was held in *Rogers v. Rogers*, 3 Wend. R. 503, that an executor cannot be allowed in his accounts a charge for retaining a debt barred by the statute of limitations. In Delaware it is considered, that if a debt was not barred at the decedent's death, 370 his administrator may, *by his promise or acknowledgment, keep it alive and free from the operation of the act. 1 Rob. Prac. (new) 575, citing *Parkins' adm'r v. Bennington*, 1 Harrington's R. 209. The Supreme court of Connecticut has decided that an acknowledgment by a personal representative that a stale demand is due, shall not be allowed to defeat the operation of the statute; he whose duty it is to settle the estate according to law, shall not subject it to debts by his declarations or admissions. *Peck v. Botsford*, 7 Conn. R. 172. While there is some diversity of opinion on this subject in some of the States, it is believed that no case can be found in Virginia where a different doctrine has been held. In the case referred to, supra, J. Tucker, in whose opinion Judges Cabell and Brooke concurred, was evidently inclined to sanction the doctrine as held in *Rogers v. Rogers*, and as expounded by Justice Bailey in *McCulloch v. Davis*.

But *Bishop v. Harrison's adm'r*, 2 Leigh 532, decided by this court, is relied upon by the appellee's counsel, as an authority to the contrary. We do not think it is. The opinions of the judges were evidently given in reference to a case where the debt had not been barred in the lifetime of the testator, and the promise by the executor was not relied on to remove an existing bar, but to exempt the case from the statute of limitations. This clearly appears from the language of Judge Carr, in his opinion, delivered in the case. "Here (he says,) was a debt claimed of the testator; to whom was the creditor to look? To the representative. He applies to the executor while the debt is yet untouched by the statute of limitations, and tells him here is a debt due me by your testator, and here is the proof of it. It is a debt due by simple contract, I must sue at once. The executor replies, I see the debt is just, and I tell you before this witness, I will pay it; therefore, you need not bring suit." It is evident, that all the judges in this case were speaking with reference to a promise of the

371 executor to *pay a debt which had not been already barred—a debt which had been “untouched by the statute of limitations;” and Judge Carr seems to rely upon that, as a warrant to the executor for his promise to pay the debt. It seems to me, therefore, that as the law then stood, as well as now, a debt against the decedent barred by the statute of limitations in his lifetime, could not be revived and made a charge upon the estate by the promise of the executor or administrator to pay it. And consequently, if it was a debt due to the personal representative, in his own right, he could not retain it out of the assets, and charge the estate with it.

But in this case, there is no promise of the administratrix to pay. It is only an admission, by one of a joint administration, that the account was correct. And where there is a joint administration, if the admission of one could bind the estate, which is, to say the least, problematical, (*Tullock v. Dunn*, Ry. & Mood. 416, 21 Eng. C. L. R. 478; *Scholey v. Walton, &c.*, 12 M. & W. 509, cited 1 Rob. Pr. (new) p. 573,) it seems to be well settled, that the acknowledgment by a personal representative, that the claim is just, does not imply a promise to pay, as it would, if the acknowledgment had been made by the decedent himself; and, therefore, does not create a charge against the estate. C. J. Abbott, in *Tullock v. Dunn*, supra; *Thompson v. Peter*, 12 Wheat. R. 565; *Oakes v. Mitchell*, 15 Maine R. 360; *Bunhur v. Athedyn*, 35 Id. 364; cited 1 Rob. Pr. (new) p. 575; *Head's ex'ors v. Manners' adm'rs*, 5 J. J. Marsh. R. 255. We are of opinion, therefore, that the decree of the Circuit court is erroneous in overruling the exception to this item in the account of the commissioner, designated as report No. 2, and in allowing the same as a debit against the estate of John Falls, deceased. But as the report of commissioner No. 3, filed the day of June 1855, ascertains what is the true state of account,

omitting this item as a debit against the estate, we are of *opinion that the Circuit court erred in adopting the report No. 2 of Commissioner Hendren, and in not adopting report No. 3 of said commissioner. The court is of opinion, therefore, that the decree of the Circuit court, so far as it is in conflict with this opinion, should be reversed, with costs to the appellants, and in all other respects, should be affirmed.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that report No. 3, instead of report No. 2, of Master Commissioner Hendren, shows the correct balance due to the plaintiff's testator, for which he is entitled to satisfaction out of the proceeds of the land sold under a decree made in this cause; and that the commissioners who sold the said land, out of the money to be collected by them according to the decree appealed from as aforesaid, should have been directed to pay

over to the plaintiff or his counsel the sum of two hundred and eight dollars, with legal interest on one hundred and eighty-three dollars and thirty-nine cents, part thereof, from the 1st day of November 1850, till paid, instead of the sum of \$1,387.08, with legal interest on \$1,223, part thereof, till paid; and that the said decree is erroneous in the respect aforesaid but no other; therefore, it is decreed and ordered that so much of the said decree as is above declared to be erroneous be reversed and annulled; and the residue thereof affirmed; and that the said appellee, James Wilson, surviving executor of Jacob Acord, deceased, out of the estate of his said testator, do pay to the appellant his costs by him expended in the prosecution of his appeal here; and the cause is remanded to the said Circuit court for further proceedings to be had therein in conformity with the foregoing opinion and decree; which is ordered to be certified to the said Circuit court of Augusta county.

Decree reversed.

373 *Dixon & als. v. McCue's Adm'x & als.

August Term, 1871, Staunton.

Sale of Infant's Land—Case at Bar.*—In November 1860, M was appointed a commissioner to sell infant's land, on a credit of six, twelve, eighteen and twenty-four months. M reports, that after three trials he had failed to sell, and suggests that it be rented out for the present; and in June 1861, there is an order that M be authorized to rent out the land for such time, and on such terms as he might think judicious; and he rents it out for that and the next year. In March 1863, M reports that he in that month sold the land on the terms of the decree, to S and D; and the report is confirmed; and he is directed to collect the purchase money as it falls due, and pay it to the receiver of the court, if the parties entitled decline to receive it. M, without giving bond as required by the statute, but which was not directed by the decree, collects the first three payments as they fall due, and pays the money into a bank which has been appointed receiver of the court. The last payment was not made by S and D, one of them being in the army, and the other a prisoner. After the war they propose to pay the last payment; and the parties entitled object to the sale, and also to the payments made; which were in Confederate currency. **Held:**

1. **Same—Same.**—The decree of November 1860, for the sale of the land, continued in force, notwithstanding the order of June 1861, for renting it, and the commissioner had authority to sell in March 1863.

***Sale of Infant's Land.**—In *Staples v. Staples*, 24 Gratt. 234, the court, citing the principal case said: “That sales of real estate might properly be, and were frequently made during the war, for Confederate money, under decrees of courts of chancery and by fiduciaries, where non-residents and persons under disability were concerned, has been established by repeated decisions of this court. *Walker v. Page*, 21 Gratt. 636; *Poague v. Greenlee*, 22 Gratt. 724.”

2. **Same—Title of Purchaser—Statute.***—The sale having been made more than six months after the decree for a sale, and having been confirmed, the sale cannot be set aside, as to the purchasers.

3. **Same—Confederate Money.**—When the sale was confirmed in March 1863, the court must have understood and intended that the sale was for Confederate currency, and the purchase money was to be paid in such currency.

4. **Same—Payment of Purchase Money—Bond of Commissioner.†**—The payments made to M, and his payments to the receiver of the court, were valid payments; though M had not given the bond required by the statute; and the purchasers and M are not liable for this part of the purchase money.

374 *5. **Same—Rights of Purchasers.**—S and D were, under the circumstances, excused for the non-payment of their fourth bonds as they fell due; and upon their paying these bonds are entitled to have the land conveyed to them.

This is the sequel of the case of *Dixon v. McCue & als.*, reported in 14 Grattan, 540. When the cause went back to the Circuit court, Wm. A. Burket filed his petition, stating that he had purchased the interests of John J. Dixon and Christopher C. Dixon, two of the children of John Dixon, deceased, in the land, and asking that his portion of it might be set off to him: and he exhibited their deeds; Mrs. Dixon elected to take her dower; and thereupon, on the 5th of November 1858, commissioners were appointed to lay off Mrs. Dixon's dower; and also if it was practicable, without injury to the parties in interest, to lay off the remainder into nine shares; and if this could not be done, to lay off for Burket his two-ninths in a body, and the other owners their seven-ninths together.

The commissioners reported that they had allotted to the widow, for her dower, fifty-one acres and a fraction, including the buildings: That the remainder of the land could not be divided into nine parts, without injury to all of them; and they divided it into two parts; giving to Burket his two-ninths in a body.

On the 28th of November 1860, the cause came on again to be heard, when the court confirmed the report; and Thomas W. Mc-

Cue, the executor, was appointed a commissioner to sell, at public auction, the land allotted to the seven children, upon a credit of six, twelve, eighteen and twenty-four months; taking from the purchaser bonds, with personal security, and retaining the title. And the commissioner was directed, in making the sale, to offer separately that part of the land covered by the widow's dower.

McCue having reported to the court, that after three efforts he had been unable 375 to sell the land, and suggesting *that, for the present, it be rented out, on the 3d of June 1861, the court made an order authorizing him to rent out the land, on such terms and for such time and crops as he might think judicious. And in pursuance of this order McCue rented it out for the balance of the year 1861 and for 1862.

In March 1863, McCue reported to the court that he had, on the 16th of that month, sold at public auction, the land covered by Mrs. Dixon's dower, on the terms of the decree of the 28th November 1860, for \$43 per acre, making in the whole \$1,792.04; and the tract allotted to the children, at \$40 per acre; making in the aggregate \$5,304.50; and he considered the land well sold. He returned with his report the bonds of Charles B. Steigel, the purchaser of the first tract, each for \$448.01; and those of J. P. Dixon for the second tract, each for \$1,326.12½.

On the 9th of June 1863, the cause came on again to be heard, when the court confirmed the report, and directed a commissioner to take an account for the final settlement of the executorial transactions of McCue, and the distribution of any balance of the estate in his hands, among those entitled, and also for the distribution of the real estate among those entitled. And McCue was authorized to receive the purchase money of the land as it fell due, and pay the same, as also the amount in his hands as executor, to the receiver of the court; unless the parties entitled to the personalty or realty will consent to receive and account for the same.

On the 6th of November 1866, Thomas W. McCue, having died, the suit was revived in the name of Elizabeth McCue, his administratrix; and the court made a decree, directing her to report the proceedings of her intestate, under the decree of the 9th of June 1863. And it being suggested that the purchasers of the land sold by McCue, who claimed to have discharged the first

three payments, and are now willing 376 to pay the last payments, *without prejudice to the rights and claims of the parties who intend to question the validity of the payments of the first three bonds of said purchasers, it was decreed that John N. Hendren, who was appointed a receiver for the purpose, do proceed to collect the last bonds of said purchasers, and that he distribute the same among the parties legally entitled thereto. And on the 7th of December following, rules were made upon Charles B. Steigel and J. P.

***Same—Title of Purchaser—Statute.**—For the proposition that a sale having been made more than six months after the decree for sale, and having been confirmed, cannot be set aside as to the purchasers, the principal case is cited and followed in the following cases: *Lancaster v. Barton*, 92 Va. 626, 24 S. E. Rep. 251; *Quesenberry v. Barbour*, 31 Gratt. 500. See, in accord, *Cooper v. Hepburn*, 15 Gratt. 551; *Garland v. Pamplin*, 32 Gratt. 305; Va. Code 1887, § 3425.

†**Same—Payment of Purchase Money—Bond of Commissioner.**—For the general rule as to the payment of the purchase money to a commissioner who has not given the required bond, see *foot-note* to *Jones v. Tatum*, 19 Gratt. 720. But the proposition as laid down in the fourth headnote of the principal case is approved in the following cases which cite the principal case. *Whitehead v. Bradley*, 87 Va. 682, 13 S. E. Rep. 195; *Mead v. Jones*, 24 Gratt. 382.

Dixon to show how much money they had paid on account of their respective purchases of the land aforesaid.

Mrs. McCue filed her answer to the rule. She states that McCue, under the authority of the decree of June term 1863, proceeded to collect from Steigel and Dixon the first three instalments of the purchase money; and being unable to pay them over to the parties entitled thereto, he paid them to the receiver, as directed by the said decree. And she filed the receipts of the receiver. She says further, that Commissioner Hendren settled the executorial account of her intestate, showing a balance due from him to his testator's widow and children of \$151.30; that her intestate sought to make payments to the parties entitled, of the balances due to them respectively; but they refused to receive the same; and he thereupon paid the amount to the receiver of the court. She says the bonds of the purchasers for the fourth instalment fell due in March 1865, and were not paid, as the obligors were in the Confederate army, and one or both of them were prisoners of war. These bonds have been lost or mislaid. The receipts filed by Mrs. McCue with her answer, show that the amount due on the executorial account was paid by McCue to the receiver July 8th, 1863; and the payments made for the land were received by him and paid to the receiver within a few days after they respectively fell due.

Steigel and J. P. Dixon filed their answer to the rule. They say they gave their
377 bonds to McCue with good *security, and as these bonds for the first three payments fell due they were paid; and they exhibit the bonds. And they say that when the bonds for the fourth payments fell due, Steigel was in the army at Petersburg, and Dixon was a prisoner of war at camp Chase in Ohio. And they ask that titles may be made to them for their purchases. Dixon further insisted that as one of the heirs of his father, he was entitled to one-fifth of the proceeds of the land sold, two of the children having died, and he was entitled to have that one-fifth set off against his bond still unpaid.

Mrs. Dixon and two of the children filed a special replication to the foregoing answers. They insist that the sale of the land was most improper and injurious; that it had been postponed from time to time, in consequence of the worthless condition of the currency, and when McCue persisted in making the sale, that it was still more rapidly declining. That the price obtained was not more than its value in good money at the time. If the sale was made for Confederate currency, the price was grossly inadequate, and should be set aside; and if not so made, the purchase money should not have been received in that currency; and the purchasers should be required to discharge the purchase money in good money. That McCue as commissioner, not having given the bond required by the statute, Code of Va. ch. 178, § 1, the payments alleged to have been made to him by Steigel

and J. P. Dixon, were made without any authority on the part of McCue to receive the same; and do not discharge them as purchasers of the land.

On the 12th of January 1867, the cause came on to be heard upon the rule, when the court held, 1st, that the court having directed the sale of the land in June 1860, and the sale having been made in March 1863, and confirmed by the court in June 1863, the title of the purchasers should not be affected, even if the last named decree were reversed in an appellate tribunal;

378 and therefore *the Circuit court had no authority to set it aside; 2d, that although it did not appear that McCue, as commissioner, gave the bond as required by law, yet the decree of June 1863 not having required him to give bond, or named the penalty for such bond; and the money having in fact been promptly paid to the receiver, there had been a literal compliance with the requirements of the decree by the commissioner; and the failure of the court to require the bond had caused no damage to any party; and therefore that the receipts of the receiver must stand as acquittances of the commissioner, as well as of the purchasers. And it was, therefore, decreed that the rules be discharged, but without costs. And Hendren, the commissioner, appointed by the decree of November 1866, was directed to convey to Steigel the land purchased by him, upon his payment of his last bond with interest. And disallowing J. P. Dixon's claim to set off his portion of the money paid to McCue, against his last bond, the same commissioner was directed to convey to him the land he purchased upon his payment of his last bond, with interest.

In March 1867, Mrs. Dixon and two of the children, by leave of the court, filed their cross-bill in the cause. They allege that Charles S. Dixon, one of the plaintiffs, arrived at the age of twenty-one years on the 5th of January 1864, and that another, Sarah M. Dixon, came of age on the 23d of May 1865; and that they were non-residents of the State, and had no knowledge of what was going on, and had no opportunity to except to the action of McCue, and to object to the confirmation of the sale of the land made by him. And they rely upon the same grounds of objection to what had been done, stated in their special replication.

There were demurrers and answers to this bill, by McCue's adm'x and Steigel and John P. Dixon. They denied that the plaintiffs had no knowledge of what
379 was *going on in the cause; and insisted that they were parties in the cause, and represented by able counsel; and that everything had been done regularly and in good faith.

On the 21st of November 1867, the cause came on to be heard, when the court dismissed the cross-bill, and affirmed the decree of the 13th of January 1867. And thereupon Rachel Dixon, the widow, Charles Dixon and Sarah M. Dixon obtained an

appeal to the District court of appeals at Charlottesville; from whence the cause was transferred to this court.

Fultz, for the appellants.

A. H. H. Stuart, for the appellees.

STAPLES, J., delivered the opinion of the court.

The court is of opinion, that although no bond was given by Thomas W. McCue, the commissioner, before he proceeded to collect the purchase money for the land, yet, inasmuch as he was authorized by the decree of the 9th of June 1863, to collect said money as it fell due, and to pay it to the receiver of the court, in the event of the refusal of the parties to receive it, and the money having been paid by the purchasers, Charles B. Steigel and J. P. Dixon, and deposited by said commissioner in bank acting as receiver, to the credit of the cause, in consequence of such refusal of the parties interested, and said fund having been lost without the default of said commissioner; the purchasers cannot be in any manner prejudiced by his failure to execute the bond required by law.

It does not appear that said Steigel and Dixon were guilty of any fraud, imposition, or other unfair conduct. They purchased at a sale publicly and fairly made; they complied with all its terms, by the prompt payment of the three first instalments 380 of the purchase money: when *the fourth and last instalment became due, one of them was in the army, and the other a prisoner in the Federal lines. The appellants have sustained no loss or damage by the failure of said purchasers to comply with this part of their contract. On the contrary, such failure manifestly enured to their benefit; as under the decree of the Circuit court, they are entitled to receive the nominal amount of the last instalment in United States currency.

It is unnecessary to consider the other objections urged to the various decrees and proceedings in the cause. Even if well founded, they cannot operate to the prejudice of the purchasers, inasmuch as the sale was made more than six months after the date of the decree, and was duly confirmed; and the said purchasers are, therefore, fully protected by the provisions of the 8th section of chapter 178, Code of 1860, which declare, that if a sale of property be made under a decree or order of a court, after six months from the date thereof, and such sale be confirmed, though such decree or order be afterwards reversed or set aside, the title of the purchaser at such sale shall not be affected thereby; but there may be a restitution of the proceeds of sale to those entitled.

The court is further of opinion, that no liability attaches to the estate of the said Thomas W. McCue, by reason of anything done by him in the execution of the trust confided to him. Under the decree of 1860 he was authorized to sell the land in con-

troversy; and under that of 1861, to rent it out on such terms and for such time as he might deem most advantageous to the estate. Upon the termination of said renting it was not necessary for him to apply again to the court for authority to sell. The decree of 1860 was still in effect; and the authority to execute it unrevoked. Such was the construction given to that decree by the Circuit court when it confirmed the sale. Upon well settled principles, when commissioners are appointed to make 381 sales of property, *they are subject to the supervision and control of the court, and their acts, when sanctioned, become the acts of the court. It is unreasonable to suppose the presiding judge was not apprized that the sale was made for Confederate currency; and in authorizing the commissioner to collect the purchase money, he must have intended the collection to be made in the currency then exclusively in circulation. If the parties deemed the sale injudicious, it was easy to apply to the court to set aside or modify the decree of 1860, or to arrest the action of the commissioner.

It is true that some of them were infants; but it appears from the statement of the judge who rendered the decree now appealed from, that they were represented by efficient counsel, who prepared the decree confirming the sale, and authorizing the collection of the purchase money. No objection was ever made to any of the proceedings; and now, after the loss of the fund by the disastrous termination of the war, it is sought to make the commissioner responsible for an act approved by the court, and never disapproved, so far as this record discloses, by the parties or their counsel. A rule of this sort, adopted by this court, would produce incalculable mischief throughout the State, and tend to the utter ruin of a vast number of innocent officers acting under the sanction and by the authority of the courts, during the protracted struggle in which the country was engaged. Every consideration of sound policy and justice requires that such officers should not be held responsible for acts bona fide performed, under the direct approval and sanction of the court appointing them.

The court is therefore of opinion that there is no error in the decree of the 12th January 1867, nor in the decree of the 22d November 1867, dismissing the cross-bill of the appellants, and that the same should be affirmed.

Decree affirmed.

382 *Gunn & als. v. Turner's Adm'r.

August Term, 1871, Staunton.

1. Office Judgment—Notice of Motion to Reform—Case at Bar.*—An office judgment confirmed in debt on

*Office Judgment—Notice of Motion to Reform—Case at Bar.—On the question of service of notice to reform an office judgment the principal case is cited in *Amiss v. McGinnis*, 12 W. Va. 373, where it is said:

a bond dated November 21st, 1862, in favor of T against G and three others, upon one of whom the process was not served, G and another give notice to T that they will move the court to reform the judgment, by allowing certain credits, one of the date of the bond and one a payment January 4, 1864, and directing at what scale of depreciation the judgment should be discharged. In fact, one of the credits claimed is endorsed on the bond, and the plaintiff endorses the other at the time of the motion: The court therefore refuses to reform the judgment, and no exception is taken, nor does it appear what was the evidence before the court. **Held:**

1. **Same—Same—Same.**—There was no error in refusing to form the judgment as to the credits.
2. **Appellate Practice—Scaling—Exception in Lower Court.**—No exception having been taken, and the evidence before the court not being shown by the record, the appellate court cannot review the judgment of the court below as to the scaling of the debt.
3. **Same—Office Judgment—Motion to Reverse in Lower Court.**†—As there was no motion to reverse the judgment, on the ground that the process was not served on one of the defendants, that question cannot be considered by the appellate court.

In February 1866, Wm. T. Turner's administrator instituted an action of debt in the Circuit court of Rockbridge county, against Nancy Turner, Giles Gunn, Wm. C. Gilmore, and A. B. Tanquary, to recover the sum of \$1,267.30, the amount of a bond executed by the defendants to the plaintiff. The process was executed on all the defendants except Tanquary; as to whom it was silent. The declaration was against all, and they not appearing, the office judgment was confirmed against *them, including Tanquary, at the April term of the court.

"It seems that such notice is not only proper as to the defendants, who fail to answer, but it was the only remedy they had to have the said decrees corrected." See, in accord, *Baker v. W. M. & Mining Co.*, 6 W. Va. 196; *Erwin v. Vint*, 6 Munf. 267. In *Reinhard v. Baker*, 13 W. Va. 811, citing the principal case, it is said: "The appellant must show affirmatively, that there was error in the judgment of the court. They cannot do so in the absence of all the evidence on which the court below acted. It must be presumed that the plaintiffs below proved the facts stated in their notice; and therefore that its judgment is right."

†**Appellate Practice—Motion to Reverse in Lower Court.**—For the proposition that there must be a motion in the lower court to reverse the judgment, on the grounds that the process was not served on one of the defendants, see the principal case cited in *Carlton v. Ruffner*, 12 W. Va. 299, where it is said: "Where judgment is given against persons, upon whom process has not been served and who had not appeared to the action, the proper way to correct the error is upon motion before the court, that rendered the judgment." The principal case is also cited in *Campbell v. Hughes*, 12 W. Va. 210, for the same point. See *foot-note* to *Goolsby v. Strother*, 21 Gratt. 107. The principal case is cited and explained in *Saunders v. Griggs*, 81 Va. 511.

The bond on which the action was founded bears date the 21st of November 1862, and was payable nine months after date: and a credit of \$200 was endorsed upon it as of the date of the bond. This bond was filed with the declaration.

After the office judgment was confirmed, Gilmore and Gunn gave notice to Turner's administrator, that they would, on the 13th September, move the court to reform the judgment, as well by allowing offsets improperly omitted for \$200 on November 21, 1862, and \$300 on January 4, 1864, as by settling and directing at what depreciation the judgment should be discharged, according to the act of Assembly.

The motion came on to be heard at the September term, and the evidence being heard, the court was of opinion that if the 3d section of the act of March 3d, 1866, for the adjustment of liabilities, &c., applies to judgments rendered after the date of said act, as to which the court expressed no opinion, no sufficient reason was shown for altering or reforming the judgment in this case; one of the credits specified in the notice having been endorsed on the bond when filed with the declaration, and, therefore, to be credited by the clerk whenever execution should issue; and as to the second, though not before endorsed, it was then endorsed by consent of the plaintiff; and the motion was therefore overruled, with costs. Gunn and Gilmore thereupon applied to a judge of this court for a supersedeas to the judgment, which was awarded.

Brockenbrough, for the appellants.

There was no counsel for the appellee.

STAPLES, J., delivered the opinion of the court.

The first error assigned in this case is the refusal of the court to scale the judgment rendered by default at *the April term 1866, against the plaintiffs in error. This assignment is based upon the proposition, that as the bond upon which the judgment was founded, was executed on the 25th November 1862, and a payment was made on that day of two hundred dollars, and another payment of three hundred dollars made on the 4th January 1864, the receipt by the obligee of such payments in Confederate currency affords a strong presumption that the contract was entered into with reference to such currency as a standard of value.

The record does not disclose the consideration of the bond, nor the kind of currency in which the payments were made. And if this court were authorized to infer from the date of the instrument and the period of the respective payments that the bond in question is solvable in Confederate currency, it would not be warranted in drawing such a conclusion, where the record states, as in this case, that the Circuit court, upon the evidence adduced, refused to apply the scale of depreciation. What that evidence was; what it tended to prove,

we have no means of ascertaining. No bill of exceptions was taken; and none of the facts are stated on the record, by which this court can undertake to review the decision of the Circuit court. If the plaintiffs in error considered themselves aggrieved by the judgment, it was plainly their duty to obtain a certificate of the facts proved; and thus show affirmatively there is error in the judgment. As they have failed so to do, this court is bound to conclude the decision was warranted by the evidence adduced on the trial.

The second assignment is, that the original judgment having been rendered upon a joint bond against the four obligors therein, and process being served only on three, such judgment is erroneous, and must be reversed as to all. The 6th section, chap. 181, Code of 1860, provides that "no appeal, writ of error or supersedeas shall be allowed by an appellate court or judge, for any *matter for which a judgment or decree is liable to be reversed or amended on motion, by the court which rendered it or the judge thereof, until such motion be made and overruled in whole or in part. No motion, however, was made in the court below, to reverse or amend the judgment for the error now assigned. The motion actually made was to reform the judgment by applying thereto certain omitted credits," and "by settling and directing at what scale of depreciation it should be discharged, according to the act for adjusting Confederate liabilities." The question raised by the second assignment of error is therefore not before this court, and no opinion is expressed thereon.

For these reasons the judgment of the Circuit court is affirmed; but without prejudice to the right of the plaintiffs in error to move in said court, to reverse or amend the original judgment against them, upon the ground suggested in the second assignment of error.

Judgment affirmed; but without prejudice.

386 *Hilb, for, &c. v. Peyton & als.

August Term, 1871, Staunton.

1. Bonds—Kind of Currency—Parol Evidence—Adjustment Act.*—P executes his bond to H for \$5,000, dated June 9th, 1863, and payable two years after date, without interest, "in such funds as the banks receive and payout." Parol evidence is not admissible under § 2 of the adjustment act, of March 1866, to prove the kind of currency in which the bond was to be paid, or with reference to which, as a standard of value, it was made and entered into.
2. Same—Contracts of Hazard.—Such a bond creates a contract of hazard.
3. Bonds—Payable in Designated Currency.—A bond executed between the 1st of January 1862, and the

*A rehearing of the principal case was granted, and is reported in Hilb v. Peyton, 22 Gratt. 550. The doctrines here laid down as to the admissibility of parol evidence under the "Adjustment Act" were expressly overruled in that case.

10th of April 1865, payable at a future day in a currency designated in the bond, is to be paid in the currency designated.

This was an action of covenant in the Circuit court of Augusta county, brought in January 1867, by Simon H. Hilb, for Abram Singer, against J. B. Peyton and three others. The action was founded on a bond executed by the defendants to Hilb, bearing date the 9th of June 1863, and payable two years after date, for \$5,000. The defendants pleaded covenants performed; and on the trial the jury scaled the debt, and found a verdict for the plaintiff for \$625 in gold, with interest from the date of the bond. The plaintiff moved the court for a new trial, on the ground that the verdict was contrary to the evidence. But the court overruled the motion, and rendered judgment according to the verdict: and the plaintiff excepted; and applied to this court for a supersedeas; which was awarded. The facts are stated by Judge Christian in his opinion.

Fultz and Geo. M. Cochran, Jr., for the appellant.

Baldwin, for the appellee.

387 *CHRISTIAN, J. This is a supersedeas to a judgment of the Circuit court of Augusta county.

It was an action of covenant brought upon a contract under seal in the following words:

\$5,000. Two years after date, for value received, we promise and bind ourselves jointly and severally, to pay to Simon H. Hilb, his heirs and assignees, the sum of five thousand dollars, without interest, and in such funds as the banks receive and payout. Witness our hands and seals, &c.

Signed, J. B. Peyton, [Seal.]
Wm. H. Peyton, (Sec.,) [Seal.]
Geo. L. Peyton, " [Seal.]
Thos. H. Peyton, " [Seal.]

Dated June 9th. 1863.

The defendants pleaded "covenants performed," and gave notice that they should insist that the debt should be scaled under the adjustment act.

The plaintiff, to sustain the issue on his part, produced the obligation sued upon, and then proved that at the maturity of said obligation, to wit: on the 9th day of June 1865, the funds received and paid out by the banks were greenbacks and National bank notes, which were at that time worth, as compared with gold, from \$135 to \$145 of currency to \$100 of gold. The plaintiff there rested his case. The defendants, on their part, proved that the bond in controversy was given for a loan of \$5,000 in Confederate States treasury notes, and there rested their case. And, thereupon, the plaintiff, Hilb, was introduced and examined, to prove the true understanding and agreement of the parties in respect to the kind of currency in which the contract was to be performed. He proved that he was engaged in business in Staunton, and was

not a money lender: that wher applied to by one of the defendants for a loan of money, he declined; but that upon a second application, he agreed to make the loan upon the terms stated in the bond.

388 *And that in accepting these terms, he expected to receive at the maturity of the bond, a better currency than that which he loaned.

The defendants then introduced J. B. Peyton, one of the defendants, who proved that he was the principal in the bond; and was the party with whom the negotiations were had. He confirmed the evidence of the plaintiff as to his refusal, at first, to make the loan, and his subsequent agreement to loan on the terms stated in the bond. This witness proved that he regarded the contract to some extent as a contract of hazard; that he had faith in the Confederate cause; that when he made the contract he expected to discharge it in Confederate treasury notes; and that the hazard of the contract was the appreciation or depreciation of that currency. He also proved that he wrote the bond upon which this action was brought.

Wm. H. Peyton, another of the defendants, also proved the unwillingness of the plaintiff to loan the Confederate treasury notes at first, but his subsequent agreement to do so upon the terms set forth in the bond. This witness also proved that the verbal understanding between the parties prior to the loan, was correctly expressed in the bond. The defendants also introduced the scale of depreciation of Confederate treasury notes, showing that at the date of the bond they were worth from $7\frac{1}{2}$ to 8 for one in gold. These were all the facts proved as certified by the court below. Upon these facts the jury found a verdict for the plaintiff, and assessed his damages at \$625 in gold, with interest from the 9th of June 1863, till paid: the jury having scaled the debt according to the scale of depreciation of Confederate treasury notes. A motion was made by the plaintiff, to set aside the verdict and grant a new trial; which was overruled by the court; and a judgment entered for the amount found by the jury. A writ of error and supersedeas to that judgment brings up the case to this court.

The case presents, here as it did to 389 the court below, a *single question, and that is, what is the legal construction and legal effect of the contract which the parties entered into, reduced to writing, signed and sealed for themselves? That writing, and that alone, must be looked to as containing the true understanding and agreement of the parties. Clearly, and beyond all question, that writing bound the obligors to pay five thousand dollars, without interest, in such currency as the banks should receive and pay out at its maturity, to wit: on the 9th day of June 1865. The only parol evidence necessary or proper to be introduced, to fix the measure of their liability, was, in reference to the kind of currency received and paid out by the banks two years after the date of

the obligation. If, at the maturity of the bond, the banks were receiving Confederate treasury notes, then it was solvable in that currency; if the banks were receiving and paying out gold and silver, then it was solvable in gold and silver; and if they were receiving and paying out national currency and greenbacks, then the obligation was solvable in that currency. This is the plain and unmistakable meaning of the terms employed by the parties, and the plain, legal effect of their obligation. It is difficult to conceive what form of words could have been employed, more plainly to express their meaning, than those which have been written and signed by the parties.

The words used import their own meaning, the language employed furnishes its own construction, so plain to my mind as to admit of no controversy; indeed, so plain that every argument advanced by the learned counsel for the defendant in error here, might have been fully answered by simply reading the bond. It was not a case in which parol evidence was admissible, and if objected to it ought to have been excluded. The learned counsel for the defendants in error, invokes the aid of the statute known as the "adjustment act," to justify the ad-

mission of parol evidence in such a 390 case as this, *and indeed in all other cases where the contract, no matter what may be its terms, is made between the 1st of January 1862 and the 10th of April 1865. I cannot assent to this broad and unlimited construction. It is not warranted either by the letter or the spirit of the statute. The section relied upon is in these words: "In any action of suit or other proceeding for the enforcement of any contract, express or implied, made and entered into between the 1st day of January 1862, and the 10th day of April 1865, it shall be lawful for either party to show by parol or other relevant evidence, what was the true understanding and agreement of the parties, either expressed or to be implied, in respect to the kind of currency in which the same was to be fulfilled or performed, or with reference to which, as a standard of value, it was made and entered into," &c. Now, by the very terms of this section, the parol evidence to be admitted under it, is confined and limited to the kind of currency in which the contract is to be fulfilled or performed. Where the parties themselves have stipulated in writing as to the kind of currency in which the obligation is to be fulfilled or performed, then this section clearly does not apply. It is only in a case where the parties have not stipulated plainly and unmistakably as to the kind of currency in which the obligation is solvable, that parol evidence can be heard. The statute became necessary because of the use, in contracts during the war, of the word dollars (which before had a technical and constitutional meaning), as applied to a depreciated currency; and when that word is employed or any other words used, which leave it in doubt what kind of currency was to be paid, then parol evidence may be ad-

mitted to show the true understanding and agreement of the parties, in respect to the kind of currency in which the contract is to be fulfilled or employed. But surely, where the parties have reduced to writing their own understanding and agree-
 391 ment, as to the kind of currency *in which their obligation is to be performed, it would violate the plainest rules of evidence to admit parol evidence to vary, alter or contradict that written agreement.

But in this case parol evidence was offered by both plaintiff and defendants without objection. It was considered by the jury as proper evidence in the cause. And, even regarding that evidence as admissible and proper to be heard, let us now enquire, was the jury warranted in finding the verdict which they have rendered? This is not a case of conflict of testimony. It is not a case dependent upon the weight and tendency of the evidence where a jury has to decide upon the credit of witnesses. There is no conflict in the statement of the plaintiff and defendants. Every word uttered by the plaintiff is confirmed by the defendants. Nor is the statement of either at all in conflict with the express terms of the written obligation; but, on the contrary, both plaintiff and defendants point to the bond (which was written by one of the defendants), as expressing the terms of their agreement. It is true the plaintiff says that, in accepting the terms stated in the bond, he expected to receive a better currency than that which he loaned; and the defendant, who was principal in the bond, stated that he expected, while he regarded the contract to some extent a contract of hazard, to discharge it in Confederate treasury notes. Now, these respective expectations of the parties cannot weigh a feather in the scale of judicial construction. But even these are perfectly consistent with the terms of the bond, and with their own statements respecting it. It is evident that the plaintiff expected to receive a better currency than he loaned, or he would not have loaned it without interest. The defendant, who was principal, gives the reason why he expected to discharge the obligation in Confederate money. He says he had faith in the Confederate cause. He
 evidently did not expect that the

392 *Confederacy would be overthrown in less than two years. His calculation was to pay in a currency still more depreciated. He knew it was rapidly depreciating every day, and the chances were it would still continue to depreciate. His calculations came very near being verified, for, if the war had lasted sixty days longer, he would then have paid in a currency depreciated at least sixty to one, a debt which he had contracted in the same currency, depreciated only to the extent of eight to one. These expectations of the parties, while they cannot weigh a feather in explaining the contract, or fixing its legal construction, indicate that with both, this contract, like that in *Brackan v. Griffin*, 3 Call. 375, and *Boulware v. Newton*, 18 Gratt.

708, was a contract of hazard, fully understood by the parties, and fairly entered into on both sides.

There is nothing in the evidence to impeach it. Both plaintiff and defendants point to the contract itself as expressing the terms of their agreement. There is no doubt or ambiguity on the face of that agreement, and it must be executed as the parties have covenanted for themselves. There was nothing in the contract or the evidence to warrant the jury in scaling the amount of the obligation; and the Circuit court erred in refusing to set aside the verdict and grant a new trial.

Nor can it be maintained, as was earnestly argued by the learned counsel for the defendants in error, that the granting of a new trial in such a case as this, is at all in conflict with the well settled rules of law which govern new trials, so often established by this court, and reaffirmed in the case, *Blosser v. Harshberger*, decided at the present term. In the case at bar there was no conflict of testimony. It was not a case at all dependent upon the weight and tendency of the evidence, or the credit of the witnesses. But the whole case depended upon the legal construction to be given to the written contract of the parties. It was, therefore, a question of law
 393 *rather than a question of fact; and it should have been so considered and acted upon in the court below.

I am of opinion that the judgment be reversed, the verdict of the jury set aside, and the cause remanded to the Circuit court, for a new trial to be had therein, in conformity with the principles herein declared.

ANDERSON, J. I do not think, as has been said, that the bond in this case could not have been expressed in plainer terms to convey the idea, that it was to be paid in such funds as were received and paid out by the banks at the maturity of the bond. It does not necessarily convey that meaning without adding the words "at maturity," or interpolating other words which are equivalent. I think it is upon its face, susceptible of a different construction from that which has been given to it. The bond is in these words: "Two years after date, for value received, we promise and bind ourselves, jointly and severally, to pay to Simon H. Hilb, his heirs or assigns, the sum of \$5,000, without interest. and in such funds as the banks receive and pay out. If it had said in such funds as the banks shall then receive and pay out, or receive and pay out at maturity, the meaning would be plain. And that may have been the intention of the parties, but such intention is not expressed by the language without interpolating or adding the words mentioned. And to give it that construction is to make it a contract of hazard, which the courts are not disposed to do if it is susceptible of a construction which will relieve it from that character.

I think it may be fairly construed to mean, that it was payable at that future

time, in such funds as the banks received and paid out at the time the bond was given. If it had specified, in such funds as the banks shall then receive and pay out, it would plainly import, at maturity. On the other hand, if it had been, "in such funds as the banks now receive and pay out," it would as plainly mean, at the date of the contract. The phraseology is not precisely this. It is not as the banks shall then receive and pay out; which imports a future time. Nor is it, as they now receive and pay out; which imports the present time. And why may you not as well interpolate the word "now" as to interpolate the words "shall then," or add the words "at maturity?" But that interpolation is unnecessary, in the former case, to convey the meaning. The words, "in such funds as the banks receive and pay out," in the present tense, which means now, need not the interpolation of that word, or any other, to convey the meaning which I think may be given to the clause.

It is not inconsistent with, nor does it militate against this construction, that it is payable without interest. It does not appear from the face of the bond, whether it was given for the loan of Confederate money, or for the sale of property. And it is not uncommon for purchases of property to be made on time without interest. But if we resort to the parol testimony, to learn that it was for the loan of Confederate treasury notes, that fact does not preclude the construction indicated. The contract so construed, was still a good bargain for the plaintiff. It was to put his Confederate treasury notes in good hands to be safely kept, and returned to him in value, when the war was over and things became settled; a disposition which many who held that currency in large amounts would have readily made.

If this is a fair construction it is not a contract of hazard. The plaintiff lends his Confederate money, which was rapidly depreciating every day, upon the assurance of the borrower, amply secured, that he will return its then present value after two years, without interest. He might well forego the interest upon his Confederate treasury notes, to have their then present value secured to him for two years. The obligation is not to return it in Confederate treasury notes or Confederate currency, but "in such funds" as the banks were receiving and paying out at the date of the contract; which may, I think, imply funds of equal value. The jury so understood the agreement. For to that effect is their verdict. And the learned judge who tried the cause and heard all the evidence, refused to interfere with the verdict; because he regarded it "just and in accordance with the true understanding and agreement of the parties."

As I have said, the contract, so construed, is not a contract of hazard. The only risk incurred was that of the borrower, on account of the fluctuations, and rapid depreciation of the Confederate currency; and

that depended upon his ability to make an immediate investment. Any loss that he might sustain by a short delay would be compensated by the abatement of interest. It could not, therefore, be said to be a contract of hazard on his part, as the presumption is, he knew how he could dispose of it before he borrowed it: and was only bound to pay back "such funds" as the banks were dealing in at the time he effected the loan; that is the value of the Confederate notes at the time he received them. And the plaintiff incurred no hazard inasmuch as he was to receive the value of his money loaned.

If the language will not bear that construction, the words such funds as the banks receive and pay out, referring to the date of the contract, must be construed as meaning Confederate currency, as that was the only currency which the banks were then receiving and paying out. If that be the correct view, then it was simply an obligation to pay \$5,000 in Confederate currency. And upon that construction, the judgment greatly exceeds the amount which the plaintiff was entitled to receive. But I am disposed to give a construction more just and favorable to the plaintiff; and it seems to me that the words "in such funds," may be construed to imply funds of equal value. The word "such," in its common acceptation, means "like."

The funds may be alike in one respect and not in another; but may be bank notes, or both may be Confederate currency. But they cannot be said to be altogether alike unless they are alike in value. When speaking of funds that are alike, value, it seems to me, is the most important point of resemblance. Therefore, if the dealings of the bank were in Confederate funds, the words "such funds," might be construed to mean not only Confederate funds, but funds of equal value. If funds of very unequal value, they could not, with propriety, be said to be such funds.

Why then should not the contract receive this judicial construction? If the parol testimony is to be excluded, the face of the bond is at least as susceptible of this construction as the other. Indeed, it cannot import the intention ascribed to the parties by the plaintiffs, without the interpolation of words or the transposition of sentences; whilst the other interpretation is according to its grammatical structure, and the obvious import of its terms. Contrary to the well established principle, that contracts of hazard are not to be encouraged, ought we to give a strained construction to this instrument in order to hold these parties to a contract of hazard, and require the defendant to pay to the plaintiff five thousand dollars, for the consideration of only \$625 which he received?

If it was clearly a contract of hazard, entered into by the parties with their eyes open, with an understanding of the risks they were incurring, and with the unquestionable purpose and intention of incurring those risks depending on contingencies,

upon which it was lawful to contract, the courts have no discretion but to enforce it, however hard and oppressively it may operate on one of the parties. Because it is not the province of the court to make or unmake contracts, but to enforce such as have been lawfully and fairly made.

The plaintiff contends, that this was
397 a contract of *hazard, contingent upon the event of a war in which their country was engaged, and which required the active co-operation and united and vigorous exertions of all its citizens to bring it to a successful termination. Without inquiring whether it was lawful for these parties, whilst their fellow-citizens were imperilling their lives and fortunes in the defence of their country, and to bring the war to a successful issue, to be speculating upon its result, and to be making contracts of wager upon its result, I have endeavored to show, that the written contract between them is, upon its face, susceptible of a different construction, and is not a contract of hazard. Does the parole evidence conflict with that construction, and show that the parties intended to make a contract of hazard?

The parole testimony is excluded by a majority of the court. But not concurring in that opinion, I will briefly consider it. Does it show that these parties intended to make a contract of hazard, depending upon the result of the war whether favorable or unfavorable to the Confederate States? There is no testimony in the cause, except that of the parties, which is certified by the court. J. B. Peyton, the principal obligor, proves that he regarded the contract to some extent as a contract of hazard; but the hazard was the appreciation or depreciation of Confederate currency. The plaintiff says he expected to receive payment in a currency better than that which he loaned. In other words, he expected an improvement in Confederate currency; otherwise, his evidence is in conflict with the defendants, and could not be considered.

Wm. H. Peyton, one of the defendants, says that the agreement was upon the terms set forth in the bond. So say the other witnesses. Neither of the witnesses says that the contract was made with reference to the termination of the war, or how it would terminate, whether favorably or unfavorably. It was a contract to
398 *pay in two years; and the idea of the war terminating in the meantime, or, if it did, how it would result, and what would be its effect upon their contract, seems not to have been thought of by either party, or to have been contemplated in their contract. And even if they intended that payment should be made in such funds as the banks were receiving and paying out at the maturity of the contract, as contended by the plaintiff's counsel, they intended the banks which then operated in the State, or which might afterwards be created by the government of Virginia, or of the Confederate States, and be subordinate to those governments; and which dealt in funds

which were created by, or authorized by the Confederate government, or by Virginia, as a member of the Confederacy. It was no part of their contract, and never entered their heads, that payment was to be made in such funds as was received and paid out by United States banks, or by banks which were subject to the government of the United States, or in the currency of the United States government. I am clearly of opinion that banks of Virginia, as a member of the Confederacy, were meant. They were the only banks in Virginia, and were then receiving and paying out the same kind of currency which the plaintiff loaned to the defendants. They were the only banks that were known to the parties. They had nothing to do with any other banks. And being good and faithful citizens of Virginia, which was then at war with the United States, they could not have contemplated payment in United States currency; such as was received and paid out by the United States banks—a currency which they could not have received, and paid out, at the time of this contract, without incurring the penalty of crime against their country. I conclude, therefore, that it was no part of the contract between those parties, that payment was to be made in such funds as were received and paid out
399 by United States banks, or banks which were under the *power and control of the United States government, either directly or indirectly, through the government of Virginia. It is not a contract, expressed or implied, that if the war terminated favorably to the United States, before the maturity of the bond, it was to be paid in United States currency; and if it terminated favorably to the Confederate States, or if the bond matured before the termination of the war, it was to be paid in Confederate States currency. Whether, if such had been the contract, it would have been lawful and valid, I deem it unnecessary to enquire, inasmuch as it was not the contract.

It is with great diffidence and distrust of the correctness of my own views, when opposed by those of my brethren, that I have given this opinion. But, whether right or wrong, it is my opinion, and the country is entitled to it. And I have the satisfaction to know that it is in support of justice; and in accordance with the judgment of the learned judge of the Circuit court, and with the verdict of the jury, which I think are as favorable to the plaintiff as he had any right to expect. I am, therefore, for affirming the judgment.

The other judges concurred in the opinion of Christian, J.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that, according to the true legal construction of the contract upon which the said action of covenant was founded, the said defendants in error bound themselves to pay to the plaintiff in error the sum of five thousand

dollars, without interest, in such funds as the banks received and paid out two years after the date of the said contract, to wit: on the 9th day of June 1865; and that the only evidence proper to be heard, in order to fix the measure of their liability, 400 *was proof of the kind of currency received and paid out by the banks on that day. And the court is further of opinion that the parties, having stipulated in writing for themselves, as to the kind of currency in which their contract was to be fulfilled or performed, it was not competent for them to introduce parol evidence to vary or contradict their written agreement. It is, therefore, considered that the said judgment is erroneous, and that the same be reversed and annulled, and that the plaintiff in error recover against the defendants in error his costs expended about the prosecution of his writ of supersedeas here. And it is ordered that the verdict of the jury be set aside, and the cause remanded to the said Circuit court for a new trial to be had therein, in conformity with the principles herein declared.

Judgment reversed.

401

*Wall v. Atwell.

August Term, 1871, Staunton.

1. **Debt on Bond—Office Judgment—When Cause Properly on Docket.**—In debt on bond, if the common order and the common order confirmed have been regularly entered at rules, the cause is properly on the office judgment docket at the next term of the court; though no endorsement of the proceedings may have been made upon the papers in the cause.
2. **Same—Same—Cause Improperly on Docket—Action of Court.**—If the proceedings in the office had been so irregular that the cause is not properly on the office judgment docket, the court should remand it to the rules for proper proceedings.
3. **Office Judgment—Plea in Abatement.**—An office judgment cannot be set aside when it stands as an office judgment on the docket of the court, by a plea in abatement.

In April 1869, Asa Wall, assignee, sued out of the clerk's office of the Circuit court of Frederick county, a writ in debt against Samuel R. Atwell, for eleven hundred and seventy-six dollars, with interest from the 25th of November 1862. At the May rules a declaration was filed setting out a note for \$1,176, executed by Atwell to V. Wall, and assigned by her to the plaintiff. The office judgment was set aside at the June term of the court, and the defendant pleaded payment. And thereupon the plaintiff had leave to file an amended declaration; and the cause was remanded to the rules.

At the rules in January 1870, the plaintiff filed his amended declaration, not describing himself as assignee. This declaration contained three counts: The first for \$1,050, borrowed by the defendant from the plaintiff. The second was that in consideration that the plaintiff had loaned to the defend-

ant \$1,050, the defendant had delivered to an agent of the plaintiff his note 402 whereby *he had promised to pay to the plaintiff this sum of \$1,050; and this note had been handed by a third person to the defendant without the same or the interest having been paid, and the defendant still had possession of it. The third count set out an accounting between the plaintiff and the defendant, when the defendant was found indebted to the plaintiff for money loaned, and interest thereon in the sum of \$1,176.

The common order was taken and confirmed at rules on this declaration, and the cause stood upon the office judgment docket at the June term of the court. At this term of the court, when the cause was called, the defendant appeared by counsel and offered a plea in abatement; to the admission of which the plaintiff objected. But it appearing to the court by inspection of the rule book, that the same had been irregularly kept, and that in this cause the statement showing the state of the parties and pleadings, and orders in the cause, required by the rules of practice of the court had not, up to the commencement of the term of the court, been filed and kept with the papers of the cause, except the single entry on the back of the plaintiff's declaration, in these words—"1869, 18 Dec. filed, W. B. Reily, D. C."; the said 18th day of December 1869 being neither a rule day or a day of any term of the court, and the other entries on the back of said declaration having been made since the commencement of the present term of the court: and it further appearing from the statement of the counsel for the defence, that upon an examination of the papers, at the June rules 1870, had by him with reference to the preparation of the defendants' defence, he was misled by the single entry aforesaid, and regarded the filing of any defence as premature, and that he was surprised at finding the said cause entered upon the office judgment docket of the term; the court overruled the objection and admitted the plea to set aside the office judgment. To this opinion of the court the plaintiff excepted.

403 *The defendant then filed his plea setting out the variance between the declaration and the writ. To this plea the plaintiff demurred: but the court overruled the demurrer and rendered a judgment for the defendant. And thereupon Wall applied to this court for a supersedeas; which was awarded.

Robert Y. Conrad & Son, for the appellant.

Parker, for the appellee.

MONCURE, P., delivered the judgment of the court.

The court, without deciding whether the causes of action set forth in the amended declaration could or could not properly be joined with the cause of action set forth in

the original declaration, is yet of opinion that the supposed variance between the writ and the amended declaration, if there be any such variance, is matter for a plea in abatement only, and not a plea in bar; and as an office judgment cannot be set aside except by the defendants appearing and pleading to issue, (Code, 714, § 45), that is, pleading in bar of the action, unless some matter in abatement happens after the conditional judgment is confirmed in the office, and before the next term; in which case the defendant should be allowed to set aside the office judgment by pleading the matter, in the form of a plea puis darrein continuance, before the end of the next term, (1 Rob. Pr. old ed. p. 205; 5th id. new ed. p. 18); the Circuit court, therefore, erred in overruling the objection of the plaintiff to the filing of the special plea offered by the defendant in this case, (being a plea in abatement), and ordering the same to be filed to set aside the office judgment. And the court is further of opinion, that the reasons assigned by the said court for overruling said objection and ordering said plea to be filed are not sufficient for that purpose. The record shows that, although it appeared to the said court by inspection of the Rule Book thereof, that the same

404 *had been irregularly kept, and although in this cause the statement showing the state of the parties and pleadings and orders in the case, required by the rules of practice of the court, had not, up to the commencement of the term when the plea was received been filed and kept with the papers of the cause; yet the rules in this cause, to wit: the "Common Order," and the "Common Order confirmed," were regularly taken, and the cause was regularly placed on the office judgment docket, where it properly was when the said plea in abatement was received. If the rules had not been regularly taken, and the cause had been improperly put upon the office judgment docket, it would have been competent for the court, and indeed would have been its duty, (having control over all proceedings in the office during the preceding vacation), to have remanded the cause to the rules, in order that proper proceedings might there be had therein. It is, therefore, considered by the court, that the said judgment is erroneous, and that the same be reversed and annulled, and that the plaintiff recover against the defendant his costs by him expended in the prosecution of his writ of supersedeas aforesaid here. And it is ordered that the said plea and all the proceedings thereon be set aside, and the cause remanded to the said Circuit court for further proceedings to be had therein, on an enquiry of damages, or on any plea in bar which may be offered by the defendant and received by the court, or otherwise, according to law and in conformity with the foregoing opinion and judgment; which is ordered to be certified to the said Circuit court of Frederick county.

Judgment reversed.

405

*Campbell v. Ranson & als.

August Term, 1871, Staunton.

Bonds—Payment of Debt in Confederate Bonds—Memorandum—Case at Bar.—C, living in Rockbridge county, is indebted to R, living in Jefferson, on a bond for an ante-war debt, well secured on real estate, and falling due on the 26th January 1863. About a month before this date, C sends to R, by H, who lives in Jefferson, but is then in Rockbridge, a blank check on a Rockbridge bank, to pay the debt. H goes to see R in a few days, and proposes to pay the debt by the check, which would be paid in Confederate currency, and R refuses to receive it, but says he is willing to receive Confederate bonds of a specified description, and at H's request R writes a memorandum, which is not dated, stating the debt, and when due, and says it can be paid in registered eight per cent. Confederate bonds, issued to run the longest period of time, bought at par, specifying the number of bonds and amount of each, and the treasury notes with which they are to be bought. H wrote to C, enclosing a copy of the memorandum, which did not arrive; but he wrote again on the 20th of January 1863, that R had refused to receive payment, but wished C to procure for him registered bonds; stating the number and amount of each. This letter was received by C in April, and in August he procured eight per cent. bonds, in the name of R, but not the number or in the amounts prescribed. In August H was again in Rockbridge, when C handed him the bonds to be taken to R, but fearing they might be lost on the way, H deposited them in the bank for R, and took the cashier's receipt for them. H was not able to go to see R, but in December sent the receipt to R, who, on the day he received it, wrote to C declining then to receive them; and he sent to C the receipt endorsed to him; and this letter C received. The bonds were ultimately withdrawn from the bank by C, and exchanged for bonds in his own name. **HELD:**

1. **Same—Same—Same—Same.**—The memorandum of R is to be construed as consenting to receive the bonds in payment of his debt, only if delivered by the time the bond fell due; and not at any indefinite time in the future.
2. **Same—Same—Conditions—Difficulty of Compliance Does Not Excuse.**—R had the right to require payment to be made in these bonds at the maturity of the debt, as the condition on which the
- 406 *privilege might be secured: and also to require that the bonds should be precisely of the description named in the memorandum. And the difficulty or impossibility of complying with the conditions by C, does not entitle him to pay his debt at any other time, or in any other bonds.
3. **Same—Same—Same—Failure to Perform—Condition Precedent.**—The condition precedent not having been performed, the debt remains in full and absolute force.
4. **Same—Same—Delay.**—If C might have paid upon receiving the letter from H in April 1863, it was his duty to procure the bonds immediately, and deliver them; and having waited until August, when they had greatly depreciated, his procuring them then was no compliance with the terms prescribed by C.

*See monographic note on "Bonds."

5. Same—Same—Authority of Agent to Accept.—

Though R might have accepted the bonds at any time, and might have done so by his agent, the evidence of the acceptance by the agent, and of his authority to accept, should be beyond all doubt.

6. Same—Same—Same.—Though the amended bill charges that H was the agent of R, the answer denies it, and the proofs do not sustain it; and therefore the receipt of the bonds by H does not bind R to accept them as payment of his debt.

This case was argued at the August term of the court held in Staunton; and was decided at the November term held in Richmond. The facts of the case are stated by Judge Moncure in his opinion.

Brockenbrough, Letcher, and Maury, for the appellant.

Baldwin and Ranson, for the appellee.

MONCURE, P. This is an appeal from a decree of the late District court at Charlottesville, affirming a decree of the Circuit court of Rockbridge county, dissolving an injunction of a sale of a tract of land in said county under a deed of trust to secure the payment of certain bonds therein mentioned; the alleged ground of the injunction being, that one of the said bonds, and the only one about which there was any controversy, had been paid and discharged, by the delivery and acceptance of certain Confederate bonds as an accord and satisfaction.

In April 1858, James M. Ranson sold and conveyed *the tract of land aforesaid to Joseph H. Maddox, and on the 15th day of the same month, the said Maddox conveyed the same land to John B. Baldwin, in trust, besides other purposes, to secure the payment of three bonds given for part of the purchase money of the said land, one of them for \$6,492.96, due 26th January 1862, another for \$6,150.56, due 26th January 1863, and the other for \$5,808.16, due 26th January 1864.

In April 1859, the said Maddox sold the said tract of land, (except 21 acres previously sold and conveyed by him to J. H. Myers), together with a large amount of personal property, to Samuel J. Campbell, for the sum of fifty thousand dollars, out of which the said Campbell agreed with the said Maddox to pay, in the first place, the said three bonds of the said Maddox to the said Ranson, secured by deed of trust on the said land as aforesaid.

The first of the said three bonds, to wit: the one due 26th January 1862, was duly paid at maturity. The third of them, to wit: the one due 26th January, 1864, has also been settled, since this litigation commenced. The only one in controversy, therefore, is the second, which became due on the 26th of January 1863.

When that bond became due, and for some time previously, Ranson resided in the county of Jefferson, and Campbell resided in the county of Rockbridge, about a hundred and fifty miles apart, and they

continued so to reside until the end of the war. The military lines of the enemy generally ran between them, the intermediate country was often a theatre of battle, and personal communication between Jefferson and Rockbridge was often attended with difficulty and danger. This state of things existed in December 1862, and generally afterwards until the end of the war.

In that month, to wit: December '62, Campbell, for the purpose of taking up the second of the said three bonds of Maddox to Ranson at its maturity on the 26th
408 *of January 1863, placed his blank check on the bank of Rockbridge in the hands of John Humphreys, an uncle of Campbell's wife who lived in Jefferson, about five miles from the residence of Ranson, but was then in Rockbridge, which county he occasionally visited during the war; and he, Campbell, empowered Humphreys, on his return to Jefferson, to call on Ranson, to fill up the check if necessary with the proper amount, and to pay and take up the said second bond, if Ranson should be willing to accept payment in Confederate money, in which the said check was payable, and which was then the only currency of the country.

Humphreys, accordingly, received the check and undertook the agency for Campbell, and in a short time thereafter, returned to his home in Jefferson, called upon Ranson, and proposed to make payment of the bond in the manner and by the means aforesaid. Confederate money was then at a discount of about three to one as compared with gold. And, as might well have been expected, Ranson promptly refused to accept payment in the medium proposed: so promptly and positively, that he did not even look at the check which Humphreys had in his possession.

But Ranson said, at the same time, that payment of the said bond might be made in Confederate bonds of a certain description, which he named. Humphreys requested him to state that fact in writing, which he accordingly did; and a paper in the following words was written by Ranson and handed to Humphreys, viz:

"\$6,150.56. Due 26th January, 1863, from S. J. Campbell to James M. Ranson. This can be paid in registered eight per cent. Confederate bonds, issued to run the longest period of time, bought at par. Six one thousand dollar bonds, and one 150 dollar bond. They, of course, must be bought with treasury notes of the issue prior to December 1st, 1862. J. M. R."

It does not appear at what precise
409 time this paper was *handed by Ranson to Humphreys. It bears no date. The time, however, was probably in December, or early in January, and some weeks before the 26th of that month, when the bond became due. Humphreys left Rockbridge for Jefferson in December, and the presumption is that he called on Ranson directly after he got to Jefferson. It was not intended or expected that Humphreys would in any short time revisit

Rockbridge, or that he would deliver Ranson's memorandum in person to Campbell, but merely that he would enclose it to him by letter to be sent by the first opportunity.

It appears that such an opportunity occurred immediately after the interview between Humphreys and Ranson, and that Humphreys then wrote to Campbell, informing him of the particulars of that interview, and enclosing in the letter a copy of the memorandum aforesaid. There is some doubt whether that letter was ever received by Campbell. Probably it never was, and that it was destroyed by the bearer (who was taken prisoner on the way), to prevent its falling into the hands of the enemy.

Out of abundant caution, it seems, Humphreys wrote again to Campbell, and the following is so much of the letter as relates to the subject under consideration:

"Scampon, Jan. 20, 1863.

"My Dear Nephew: I wrote to you shortly after my return. I hope you received my letter. I had the promise that it should be forwarded to you. As the enemy in a day or two overran our county, probably it did not get to you; and as this is the first opportunity since to send a letter, I write again. I had stated all about my interview with Mr. James M. Ranson, his declining to receive payment, and desiring you would procure registered bonds for him from the Confederate Government. He wanted six separate bonds, each \$1,000, and one for \$150, making \$6,150.56, 410 the amount of *your payment due the 26th of this month. I suppose you could get the eight per cent. registered bonds for him. I have just heard that the Yankees have evacuated Winchester. If so, I can get this letter in."

It will be seen that this letter is dated six days before the maturity of the bond, and that in it the writer speaks of having written shortly after his return, giving an account of his interview with Ranson; which confirms the view above expressed, that that interview was either in December 1862, or early in January thereafter.

It appears that this letter of January 20, 1863, was not received by Campbell until April 1863, about three months after it was written, and that until that time, Campbell had received no information of the interview between Humphreys and Ranson, or of the willingness of Ranson to accept Confederate bonds, in payment of the bond of Maddox to him due on the 26th of January 1863.

Although Campbell received this letter in April 1863, yet he did not, even then, make any investment in Confederate bonds in the name or on the account of Ranson, nor did he do so until August and September following, about four months thereafter, when he made an investment in such bonds in said name, to the aggregate amount of \$6,150, but not then even in bonds of \$1,000 each, as directed, the treasurer refusing to cut up bonds when issued in the name of one party; nor, it seems, in bonds

which were "to run the longest period of time," Campbell not having then been informed, as he says, of the requisition of Ranson on that subject.

In August 1863, Humphreys made another visit to Rockbridge, when he was informed by Campbell that he had made the investment in Confederate bonds as requested by Ranson, and when he delivered to Campbell the original memorandum which had been handed to Humphreys by Ranson as aforesaid. These Confederate bonds were intended to have been sent by Campbell

411 *to Ranson, by the hand of Humphreys on his return to Jefferson.

But, it seems, that in consideration of the risk of being lost in that way, it was deemed best by Campbell and Humphreys that they should be deposited in the Rockbridge bank for safe keeping and a certificate of such deposit sent to Ranson instead of the bonds; and accordingly such deposit was made, and such a certificate was obtained by Humphreys to be carried to Ranson.

It does not appear at what precise time Humphreys returned to Jefferson. He was not able, he says, on his return, nor for some time thereafter, to pass the receipt to Ranson, and then only through a friend, Dr. Cameron, who lived near Ranson. At all events, Ranson did not receive it until on or about the 11th of December 1863; and that appears to have been the first information he received in regard to the purchase of Confederate bonds after handing the memorandum on that subject to Humphreys as aforesaid. On that day, to wit: the 11th of December 1863 he wrote to Campbell, refusing to receive the bonds; and on the 28th January 1864, Campbell wrote to Ranson, acknowledging the receipt of the latter's said letter of December 11th, expressing regret at his refusal of the bonds, and saying that he, Campbell, had not been able to use the bonds, in consequence of their having been registered in the name of Ranson. In Ranson's said letter of December 11th, 1863, he said, among other things, "The enclosed paper has just been handed me by Dr. Cameron. It is the first intimation that I have had that any action had been taken with regard to the land payment due me last January. I am sorry to be obliged to say that I cannot now receive the Confederate bonds for the said land payment. If the matter could have been attended to, and the Confederate bonds obtained at the time the payment fell due, that is, in January last, I would have received them; but

by the 18th of August, the date of the 412 bonds, they had depreciated *in value to such an extent, that I do not think

you can consider me at all unreasonable in declining to receive them now. I gave Mr. Humphreys a memorandum last winter, stating my willingness to receive Confederate bonds for the amount due from Maddox in January 1863; but that statement contemplated that the arrangement should be made, or the bonds obtained, at the time the land payment fell due, and not that the

matter might be postponed for any cause whatever, and such payment made at the option of the debtor, at any time thereafter, without reference to any changes that might occur in the financial condition of the country. Please let the bonds of Mr. Maddox due in January 1863 and 1864, remain for the present unpaid, and stand as they are, running on interest, until the times are more settled." "I have made the proper endorsement upon the back of the statement of the cashier, or such as will place the Confederate bonds again at your disposal."

These bonds were ultimately withdrawn by Campbell from the bank, were changed from Ranson's name to that of Campbell, and perished in the hands of Campbell at the fall of the Confederacy.

Thus stood the matter until March 1868, when John B. Baldwin, trustee in the deed of trust aforesaid, being about to execute the trusts of the said deed by a sale of the land thereby conveyed, having been requested so to do by said Ranson, for default in the payment of the said two bonds, due the 26th of January 1863 and 1864, thereby secured, an injunction was awarded to prevent him from so doing by the judge of the Circuit court of Rockbridge county, on a bill then filed in said court by said Campbell against said Ranson and others. In April 1868, the defendant Ranson filed his answer, and on the 25th of that month the cause came on to be heard on the bill, answer, general replication thereto, exhibits, and examination of witnesses, and on the motion of the said defendant to dissolve

413 the said injunction; *and on consideration thereof the said injunction was accordingly dissolved. But by leave of the court the plaintiff thereupon filed an amended and supplemental bill, on which the said injunction was reinstated, but only as to the said bond which became due on the 26th of January 1863; and leave was given the defendants to submit their motion in vacation for a dissolution of the renewed injunction. In May 1868, the defendant Ranson filed his answer to the amended bill; and in June 1868, on the motion of the said defendant, made upon due notice, a decree was made by the judge of said court in vacation, dissolving the said last mentioned injunction, and was entered by order of the said judge as a vacation decree in the book of records of said court. To this decree the plaintiff applied for and obtained an appeal and supersedeas to the District court at Charlottesville, by which the said decree was afterwards, to wit: on the 3d day of July 1869, affirmed. Application was thereafter made by the plaintiff to a judge of this court, for an appeal from, and supersedeas to, the said decree of affirmation; which was accordingly granted.

The appellant, Campbell, and the appellee, Ranson, have conflicting and competing theories of this case, and the question we have to consider is, which of them is sustained by the pleadings and the proofs in the cause.

The appellant's theory is, that wishing

to pay at maturity the bond of Maddox to Ranson, which was to become payable on the 26th of January 1863, and which he had assumed to pay by his agreement with Maddox he empowered Humphreys in December 1862, to call on Ranson and make such payment by a check on the Bank of Rockbridge, which the appellant, Campbell, gave him for the purpose, and which was of course payable in Confederate money, being then the only currency of the country; that Humphreys, who was a connection of

414 Campbell, and a friend and neighbor of Ranson, living *about five miles from his residence in Jefferson, but then on a visit to Rockbridge, was about to return to his home in Jefferson, when he was empowered, and the check was given him, as aforesaid; that he accordingly returned home, and very soon thereafter called on Ranson and offered to make the payment aforesaid; but Ranson refused to receive it, being unwilling to accept Confederate money in payment of the said bond; that Ranson expressed his willingness however to receive Confederate bonds of a certain description in payment of said debt, and was "keen" and "anxious" to do so; and accordingly proposed to empower Humphreys, as his agent, to effect such an arrangement for him with Campbell; that Humphreys undertook such agency, but for his own security required Ranson to state in writing what he was willing to do; and, accordingly, Ranson made and signed with the initial letters of his name, and handed to Humphreys, the memorandum, of which a copy marked "D" is exhibited with the original bill, and another copy marked "J. H. No. 2," is filed with the deposition of said Humphreys. That when Ranson refused to accept Confederate money in payment of the said debt, Humphreys ceased to be the agent of Campbell, and when he undertook at Ranson's request, to endeavor to affect an arrangement with Campbell for the payment of the said debt in Confederate bonds as aforesaid, he became the agent of Ranson only, and not the agent of Campbell; that this transaction took place shortly before the said debt became payable, but at what precise time is uncertain; that no time was defined either in the said memorandum or orally for the delivery of the said Confederate bonds, and Ranson knew that in the then state of the country in which the parties resided, and from the difficulty and danger of communications between them, it might require much time to consummate the proposed arrangement, and he must, therefore, have

415 designedly left the time for such consummation *indefinite. That immediately after the interview between Ranson and Humphreys the latter wrote to Campbell informing him thereof, and enclosing a copy of the memorandum aforesaid, but the letter and its contents was never received; that on the 20th of January 1863, six days before the said debt became payable, Humphreys wrote again to Camp-

bell referring to the former letter and its contents, saying: "I had stated all about my interview with Mr. James M. Ranson, his declining to receive payment, and desiring you would procure registered bonds for him from the Confederate government. He wanted six separate bonds, each 1,000 dollars, and one for 150 dollars; making \$6,150.56, the amount of your payment due the 26th of this month;" but enclosing no copy of the memorandum aforesaid in this letter; that this letter was not received by Campbell until early in April 1863; that in the latter part of July or first of August 1863, he applied to Myers, cashier of the Bank of Rockbridge, for the purpose of buying Confederate bonds for Ranson according to the directions contained in the letter of Humphreys as aforesaid, and succeeded during that month in procuring Confederate eight per cent. bonds of the required aggregate amount of \$6,150.56, payable to James M. Ranson, for which he had to pay a premium of \$1,000, but owing to some regulation of the Confederate treasury department, he could not get bonds of the particular amounts required by Ranson; that Humphreys visited Rockbridge and came to Campbell's house in August 1863, after the latter had procured the said bonds, and when he had them in his house; that on that occasion Humphreys handed to him, Campbell, the memorandum aforesaid, requesting him to lay it away carefully, as it was Mr. Ranson's order or instructions to him upon which he had acted, and thereupon Campbell handed to him, Humphreys, the bonds to carry to Ranson, instructing him to obtain from Ranson the note

416 *for which these bonds were due; that this was the first occasion on which he, Campbell, had ever seen the memorandum aforesaid: that Humphreys returned to Jefferson again in September 1863: that he did not carry the Confederate bonds with him, fearing he might be captured by the public enemy on the way, but left them in the bank of Rockbridge for safe keeping in an envelope endorsed as the property of James M. Ranson, taking from Mr. Myers, the cashier, a statement thereof; that Humphreys could not go to see Ranson for some time after his, Humphreys', return to Jefferson, by reason of the pickets of the enemy; but as soon as he could, which was several weeks after his return, he sent the said statement to Ranson by Dr. Cameron; that on the receipt of this statement, Ranson wrote a letter to Campbell, dated December 11th, 1863, refusing to receive the Confederate bonds, and returning the said statement with an endorsement made thereon, for the purpose of placing the Confederate bonds again at Campbell's disposal; that Campbell answered this letter on the 28th of January 1864, expressing his regret that Ranson had refused to receive the bonds, and saying that he had purchased them in pursuance of authority received from Ranson, and with as little delay as practicable; that he afterwards received the bonds from the bank under

protest, and with much difficulty succeeded just before the end of the war in having them transferred to his name, but never derived any benefit from them, and they perished in his hands; that Ranson never revoked the authority given by him to Humphreys as aforesaid, although they lived near together, and such revocation might easily have been effected at any time if it had been desired by Ranson; that Campbell having complied in all substantial respects, and as nearly as possible, with the request of Ranson, as communicated through his agent Humphreys in regard to the purchase of the said bonds, and the said Humphreys, as such

417 agent, and *in pursuance of full authority thereto with which he had been invested by Ranson, having received the said bonds of the said Campbell as a full satisfaction of the said bond of Maddox to Ranson due on the 26th of January 1863, the said bond was therefore, in effect, paid and discharged, and the said Ranson is estopped in equity from enforcing its payment by a sale under the deed of trust aforesaid or otherwise.

This is Campbell's theory, and if it be well founded in fact there can be no doubt, I presume, but that he is entitled to succeed in this controversy.

On the other hand, Ranson's theory is, that Maddox's debt to him was an ante-war debt, payable in specie, and well secured by deed of trust on real estate much more than ample for its payment; that he was not anxious for its payment during the war, and was wholly unwilling to receive such payment in Confederate money; that accordingly, when Humphreys, in December 1862, or in January 1863, as the agent of Campbell, offered to pay the bond of Maddox to Ranson, which was to become due on the 26th of January 1863, by the check of Campbell on the bank of Rockbridge, he, Ranson, refused to receive such payment; the value of Confederate money, as compared with gold, being then but as three to one; that, although unwilling to receive Confederate money in payment of the said debt, he was yet willing, but not anxious, to receive such payment in Confederate bonds of a particular description at par, and accordingly so informed Humphreys at the time of refusing to receive the check aforesaid; that the memorandum given by him to Humphreys at that time, at the latter's request, truly sets out what he was willing to do, and consented to do; that he intended the memorandum only to say what he had just said orally, and what he is advised is the true construction of the writing, that payment of the bond at the time of its maturity might be made in

418 registered eight per cent. Confederate bonds *of the designated description at par; that he did not make Humphreys his agent in the transaction for any purpose, but dealt with him only as agent of Campbell, connecting with his refusal to accept the offered payment in Confederate money an expression of his

willingness to accept payment in Confederate bonds, as aforesaid, at par; that, not having constituted Humphreys his agent for any purpose, it was not necessary or proper to revoke an agency which never existed; that, holding the bond of Maddox, well secured by deed of trust on real estate, and having only consented to receive Confederate bonds of a particular description, though even then greatly depreciated in value, in payment of the debt at maturity, it was not incumbent on him to do anything or say anything more on the subject, but he had a right to remain quietly and passively until the debt became due, knowing that if it should not then be paid in Confederate bonds, as aforesaid, or otherwise, it would thereafter remain, in all its force and with all its security, as a specie debt; that, although Campbell was informed of Ranson's willingness to accept Confederate bonds, as aforesaid, in payment of the said debt at least as early as April 1863, when Confederate currency stood at the rate of five or six to one, as compared with gold, yet he made no purchase of Confederate bonds on account of Ranson until some time in August 1863, when Confederate currency had depreciated to such a degree as to be of the value only of twelve or thirteen to one, as compared with gold; that Ranson never received any intimation from any source in regard to a purchase being made of Confederate bonds with a view to the payment of the said debt due to him on the 26th of January 1863, from the time he handed the memorandum to Humphreys in December 1862, or January 1863, as aforesaid, down to the 11th of December 1863, when Dr. Cameron handed him a statement of the

Confederate bonds which had been
419 purchased and deposited *in the bank of Rockbridge, as aforesaid, and when Confederate currency had depreciated in value to less than eighteen or twenty to one, as compared with gold; and that, therefore, he had a right to refuse to receive the said Confederate bonds in payment of the said debt, as he did by his letter to Campbell of December 11th 1863, and the said debt still remains wholly due and unpaid, and the said deed of trust for its security still remains in full force and effect.

This is Ranson's theory, and if it will be well founded in fact, it is evident that he is entitled to succeed in this controversy.

This case has been ably argued by the counsel on both sides, and the counsel for the appellant have certainly maintained his theory with great force and ingenuity. But I am decidedly of opinion that the theory of the appellee, Ranson, is fully sustained, in substance at least, by the pleadings and proofs in the cause.

That Ranson was willing, in December 1862, or January '63, to receive payment at its maturity, on the 26th of the latter month, of a specie debt, well secured on real estate, in a medium at par, whose market value was then not worth more than about one-third of the same

amount of specie, and whose tendency was downward, is a fact of which strong and clear proof ought to be required. Such strong and clear, and indeed conclusive proof is afforded in its case by the memorandum, written and signed by Ranson, and handed to Humphreys as aforesaid. And if, on the 26th of January 1863, when the said debt became due, Campbell had paid, or offered to pay it in Confederate bonds, of the description and amount prescribed by the memorandum aforesaid, there can be no doubt but that Ranson would have been bound to receive such payment, and to surrender the evidence of said debt to be cancelled.

But still stronger proof ought to be required of Ranson's willingness at the time of handing the said memorandum

420 *to Humphreys, to give to Campbell the privilege of paying the said debt in Confederate bonds, not only at its maturity on the 26th of January 1862, but indefinitely, at any future time thereafter, no matter how great might be the depreciation of such bonds in the meantime. Certainly the said memorandum ought not to be construed as giving such a privilege, unless an intention to do so be very plainly expressed; but should rather be construed as confining the privilege to the time of the maturity of the debt, unless the latter construction would be plainly contrary to the intention of the author of the instrument.

Now, I think, that the plain and reasonable meaning of the memorandum, especially when viewed in the light of the surrounding circumstances, is to confine the privilege to the time of the maturity of the debt. Campbell wished to provide for the payment of the debt at or before its maturity, and accordingly made an offer through Humphreys, his agent, about a month before the debt became due, to pay it by a check on the Rockbridge bank, which would have been equivalent to a payment in Confederate currency. Ranson declined to receive such payment, but said that payment might be made in Confederate bonds of a certain description; and upon being requested by Humphreys to put this down in writing, he did so, in these words: "\$6,150.56. Due 26th January 1863, from S. J. Campbell to James M. Ranson. This can be paid in registered eight per cent. Confederate bonds, issued to run the longest period of time, bought at par—six one thousand dollar bonds, and one 150 dollar bond. They of course must be bought with treasury notes of the issue prior to December 1st, 1862. J. M. R." "This can be paid." When? Certainly at the maturity of the debt, and not at any time thereafter. If so, at what time? Could it have been intended that Campbell might pay the debt in Confederate bonds at any time thereafter he might think proper to do so?

421 *Does not the variable nature of the subject, its tendency to depreciation, conclude such an idea? Could it have been intended to convert this specie debt of Mad-

dox, so well secured by deed of trust on real estate, into a mere parol promise of Campbell to pay the amount in Confederate bonds on demand, or at his pleasure? Indeed, there was not even a parol promise of Campbell to make such payment, but a mere privilege offered him to do so. How long was he to have this privilege? The writing declares—"Due 26th January 1863," when of course payment in this privileged form was required to be made, else the debt would remain in all its force as a specie debt. It was all-important that some time should be specified for such payment, and this is the only specification of time in the writing, and was plainly made to indicate when the payment was to be made. The writing is minute in the description of the bonds which Ranson was willing to receive. "They must be registered eight per cent. Confederate bonds—issued to run the longest period of time—bought at par—six one thousand dollar bonds, and one 150 dollar bond. They of course must be bought with treasury notes of the issue prior to December 1st, 1862." Can it be supposed that Ranson would have been thus minute in these descriptions, some of which are apparently unimportant, and that he would have left unnamed so important a matter as the period when the privilege he gave of making payment in such a medium was to be exercised? That the amount of the Confederate bonds named in the memorandum is precisely the same with the principal of the debt, without any provision for interest which might accumulate, confirms the view that payment if made in such bonds was required to be made before there was any accumulation of interest, that is at the maturity of the debt.

But it is argued that Ranson knew it would require time to communicate with Campbell and to procure the bonds; that he could not have expected that these
422 things *could be done before the debt became due, and that therefore he must have intended that payment might be made in these bonds after the debt became due as well as before. It was not certain by any means that the bonds could not be procured and delivered by the time the debt was to become due. The memorandum is not dated, and it does not appear precisely when it was given. But the probability is, that it was given about a month before the debt became due: in which time Ranson might well have thought that the bonds could be procured. At all events, he had a right to require payment to be made in these bonds at the maturity of the debt, as the condition on which the privilege might be secured. And he had a right also to require that the bonds should be precisely of the description named in the memorandum. It is no excuse to say that Campbell did not hear of the matter in time, and could not procure and deliver the bonds before the debt became due; or that he could not, by reason of any regulation of government or otherwise, procure such bonds as were required. The answer to all such excuses is,

that a creditor has a right to demand payment of a debt, according to the terms of the obligation; and if he is willing to concede to his debtor the privilege of discharging it in some other prescribed mode, the mode so prescribed must be strictly pursued, or the debtor will lose the benefit of the privilege, and remain bound to discharge the obligation according to its terms. It may be the misfortune of the debtor, and not his fault, that he did not do what was required to give him the benefit of the privilege; but, whether it be his misfortune or his fault, the effect is the same: The condition precedent not having been performed, or not having happened, the privilege is lost, and the debt remains in full and absolute force. It will not do for the debtor to say that the condition was substantially performed, though not at the precise time, or in the precise mode prescribed, and
423 that the creditor *would have been no better off if the condition has been strictly performed. The creditor may prescribe his own terms of defeasance, however capricious and unmeaning they may be, or seem to be: Cujus est dare, ejus est disponere. The debtor is not bound to accept or perform them; and, if they be not performed, whether it be from his choice or from necessity, he only remains where he was before, and is bound to perform his obligation. To be sure, the creditor may accept substantial and substituted performance, and thus give it the same effect as if it had been in strict and literal pursuance of the prescribed terms. But then there must be clear evidence of such acceptance, either by words or act.

But suppose it be conceded that, according to the true construction of Ranson's memorandum, he consented to accept payment of the debt in Confederate bonds, though delivered after the debt had become payable, and that it was time enough for Campbell to buy the bonds after he first heard of the willingness of Ranson to receive payment in them, which was in April 1863. It was certainly the duty of Campbell, if he wished to make payment in that way, to procure the bonds with as little delay as possible. Already about four months had elapsed since the memorandum was given, and Confederate bonds had much depreciated in value since then, and their tendency was downwards. Did he do so? On the contrary, he did not procure the bonds until August 1863, four months thereafter, when, in consequence of the battle of Gettysburg, which was fought in the meantime, and other causes, Confederate securities were reduced to a very low ebb. He bought them then, without any communication with Ranson, or even with his alleged agent, Humphreys, on the subject! Can this delay, and this act of Campbell, be excused, and are they not, necessarily, fatal to his pretensions, in any view which can be taken of them? He knows the necessity of excusing them or obviating
424 their effect in *order to his success in this case, and he therefore seeks to

do so upon the ground that the bonds were accepted by Humphreys, as the agent of Ranson, and that Humphreys had full authority, as such agent, to accept them in payment of the debt.

Certainly Ranson still had a right to accept Confederate bonds in payment of the debt, notwithstanding their great depreciation in value since he first made an offer to do so; and that acceptance might as well be by an agent as in proper person.

But, then, the evidence ought to leave no doubt on the judicial mind as to the fact of such acceptance, and if it was an agent, as to the authority of the agent to make it.

It is not pretended that there was any such acceptance by Ranson personally, or any, otherwise than by the agency of Humphreys: Was there an acceptance in that way?

Was Humphreys the agent of Ranson for any such purpose, or indeed for any purpose at all, in connection with this matter? I have already shown, I think, that he was not. Campbell in his amended bill, varying the ground taken in the original bill, alleges such an agency, and lays much stress upon it; indeed, places the whole case upon that issue. But Ranson in his answer to the amended bill expressly denies allegation. "It is not true as is now stated," he says, "that Mr. John Humphreys was at any time, or to any extent, the agent of this respondent, for any purpose connected with the subject of this controversy. He came to respondent as the friend, connection and agent of the complainant, and he returned with a message from respondent to complainant in response, which, to avoid all mistake or misunderstanding, was reduced to writing, and is now in the papers of this cause as 'J. H. No. 2.' Respondent gave him no agency or authority of any kind, and dealt with him only as the agent and messenger of complainant."

425 "The consent to accept Confederate bonds in payment according to paper 'J. H. No. 2,' was not upon any suggestion of respondent, but was a reluctant concession to the importunity of said Humphreys, who urged it in the interest of the complainant. When Mr. Humphreys left the house of respondent on the occasion referred to, respondent had not the least idea that he could possibly regard himself as anything more than the bearer of a return message to his friend, the complainant, who sent him."

Now here is an express and positive denial in the answer, of the agency alleged in the amended bill, and there is nothing in the evidence which can be sufficient to overthrow his denial. Indeed, the evidence, taken altogether, confirms it. To be sure Humphreys, in his deposition, does speak of his being the agent of Ranson, and of his acting as such in the matter; and he no doubt thought so when he gave his evidence; but he shows, in answer to questions put to him in his cross-examination, that he was, in fact, no agent of Ranson at all. To question 16, "Did you expect or under-

take to do more than communicate Mr. Ranson's memorandum to Mr. Campbell?" he answers, "First I was invested with verbal authority from him to make the communication to Mr. Campbell. I declined doing so unless I had authority from him, when he gave me this paper, 'J. H. No. 2.' I did not undertake to do more than communicate Mr. Ranson's memorandum to Mr. Campbell." To question 19, "Had you any authority to say or to do anything in respect to Mr. Ranson's business, except what was given or recognized in that paper?" he answers, "I don't think I had."

Now look to the paper and see if it can properly be construed as giving any authority to Humphreys. I have already set it out in this opinion, and need not here repeat it. It only says in effect: the debt will be due on the 26th of January 1863, and 426 payment may be *made in Confederate bonds of a certain description, and this is said in answer to an offer to make payment in Confederate currency, and in connection with Ranson's refusal to accept payment in such currency. And the memorandum containing this answer is handed to the messenger by whom the offer was brought to be carried back or sent back to the person from whom the offer came. Can this amount to the creation of such an important agency as that which is now contended for? I think not.

But, even if such an agency in fact existed, does the evidence show that Humphreys accepted the bonds, as such agent, in payment of the debt? I think not. The bonds were handed to him, if at all, "as a friend of both parties," to take to Ranson. It was a convenient opportunity to send the bonds to Ranson, and as such, Campbell availed himself of it. But Humphreys apprehending that the bonds might be lost in the event of his being taken prisoner on the way, concluded to leave them in bank for safe keeping, and carried a statement of the cashier in their stead. It is evident that Campbell, when he wrote the letter of the 26th of January 1864 to Ranson as aforesaid, and all the facts were fresh in his memory, had no idea that Humphreys as agent of Ranson had accepted the bonds in payment of the debt. "I received," he says, "your letter, dated December 11th. I am truly sorry that you had found it necessary to refuse the registered bonds which I went to great expense to procure," &c. How could he then refuse them, when, according to the theory now set up, he had already accepted them through his agent, Humphreys? In all that letter, not one word is said about such an acceptance or such an agency. And although that letter is in answer to one from Ranson stating his own version of the matter, not a word is said to the contrary; and it plainly shows, that although Campbell thought hard of Ranson's refusal to accept the bonds, he did not then 427 doubt *his legal right to do so, and intended to make the best of his situation. This idea that the bonds were accepted in payment of the debt by Hum-

phreys as Ranson's agent, seems not to have existed in the mind of Campbell even when the original bill was filed, as we see no trace of it there; and it was probably engendered by the parol evidence given in the cause and by the stress of the case, which, without its aid seemed to be in danger of being lost. It therefore makes its first appearance and is prominently set forth in the amended bill. Now I do not mean to say that Campbell in his amended bill, or Humphreys in his deposition, made any statement which they did not respectively believe to be true. They no doubt conscientiously believed what they stated. There is an apparent inconsistency, certainly, between the original and amended bills; but the cause of that is explained in the latter, and I have treated the case as it is stated in the letter, so far as that is inconsistent with the former. The instance we have here, is only another illustration of the danger of relying on the loose recollection of witnesses as to remote transactions in which they are interested, or when their feelings are in favor of one of the parties rather than the other; and also of the inferiority of such parol evidence to contemporaneous written evidence on the same subject. Fortunately, there is in this case contemporaneous written evidence of the transaction, which I think leaves no room for rational doubt as to its true character.

I am therefore of opinion, that there has been no accord and satisfaction of the debt in controversy; that it has not been paid in Confederate bonds or otherwise; and that Ranson is not estopped in equity from enforcing the payment of the said debt, or from having a sale made under the deed of trust for that purpose, if necessary.

There is another question raised by 428 the original bill, *and noticed in the argument, of which it may be necessary to take some notice here; and that is, in regard to the notice of the sale which was about to be advertised by the trustee under the deed of trust, when the injunction was awarded in this case. It appears from the answer to that bill, and exhibit No. 1 filed therewith, that before the award of the said injunction, an arrangement was made between the parties for the settlement of all the questions in controversy in the cause except in regard to the payment or accord and satisfaction of the said debt due on the 26th of January 1863, as contended for by the appellant, as aforesaid. The advertisement aforesaid was never inserted in a newspaper, and there can now, of course, be no sale under it. The trustee in the deed, if it be necessary to execute the trusts thereof, will of course proceed according to law and the provisions of the deed.

I am of opinion that there is no error in the decree of the District court, and am for affirming it.

The other judges concurred in the opinion of Moncure, P.

The decree was as follows:

This case, which is pending in this court at its place of session in Staunton, having been heard, but not determined by the court at the said place of session: This day came here the parties by their counsel; and the court having maturely considered the transcript of the record of the decrees aforesaid and the argument of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the said decrees: Therefore, it is decreed and ordered, that the same be affirmed, and that the appellant pay to the appellee, Ranson, thirty dollars damages and his costs by him about his defence in this behalf expended. And it *is ordered that this decree be entered on the order book here, and be certified to the clerk of the court, where the case is pending as aforesaid, who shall enter the same on his order book, and certify it to the clerk of the said Circuit court of Rockbridge county.

Decree affirmed.

430 *Effinger v. Ralston & als.

August Term, 1871. Staunton.

Sale of Land—Vendor's Lien—Case at Bar.—R sold land to E, and retained the vendor's lien. E sold parts of the land to F and Q. E not paying R, R filed his bill against E, F and Q, to enforce his lien. The court decrees a sale, of that in possession of E first, and if that is not sufficient, then of that bought by F and Q. The sale is made, and F and Q buy the parts they had before bought of E, at less than they were to give to E. The commissioner reports the sales good. E objects to the confirmation of the sale, on the ground of the inadequacy of price, but he does not move to open the biddings, or offer an advance. **HELD:**

1. **Same—Same—Same.**—There was no error as to R, in directing the sale of the parts by F and Q, instead of confirming the sale of E to them; especially as Q alleged that E had defrauded him, and he did not intend to pay him.
2. **Judicial Sales—Inadequacy of Price.**—If E objected to the sale for inadequacy of price, he should have moved the court to open the biddings, and have offered an advance on the price bid: his objection to the confirmation of the sale, without more, was no ground for refusing to confirm it.
3. **Same—Reopening Biddings—Mode of Procedure.***—For the mode of proceeding on application to open the biddings, and on what advance it will be done, see the opinion of MONCURE, P.
4. **Case at Bar—Quære.**—**QUÆRE:** If E may not recover of F and Q the difference between the price they gave at the judicial sale, and that they had contracted to pay to him.

*See *Roudabush v. Miller*, 33 Gratt. 454, and *foot-note*; *Hudgins v. Lanier*, 23 Gratt. 494, and *foot-note*; *Todd v. Gallego, etc., Co.*, 84 Va. 590, 5 S. E. Rep. 676; *Kahle v. Mitchell*, 9 W. Va. 515; *Curtis v. Thompson*, 20 Gratt. 474, and *foot-note*.

See generally, monographic *note* on "Judicial Sales."

This case was heard at the August term at Staunton, and the case was decided at the November term at Richmond.

In March 1867, Jesse Ralston filed his bill in the Circuit court of Rockingham county, against Jacob P. Effinger, Henry Flick and Timothy Quinlan to enforce
431 *the vendors, and also judgment, liens, against a tract of land in the county of Rockingham, which Ralston had sold to Effinger, and parts of which Effinger had sold to the other defendants.

In October 1858, by a written agreement under seal, Ralston sold to Effinger a tract of land estimated to contain three hundred and thirty-one acres, for the sum of \$12,000, of which \$1,000 was to be paid in cash, Effinger was to discharge a debt of \$3,000 due to Robert Grey, for which there was a lien on the land; and the remainder was to be paid in seven equal annual payments of \$1,142.85. And Ralston was to convey the land by deed with general warranty, in which a lien was to be reserved for the purchase money.

Effinger was put into possession of the land, and in 1860 Ralston and wife conveyed it to him with general warranty. In the same year Ralston recovered a judgment against Effinger on the first bond; and in 1866, he recovered judgments on the other bonds. He set out the foregoing facts in his bill; stated that Effinger had lately sold to Flick about eight acres, and to Quinlan about eighty acres of the land. That the debt of \$3,000 to Grey, which, by the contract, Effinger had assumed to pay, was still unpaid. And he prayed that the land might be sold for the payment of the judgments; and for general relief.

The defendants demurred to the bill, and Effinger also answered. He stated some small payments he had made on the judgments, and also some interest on the debt to Grey; and he says that the plaintiff derived his title to the land, except about thirty acres, from his father, David Ralston, and that David Ralston had not made a deed to him for it: though said David had joined with the plaintiff in conveying the property to the trustee in the deed to secure Grey's debt.

In May 1867, the cause came on to be heard, when the court overruled the demurrer, and directed a commissioner
432 *to ascertain and report the amount due from Effinger to the plaintiff, on account of the purchase of the land; and leave was granted the plaintiff to file an amended bill. This amended bill made the heirs of David Ralston, deceased, H. Jewett Grey, to whom the debt due Robert Grey, had, on the death of the latter, been transferred, parties.

The commissioner returned his report, and the cause came on again to be heard, when it appearing by said report that there was due from Effinger to the plaintiff \$7,780.57, of principal money due by judgment, with interest from the dates when the payments fell due, and that Effinger

was further indebted to Grey in the sum of \$3,000, with interest from January 1st, 1849, subject to some small credits named, and that Ralston could make a good title to the land, the court made a decree against Effinger in favor of Ralston and Grey, for the sums ascertained to be due to them respectively; and unless he paid the money within sixty days from the date of the decree, the sheriff who was appointed a commissioner for the purpose, should proceed to sell the land, on the terms of one-fourth cash, and the balance in four equal annual payments, bearing interest from the day of sale; the title to be retained until the whole purchase money was paid. And out of the proceeds of sale he should first pay off Grey's debt, and then pay to Ralston the amount ascertained to be due to him. The decree provided that the land in the possession of Effinger should be first sold; and if that was not sufficient to pay the debts, the residue of the tract, or so much as was necessary, should be sold.

The commissioner returned his report of the sale, by which it appeared that the land still in the possession of Effinger, consisting of two hundred and fifty acres, was sold at \$31.10 per acre, and Ralston became the purchaser; that the land in the possession
of Quinlan was sold at \$32.70 per acre,

433 and he was the purchaser; and *that Flick became the purchaser of the eight acres in his possession at \$25 per acre. The commissioner says "that in his opinion, as well as of persons who are disinterested with whom he has conversed, all of these sales have been judiciously made, and ought to be confirmed." And he says that the price realized from the sales exceeds considerably the amount which Effinger was to pay for the property when it was in good condition; and that it has been much injured since his purchase.

The commissioner returned with his report a number of affidavits of farmers residing near the land and knowing it well, expressing the opinion that it went for its full value. There is also an affidavit from Quinlan, in which he says, that though he contracted in 1866, or February 1867, to pay Effinger \$45 per acre for the eighty acres he purchased, yet he was deceived by Effinger in regard to the lines and in other respects, in such way that he determined shortly afterwards not to pay for it. And he did not intend to pay any more than he contracted to pay at the sale by the commissioner; and that it is not worth that much.

Effinger excepted to the report, and objected to the confirmation of the sale, upon the ground that the court should have confirmed the sales made by Effinger to Quinlan and Flick; and should have subjected the purchase money due to Effinger to the payment of the purchase money due to Ralston, instead of virtually setting said sales aside and ordering a resale. 2d. Because of inadequacy of price, as shown by affidavits filed. These were affidavits also filed by persons living in the neighborhood of the

land, who express the opinion that the land was worth forty-five dollars per acre.

The cause came on to be further heard on the 3d day of November 1869, when it was decreed that if Effinger files with the clerk of the court bond with good security in the penalty of \$15,000, conditioned that at the next offer of the land for sale, 434 he will bid five per cent. more *than the commissioner sold the land for, including costs of said sale, and upon the same terms, and comply with them, then the commissioner should proceed to advertise and sell the said land upon the terms prescribed in the former decree. But if Effinger did not execute said bond within sixty days from the rising of the court, then the sale made should stand confirmed; and the sheriff was directed in that event to deliver the land to the purchasers. Effinger obtained an appeal from this decree to the District court of appeals at Winchester, from whence it was transferred to this court.

Harris, for the appellant.

Woodson and Liggett, for the appellees.

MONCURE, P., delivered the opinion of the court.

The court is of opinion that the Circuit court did not err, at least so far as the appellee, Ralston, is concerned, in not confirming the sales made by the appellant to Flick and Quinlan in the proceedings mentioned. Those sales were made in subordination to the paramount right of the said appellee, Ralston, who, in his contract of sale to the appellant, expressly reserved a lien on the entire tract of land sold, to secure the deferred instalments of the purchase money. The sales to Flick and Quinlan of portions of the said tract of land, were subsequently made by the vendee, Effinger, without the consent of the vendor, Ralston, and of course were not binding upon him, and could not prejudice his paramount right to have the whole tract of land sold, if necessary, for the payment of the purchase money due to him. The court properly directed the commissioner appointed to make the sale, to sell in the first place the portion of the land remaining in the hands of Effinger; and if a sufficient amount should be realized from said sale to satisfy the decree, including costs of suit and sale, to make no further sale. But, in

435 case a sufficient amount should not be realized from *said sale to pay off and satisfy the said decree, then the court properly directed the said commissioner to sell the residue of said land sold by Ralston to Effinger, or so much thereof as might be necessary to satisfy the balance due under the said decree from the said Effinger. This was all that either Effinger, Flick, or Quinlan had any right to require in regard to the land sold to Flick and Quinlan. Ralston was not bound to engage in a controversy with them about the specific execution of the contracts of sale made

to them by Effinger. If they had proposed to pay into court to the credit of the cause the amounts due on their contracts with Effinger, and had shown that such amounts were at least equal to the value of the land bought by them respectively, the court ought to have accepted their proposition, received the money, and confirmed their title: and no doubt the court would have done so. But they made no such proposition. On the contrary, Quinlan, who purchased eighty acres of the land, says, in an affidavit filed and read as evidence in the cause, that he was deceived by Effinger in regard to the lines of the said land, and in other respects, and in such a way, that he determined, shortly afterwards, not to pay for it. It seems that the sale to Quinlan was in February 1867, about a month before the institution of this suit; and, except as to \$500 of the purchase money, which was to be paid in hand, was on a credit of one, two, three and four years. It would have been unreasonable and unjust to require Ralston to incur the expense, trouble, and delay of a suit to enforce the specific execution of this contract between Effinger and Quinlan, especially when Quinlan contested its validity on the ground of fraud.

The court is further of opinion that the Circuit court did not err in not setting aside the sale made by the commissioner in February 1869, on the ground of inadequacy of price, and ordering a resale. The commissioner who made the sale reported 436 that it was for a fair and full *price, and ought to be confirmed; and many affidavits were taken and filed to that effect; while on the other hand, about as many were taken and filed to the contrary effect. The preponderance of the evidence seems to sustain the report, and the opinion of the Circuit court was to the same effect. To induce a court to set aside a sale fairly made in pursuance of a decree, merely upon the ground of inadequacy of price, there ought to be a decided preponderance of evidence of such inadequacy, even if it be conceded that mere inadequacy of price is, in itself, a sufficient ground for setting aside such a sale.

The court is further of opinion that the Circuit court did not err in making it a condition of a resale of the land that the appellant should file with the clerk of said court, bond with good security in the penalty of \$15,000, conditioned that at the next offer of the land for sale he would bid five per cent. more than the commissioner sold the same for before, including the costs of said sale, and upon the same terms, and would comply with the terms of said sale. The court might well have refused to order a resale on any terms whatever, but have confirmed the sale absolutely; and of course the appellant has no right to complain of the terms on which a privilege was afforded him by the court of having a resale, if he desired one and could and would comply with the terms. He made no motion to open the biddings. If he had done so, and pursued the proper course in such cases, the

court would have ordered them to be opened on proper terms. "Where a person is desirous of opening a bidding, (says Sugden in his law of vendors, p. 66, marginal), he must, at his own expense, apply to the court by motion for that purpose, stating the advance offered. Notice of the motion must be given to the person reported the purchaser of the lot, and to the parties in the cause. If the court approve of the sum offered, the application will be granted," and a new sale ordered. "Mere advance of

437 price, (says Sugden further, *Id.,) if the report of the purchaser being the best bidder is not absolutely confirmed, is sufficient to open the biddings;" "but the court will stipulate for the price, and not permit the biddings to be opened upon a small advance; and although an advance of ten per cent. used, generally, to be considered sufficient on a large sum, yet no such rule now prevails; but in the case of a sale under a creditor's suit, the court permitted the biddings to be opened upon an advance of 5 per cent. on £10,000. An advance of £350 upon £5,300 was refused, and it was said that the former cases only established, that where an advance so large as £500 is offered, the court will act upon it, though it be less than 10 per cent." "The determinations on this subject assume a very different aspect when the report is absolutely confirmed. Biddings are in general not to be opened after confirmation of the report; increase of price alone is not sufficient, however large, although it is a strong auxiliary argument where there are other grounds." (Id. 67.) "Where the biddings are opened, the advance is ordered to be deposited immediately, and the costs of the purchaser to be paid by the persons opening the biddings." (Id. 69.) Such are some of the rules of the English practice on this subject, and the same practice and rules, substantially, exist in this State, though not in all the States of the Union. They do not, however, apply to this case, as it was not a case for opening the biddings, no advance of price having been offered, nor even a motion to open the biddings made. It is needless, therefore, to enquire whether the penalty of the bond required of the appellant as aforesaid was not greater than it might well have been.

The court is therefore of opinion that there is no error in the decrees aforesaid, and that the same ought to be affirmed. But the court is of opinion that such affirmance ought to be without prejudice to any relief to which the appellant may be entitled against the appellees, Flick and Quinlan, or either of them, either in this suit 438 *or in any other suit he may be advised to bring on account of the sales made by him to them respectively in the proceedings mentioned. They have become purchasers at the sale made under a decree in this suit of the same land previously bought by them respectively of the appellant, but they have so become purchasers at less prices than those at which they had previously bought the land as aforesaid.

And as they seem to have thus gotten what they had contracted for with Effinger, it may be just and equitable that they should account with him for the difference between the amount of purchase money agreed to be paid by them to him, and the amount of the price at which they purchased the same land under a decree in this suit as aforesaid. Such a mode of settlement would seem to be consonant with the case of *Stephens v. Hutchison, &c.*, 6 Gratt. 147. Without, however, deciding that question, which cannot properly be decided upon the pleadings and proofs now in this cause, we think the decree appealed from and the affirmance thereof ought to be without prejudice as aforesaid; and it is therefore ordered accordingly.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree aforesaid. But, as the appellees, Flick and Quinlan, have become purchasers at the sale made under a decree in said suit, of the same land previously bought by them respectively of the appellant, and have so become purchasers at lower prices than those they had agreed to pay to him for the same land, it may be just and equitable that they should account with him for the difference between the amount of purchase money agreed to be paid by them to him, and the amount of the price at which they purchased the same land under a decree in said suit as aforesaid. Such a mode of settlement would seem to be consonant with what was 439 decided by this court in the *case of *Stephens v. Hutchison, &c.*, 6 Gratt. 147. Without, however, deciding that question, which cannot properly be decided upon the pleading and proofs now in the cause, the court is of opinion that the said decree appealed from, and the affirmance thereof, ought to be without prejudice to any relief to which the appellant may be entitled against the said Flick and Quinlan or either of them, either in this suit or in any other suit he may be advised to bring, on account of the sales made by him to them respectively as aforesaid.

Therefore, it is decreed and ordered that the said decree appealed from be affirmed, but without prejudice as aforesaid, and that the appellant pay to the appellee, Ralston, thirty dollars damages, and his costs by him about his defence in this behalf expended, which is ordered to be certified, &c.

Decree affirmed; but without prejudice.

440 *Strider & al. v. Winch. & Pot. R. Co.

August Term, 1871, Staunton.

Principal and Agent—Credit from Agent—Liability of Purchaser—Case at Bar.*—C. president of a railroad

*See monographic note on "Agencies" appended to *Silliman v. Fredericksburg, &c.*, R. R. Co., 27 Gratt. 119.

company, and A, agent of the company, borrow money from H, and give their own bond for it. The money is borrowed for the use of the company, which is itself without credit, and it is immediately turned over to the company. A, as agent, receives money of the company, out of which he is expected to pay the debt; but the bond having been given for money in suit, he cannot pay it; and C and A become insolvent. **Held:**

1. **Same—Same—Liability of Agent.**—The money having been loaned to C and A individually, with the knowledge that it was for the use of the company, and H having chosen to take the responsibility of C and A, cannot afterwards make the company his debtor.

2. **Same—Same—Same.**—The company having put money into the hands of A to pay the debt, they are not liable in equity as having received the benefit of the loan.

This was a suit in equity in the Circuit court of Frederick county, brought in August 1869, by Isaac Strider and John Goldsborough against The Winchester & Potomac Railroad Company, to recover the amount of a bond for one thousand dollars, executed by W. L. Clark and E. M. Aisquith to Andrew Hunter and Edward E. Cooke, bearing date the 27th of December 1858, and payable on the 1st of May following. It appears that Hunter and Cooke had in their hands a large sum of money, which, under an order of the Circuit court of Jefferson county in a cause depending therein, they were directed to lend out; and Clark, who was the president of the Winchester & Potomac Railroad Company, and Aisquith, who was the agent of the company at the Charlestown depot, executed their individual
441 *bond for the sum of \$1,000 to Hunter and Cooke; and the money was received by Aisquith, and immediately sent to the treasurer of the company. Upon the final decision of the chancery suit in Jefferson county, this bond was directed to be transferred to the plaintiffs. The question of fact in this cause was, whether the money was borrowed by Clark, or Clark and Aisquith, upon their individual responsibility, to be lent by them to the company, or whether it was borrowed for the company, and they executed their bond as security for the company. It is impossible to give the evidence on this question, without copying much of it. The view of it taken by this court will be seen in the opinion of Judge Staples.

It appears that more than once Aisquith, out of moneys of the company in his hands, received as their agent at the Charlestown depot, offered to pay the bond to one of the obligees, but was told that the bond was filed in the Chancery court, and the obligees had no authority to receive it; and he then accounted for the money with the treasurer of the company; but from entries on the books of the company, he seems to have had in his hands, in July 1861, \$1,210.23, derived from the same source, for the payment of this debt. Since the war both Clark and Aisquith had become insolvent, and Clark had died.

The court below dismissed the bill as to the railroad company; and thereupon Strider and Goldsborough applied to a judge of this court for an appeal; which was allowed.

The case was elaborately argued in printed notes by Barton & Boyd, for the appellants, and Robt. Y. Conrad & Son, for the appellee.

STAPLES, J. I am of opinion this decree must be affirmed. The evidence, to
442 my mind, is wholly insufficient *to establish the liability of the appellee for the claim asserted in the bill. It is true that some of the witnesses give it as their impression, that the money was loaned not to Clark and Aisquith individually, but to the appellees. It is, nevertheless, a mere impression, and however honestly entertained, it is not supported by the facts disclosed in this record. It is no doubt correct, that the loan was fully understood at the time to be for the use of the appellee, and that the proceeds were accordingly so applied; but that is perfectly consistent with the idea that Clark and Aisquith borrowed the money in their own name, and on their own responsibility, agreeing to look to the revenues of the company for their indemnity. All the facts and circumstances tend to sustain this view. At that time the company was utterly insolvent, and wholly unable to meet its engagements or to raise a dollar on its own credit. The fair inference is, that the holders of the fund did not desire to be embarrassed by any understanding or contract with a corporation in whose ability to pay they had no confidence; but preferred the obligation of two solvent and responsible individuals, upon whom a demand might be made when the fund should be needed. If the money was loaned to the company, and Clark and Aisquith were merely sureties, why was no bond ever executed by the company, why is it that the board of directors never sanctioned or recognized the transaction. Mr. Hunter was a member of the board; he was present at a meeting in November 1858, and also in January 1859. He must have been apprised of the resolution of 1840, declaring invalid any note or contract of any kind exceeding fifty dollars, made by any officer of the company, unless such note or contract was sanctioned by the board of directors. And, yet, on neither of the occasions referred to, nor at either of the other numerous meetings of the board in 1859 and 1860, was there the slightest allusion to the transaction, or any recognition of it as a loan to the company. Neither the clerk nor
443 *the treasurer, nor any of the directors, ever heard it mentioned otherwise than as an arrangement by which Clark and Aisquith became the borrowers of the fund, and solely responsible to Messrs. Hunter & Cooke for its repayment.

The company was reorganized in 1866. Since that time the board of directors have been diligently attempting to ascertain the indebtedness of the company arising out of transactions prior to the war, and although

Messrs. Hunter and Cooke have been, during this period, members of the board, this claim has not been alluded to by either of them as imposing a liability on the company, nor has such pretension been asserted by any other person, until the ascertained insolvency of the parties executing the bond. Against this array of facts and circumstances an entry is produced made in 1860, in the day-book of the company, by a clerk who does not profess to be familiar with the original transaction. In this entry mention is made of "company's note" to Cooke & Hunter. The clerk states that these words were taken from certain vouchers produced before him showing amount of revenues retained by Aisquith to indemnify him against the liability he had incurred, and because he supposed the money so retained was eventually paid to Messrs. Cooke & Hunter. He did not mean to convey the idea that the company had incurred any responsibility to these gentlemen; or that its records and books disclosed any facts from which such responsibility could be inferred. On the contrary, the impression made upon his mind was, that Clark and Aisquith had borrowed the money in their individual capacities, for the use of the company, and let the company have the proceeds, to be retained from the Charlestown depot. I am satisfied that this is the true history of the transaction, that the loan was made to Clark and Aisquith and the credit given to them exclusively. If this be so no proposition can be clearer than

444 that the company is not responsible for *the debt. This exemption is based upon the familiar principle that where exclusive credit is given to an agent in any transaction for a known principle, the creditor must abide by his election, and he will not afterwards be permitted to shift the responsibility upon the principal.

In *Thomson v. Davenport*, 9 Barn. & Cress. 78, Lord Teuterden laid down the rule as follows: "If at the time of sale the seller knows not only that the person who is nominally dealing with him is not principal, but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then according to the cases of *Addison v. Gandasequi* and *Paterson v. Gandasequi*, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other." Mr. Justice Story uses the following language on the same subject: "If the agent and principal are both known, and exclusive credit is given to the latter, the principal will not be liable, though the agent should subsequently fail; for it is competent to the parties to agree to charge the one, exonerating the other; and an election when once made, becomes conclusive and irrevocable." Story on Agency, § 447.

It is said, however, that a court of equity, looking to the fact that the company re-

ceived all the benefit of the loan, and was the party beneficially interested, will upon principles *ex equo et bono* hold it liable, even though at law the form of the contract may impose upon it no valid obligation. This view would be entitled to much consideration, if it appeared that the company had not accounted to any one for the amount of the loan. But the difficulty is that the company, in accordance with its agreement with Clark and Aisquith, permitted the latter to retain in his own hands its funds to an amount sufficient to meet the debt to Hunter and Cooke. This arrangement

445 *was made by the company, under the impression that the credit was exclusively given to its agents, and without a suspicion it had incurred any liability to Messrs. Cooke and Hunter, and not until the clearly ascertained insolvency of these agents was any intimation given that the arrangement had been misunderstood. Under such circumstances the appellants are conclusively bound by the election of those having charge of the fund to rely upon the credit of the parties to the original obligation. It is true that ordinarily, when an agent without authority makes a contract, and the principal receives the benefit of it and retains the money or property acquired by it, the principal will be held to have ratified the contract, and will be responsible upon it. But where the creditor, knowing of the existence of the principal, contracts with the agent, takes his personal obligation, and suffers the principal to settle with his agent for the amount of the debt without disclosing his demand against the principal, he cannot afterwards charge the latter so as to make him a loser; but will be deemed to have elected the agent for his debtor. Story on Agency, § 449; and cases cited in note; *Wyatt v. Marquis of Hertford*, 3 Easts. R. 147.

For these reasons I am of opinion the decree should be affirmed.

The other judges concurred in the opinion of Staples, J.

Decree affirmed.

446 *Burwell's Adm'rs v. Fauber & als.

August Term, 1871. Staunton.

Will—Suit by Administrator d. b. n.—Case at Bar.—F devises by his will, a tract of land named H. with his personal property, for the payment of his debts: another tract, named P, to his two sons, N and T, subjected to charges of an annuity of \$300, in favor of his wife, and a legacy of \$1,000 to another son, J, and \$1,500 to his daughter K, and he appoints N and T his executors. He had been adm'r c. t. a. of H, and soon after his death his adm'n account was settled, showing amounts due to the legatees of H. N and T, as ex'ors, sell to the widow the tract H, for \$2,700, of which \$1,200 is given in lieu of her annuity, and she releases the charge upon the P land: and she gives her bond, with a lien on the H land, for the amount of J's legacy. Within eight months after the death of F, his sons N and T sell the P tract to B for \$7,000; their deed

referring to F's will for their title, and they covenanting to remove all charges. But a few days after this deed, G, as adm'r *de bonis non* of H, filed his bill against F's ex'ors and devisees, B and the legatees of H, to recover the amounts reported to be due from F to the estate of H. **HELD:**

1. **Same—Same—Same.**—The legatees of H being parties, and concurring with the plaintiff, he may maintain the suit.
2. **Same—Purchasers—Constructive Notice of Provisions of Will.***—B had constructive notice of the provisions of the will of F, and that the H land had been sold by N and T to pay charges upon the P land, and was bound therefore to enquire whether the debt of F, which was directed to be paid out of the H tract, had been discharged.
3. **Same—Same—Same—Liability of Purchaser.**—B being a purchaser with constructive notice, his land is liable to satisfy the charges upon it; and two of these charges having been satisfied out of the H tract, the creditors are entitled to be subrogated to the rights of these legatees, and to the extent of these charges, to have the land of B subjected to the satisfaction of their claims.
4. **Same—Same—Same—Same.**—There having been a decree against the sureties of F, on his bond as adm'r c. t. a. of H, in favor of the creditors, and they having paid the decree, have a right to be substituted to the creditors rights against the land of B.

447 *This case was heard at the August term of the court held at Staunton, and was decided at the November term held at Richmond.

Thomas Hutchins, of the county of Augusta, died in 1851, having made a will which was admitted to probate in the County court of that county. By his will, after two devises of land, he directs the residue of his property to be sold, and after directing his executors to pay one hundred dollars to his grand-daughter, Nancy Ann Alford, when she comes of age, he gives the residue to four of his daughters. One of these was Catharine Fauber, wife of John Fauber, and another was Betsey

***Purchasers—Title Papers—Means of Knowledge.**—A purchaser must take care, and make due inquiries, or he may not be a *bona fide* purchaser. He is bound, not only by *actual* but by *constructive* notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information and say that he is a *bona fide* purchaser without notice. For the above proposition the principal case is cited and approved in the following cases: Long v. Weller, 29 Gratt. 354, and *foot-note*; Justis v. English, 30 Gratt. 576; Armentrout v. Gibbons, 30 Gratt. 651; Wood v. Krebs, 30 Gratt. 714; Effinger v. Hall, 81 Va. 105; Tardy v. Creasy, 81 Va. 565; Wissler v. Craig, 80 Va. 32; Jameson v. Rixey, 94 Va. 348, 26 S. E. Rep. 861; Dugger v. Dugger, 84 Va. 142, 4 S. E. Rep. 171; Fidelity Co. v. Ry. Co., 32 W. Va. 271, 9 S. E. Rep. 190; Roanoke, etc., Co. v. Simmons (Va.), 20 S. E. Rep. 955; Williamson v. Jones, 43 W. Va. 575, 27 S. E. Rep. 416; Summers Creek Coal Co. v. Doran, 12 Sup. Ct. Rep. 246.

Helmick, wife of John Helmick, and he directs his executors to manage the share of B. Helmick so as to benefit her, and prevent her husband from having any control of it. The executors named in the will refused to qualify as such, and John Fauber became the administrator with the will annexed, and Wm. A. Bell and others became his sureties.

John Fauber died in 1855, and in that year his administration account seems to have been reported upon by a commissioner; and in January 1856 an order was made by the court recommitting the report to the commissioner to be revised by him. He returned his report in October 1856, which was confirmed and ordered to be recorded. This report shows that after retaining in his hands the legacy of \$100 to N. A. Alford, the distributable share of each of the four daughters was \$1,110.83, as of the 1st of July 1855: of the shares of two of the daughters about one half had been then paid, and they had subsequently received payment in full; but nothing was paid to Mrs. Helmick.

John Fauber, by his will, after by the first clause giving to his wife Catharine certain household furniture, devised and bequeathed as follows: 2d. My Heiskell farm, bought of James A. Cochran, and all my personal estate, other than the
448 articles above given to my *wife, I wish reduced to money, for the payment of my debts; and any surplus remaining to be applied towards paying the legacies hereafter given to my daughter Keturah and my son Joseph and family.

3d. I direct that my home place, containing about two hundred and thirty acres, be divided equally between my sons Noah and Thomas, quantity and quality considered; this land to be charged in equal portions with the payment of the following legacies:

4th. To my wife during her lifetime, the sum of two hundred dollars a year, counting from my death, and payable half yearly.

5th. To my daughter, Keturah, fifteen hundred dollars, payable when she comes of age or marries, the interest in the meantime to be paid to her mother for her support and education.

6th. To my son Joseph and family, one thousand dollars, to be held in trust by my said sons Noah and Thomas, and the interest applied annually for the comfort of my said son and his wife and children, free from the debts of the said Joseph. At the death of said Joseph and his wife, or upon the death of the said Joseph, and the marriage of his widow, this fund to be equally divided among their children. If no children, then to be equally divided among my other children, or their representatives.

7th. I appoint my sons Noah and Thomas executors of this will.

This will was admitted to probate in the County court of Augusta, and Noah and Thomas Fauber qualified as executors, with David A. Kayser and Charles T. Cochran as their securities.

By deed bearing date the 24th of April

1856, Noah and Thomas Fauber, as executors of John Fauber deceased, in consideration of the sum of \$2,700 conveyed to Catharine Fauber the tract of land described in the will of their testator as the 449 Heiskell farm. And it was *stated in the deed that of the sum of twenty-seven hundred dollars, \$1,200 had been paid, and she had given to them her bonds, one for \$500, payable on demand, and the other for \$1,000, given to them as trustees of Joseph Fauber and his family. For these two bonds a lien was expressly retained upon the land conveyed. And Catharine Fauber, for the consideration of \$1,200 paid to her in the purchase of the land aforesaid, released to Noah and Thomas Fauber all right, title, interest and claim which she had under the will of John Fauber to the annuity of \$200 provided by the said will for her benefit during her life, and she discharged the whole estate of John Fauber from any charge created to secure the said annuity, and from all claim for dower or distribution in said estate. Catharine Fauber signs the deed by her mark, and her signature is attested by Thomas C. Burwell. But the deed was acknowledged by all the parties before a notary, and admitted to record.

By an agreement under seal bearing date the 21st of January 1857, Thomas C. Burwell purchased of Noah and Thomas Fauber, the home place devised to them by their father, John Fauber, at the price of \$7,000; and he was to pay for the place \$2,000 in hand, in goods in his store at Cline's mill, and \$1,000 a year for the balance; and they were to take the remainder of his goods, the price of which was to be credited on the first three deferred payments. And they bound themselves to make to Burwell a good title to the land.

By deed bearing date the 10th of March, 1857, Noah and Thomas Fauber, in consideration of five thousand three hundred and seventy-seven dollars and forty-one cents in hand paid, and \$1,622.59 secured by Burwell's bond of that date, conveyed to him the land, describing it as the land devised to them by their father, subject to certain charges mentioned in his will, to which they refer. And they covenant that they will obtain from the Circuit court of Augusta a decree exonerating said land 450 entirely *from the charges and incumbrances still binding upon it under said bill, such decree to be applied for at the next June term of said court. And they warrant the title generally.

In April 1857, George Baylor, as the administrator de bonis non with the will annexed of Thomas Hutchins, brought his suit in the Circuit court of Augusta county, against Noah and Thomas Fauber as executors of John Fauber, and in their own right, and the legatees of Hutchins, setting out his will, and exhibiting a copy of the account of John Fauber's administration on Hutchins' estate; and he prayed that Noah and Thomas Fauber be compelled to pay to the plaintiff whatever may be found due to

the estate of Thomas Hutchins, or the legatees under his will; and that the whole estate of John Fauber be subjected, if necessary, to pay whatever may be found to be due to the estate of Hutchins.

Before any answers were filed, the plaintiff amended his bill and made Bell and the other sureties of John Fauber and Thomas C. Burwell additional defendants. And in the progress of the cause the sureties of Noah and Thomas Fauber were also made parties. The amended bill sets out the conveyance to Catharine Fauber, and also that the home place had been sold to Burwell; and prays that the sureties of John Fauber may be compelled to pay what is due from their principal; and if necessary, that the land in the possession of Burwell may be subjected to satisfy the demand.

The process was served on Noah and Thomas Fauber; though they appear to have removed from the Commonwealth during the pendency of the cause. Answers were filed by the guardian ad litem of Nancy L. Alford and another infant defendant. Helmick, and his wife Betsy Helmick, answered. They say that they live and have lived for many years in the State of Illinois; that they have tried to obtain something from the estate of Hutchins, but in vain, and they have never 451 received a cent; *and they join in the prayer of the bills, and ask that the court will grant the plaintiff any aid in its power to collect the legacy to which they are entitled; and to make such other order as the court may deem proper for the protection of their rights.

Burwell answered. He says that prior to his purchase of the land he probably was aware of the fact, that John Fauber had been in his lifetime administrator or executor of Thomas Hutchins; but he certainly had no knowledge of the state of his accounts as such administrator or executor. After the death of John Fauber, and the qualification of his executors, the first knowledge the respondent had of any of their transactions was his attestation of the deed between the executors and Catharine Fauber. From this time until January 1857, he had no occasion to enquire anything about the condition of the estate of Hutchins, or that of John Fauber, and in fact knew nothing of either. That he purchased the land in January, and obtained a deed in March 1857; that he had paid all the purchase money but \$1,622.59, which did not bear interest for some years, and his land is subject to the charge of \$1,500 in favor of Keturah Fauber, to enforce which a suit was then pending, and this amounted to more than was due from him. That at the time of the conveyance to him he had no notice or knowledge of the existence of the claim set up in this case, and he is advised that the sale having been made by devisees bona fide, and there having been no suit begun for the administration of the assets of the estate of John Fauber, and no report having been filed of the debts and demands of those entitled under chapter 132 of the

Code of Virginia, however the devisees may be liable for the value of the land as assets of the estate, the estate conveyed is not liable, by express provisions of the act of Assembly, ch. 131, § 5, of the Code; and he prays the full benefit of the statute.

The sureties of John Fauber, and 452 of Noah and *Thomas Fauber, answered, insisting that his estate was ample to pay anything he may have owed, and that it should be subjected to that object.

In the progress of the cause accounts were ordered. From the commissioner's reports it appeared that two of the four daughters of Thomas Hutchins had then been paid: there was due to Mrs. Helmick, on the 1st of June 1859, \$1,371.87, of which \$1,110.83 was principal, and there was due at the same date to Nancy Ann Alford \$123.50, of which \$100 was principal. Although Noah and Thomas Fauber had removed from the Commonwealth, and their vouchers had been lost, proof was taken which showed that the personal estate of John Fauber, which came to their hands, was appraised at \$1,478.80; they had paid debts of the estate, which with their commissions thereon amounted to \$4,249.44; and there were debts outstanding on the 1st November 1859, of \$140.64, of which \$103.86 was principal.

The cause came on to be heard on the 29th of June 1859, when the court made a decree that Noah and Thomas Fauber, out of the assets of their testator, and Wm. A. Bell and the other sureties of John Fauber, as adm'r, &c., of Thomas Hutchins, out of their own estate, should pay to the plaintiff, for the sole and separate use of Betsy Helmick, the sum of \$1,371.87, with interest on \$1,110.83, part thereof, from the 1st of June 1859, until paid; and to the plaintiff for the use of Nancy Ann Alford, to be paid to her when she attains the age of twenty-one years, or to her legally appointed guardian when one shall be appointed, the sum of \$123.50, with interest on \$100, part thereof, from the same date. And the cause was retained upon the docket for further proceedings as between the sureties of John Fauber, and at their costs, against the executors of John Fauber and their sureties, Thomas C. Burwell and the real and personal representatives of Catharine Fauber, who had died.

453 *The cause came on again to be heard on the 11th of December 1860, when it appearing that Bell and his co-sureties had paid the sum of \$1,569.78, in full of the former decree; and that the Heiskell farm had been sold under a previous decree; the court decreed that the legacy of \$1,000 to Joseph Fauber should be first paid out of the proceeds of the sale, with the interest due thereon, and that the commissioner pay the residue of the proceeds of sale to the creditors of Catharine Fauber, according to their priorities. And it being suggested that the legacy to Keturah Fauber had been settled by Burwell, no decree was made as to that legacy; but it was de-

creed that Burwell should pay to Bell, &c., the amount they had paid under the former decree, with interest, and that he should also pay the outstanding debts of John Fauber reported by the commissioner. And unless he paid the same within ninety days from the date of the decree, commissioners were appointed to sell the land, &c. Burwell thereupon obtained an appeal to the District court of appeals at Charlottesville; where the decree was affirmed: and he having died, his executors obtained an appeal to this court.

Baldwin and Young, for the appellants.

Echols and Sheffey, for the appellees.

MONCURE, P. In the petition for the appeal in this case, but two errors are assigned, viz:

1st. That it was error to decree against John Fauber, or against his estate or his representatives, in favor of the administrator de bonis non of Thomas Hutchins, for any supposed failure to distribute administered assets in the hands of said Fauber as the first administrator.

2d. That Burwell as a purchaser in good faith from the devisees without notice of any outstanding debts of the estate, or unsatisfied claim upon the land purchased, 454 *is fully protected by the statute in the Code, chap. 131, § 5.

I regard the first assignment of error as waived by the learned counsel of the appellants; and it was properly waived, for it is certainly unsustainable. For, although Baylor, as adm'r de bonis non with the will annexed of Hutchins, may not have a right, of himself, to maintain a suit against the representatives of his predecessor, for assets of the testator which that predecessor received and converted to his own use, according to the principle of the case of Wernick v. McMurdo, 5 Rand. 51; 2 Rob. Pr., old ed., p. 77; yet, as the legatees of Hutchins, who were entitled to maintain the suit, were parties thereto, and made no objection, and do not complain of the decree, which in fact was in their favor; the appellants, certainly, have no right to make any such objection or complaint on that ground. If any authority were necessary to sustain so plain a proposition, the case of Morriss, adm'r v. Morriss' adm'r, &c., 4 Gratt. 294, cited by the learned counsel of the appellees, would be full to that effect. I therefore proceed at once to notice the second, and only substantial, assignment of error in the case.

The Code, chap. 131, § 3, provides that "all real estate of any person who may hereafter die, as to which he may die intestate, or which, though he die testate, shall not, by his will, be charged with, or devised subject to the payment of his debts, or which may remain after satisfying the debts with which it may be so charged, or subject to which it may be so devised, shall be assets for the payment of the decedent's debts, and all lawful demands against his estate, in the order in which the personal

estate of a decedent is directed to be applied."

§ 4 provides, that "such assets, so far as they may be in the hands of the personal representative of the decedent, may be administered by the court, in the office whereof there is or may be filed, under the 455 132nd chapter, "a report of the accounts of such representative, and of the debts and demands against the decedent's estate: or they may, in any case, be administered by a court of equity."

§ 5 provides, that "any heir or devisee who shall sell and convey any real estate which by this chapter is made assets, shall be liable to those entitled to be paid out of the said assets, for the value thereof, with interest; in such case the estate conveyed shall not be liable, if the conveyance was bona fide, and at the time of such conveyance no suit shall have been commenced for the administration of the said assets, nor any report have been filed as aforesaid of the debts and demands of those entitled."

The "Home Place," devised by the third clause of the will of John Fauber to his sons Noah and Thomas, charged with the payment of the legacies given by the fourth, fifth and sixth clauses of the will, being the land sold by the said devisees to Thomas C. Burwell, the intestate of the appellants, and the subject of controversy in this case, was not, by the said will, charged with the payment of the testator's debts, and was therefore assets for the payment of said debts, under the third clause of chap. 131 of the Code, as aforesaid; and there was no suit pending for the administration of the said assets at the time of the conveyance of the said land by the said devisees to the said Burwell. The only questions arising in the case, then, are, first, whether such conveyance was bona fide; and, secondly, whether, at the time of such conveyance, any report had been filed as aforesaid of the debts and demands of those entitled. I will enquire, first, whether such conveyance was bona fide.

When John Fauber died in August 1855, he had an ample estate, real and personal, for the payment of all his debts, and then making a comfortable provision for his family. He had a small personal 456 estate, not greater *in value than from one to two thousand dollars; but he had two tracts of land, both lying in the county of Augusta, where he lived and died, and where his will was recorded; one of them, called the "Heiskell farm," worth about \$2,700; and the other, called the "Home Place," worth about \$7,000. His family consisted of a wife, Catharine Fauber, and four children, three of them sons and adults, to wit: Noah, Thomas and Joseph, and the other, a daughter, Keturah, who was an infant. Like a just man and a good father, as he no doubt was, he, by his will, provided, in the first place, amply for the payment of all his debts, and then disposed of the residue of his estate among the members of his family, in such shares and proportions as he considered just and

equal; and, as to some of the shares, subject to such trusts as the state of the owners of those shares seemed to him to require. After directing, by the first clause of his will, that his wife should select from all his household furniture such articles as she might choose, for the complete furnishing of a room for her and his daughter Keturah, such articles to be hers forever; by the second clause he provides amply for the payment of all his debts, by devoting to that purpose his Heiskell farm, and all his personal estate, other than the articles above given to his wife, directing any surplus which might remain after the payment of his debts, to be applied towards paying two of the legacies thereafter given by his will. The second clause is in these words: The judge sets out the second, third, fourth, fifth, sixth and seventh clauses of the will (see the statement of the case), and then proceeds:

Now it was the plain duty of the executors, under the second clause of the will, to sell the Heiskell farm and apply the proceeds to the payment of the debts, which were sufficient in amount to cover the value of said farm, after applying to their payment the proceeds of sale of the personal estate,

also directed by the will to be sold for 457 *that purpose. And it was a plain breach of trust in the executors, to devote any part of the subject of that clause, or of the proceeds of the sale thereof, to the payment of legacies, or any other purpose than the payment of debts, until that express and main object of the clause was fully accomplished. The "Home Place" was not given by the will, exclusively and absolutely to the testator's two sons, Noah and Thomas, but, in effect, was given to all his family, being almost the entire residue of his estate after the payment of his debts. The mode of giving it to all his family was, by giving it to his two sons, Noah and Thomas, equally to be divided between them, but to be charged in equal portions with the payment of the legacies given to the rest of the family. The interest of these two sons in this land, was only the surplus, after the payment of these legacies. If they should pay the legacies, the land would be absolutely theirs. But if they should not pay them, the land was subject to be sold under a decree of a court of chancery for their payment, and the surplus only, after such payment, belonged to the devisees. They could convey to a purchaser no greater interest in the land than they were themselves entitled to. The full measure of their interest appeared upon the face of the will from which it was derived, and a purchaser from them was necessarily fixed with notice of the nature and extent of the interest acquired by the purchase. He could, in fact, be a purchaser only of that interest, and not of an absolute estate in the land freed and discharged from the legacies expressly charged by the will upon it. Instead of being a bona fide purchaser for value and without notice, of the land absolutely, he could not be a purchaser

of it at all, but only of the interest of the devisees in it; that is the land subject to the charges expressly imposed upon it. The devisees, as executors, had no power to sell this land; and they could, therefore, as such, make no title to it to a purchaser,

however bona fide, or for whatever value. They *could only sell it as devisees, to the extent of the interest devised to them; and a purchaser from them must stand in their shoes, and hold it, as they held it, subject to the legacies charged thereon. Nothing less than satisfaction of those legacies to the legatees or their assigns, could relieve the land of the charge. Such was the state of the case, and such were the rights of the parties, when the transactions occurred out of which this litigation has arisen.

The law allowed to the executors one full year after their qualification, to enquire into and ascertain the condition of their testator's estate, and the amount, nature and relative dignity of his debts, and to make preparation, by sales and collections, for payment of debts and legacies, preparatory to a final settlement of the affairs of the estate. Until the expiration of a year, they could be compelled to pay the debts of their testator only in their legal order of priority, and could not be compelled to pay any of the legacies. The executors in this case doubtless knew of the existence of all, or nearly all, of the debts of their testator, and that they would require for their payment all, or nearly all, of the subject devoted to that purpose by the second clause of the will. They certainly knew of the existence of the debt due by their testator to the estate and legatees of Thomas Hutchins, of whom he was administrator with the will annexed, which constitutes almost the entire amount for which the decree appealed from in this case was rendered. The account of John Fauber as such administrator, was settled by a commissioner of the County court of Augusta, about the time of said Fauber's death, in August 1855; and shortly after his death, to wit: on the 31st of January 1856, an order was made by said court, directing said commissioner to revise said settlement, which was accordingly revised; and the revised settlement was returned to the said court, and not being excepted to, was confirmed and

ordered to be recorded *by the court, on the 27th of October 1856. This settlement showed the precise amount then due by the estate of John Fauber to the estate and legatees of Thomas Hutchins. A portion of this amount was afterwards paid by the executors of John Fauber, leaving due a large balance, which constitutes nearly the whole amount for which the decree appealed from was rendered as aforesaid.

On the 24th of April 1856, about eight months after the death of John Fauber, and with full knowledge of the existence of the said debt to Hutchins' estate, and while, it seems, those to whom that debt was due were trying to collect it, the executors of John Fauber, to wit: Noah and Thomas

Fauber, sold and conveyed the "Heiskell farm" to Catharine Fauber, widow of the said John Fauber, in consideration of \$2,700, of which the sum of \$1,200 was retained by her as an agreed satisfaction in gross of her annuity of \$200 for life, under the will of her husband, the said John Fauber, and for the residue she executed her two single bills, both dated that day, and carrying interest from date; one for \$500, to the said Noah and Thomas H. Fauber, ex'ors of John Fauber, payable on demand; and the other for \$1,000, to the said Noah and Thomas H. ex'ors of John Fauber, and trustees for Joseph Fauber and his family, payable twelve months after date. For these two bonds a lien was retained upon the land conveyed. And Catharine Fauber, for the consideration of \$1,200 aforesaid, released to the said Noah and Thomas H., as ex'ors of John Fauber, and as devisees and legatees under his will, all her interest under the said will to the said annuity of \$200 for life, and released the estate of said John Fauber from any charge for the same, and from all claim to dower or distribution. Catharine Fauber did not sign her own name to the deed, but merely made her mark; and says in her answer that she was an illiterate woman, knew nothing *of the debts due by her husband's estate, and especially of the debt due by him to the estate of her father, the said Thomas Hutchins, and that she was deceived, and induced to make the arrangement embraced in the deed by representations made to her by her sons, the said Noah and Thomas H. Fauber. This deed was attested by Thomas C. Burwell. No doubt it was attested because of the fact that it was executed by one who could not sign her own name, but had to make her mark to it. This arrangement was no doubt made by Noah and Thomas H. Fauber for the purpose of disencumbering as much as possible the "Home Place," devised to them, and enabling them to realize by a sale of it as large a price as possible. They contemplated by the arrangement to relieve the "Home Place" of two, of the three, legacies charged upon it by the will, being the larger part in amount or value, and the two which involved continuing, and, to some extent, troublesome trusts, leaving to be borne by the "Home Place," only one of the three legacies, and that of a certain amount payable at a certain time, and unembarrassed by any trust.

Not long after that arrangement was made, to wit: on the 21st of January 1857, Thomas C. Burwell entered into a contract with Noah and Thomas H. Fauber for the purchase of the "Home Place," at the sum of \$7,000, payable as follows: The said Burwell sold to said Noah and Thomas H. his entire stock of goods, &c., at cost and carriage, the amount to be ascertained by inventory. He was to pay \$2,000 down in goods, at cost and carriage, and the remaining \$5,000 in instalments of \$1,000 annually, until paid, after deducting the remaining part of the stock of goods and accounts that said Burwell might transfer

to the said Noah and Thomas H. from the 1st, 2d, and 3d payments of \$1,000 annually, deducting the interest therefrom.

Less than two months after the said contract was entered into, to wit: on the 10th of March 1857, a deed *was executed by Noah and Thomas H. Fauber and the wife of the latter, conveying the said land to Burwell, in consideration of \$5,377.41 in hand paid, and \$1,622.59, secured by said Burwell's obligation of that date, (the said two sums making together the sum of \$7,000 aforesaid). The land is described in the deed as having been devised by the will of John Fauber to the said Noah and Thomas H., "subject to certain charges in the said will mentioned, as will more fully appear by reference thereto." And the grantors by the said deed, "covenant that they will obtain from the Circuit court of Augusta, a decree exonerating said land entirely from the charges and incumbrances still binding upon it under the said will, such decree to be applied for at the next June term of said court," and "that they will warrant generally the property," thereby conveyed. It does not appear how the whole of the said sum of \$5,377.41 was paid. The sum of \$2,000 of it seems to have been paid down, in goods, at the time of the contract. But whether the residue of \$3,377.41, or any part, and if any, what part of it, was paid also in goods, is not ascertained by the record. It does appear, however, by the contract, that a further payment in goods and accounts than the said sum of \$2,000 was contemplated; indeed, that Burwell's "entire stock of goods," &c., whatever it might be, was purchased, and agreed to be taken, by Noah and Thomas H. Fauber, on account of the purchase money of the land. As to the balance of \$1,622.59 mentioned in the deed, it seems to have been since applied by the purchaser to the payment of the legacy of Keturah Fauber, for which he says the amount was retained in his hands out of the said purchase money.

Noah and Thomas H. Fauber having thus disposed of the estate of their testator, left the Commonwealth, leaving unpaid the debts of their testator, which are the subject of controversy in this suit. The amount of those debts has been decreed in this case to be paid out of the *land purchased by Burwell as aforesaid. And the question we now have to solve is, whether or not that decree is erroneous.

That Noah and Thomas H. Fauber, executors of John Fauber, were guilty of a plain and palpable breach of trust, in diverting the trust subject created by the second clause of their testator's will, from the payment of his debts, to which it was devoted by the will, and applying it to the payment of legacies expressly charged by the will on land devised to them in their own right, is a matter beyond all controversy. And if that land had never been alienated by them; if the title in law and equity yet remained vested in them, as it was given to them by the will; nothing in law can, I suppose, be

more certain, than that the said land would be now liable for the payment of the said debts yet remaining unpaid. The executors had a right, and it was their duty, to sell the "Heiskell farm" for the payment of their testator's debts; and if they had sold the said land to a bona fide purchaser, and received from him the purchase money, he would not have been bound to see to its application; and his title could not have been questioned, even though the money had been misapplied. But they had no right to apply that farm, or the proceeds of the sale of it, to the payment of legacies, charged upon the home place, at least until all the debts were paid; and if they sold the Heiskell farm for the express purpose of paying the legacies instead of the debts, the right of the creditors, in equity, to interpose and arrest the proceeds of sale before being applied to the payment of legacies, and have them applied to the payment of debts; or to be subrogated to the place of the legatees, and be paid out of the proceeds of sale of the home place, if those legatees had received payment out of the proceeds of sale of the Heiskell farm, rests upon the plainest and best established principles of the law. Such would be the state of

things, and such the *relative rights of the parties, if Noah and Thomas H. Fauber had not alienated the home place.

But those devisees having sold and conveyed the land devised to them to Thomas C. Burwell as aforesaid, is he entitled to hold it against the claims of the creditors?

He claims to be so entitled as a bona fide purchaser.

Certainly a bona fide purchaser for value, and without notice, is a great favorite of a court of equity, and that court will not disarm such a purchaser of a legal advantage.

But we must not permit ourselves to be misled by words or maxims in this matter. Other persons are entitled to the protection and the favor of a court of equity as well as purchasers. Creditors are such persons, especially when they are, as sometimes, and in this case, in fact, they are or were, infants, feme coverts and non-residents. Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. Caveat emptor is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care, and make due enquiries, or he may not be a bona fide purchaser. He is bound, not only by actual, but also by constructive notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a bona fide purchaser without notice. The law on this subject of constructive notice is laid down with great clearness by a very great judge, Vice Chancellor Wigram, in *Jones v. Smith*, 1 Hare R. 43, 55, 23 Eng.

Ch. R. cited by the learned counsel for the appellees. See also *Le Neve v. Le Neve*, and the notes thereto in second Leading Cases in Equity, Pt. 1, p. 23, marg. 127 top; and *Brush v. Ware, &c.*, 15 Peters.

U. S. R. 93-114; also cited by the 464 *same counsel. In the case last cited,

the Supreme court, in an opinion delivered by Mr. Justice McLean for the whole court, held, that "no principle is better established than that a purchaser must look to every part of the title which is essential to its validity. The law requires reasonable diligence in a purchaser to ascertain any defect of title. But when such defect is brought to his knowledge, no inconvenience will excuse him from the utmost scrutiny. He is a voluntary purchaser, and having notice of a fact which casts doubt upon the validity of his title, are the rights of innocent persons to be prejudiced through his negligence?" *Id.* p. 111, 112. "Why," asked the court, "was not the defendant bound to search for the will? The answer given is, the distance was too great, and the place where the will could be found was not stated on the warrant, or on any of the other papers. That mere distance shall excuse enquiry in such a case, would be a new principle in the law of notice."

That Burwell had actual notice of the will of John Fauber and its contents is perfectly certain. That he would necessarily have had constructive, if he had not had actual notice of the same, is just as certain. That will was the source from which his title was derived; and he was bound to take notice of it and all its contents. He had constructive notice of every fact apparently affecting the title to the land, to which the will refers, and he was bound to enquire into such fact and fully inform himself on the subject. He had actual notice of the deed and its contents from John Fauber's executors to Catharine Fauber conveying the Heiskell farm, not because he was an attesting witness to that deed, but because he relies on it in his defence, and must have known its contents. Knowing the contents of the will, he therefore knew that Noah and Thomas H. Fauber held the home place subject to the legacies charged thereon by the will, and that in becoming a purchaser of that place from them, he acquired,

465 and could acquire, only their *interest in it; that is, the land subject to the charges imposed thereon by the will, just as it was held by his vendors. So that instead of being a bona fide purchaser of the land, he was not a purchaser of it at all free of those charges. In fact the deed to him for the land expressly describes it as subject to those charges. But it is said for him, that he was informed by the deed from John Fauber's ex'ors to Catharine Fauber for the Heiskell farm, that two of the said charges, to wit: the legacy to her and the legacy to Joseph Fauber and family, were satisfied or secured by means of the sale of the Heiskell farm. Now the second clause of the will of John Fauber, of which he had notice, expressly devoted

the Heiskell farm to the payment of the testator's debts, and directs only any possibly remaining surplus of the proceeds of the sale thereof, after the payment of debts, to be applied towards the payment of the legacies given to Keturah, and Joseph and family (not including the legacy to Catharine Fauber). But Burwell says in his answer, that at the time of the conveyance of the home place to him, "respondent had no notice or knowledge of the existence of the claim now asserted in this case;" and that prior to the purchase made by him, "he may have been, and probably was, aware of the fact, that John Fauber had been in his lifetime administrator or executor of Thomas Hutchins; but respondent certainly had no knowledge of the state of his accounts as such administrator or executor. After the death of the said John Fauber, and the qualification of his executors, the first knowledge which respondent had of any of their transactions was, that on or about the 24th day of April 1856, he was called upon to attest as a witness, a deed between the executors and the widow of the said Fauber, in relation to a sale of some of the real estate. That deed is duly recorded in the County court of Augusta, and will show for itself. From this time

466 until in January 1857, (when *he purchased the home place.) respondent had no occasion to enquire anything about the condition of the estate of Thomas Hutchins, or that of John Fauber, and, in fact, knew nothing of either." Now was not Burwell bound to inform himself on the subject, according to the best settled principles of the law, and were not the means of information readily accessible to him? I think so. Undoubtedly the pecuniary legatees had all of them a right to look to the home place for payment of their legacies, which remained charged thereon unless and until they were otherwise satisfied. The only satisfaction ever pretended of any of them was, in regard to the legacies to Catharine Fauber and Joseph Fauber and family, provided for in the sale of the Heiskell farm as aforesaid. Whether that was a valid satisfaction or not, plainly depended upon whether the proceeds of the sale of the Heiskell farm were sufficient for their satisfaction, after paying all the debts of John Fauber, which by his will were primarily and expressly charged on said farm. Now here the will, while it did not disclose in numero the amount of the testator's debts, yet expressly refers to a subject vitally affecting the title of the devisees of the home place, into which subject the purchaser, Burwell, was bound to enquire. He had no right to shut his eyes and say: "I have no occasion to enquire anything about the condition of the estate of Thomas Hutchins, or that of John Fauber." That was the very thing about which he had occasion to enquire. He was not bound to make the purchase. He could only be a voluntary purchaser. And he could effectually guard himself against all danger, by making due enquiry. Is it not better that

he should be required to do this, than that he should be permitted to shut his eyes, make the purchase blindly, and thereby involve in loss innocent creditors, who may be, as in fact in this case they were, infants, feme coverts and non-residents, and of course unable to take care of themselves? The authorities before referred

467 *to decide that he was bound to make such enquiry. It was manifest from the will that the testator owed a large amount of debts, equal or nearly so, in his estimation, to the value of the Heiskell farm, and the personal estate subjected to their payment. And when his executors, in about eight months after his death, sold and conveyed that farm, not for the payment of his debts, but for the express purpose chiefly, of paying legacies expressly charged by the will on the home place devised to them subject to the charge, was not this a matter of which the purchaser of the home place, Burwell, had notice; and which should have led to further enquiry by him, according to the principle laid down by Wigram, V. C., as aforesaid? "Was it not a fact," as the Supreme court said in *Brush v. Ware, &c.*, before referred to, "essentially connected with the title purchased by the defendant, which should have put him upon enquiry. If it would do this it was notice; for whatever shall put a prudent man on enquiry is sufficient; and this rule is founded on sound reason, as well as law. How can an individual claim as an innocent purchaser under such a circumstance?" 15 Peters. U. S. R. 93, 112. Burwell made no enquiry whatever. He did not even ask the executors a single question on the subject. Nothing was easier than for him to have obtained the fullest information. The means of information were readily accessible, and right at hand. They were not, as in the case in 15 Peters., in a remote and uncertain place and in another State. They were of record in the very court in which the will under which he claimed title was recorded, and in the very county in which the land purchased by him was situated. On the 27th of October 1856, less than three months before he made the purchase, the settled account of John Fauber, as adm'r, with the will annexed of Thomas Hutchins, clearly showing almost the entire debt due by John Fauber's estate, was ordered to be recorded by the County court of Augusta. When he

468 *made that purchase the agent or attorney of those to whom that debt was due must have been actually engaged in an effort to collect it; for in the next month after the execution of the deed to Burwell for the home place, to wit: the 23d of April 1857, the bill in this suit was filed by Baylor as adm'r de bonis non, with the will annexed of Hutchins, for the recovery of that debt, in which bill the plaintiff sets out the means he had in vain used to collect it. The wonder is, not so much why Burwell did not inform himself of these facts by enquiry, as how he could have kept from knowing them. One word spoken to the

executors would have brought to him a knowledge of them all; and yet he did not speak that word. The wonder is, how it happened that such knowledge did not reach him even without that spoken word. A question might, perhaps, be raised in this case, if it were necessary, whether the case does not come under both of the categories embraced in the principle as laid down by Wigram, V. C., as aforesaid; that is, whether, 1st, the purchaser, not only had constructive notice of facts to a knowledge of which he would have been led by an enquiry into circumstances affecting the property of which he had actual notice; and whether, 2dly, he did not designedly abstain from enquiry for the very purpose of avoiding notice. It certainly, I think, comes under the former, which is enough for the purposes of the case. The latter alternative has been reluctantly applied by the court, as is said by the Vice Chancellor, and I would be indisposed to apply it in this case. My opinion rather is that Burwell instead of troubling himself to enquire into the affairs of John Fauber's estate, and as to the amount of debts which it owed, chose to rely on the covenant of his vendors contained in the deed, to relieve the land purchased by him of the incumbrance of the legacies charged upon it, and to warrant the title generally against all claims and demands. The grantors expressly and specially covenant in the deed "that they

469 will obtain *from the Circuit court of Augusta, a decree exonerating said land entirely from the charges and incumbrances still binding upon it under the said will, such decree to be applied for at the next June term of said court." Such a decree was never obtained; and it does not appear that it was ever applied for. Burwell was no doubt willing to run the risk of his vendors not complying with their covenant, for the sake of the advantages which he hoped to derive from his arrangement with them. And he ought not now to be permitted to shift the damages arising from the breach of that covenant, from his own shoulders to those of the creditors of John Fauber.

How then does the case stand upon the law and the facts as they seem to exist?

John Fauber owned two tracts of land, the Heiskell farm and the home place. He owed debts about equal in amount to the value of the Heiskell farm; and had a family consisting of a wife, three sons and a daughter. By his will he directed the Heiskell farm to be sold, and the proceeds of sale applied to the payment of his debts; devised the home place to his two sons, Noah and Thomas, charged with the payment of legacies to his wife and other two children; and appointed his sons, Noah and Thomas, his executors. In about eight months after his death, his executors sold and conveyed the Heiskell farm to his widow for \$2,700, agreeing to apply \$2,200 of the purchase money to the payment of two of the three legacies given by the will, to wit: the legacies to his wife and to his son Joseph; and

the same has been accordingly so applied, leaving unpaid debts of the testator to about an equal amount. Shortly after the executors made that sale, they, as devisees, sold and conveyed the home place, devised to them, to Thomas C. Burwell for \$7,000, a large portion of it payable in goods, and the vendors covenanting to relieve the land of the incumbrance of the legacies, and to obtain a decree for that purpose, and to warrant the title generally. At the

470 *time of the sale and conveyance to Burwell, he had notice, actual or constructive, that the two legacies to Catharine and Joseph Fauber were paid or provided for out of the proceeds of the sale of the Heiskell farm which had been devoted by the testator to the payment of his debts, and that the debts now claimed in this suit then remained unpaid. The unpaid creditors of John Fauber brought this suit to recover the amount due them from those who might be legally bound therefor upon the facts of the case. The court below first decreed the payment of them (except a very small amount) by the sureties of John Fauber as administrator with the will annexed of Thomas Hutchins, deceased, on account of the administration of whose estate those debts (except as aforesaid) were due; and the said sureties, or two of them, having paid the amount, they claimed to recover it over against the party or subject ultimately bound therefor; and the court below gave them a decree against Burwell and the home place bought by him; and also gave a decree against the same for another small debt of the estate of John Fauber still remaining unpaid. Is that decree right? I think it is.

The legatees, or two of them, having received payment of their legacies out of the fund which belonged to the creditors, the latter had a clear and plain right to compel the former to refund the money, so far as it was necessary for the payment of the debts. And the legatees, being thus disappointed in obtaining satisfaction out of the fund which belonged to the creditors, would have as clear and plain a right to be reinstated in their charge upon the home place, and to be satisfied out of the same. But, to avoid circuitry, a court of equity will subrogate the creditors to the place of the legatees, and give the former a direct decree against the home place. This is a simple process daily pursued in courts of equity.

The only possible difficulty in the case is at once removed when it is shown, 471 as I think has conclusively *been done, that Burwell was not a bona fide purchaser without notice.

The release given by Catharine Fauber in the deed to her for the Heiskell farm can make no difference. The consideration for that release having wholly failed, it cannot stand in the way of her right to have satisfaction of her legacy out of the home place charged therewith by the will. The sum agreed to be paid to her in gross as compensation for her annuity for life, seems to have been considered a reasonable equiva-

lent therefor, and no objection has been made to it from any quarter. Twelve hundred dollars may therefore be assumed as the amount or value of her legacy. At all events, that amount was paid out of the proceeds of the sale of the Heiskell farm on account of that legacy. As to the amount of the legacy of \$1,000 to Joseph Fauber and family paid out of the proceeds of sale of the Heiskell farm by decree of the court below, there can be no possible doubt of the right of the creditors to a decree against the home place to the extent of that amount, which (including interest) is not greatly less than the whole amount of the unpaid debts. Joseph Fauber gave no release of his legacy, as Catharine Fauber did; and his legacy had not been actually paid out of the proceeds of the Heiskell farm when this suit was brought. It would have been an easy matter, therefore, to have had that legacy charged upon the home place, leaving the money which he was to have received out of the Heiskell farm to be paid to the creditors. But the court having decreed the payment of the legacy to Joseph Fauber out of the proceeds of the Heiskell farm, the right of the creditors to subrogation and satisfaction to that extent out of the home place would have been self evident. There can be no doubt, however, for the reason before stated, that the right of the creditors to subrogation and satisfaction extends to the whole amount due them.

It may be proper to state that I 472 think the record shows *that John

Fauber's executors are not indebted on account of his personal estate. Though no account was ever settled by them, so as to show that any thing, and if any thing, what amount is due them; yet it is sufficiently shown in the case that they owe nothing on that account, and there can therefore be no ground for making the sureties for their administration of their testator's estate liable for an amount claimed in this case, or any part thereof.

My opinion upon the question, whether the conveyance of the home place to Burwell was bona fide, renders it unnecessary to consider the question, whether at the time of such conveyance, any report had been filed as aforesaid of the debts and demands of those entitled; and I therefore refrain from doing so.

Upon the whole, I am of opinion that there is no error in the decree appealed from, and that it ought to be affirmed.

STAPLES, J., dissented. He was of opinion the appellant Burwell could only be held responsible for the amount of the legacy given to Joseph Fauber and family. It is conceded that the creditors of John Fauber have no claim to or lien on the real estate in the possession of the appellant. If they have the right to subject it to the payment of their debts at all, it is only by subrogation to the rights of the legatees whose legacies have been satisfied out of the Heiskell farm. But Catharine Fauber, one of these legatees, released all claim to

or interest in the whole and every part of the real estate of the testator. The deed containing this release was duly recorded, in order to give notice of the fact, and to enable the executors to convey a clear and unencumbered title to any purchaser. The appellant, relying upon this release, purchased the home farm, paid the purchase money, received his deed of conveyance with the clear and full conviction that the annuity claim *of Catharine Fauber was fully satisfied, and her release valid and unimpeachable. And now it is insisted, that as she was mistaken, and received her annuity in a tract appropriated to the payment of the debts, she has the right, notwithstanding her release, to resort to appellant's land for her indemnity.

It seems to me, to sustain such a pretension, is not only to violate every principle of natural justice, but also a favorite maxim of courts of equity, that where one of two innocent persons must suffer, he shall suffer who by his own acts occasioned the confidence and the loss. Catharine Fauber having released her claim, she has no equity to which the creditors can be subrogated. These views, however, have no application to the legacy given to Joseph Fauber. That, having been paid from the Heiskell farm, without, however, the execution of any release, the creditors have the right to be compensated to that extent out of the home farm; and for the residue of their debt they should be satisfied from the proceeds of the sale of the Heiskell farm in the possession of both or one of Fauber's representatives.

In my opinion the decree of the Circuit court should be reversed so far as it is in conflict with these views.

Decree affirmed.

474 *Booten v. Scheffer.

August Term, 1871, Staunton.

Sale of Real Estate—Case at Bar.—In September 1863, B sold to S one-half of the Virginia hotel, in Staunton, part in cash, and the balance in six, twelve, and eighteen months, for which S gave his bonds, payable in such funds as should be current or receivable in payment of Virginia State taxes when they fell due; with the privilege to S to pay them at any time before they fell due. And it was at the same time agreed, that S might elect at any time within a year, to take the other half of the hotel at the same price, and upon the same terms, and the bonds for this last half were to bear interest from the date of the agreement. Near the end of the year S, (as assumed,) elects to take the property and gives B notice, but does not execute or tender the bonds. Before the election S paid largely more of the purchase money for the first moiety than was then due; but he makes no payments specially for the last moiety; but in February 1865, he tendered to B the whole purchase money, which B refused to take. **Held:**

1. **Same—Payment in Confederate Currency—Time of the Essence of Contract.**—Where payment is to be made in Confederate currency for land purchased, time is of the essence of the contract;

though it is not generally, unless injustice is thereby done to the vendor.

2. **Specific Performance—Applicant in Default.**—S having failed to pay the purchase money for the second half of the property when it fell due, is not entitled to have specific execution of the contract.

3. **Two Contracts—Effect of Over-Payment on One.**—The payments on the first contract, though more than was due, cannot be treated as payment on the second; but as an anticipation of the payments not yet due on the first.

4. **Case at Bar.**—S, not having given the bonds for the last half of the property, has failed to comply with the terms of the contract.

5. **Specific Performance—Applicant in Default.**—Equity will not decree a specific execution of a contract where the applicant for relief has been in default, and by the force of subsequent events or a change of circumstances, the execution of the contract would entail great loss and hardship upon the adverse party.

- 475 *6. **Same—Same.**—Where a party who applies for a specific performance, has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay, and where there is nothing in the conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance. *Kent, Ch., in Benedict v. Lynch*, 1 John. Ch. R. 370.

7. **Same—Demand Set Up in Answer.**—Though S sets up his demand for specific performance, by answer to a bill by P asking for partition, it is still an application for equitable aid, and is to be governed by the settled rules appropriate to bills for specific performance: and the court will not leave S to bring his suit, but will terminate the controversy, by adjudicating the rights of the parties, and administering such relief as may be appropriate to the equity forum.

This case was heard at the August term of the court at Staunton, though the decision was made at the November term of the court at Richmond.

In September 1865, John K. Booten instituted a suit in the Circuit court of the county of Augusta, against Frederick

*See principal case distinguished in *Smith v. Proffitt*, 82 Va. 848, 1 S. E. Rep. 67.

†**Specific Performance—Hardship.**—In *Dyer v. Duffy*, 39 W. Va. 159, 19 S. E. Rep. 544, the court said: "Courts of equity will not exercise jurisdiction in specific performance where it would impose hardship on people not censurable in conduct, and where the circumstances and condition of things have so changed as to make it work loss and hardship to them. *Bowles v. Woodson*, 6 Gratt. 78; *Booten v. Scheffer*, 21 Gratt. 474; *Clay v. Deskins*, 36 W. Va. 350, 15 S. E. Rep. 85."

‡**Same—Demand Set Up in Answer.**—In *Lightner v. Lightner* (Va.), 23 S. E. Rep. 302, the court said: "The demand for specific performance may be set up in an answer to a bill asking partition, but it is still an application for equitable aid, and is to be governed by settled rules appropriate to bills for specific performance. *Booten v. Scheffer*, 21 Gratt. 474."

Same—Inadequate Consideration.—See foot-note to *Hale v. Wilkinson*, 21 Gratt. 75.

Scheffer, for a partition of real estate in the town of Staunton, known as the Virginia hotel. On the 19th of November 1863, Booten entered into an agreement under seal, with Frederick Scheffer, by which Booten sold to Scheffer and covenanted to convey to him a fee simple with general warranty, one moiety of the Virginia hotel, at \$42,500, and all the furniture and fixtures at \$40,000. Said purchase money to be paid in three equal instalments, at six, twelve and eighteen months from the date, to be secured by the bonds of Scheffer of equal date with the agreement, and bearing interest from that time, and the withholding of the legal title to the real estate until the whole of said purchase money shall have been paid. But the privilege was reserved to Scheffer to pay the whole or any part of said purchase money at any time thereafter, without respect to whether said bonds had become due or not. And the said

purchase money might be paid from
476 time to time *in such funds as should be current or receivable in payment of Virginia State taxes at the respective dates or times of payment.

It was further agreed, that Booten would rent to Scheffer, the other undivided moiety of the said real estate for one year from the date, with the privilege to Scheffer to extend the lease to two or three years, upon his giving notice of his election sixty days before the end of each year; and for this lease Scheffer was to pay \$4,000 a year in like current funds. And it was further agreed, that Scheffer might at his election, to be made at any time within one year from the date of the agreement, purchase the remaining undivided moiety of said real estate, at the like sum of \$42,500, to be secured and paid for in the same manner as above stipulated in respect to the one-half already purchased by him. And in that event Scheffer was to pay no rent up to the time of making such purchase, but the purchase money bonds were to bear legal interest from the date of the agreement.

And it was further agreed, that in part satisfaction of the property, real and personal, that day sold to Scheffer, Booten was to receive from him certain slaves named, at the price of \$34,500.

The bill sets out the agreement, the execution of the bonds by Scheffer, each for \$16,000, which, with the slaves, made up the amount of the purchase money for the one moiety of the real estate and the personal property; says that large payments have been made upon the bonds, but that on the said bonds and one year's rent at \$4,000, Scheffer is still largely indebted to the plaintiff. That by the terms of the agreement the title was to be withheld until the purchase money was paid, and that no conveyance of the property had been made, but he was ready to make it whenever Scheffer could show that the purchase money had been fully paid.

The plaintiff further alleged that Scheffer
477 did not elect to extend the lease beyond the first year, nor did he elect *within

the year from the date of the agreement, to purchase, nor has he purchased the remaining undivided moiety of the said real property; but the plaintiff was still the owner thereof and tenant in common with Scheffer. That since the expiration of the year, and since the affairs of the South had become desperate, Scheffer fraudulently pretends that he had purchased the property in pursuance of the privilege of election given him by said contract; but the plaintiff expressly denies that he has done it. It could only be done by a new instrument in writing, signed by the parties as required by the statute of frauds: or if this was not necessary, clearly by the terms of the agreement, bonds were to be executed for the purchase money. And he denies that any new written contract has been executed or proposed by Scheffer, or any tender made to the plaintiff of bonds by which said additional purchase money was to be secured. The prayer of the bill is for an account of rents and profits, and of the purchase money remaining due, for the execution of the contract, and for partition of the real estate either in kind or by a sale, as the court should deem best.

Scheffer answered the bill. He says that he made the contract and received possession of the property; that he had paid in slaves \$34,500, and had given his bonds for the residue of the purchase money, on which he had made large payments, the items and amount of which are shown by a statement he exhibits. That it is true he did not elect to extend the lease created by the contract of November 19th, 1863, beyond the first year; but it is not true that he did not elect within one year from the date of the contract, to purchase or that he had not purchased the remaining undivided moiety of said real estate from the plaintiff. On the contrary, he expressly affirms that he did, within one year from the date of said contract, elect to purchase and did purchase
478 the same on the terms of the said contract, and that he *repeatedly notified the plaintiff of such election, both orally and in writing. That he is advised that for such election no formality was required, nor any consultation with the plaintiff, nor any instrument in writing signed by the parties and providing for a new sale. And he is advised that the election having been once made, the execution of bonds, for which no sureties were required, was not of the essence of the contract; and that even if he had been in default as to their execution, it would not have effected his rights under the contract.

He further says that the plaintiff purchased the property from George L. Peyton, and his bonds for the purchase money were outstanding at the time of the sale to the respondent. The defendant made large payments upon these bonds with the consent of the plaintiff, and of themselves these payments amounted to the full amount of all that was due from the defendant on the original contract. The purchase of the second half of the real estate, however, re-

quired a large additional sum to be paid to the plaintiff, and it was in regard to this that all subsequent negotiations and correspondence between him and the plaintiff took place.

He refers to the kind of funds in which by the agreement the purchase money was payable, and his right to pay at any time, and insists that the second purchase was governed by these provisions; and he says he was anxious from the time he determined to take the whole property, to exercise these privileges of paying the whole in advance and in Confederate currency, and the plaintiff was equally desirous to avoid such payment. He took the ground that Confederate money was not current and receivable for taxes, and when driven from that ground, he resorted to the humiliating expedient of dodging and avoiding the respondent, in the hope to escape such payment or any tender of it. That the respondent, though often prevented from access to the plaintiff

by the accidents of war or by his
479 active avoidance, was at last *successful in meeting him and making a full tender of the entire sum due upon the whole property, in Confederate treasury notes, which were at the time current, receivable for Virginia State taxes, and bankable in all the Virginia banks. And he is ready and has been ready at all times to produce the Confederate currency due upon the contract and tendered in discharge of it.

He says further that since the beginning of this controversy he has learned that there are liens upon the property; which the plaintiff is bound to discharge as part of his obligations to make to the respondent a good title under their contract.

It appears from the evidence that the Virginia hotel was worth before the war from forty to fifty thousand dollars. The furniture when it was new was worth \$10,000, but when sold to Scheffer it was old and much worn. A few weeks before the sale to Scheffer, Booten had purchased the property from the Peytons at \$100,000; of which sum he paid in cash \$50,000, and executed his four bonds, each for \$12,500, payable in three, six, nine and twelve months, in such funds as may be current at the time of payment. After his sale to Scheffer, Booten directed the Peytons to receive any money Scheffer might desire to pay upon these bonds; and Scheffer did pay the whole amount thereof. The parties do not agree as to when these bonds were paid; but John H. Peyton states that the whole amount, except \$2,000, was paid before the 1st of April 1864.

The plaintiff, at the instance of the defendant, as is probable, though the record does not show it, filed, under oath, seven letters which he received from Scheffer within twelve months from the date of the contract; which he says are all the letters he received from him in that time. The first letter has nothing in relation to the questions in issue in this cause. The second, bearing date February 11th, 1864, after speaking of several other matters, says:

"L. Peyton was here, and I paid him
480 *your due bill for \$1,734, and will pay your first note by court." The third, dated February 18th, towards the close, says: "I want to square up with you as near as possible by the 1st of April." On the 25th of February he says: "I paid to-day your note for \$12,500, with interest, to G. L. Peyton;" and again: "I am trying to turn everything into money I can, and expect to pay you nearly off between now and the 1st. I am going down next week to Woodstock to have a sale there at March. Maj. Briscoe wants to buy my Shepherdstown negroes, and if I succeed I will be able to take the other half of you at once." And again: "I am afraid the currency bill don't set very well on G. L. Peyton, as he took the money very reluctantly; but I suppose he will have plenty of company of gentlemen who have to invest." Under date of May 7th he writes: "On my arrival home I went to the clerk's office and examined our agreement, and find I am right in my construction; and so says my lawyer. I send you herewith a copy, so you can show it to yours. While I am disposed to do everything in my power to keep on good terms with you, and do everything that is strictly honorable, yet I cannot sacrifice my own interest to protect the interest of others; and while you expected for Peyton to come up to the mark with you, you ought to do the same with me, and ought to be willing either to invest or financier a little on the three weeks' profits on your investment in the Virginia hotel. While I will have no difficulty in exchanging my certificates or four per cent. bonds for five dollar notes, yet I will make the following proposition to you: if you will take \$6,000 in four per cent. bonds towards squaring up the purchase of the other half and the first payment due you, I will only require you to take another payment in five dollar notes, and let the last payment stand until fall or winter, and pay it in new issue. But should you do as you did before, and treat my letter with silent con-
481 tempt, you may rest assured *that I shall pay you the whole amount due you in fives, and if you get to dodging me, you will have to get into a cave in the mountains." The extract from the agreement which he sends with this letter, is that as to the kind of funds in which the purchase money might be paid.

Under date of May 10th, 1864, Scheffer again writes: "Yours of the 9th inst. is at hand, and from the length or tone of your letter I infer that you are in a bad humor, or offended at some jocular remarks in my letter. If there is a difference between us in construing our agreement, it is an honest difference on my part, otherwise I should certainly have paid you up before the 1st of April, had I not been satisfied that I could pay you in fives until the 10th of June. Still, if you are not compelled to take them I shall not think hard of you, and hope you will not think hard of me if you are. I shall make my arrangements now to square up, as I cannot let thirty-eight or forty

thousand dollars hang over me with the future prospect of money matters, when I can sell off a good deal of my property now for such funds as will pay State taxes."

Under date of July 6th, 1864, he writes: "In regard to our money matters you have succeeded to outgeneral me, yet I do not consider it a feat of great shrewdness; it was only a breach of confidence and trust I had reposed in you." . . . "The only oversight I made was that I took your word, and did not reduce it to writing, that whenever I was ready to make payment, that I could deposit it here in bank, and not compel me to come to Luray to make you a tender." . . . "As you expected to pay Peyton in the old currency, you could expect nothing else from me, as you did not expect better currency of me, at the time of our contract, than you expected to pay, because every man who paid war prices for property expected to pay it in war money.

482 *You had no expectation to get \$25,000 advance and an improved currency."

There are several witnesses who speak of conversations with Booten, in which he said he had sold the property to Scheffer; but there is some uncertainty as to the time of these conversations, extending from the 1st of April to July. There are also others who prove messages, and one of them proves the delivery of a letter from Scheffer to Booten, to tell him to come up that he was ready to pay him. Some of the messages, and probably all, were after the 1st of April, and the letter was in June. In one instance Booten said he knew what Scheffer wanted; that he wanted to pay him some five dollar notes, and he did not intend to take them if he could get shut of it. In October or November 1864, to another witness he said he had received a letter from Scheffer stating he had his money for him; and Booten remarked—it was customary for a man who owed money to hunt up the creditor. There was evidence that at one time on the cars at Gordonsville, near the end of March 1864, Booten went to another part of the car, when Scheffer, who was on the platform, came to the window to speak to the witness, and after Scheffer had left, Booten returned and said to the witness he had sold his entire interest in the hotel to Scheffer, who owed him a considerable sum, but he did not wish to see him till after the 1st of April, when the new issue would be out.

It appeared further that after the sale Booten lived in Luray, in Page county, but had a shop in Mount Sidney, about ten miles from Staunton, from January 1864 until the fall of that year; where he was manufacturing saddles and harness for the Confederate Government; and that he was frequently at that place. It also appeared that he was several times in Staunton during that period. Scheffer lived in Staunton, but he had property in Woodstock, in Shenandoah county, where he was carrying on business; and he was frequently at

483 that *place between November 1863 and November 1864; and the access to Luray from Staunton during that period

was open except for about two or three weeks.

It was further stated by one witness that in a conversation with Scheffer in Woodstock, the time of which he could not state, but it was probably in the summer of 1864, Scheffer said he had purchased the Virginia hotel, and had the money to pay for it. Witness remarked that he had better pay it then. Scheffer said he thought he would make use of it in another speculation first. And another witness, who was a merchant in Luray, stated that in December 1864 he saw Scheffer in Richmond frequently. He asked witness about Booten, and said, "John K. Booten had been dodging him, that he wanted to pay him some money, and that in consequence of Booten's dodging him he had been unable to do so." We happened in the auction room of Robinson, Adams & Co. Witness was buying some goods, and so was he. He brought to witness samples of a lot of tobacco which he said he had purchased, and observed to witness that he had intended to pay John K. Booten some money, but upon reflection he had concluded to invest it in tobacco, cotton, &c.; that the money had not got quite bad enough; that he wanted it to get a little worse before he paid him. Witness thinks that in one of the conversations with witness, he said when he bought the property the money was worth twenty cents in the dollar; that then it was worth about five cents, and he wanted to keep it until it got down to one or two cents in the dollar before he paid him. It was proved that in the month of February 1865, Scheffer made to Booten in Staunton a tender of \$38,000 in Confederate treasury notes of the new issue, as the sum due for the balance of the purchase money upon the Virginia Hotel, which Booten refused to receive; and it was placed in the Bank of the Valley, in Staunton, on deposit.

It was agreed by the counsel in the 484 cause, that after *the passage of the act of February 17th, 1864, by the Confederate congress, entitled an act to reduce the currency and to authorize a new issue, which act was admitted, the currency then in circulation, consisting wholly of Confederate treasury notes, was called the "old issue," and the currency authorized by that act was called the "new issue:" that the notes over five dollars at once, upon the passage of the act, became depreciated, and to a great extent uncurrent, and that after April 1st, 1864, the five dollar notes underwent the same process. And that the Virginia Legislature at Richmond passed the acts of March 22, 1862, February 28, 1863, September 14, 1863, and March 4, 1864, providing for payment of State taxes in Confederate money.

In the progress of the cause a commissioner was directed to settle the accounts between the parties, and also to enquire and report what liens there were upon the property. The commissioner, assuming that Scheffer had purchased the whole of the Virginia Hotel, reported that he was

indebted to Booten on the 7th of February 1864, \$36,806.44, and on the 15th of December of the same year, \$36,225.83; and reducing this sum to good money at the rate of sixteen for one, as of the 19th of November 1863, the date of the contract, there was due from Scheffer to Booten \$2,264.11, with interest from said 15th of December. The commissioner further reported that he had not been able to ascertain certainly the liens upon the property which remained unpaid; but, so far as yet ascertained, it does not appear that there are such liens to an amount greater than \$7,000. Both the plaintiff and the defendant excepted to the report; but it is unnecessary to state them.

The cause came on to be heard on the 30th of June 1868, when the court confirmed the commissioner's report, and fixing the amount due from Scheffer at \$2,264.11, with interest due thereon from the 15th of De-

485 cember 1864, as stated by the commissioner, decreed *that upon the filing among the papers in the cause of a deed from Booten to Scheffer, conveying an unincumbered title to the said Virginia Hotel property, Scheffer should pay Booten the said sum of \$2,264.11, with interest from the 15th of December 1864, till paid; which sum of money should constitute a charge upon said property. And the commissioner was directed to call in the creditors holding liens upon the property by publication for four weeks in a newspaper, and report upon said liens as speedily as possible. From this decree Booten applied for and obtained an appeal to this court.

James W. Green and Williams, for the appellant.

Baldwin and Cochran, for the appellees.

STAPLES, J. In considering this case I shall concede that the appellee within the appointed time made his election to purchase the property in controversy, and that he duly notified the appellant of the fact. This, however, did not comprise the whole duty of the appellee; under his contract he was required to do something more. So soon as he elected to make the purchase, it was incumbent upon him to pay the entire amount of the purchase money, or to execute his bonds and promptly discharge them as they respectively arrived at maturity. Has he shown such compliance with his contract as entitles him to the assistance of a court of equity, or such circumstances of excuse as relieve him of the obligation of performance? No one can read this record without the clearest conviction that the appellee in exercising his right of election was mainly influenced by the hope of deriving an undue advantage from the act of the Confederate Congress reducing the currency one-third in value; that it was his deliberate purpose to force upon the appellant this currency at its nominal value in payment of the purchase money, and failing in this project, he was deliberately neglectful of the obligations of his

486 contract until *the currency had be-

come almost entirely worthless by the rapidly declining fortunes of the Confederacy. In this connection it may be proper to consider the legislation referred to as a part of the history of the times, and as explanatory to some extent, of the motives and conduct of the parties. By the act of February 17, 1864, the holders of the treasury notes above the denomination of five dollars were allowed until the 1st day of April, to fund the same in four per cent. registered bonds; on all such notes not so funded, a tax of 33 $\frac{1}{3}$ cents was levied for every dollar promised on the face of such notes, and holders were authorized to exchange them for the new issue at the rate of three of the former for two of the latter. The same provisions were substantially enacted in respect to the notes of the denomination of five dollars, except that the holders were allowed until the first of July to fund the same. The effect of this legislation upon the currency will be remembered by all familiar with the history of that period. Thenceforth it was not received in the payment of debts, or in the purchase of property, except at its legal rate of depreciation. So far as this record discloses, throughout the year 1864, the appellee did not evince the slightest anxiety to comply with his contract unless he could use this currency as a medium of payment. In his letter of the 25th February, he shows that he is well informed touching the provisions of the act of Congress; and then, for the first time, he discloses his purpose to purchase the property now the subject of controversy. In his letters of May 7th, May 10th, and July 6th, he insists upon his right to pay the purchase money in the old currency, and in one of these letters he quotes certain provisions of the contract in vindication of his opinion. It is apparent from the whole correspondence, that it was his determination not only to pay in this currency, but to exercise this privilege from time to time down to the 10th of June, as best suited his convenience and his

487 interests; thus forcing *upon the appellant the necessity of funding within twenty days the notes received, or of submitting to a loss of one-third of the purchase money in exchanging it for the new currency. If, at the close of this correspondence on the 6th of July, the appellee had filed his bill demanding a specific performance, it is clear that a court of equity would not have afforded him relief upon the terms suggested in these letters. The appellee did not propose to apply the treasury notes in payment according to their fixed legal value. His purpose was to compel the appellant to receive them at their nominal rates, in other words, to accept as of the value of one dollar, a currency worth, by operation of law, only two-thirds of a dollar. Under the provisions of the contract the appellee was authorized to pay in such funds as should be current, or receivable in payment of Virginia State taxes at the respective dates or times of payment. It is notorious that these notes were not current

after the passage of the act in question, except at the value fixed by that act. Were they receivable in payment of State taxes? A simple reference to the legislation of that period will answer the question. By an act of the Virginia legislature, passed March 3d, 1864, the act of September 3d, 1863, authorizing the receipt of Confederate notes in payment of taxes, was repealed, and in lieu thereof it was enacted that treasury notes issued prior to the 1st of April 1864 should be received in payment of taxes and other public dues until 10th of December 1864; but only at the rate of sixty-six and two-third cents for each dollar of said notes. It is clear, then, that the appellee, in offering this currency at its nominal value, was not acting in compliance with his contract in its letter or spirit. He was attempting to impose terms which the appellant was well justified in rejecting. His offer of performance gave him no claim to the interposition of a court of equity. Does the

evidence place his conduct, subsequent
488 to the 1st of July, in a *more favorable aspect? It will be observed that the appellee's letter of the 6th of July makes no demand for the performance of the contract, it contains no promise to pay the purchase money, or any part of it, nothing is said in regard to the execution of the bonds. As the appellee had been defeated in his effort to pay in the old currency, it was to be expected that some new arrangement would be suggested, some proposition made, in regard to the payment of the purchase money or the execution of the bonds. But nothing of the kind is intimated, and the reader might reasonably conclude that the appellee no longer considered himself bound by the contract. Nor do we hear from him until February 1865, with the single exception of the message sent to the appellant in November 1864, that his money was ready for him. To this the appellant, I think, very properly replied, "that it was customary for the man who owed the money to hunt up the creditor." Certainly it cannot be inferred from this that the appellant was unwilling to receive the money then in circulation. All the circumstances show, the letters clearly indicate, that his only objection was to the currency embraced by the provisions of the act of Congress. If the appellee was honestly desirous of fulfilling his obligations, why did he not seek the appellant in person and make the tender. It was said that the appellant resorted to the humiliating expedient of dodging the appellee to escape a tender of the currency. There is some evidence that on one occasion, in the early spring, the appellant attempted to avoid an interview with the appellee, probably with the object suggested. But there is no pretence that this was done at any subsequent period. The appellant was in Staunton on the 26th and 28th of April, and had repeated interviews with the appellee. It is not pretended there was any offer to pay on either of these occasions. He was oftentimes at Mount Sidney, ten miles distant from Staunton, engaged in

the manufacture of articles for the
489 *government, as was well known to the appellee. He resided at Luray, in Page county, only twenty miles from Woodstock, where the appellee spent a large portion of his time in the year 1864. The appellee had no difficulty in sending messages and letters by mail and by private hand. In his letter of July 6th he laments he had not in the contract reserved the right to make a deposit of the money in a Staunton bank, instead of being compelled to go to Luray to make a tender. But he took care never to go to Luray. He admits his obligation to seek the creditor. Why did he fail to do so. The evidence furnishes an easy explanation of his motives and his conduct. He preferred to invest his funds in the more profitable and remunerative business of trade and speculation. It is proved that in the autumn of 1864 he boasted that he had the money to pay for the property; and being advised that he had better do so, he expressed his intention first to make use of it in another speculation. And in December 1864, he declared that he had intended paying the appellant some money, but upon reflection he had concluded to invest it in cotton and tobacco; that the money was not quite bad enough yet; that he wished it to get a little worse; that it was worth twenty cents in the dollar when he made the purchase; at that time it was worth about six cents; and he intended to keep it until it was depreciated to one or two cents in the dollar before he paid the appellant. Accordingly, we find him for the first time seeking his creditor, taking with him a witness, and making a formal tender in February 1865, when the currency was depreciated in the ratio of sixty-five dollars for one. And in his answer he gravely declares, that though often prevented from access to complainant by the accidents of war and by his active avoidance, he was at last successful in meeting him and making a full tender of the entire sum due upon the whole property in Confederate treasury notes. And this tender thus made, is
490 relied on as *giving the appellee a clear equity to a conveyance of the whole property free from all incumbrances. In my judgment it is not entitled to the slightest consideration, because made long after the maturity of two instalments of the purchase money, and because made not in the conscientious discharge of the obligation of his contract, but in accordance with a deliberate purpose to impose upon the appellant a currency which had substantially ceased to perform the functions of a circulating medium. The appellee was in default in regard to the instalment of fourteen thousand dollars due in May 1864, and he was also in default in regard to the like sum due in November following; and this too of deliberate will and purpose. His reparation for this delay was a tender of forty-two thousand and five hundred dollars in notes of the value of six hundred and fifty dollars in coin. What are the reasons assigned for this default? It is said that

looking to the substantial justice of the case, and supposing the appellee had made his election in May 1864, he had then paid more than he was required to pay, he had in fact paid all the instalments to November 1864, and eighteen thousand dollars besides; he was, therefore, in no default in paying the respective instalments as they fell due. I think the answer is obvious. The promptness of the appellee under one contract is not an equivalent for his default under another and wholly different contract. At the time the payments were made to Peyton, the appellee had not then exercised his right of election. These payments were made on the first purchase, in accordance with a right reserved in the original contract, and were so intended by the appellee. He alleges in his answer, that they constituted full payments of all that he would have owed on that contract. It is to be observed that they were made in the old issue of treasury notes, and in this respect were highly advantageous to the appellee in enabling him, upon easy terms to discharge the vendor's lien. When, therefore,

491 he *subsequently elected to purchase the moiety now in controversy, his obligation to pay punctually the several instalments of the purchase money as they matured, to comply in every particular with the provisions of the second contract, was as complete as though the first had not been made or no part of the purchase money thereon had been paid.

The appellee cannot refer an act done, or right exercised under the first contract, to the right and obligations incident to the second. As the appellee never considered his payments as tantamount to the performance of his second agreement, it is idle to say that this court can so regard them.

Other grounds were taken in the argument by the counsel for the appellee; but it is unnecessary to consider them: none of them are sufficient to justify the delinquency of the appellee. In every view of this case, I am satisfied he is not entitled to a specific execution. No principle is better settled than that which requires that the party seeking specific performance must have shown himself ready, prompt and eager. In *Benedict v. Lynch*, 1 John. Ch. R. 370, Chancellor Kent, upon a careful review of all the authorities bearing upon this subject, uses the following language: It may then be laid down as an acknowledged rule in courts of equity, that where a party who applies for a specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay, and where there is nothing in the conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance. Nor is it necessary for the party resisting the performance, to show any particular injury or inconvenience; it is sufficient that he has not acquiesced in it, but considered it as releasing him." And in *Bowles v. Wood-*

son, 6 Gratt. 78, similar views were announced by this court. Judge *Allen said, "as the application for a specific performance is addressed to the sound discretion of the court, he who asks it must have shown himself prompt and willing to comply with the obligation of the contract on his part; and the prayer will not be granted if it would be inequitable towards the party against whom the prayer is made." Now, it is true, that a mere default in the payment of the purchase money, as a general rule, is not a sufficient reason for refusing a specific performance; because the default admits of compensation. In most cases the interest is regarded as an equivalent for the non-payment of the purchase money. This rule, however, is not adopted if any injustice is thereby done the vendor. It must be certain that he has sustained no damage by the default of the vendee, and the payment of the principal with its interest will place him in the position he would have occupied, had there been no default. It must appear there has been no change of circumstances affecting the character of the contract, or the rights and obligations of the parties, and that compensation for the delay can be fully and effectually made. And in all such cases the burden devolves on the vendee to account, in a reasonable manner, for his delay; and also to show that the relief he asks is just and equitable. 2 Story Eq. Jur. § 776; *Taylor v. Longworth*, 14 Peters. U. S. R. 172.

The principle upon which the purchase money with its interest is generally regarded as compensating for the delay, is obvious. As the contract is to pay in a permanent currency, having a fixed legal value, the vendor obtains by the decree of the court precisely what he agreed to receive. He is paid for his property at the valuation fixed by himself. The court merely executes the contract of the parties as they made it. These are familiar principles: Can they be properly and justly applied to contracts for the sale of real estate based upon Confederate currency where the vendee was in default? If the vendor contracted to sell for a certain sum, payable in

493 *that currency, and the vendee failed to pay at the appointed time, can it be said that the scaled value in coin is a fair equivalent for such currency, or a just compensation for the delay? Is a court of equity justified in holding that the vendor would have parted with his property on such terms. If the appellee had proposed to purchase one moiety of this hotel and pay therefor the sum of two thousand two hundred and sixty-four dollars in gold, after the termination of the war, no intelligent mind can suppose the appellant would have accepted this proposition. How is it possible for the court to appreciate the motives or necessities that induced him to sell, or to know the uses he might have made of the money had it been paid, or the losses he may have sustained in failing to receive it. The contract this court is asked to ex-

ecute is not the one made by the parties. The equity raised up in behalf of the appellee is one growing out of his own default in performing his agreement.

The rule sought to be enforced here, is the very reverse of that established in *White v. Atkinson*, 2 Wash. 91. In that case the sale was made in 1779, during the existence of paper currency. The purchaser was in default in the payment of the purchase money. The court, as a condition of relief, decreed that he should pay the fair value of the land at the time of the sale, instead of the value of the currency agreed on. The rule is also in violation of the principles and the spirit of the act of 1867; which authorizes courts and juries to adopt the fair value of the property as a just measure of recovery. This act was passed under the universal conviction that as real estate did not advance during the war with the depreciation of the currency, so the specie value of the currency is in very few cases the fair value of the property, or a just measure of recovery. At the last term of this court at Staunton, the act in question was unanimously sustained as constitutional, and as a wise and beneficent measure of legislation.

494 *In this case competent and reliable witnesses estimate the Virginia Hotel at forty thousand dollars in a sound currency. The appellee, in November 1863, purchased one moiety of the property at forty-two thousand and five hundred dollars, and all the personal effects attached to the hotel at forty thousand dollars, in Confederate treasury notes, then at a depreciation of sixteen dollars for one in gold. In part payment of the purchase money he sold and delivered to the appellant sixteen slaves, estimated at \$34,600. The residue he paid in what was known as the old issue of Confederate notes. He now seeks a conveyance of the other moiety at \$2,264.11, the specie value of the contract price, and probably one-tenth of the real value of the property. It must be borne in mind that this was not a fair contract of hazard under which either party assumed the risk of loss with a probable chance of gain. Nor was it in the nature of a continuing offer to sell for a permanent currency, upon which the vendor was certain to receive the estimated value of his property. Under the agreement the appellee could sustain no loss in any contingency. If the currency continued to depreciate, and the property secure, he had only to exercise his right of election; and, under his construction of the agreement, he might make his payments as suited his convenience and his interests. Few men could pronounce such a contract fair in its terms, or free from objection in its attendant circumstances. I am aware that mere inadequacy of consideration is no defence to a specific performance, unless it amounts in itself to conclusive evidence of fraud. This principle received the sanction of this court in *Hale v. Wilkinson*, decided at the last Wytheville term; *supra*. It is to be observed, that in that case the purchase money

had been fully paid and accepted in discharge of the vendee's obligation. It was also held in that case, that as the vendee was in default in paying the purchase money, the *vendor was not bound to receive it when subsequently tendered, and had he refused it because not punctually paid, equity would not compel him to execute the agreement. The fact that the money was rapidly depreciating made time of the essence of the contract. And while it is true that mere inadequacy of consideration is not sufficient of itself to defeat a specific performance, yet in all such cases a court of equity will closely scrutinize the conduct of the party insisting on the contract, and if he be in default, it will leave him to such remedy as he may have in a court of law. This doctrine is clearly expressed by Chief Justice Marshall in *Garnett v. Macon*, 6 Call 308; and I shall content myself with a single extract from his opinion. He declares, "That although mere inadequacy of price is not a sufficient ground for a court of equity to refuse its assistance, yet, if an unreasonable contract be not performed according to its letter, equity will not interfere. And there is no difference between a contract unreasonable when made, and one which becomes so afterwards, if the applicant be in default." See also *Kirby v. Harrison*, 2 Ohio St. R. 326; *Merritt v. Brown*, 19 New Jer. Eq. R. 286; *Westerman v. Means*, 12 Penn. St. R. 97; *Piatt et als. v. Law & Campbell*, 9 Cranch U. S. R. 456, 449.

There is one other fact disclosed by this record, worthy of serious consideration. The written agreement contains a stipulation binding the appellant to convey the hotel by a good and sufficient deed in fee simple with general warranty. Under the decree of the circuit court the sum ascertained due is only to be paid the appellant upon his conveying to the appellee an unencumbered title to the said Virginia Hotel property. It appears by the report of the commissioner, there are subsisting liens upon this property to the amount of seven thousand dollars certainly. How much more there is, we have no means at present of ascertaining. The commissioner states that after the most diligent enquiry 496 he has been *unable to ascertain with any degree of accuracy what incumbrances still exist. The hotel has been repeatedly sold since the year 1850, and notes given for the purchase money, running through a period of twenty-five years; and these notes have passed into the hands, in many instances, of unknown parties. Upon some of them suits have been brought to enforce the vendor's liens. There are also judgments and deeds of trust, many of which it is thought have been satisfied. Under these circumstances it is utterly impossible to form even a conjecture of the amount of these liabilities; all of which, whatever they may be, the appellant under his contract and the decree of the Circuit court is required to discharge and to convey to the appellee an unencumbered title. In

consideration of which the appellant receives the sum of two thousand two hundred and sixty-four dollars and eleven cents, with interest. Such is the operation of a decree for a specific performance. A case of greater hardship has rarely been brought before a court of equity. A hardship not in any wise the result of appellant's conduct, but produced by circumstances over which he had no control; attributable in a great degree to the default of the appellee, and the influences consequent of an unsuccessful revolution. The appellant himself had only purchased the property shortly before his sale; and it is reasonable to suppose he was wholly ignorant of the extent of these liens, or that he relied upon the purchase money he was to receive as the means by which they were to be removed.

These considerations, in my judgment, are conclusive against the interference of a court of equity in this case. It is to be borne in mind, that specific performance belongs rather to the extraordinary jurisdiction of the courts of chancery. It is not a matter of course; every such application is addressed to the sound discretion of the court. In all such cases the question presented is, is it better for the furtherance

of justice, considering all the circumstances, to give the party specific execution, or to leave him to his legal remedy for damages. *Turpin v. Jackson*, 5 Rand. 505. I shall not stop to multiply authorities upon this point. The principle is too familiar to require argument or illustration in its support. The subject receives an exhaustive discussion in the case of *Willard v. Tayloe*, 8 Wall. U. S. R. 564. Some of the views of Mr. Justice Field are so appropriate to this case, I cannot refrain from quoting them: "It is true (he says), the cases in which the discretion of the court is asserted, arose upon contracts in which there existed inequality or unfairness in the terms, by reason of which injustice would have followed a specific performance. But the same discretion is exercised where the contract is fair in its terms, if its enforcement from subsequent events, or even collateral circumstances, would work hardship or injustice to either of the parties. Numerous cases may be cited to the same effect. The clear result of the authorities is, that equity will not decree the specific execution of a contract made under a clear misapprehension or mistake of important and material facts, or of hard and unconscionable bargains, or where the applicant for relief has been in default, and by the force of subsequent events or a change of circumstances, the execution of the contract would entail great loss and hardships upon the adverse party. Tested by these principles, this case does not commend itself to the favorable consideration of a court of equity.

Although the appellee asserts his claim by answer, it is still an application for equitable aid, and is to be governed by the well settled rules appropriate to bills for specific performance. According to the

usual practice, when specific performance is denied, the court declines to interfere either way; but leaves the parties to their respective rights and obligation at law. In this case, however, if the bill were dismissed, the appellant having the legal title might at once institute his action of ejectment, and recover the property in controversy. The dismissal of the bill would, therefore, simply result in a renewal of the litigation in another forum, and an ultimate return to a court of chancery to settle the question of rents and profits, and of compensation for improvements. Upon familiar principles the court having possession of the case will terminate the controversy by adjudicating the rights of the parties, and administering such relief as may be appropriate to the equity forum. For these reasons, I am of opinion the decree of the Circuit court must be reversed, and the cause remanded for further proceedings; upon which a decree is to be rendered for a partition of the property if it can be conveniently made, and also for a full and final settlement of all matters of account between the parties.

The other judges concurred in the opinion of Staples, J.

The decree was as follows:

The court is of opinion for reasons stated in writing and filed with the record, that the appellee under and by virtue of the contract of the 19th November 1863, marked exhibit A, and filed with the bill, is entitled to one moiety of the real estate known as the Virginia Hotel property in said contract mentioned, as purchaser thereof from the appellant; but is not entitled to a specific execution of the contract for the purchase of the other moiety; that the appellant and appellee are tenants in common of said property; that the appellant is entitled to partition of the same, and to the stipulated rent for one year of his moiety of said property, and to one-half of the fair rental value of the same since the termination of said year, subject to a deduction for one-half of the value of all useful and permanent improvements put upon said property by the appellee; and that the appellee is bound to account with the appellant for the purchase money of the moiety of said property purchased by him as aforesaid, and to pay any balance due thereon; or if he has over-paid the same, the appellant is bound to account for the amount of such excess; and the appellant is bound to relieve said property of all incumbrances thereon at the time of said purchase; and that the decrees appealed from are erroneous. Therefore it is decreed and ordered that the same be reversed and annulled, and that the appellee pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here. And it is further decreed and ordered that this cause be remanded to the said Circuit court, that all proper accounts may be taken, and all further proceedings had therein which may be

necessary or proper in order to a full and just settlement of the whole matter, and a final decree in the cause according to the rights of the parties as hereinbefore adjudged and declared.

Decree reversed.

500 *Wells v. The Commonwealth.*

November Term, 1871, Richmond.

1. **Contempts—Appeal.**—An appeal may be taken to the court of Appeals from the judgment of a Circuit court imposing a fine upon a person for a contempt of the court, in aiding to obstruct the execution of a decree of the court.

2. **Same—How Offender May Purge Himself.**†—Where a rule is made upon a person to show cause why he shall not be punished for a contempt of the court, in aiding to obstruct the execution of a decree of the court, he purges himself of the contempt, by answering under oath, that in what he had done he acted as counsel in good faith, without any design, wish or expectation of committing any contempt of, or offering disrespect to, the court.

3. **Same—Attorney—Good Faith of.**—The duty of an attorney to his client cannot conflict with his obligation to demean himself honestly in the practice of the law, or to be faithful to his country. But if he acts in good faith, and demeans himself honestly, he is not responsible for an error in judgment.

In April 1867, James P. McCabe and others obtained against Thorpe H. Nance, in the Circuit court of Bedford county, decrees for moneys which he owed as guardian; and in July 1869, they filed their bill in said court, to enforce the lien of their decrees

*For monographic note on Contempts, see end of case.

†**Contempts—How Offender May Purge Himself.**—The rule laid down in the second head-note of the principal case, that where one acts in good faith not intending any disrespect to the court, he is not guilty of any contempt is approved and followed in *Postal Telegraph Cable Co. v. N. & W. R. Co.*, 88 Va. 981, 14 S. E. Rep. 808, citing the principal case. But the rule laid down in the principal case, that the affidavit of the accused clears him of the contempt and must be taken as true is disaffirmed in *State of W. Va. v. Harper's Ferry B. Co.*, 16 W. Va. 878, where the court said: "Can this court properly hear evidence in these cases, or must they be heard only on the answers of the defendants to the rules issued against them? In proceedings of this character the weight of the authorities is in favor of the admission of other evidence than the answers of the defendants to the rules; and in our judgment this is the proper rule. See *Crooks et al. v. The People*, 16 Ill. 537; *Case of J. V. N. Yates*, 4 Johns. 878; *Commonwealth v. Dandridge*, 2 Va. Cas. 408; *See vide Well's Case*, 21 Gratt. 500." See, to the same effect, *United States v. Anonymous*, 21 Fed. Rep. 768, where the principal case is cited and the court said: "A few cases may be found so holding (i. e., that the affidavit of the accused is conclusive) but they are aberrations from the general line of authority and have not been approved."

upon a tract of land in the possession of Nance. On the 2d of May 1870, a decree was made in the cause appointing commissioners to sell the land; and on the 20th of August they made the sale, when Nance became the purchaser, but failed to comply with the terms of sale; and on the 17th of September it was again sold; when James P. McCabe became the purchaser.

501 It appears that in May 1868, Thorpe H. Nance filed *his petition in bankruptcy; and that he surrendered his estate, subject to the liens upon it; and that this property, except a small quantity of personalty set apart for him, was sold by his assignees, subject to the liens, for the gross sum of forty-five dollars, and was purchased for Nance.

On the 27th of September 1870, Thorpe H. Nance filed his petition in the court of bankruptcy, in which, after stating his application for his discharge in bankruptcy, he says the liens upon his property have not been adjusted or settled under the decree of the District court in bankruptcy; but that the holders of these liens have, since the filing his petition, proceeded in the Circuit court of Bedford, to enforce the said decrees; and to that end has procured an order for the sale of a part of said property, to wit: the homestead of the petitioner, consisting of two hundred and seventy-six acres; and commissioners had sold the same at public auction on the 17th of September 1870; and that they intended to move at the October term of the said court for a confirmation of said sale. He insists that he was entitled to a further exemption out of said property, and also to have his homestead set off to him out of the property sold. He insists that the legal title to the land vested in his assignees, and the creditors only had liens upon it; and if sold for its value it would bring double the amount of the liens. And he prays that the commissioners and the creditors, naming them, may be by the order of the District court enjoined and restrained from any other or further proceeding to sell said property, and from seeking to enforce and confirm said sale; and that the said creditors be required to settle their claims against him in the court of bankruptcy. That his homestead may be assigned to him, and that the remainder of his said estate may be sold by his assignees, and the proceeds applied to the payment of his debts.

502 The order of injunction was granted: and the judge of *the Circuit court of Bedford, at its October term 1870, made a rule upon Nance to show cause why he should not be punished for his contempt of that court, in attempting to defeat the decree aforesaid for the sale of the land, by means of his application to the District court, and obtaining the said injunction, &c. And Nance having appeared and filed his answer to the rule, the court held that the answer was not satisfactory, and adjudged and ordered that Nance be fined fifty dollars for the use of the Commonwealth, and be attached and imprisoned in the jail

of the county of Bedford for ten days, and until he should pay said fine and the costs of the rule, and dismiss his petition and injunction in the District court.

And it appearing that Henry H. Wells of the city of Richmond, counseled and aided Nance in procuring said injunction from the District court, and in said attempt to resist the lawful decree of this court, as aforesaid, it was ordered that Henry H. Wells be summoned to appear before the court on the third day of the next term, to show cause, if any he can, why he should not be fined and attached for his said contempt.

Wells appeared and filed his answer to the rule. He says he was counsel practising in the courts of the United States; and that he was employed by Nance, then a petitioner in bankruptcy in the District court of the United States for the district of Virginia, to appear for him in that court. That from the facts stated to him by Nance, he believed the said District court had jurisdiction to grant an exemption to said Nance, and to settle all liens and priority of liens, upon the estate of the bankrupt, and generally to compel all holders of liens and claimants to appear and have their rights adjudicated in said court under the law of Congress known as the bankrupt act; and the respondent did so advise said Nance, and did as such counsel, for the purposes therein stated, prepare and deliver to said Nance a petition to be by him sworn to and presented to the judge of the said District court: *and he sets out the petition at length. All of which he avers was done for, and as the counsel of Nance, and in the discharge of his professional duty, and in good faith, without any design, wish or expectation of committing any contempt, or of offering any disrespect, to the Circuit court of Bedford county; but solely that the said Nance might avail himself of what this respondent believed to be his legal rights, by the use of the usual and ordinary methods of legal procedure in a court of competent jurisdiction.

On the 9th of May 1871, the case came on to be heard upon the rule, when the court held that Wells had been guilty of a contempt of the lawful authority and jurisdiction of the Circuit court of Bedford, and for his contempt he was fined the sum of fifty dollars for the use of the Commonwealth. And from this order Wells applied to a judge of this court for a writ of error, which was allowed.

Wm. Green, for the appellant.

The Attorney General, for the Commonwealth.

ANDERSON, J., delivered the opinion of the court.

The first question which meets us in this case, is as to the jurisdiction of this court to review the judgment or sentence of the Circuit court complained of. The power to fine and imprison for contempt is incident

to every court of record. 'The courts ex necessitate rei, have the power of protecting the administration of justice, with a promptitude calculated to meet the exigency of the particular case. Clement's case, 11 Price R. 68. Even peers, and persons having privilege of Parliament, enjoy no exemption in this respect. 1 Burr. R. 631, Rex v. Earl Ferrers. And where it is not otherwise provided by statute, "the sole adjudication of contempt, and the punishment thereof, belongs exclusively, and without interference, to each respective *court." is the language of Mr. Justice Blackstone, approved by Judge Story in ex parte Kearney, 7 Wheat. R. 38, 44. A commitment for contempt is a commitment in execution, and the judgment of conviction, unless the power to supervise is given by statute, is not subject to review in any other court; not even upon a writ of habeas corpus. Hurd on Habeas Corpus, p. 412, citing numerous cases.

The fourth section of the act of Assembly, approved January 14th, 1871, Sess. Acts of 1870-1, p. 31, chap. 34, which is copied from the Code, omitting the words "against a free person," and adapting it to the present organization of the courts, Code, chap. 209, sec. 4, p. 840, gives the writ of error in cases for contempt, with certain exceptions. It is in these words: "To a judgment for a contempt of court, other than for the non-performance of or disobedience to a judgment, decree or order, a writ of error shall lie, when the judgment is of a County court, from the Circuit court having jurisdiction over such county; when it is of a Circuit, or a Corporation, or a Hustings court, from the court of Appeals." Is the judgment for contempt in this case "for the non-performance of, or disobedience to, a judgment, decree or order," in the sense in which those terms are used in this section? To all other judgments for contempt a writ of error will lie.

Chapter 194, section 24, of the Code of 1860, p. 801, describes the cases in which contempts may be punished summarily. If this case is so punishable, it must fall within the fourth class of cases therein described; to wit: "disobedience or resistance of an officer of the court, juror, witness or other person, to any lawful process, judgment, decree or order of the said court." This language is much more comprehensive than the language in the act before recited. The language there, it seems to me, embraces only such judgments for contempt as are designed to enforce performance. or obedience, and not *to punish for an offence; such process as courts of equity employ to enforce their decrees, &c. It embraces only such cases as were excluded from the operation of the writ of error, by the 9th section of chap. 24 of the Acts of Assembly of 1847-8, by the words "any proceeding by attachment to compel the performance of any decree or judgment, or to enforce obedience thereto." Acts of Assembly of 1847-8, p. 160. To all other judg-

ments for contempt a writ of error will lie. And the judgment for contempt complained of in this case, not being to compel the performance of, or obedience to a decree, &c., but to punish for an offence, the writ of error will lie.

This case is then properly before us. And what is it? It is a judgment of the Circuit court of Bedford county, for a fine of fifty dollars, against the plaintiff here, for a contempt in counselling, advising, aiding and abetting one Thorpe H. Nance, a party to a suit depending in said Circuit court, (whose jurisdiction he had not objected to, but virtually acknowledged), in his attempts afterwards to prevent the execution of its lawful decrees and orders, and to defraud the said court of its lawful jurisdiction of the subject of said suit; thereby obstructing the administration of justice, and contriving to destroy the authority of one of the superior courts of this Commonwealth, and to bring it into contempt: all of which he sought to accomplish by invoking the interference of the District court of the United States, by its high prerogative writ of injunction to inhibit and injoin the officers and commissioners of the said Circuit court, and the parties to said suit, their agents and attorneys, and all other persons, from obeying, executing and performing the said lawful decrees of said court pronounced in the exercise of its lawful jurisdiction; the said District court, sitting as a court in bankruptcy, having no jurisdiction to supervise the judgments, orders or decrees of the said Circuit court, or to
506 sit in judgment thereon, *to revise or affirm; and, in fact, having at that time no jurisdiction of the subject matter of the suit, or over the parties plaintiff therein.

This is substantially the ground upon which the honorable judge of the Circuit court instituted his proceedings against the said Nance, and the plaintiff here; and upon this ground, if sustained by the record, all must admit, it was an aggravated case of contempt, and justly obnoxious to the prompt and vigorous exercise of all the powers with which the judge of the said Circuit court was invested, to protect the authority of his court, to maintain its jurisdiction, and to enforce its decrees; and to visit with just punishment, the perpetrators of such an offence, against public justice. I say such must be the conclusion if the premises be admitted.

But they are not admitted by the plaintiff in error. He alleges that as a licensed attorney he was employed by the said Nance, to act as his counsel in a cause which he had pending in the said District court, in bankruptcy; and from the facts stated to him by the said Nance, he believed that the said District court had rightfully jurisdiction of the said subject, and could lawfully give the relief to his said client which he desired; and that with this belief, which he honestly entertained, he did advise his client, to apply to the judge of the said District court for the injunction aforesaid,

which was granted by the said judge, upon the petition which he prepared (which is copied into his answer,) for the said Nance, and which was sworn to by the said Nance; all of which, he says, was done by him as counsel for said Nance, and in the discharge of his professional duty, and in good faith, without any design, wish or expectation of committing any contempt, or of offering any disrespect, to the said Circuit court of Bedford county; but solely that the said Nance might avail himself of what this respondent believed to be his legal rights, by the use of the usual and ordinary
507 *methods of legal procedure, in a court of competent jurisdiction. This is sworn to.

It will be observed that the plaintiff in error, in his answer to the rule, takes issue upon the allegation of jurisdiction. That is a question of great delicacy and importance; and as from the view we have taken of this case, its decision is not necessarily involved, we should deem it a work of supererogation to decide it in this case; and, therefore, would not be understood as indicating any opinion thereon. If another ground of his defence is tenable, it is not material whether his belief, that the said District court had jurisdiction of the case, is right or wrong, true or false.

It is the duty of an attorney to be true to his client. Every attorney, before he is authorized to practice in any of the courts of this Commonwealth, must take an oath that he will honestly demean himself in the practice of the law, and to the best of his ability execute his office of attorney at law; and when he is licensed in this State, the oath of fidelity to the Commonwealth. It would hardly be contended, that, in executing the office of attorney at law, he could be required to violate the first branch of his oath of qualification, to demean himself honestly. It will not be contended that he could be required to do an immoral act, or an illegal act, or any wrong, in order to subserve the interests of his clients. When Lord Brougham says, in his masterly and eloquent defence of Queen Caroline, "separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion," he speaks the language rather of the impassioned orator, than the cautious and well considered language of a judge. The duty of an attorney to his client cannot conflict with his obligation to demean himself honestly in the practice of law, or to be faithful to his country. If it did, he could
508 not practice law in Virginia, because he *could not take the oaths, if licensed here, required of him. And I will be allowed to say in passing, I do not know why the Legislature inserted that proviso, "if licensed here," in the oath required, of fidelity to the Commonwealth. It seems to me that any lawyer, who resides in Virginia, whether licensed here or not, should be required to take the oath of fidelity to the Commonwealth. But it is un-

questionably the duty of an attorney to endeavor, to the best of his ability, by his advice and counsel, and by his conduct, to secure to his client every legal right and remedy to which he may think him even probably entitled; and if he fails to do it he is faithless to his trust, and should be held morally and legally responsible. And if he acts in good faith, if he demeans himself honestly, he is not responsible for an error in judgment. But it is of the utmost importance to the proper administration of justice, that he should be free and unbarrassed in the discharge of his professional duty. But when a man becomes an attorney at law, he does not cease to be a citizen; and when he assumes the relation of attorney to a client, he is not absolved from his obligations as a man and a citizen. And it is the high moral principle and conservative sentiment which have ever actuated that honorable and useful profession in Virginia, that has enabled it to perform so important a part, and deservedly, in moulding and giving tone to public sentiment, and in advancing the great interests of society. We hold that, as it is the duty of the client, so is it the duty of the attorney, and in a higher sense considering his relation to the courts, and in general his greater intelligence and capacity to appreciate its importance, to respect the authority and to maintain the lawful jurisdiction of the courts of justice. "For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory."

509 *An attorney, then, who would corruptly conspire with his client to obstruct the due administration of the law, and to bring the authority of a court of justice into contempt, by resisting and obstructing the execution of its lawful decrees, by whatever contrivance, even though it should be by procuring the interference of another court, which had no appellate or supervisory power, or jurisdiction of the subject matter of the suit, in abuse of its powers, to injoin and inhibit the officers of said court and other persons from the execution or performance of said decrees, he is at least as guilty of an offence against public justice, and of a contempt of court, as his client, and as justly liable to summary punishment.

But where, as I have said, the attorney has acted in good faith, although he may have erred in judgment, he is not liable. To vindicate his conduct, it is not necessary to be shown that he was right in his opinions. But it is necessary to be shown that he was acting in good faith, for what he believed to be the interest of his client, and not from disrespect to the court, or from a design to oust it of its lawful jurisdiction. And this, we think, is shown, by the affidavit of the plaintiff in error, in answer to the rule.

We think his affidavit clears him of the contempt: and that must be taken as true. "If the party can clear himself upon oath, he is discharged; but if perjured, may be

prosecuted for the perjury." 4 Black. Com. 287. Again on page 288, the great commentator says, "In the courts of law, the admission of the party to purge himself by oath, is more favorable to his liberty, though perhaps not less dangerous to his conscience; for if he clears himself by his answers the complaint is totally dismissed." And this exposition of the law on this subject is adopted by Stephens in his learned and valuable commentary; and we find 510 no authority to the contrary. *We are of opinion, therefore, that the judgment of the Circuit court of Bedford, imposing a fine of \$50 upon the said Henry H. Wells, must be reversed.

Judgment reversed.

CONTEMPTS.

- I. Nature of the Proceeding.
 - A. Criminal.
 - B. Summary—Inherent Power of Court.
 - C. Special.
- II. What Constitutes.
 - A. In General.
 - B. Violation of an Injunction.
 - C. Disobedience of an Order or Decree.
 - D. Alleged Misconduct of Attorneys.
 - E. Miscellaneous Instances.
 - F. Want of Guilty Intent.
- III. Procedure.
 - A. Entitling the Proceeding.
 - B. Affidavit.
 - C. Attachment.
 - D. Evidence.
 - E. Trial by Jury—W. Va. Statute.
 - F. Judgment.
 - G. Bill of Exceptions.
 - H. Appeal.
- IV. Adjudication.
 - A. Fines.
 - B. Imprisonment.
 - C. Contemnor's Disabilities.
 - D. Costs.

I. NATURE OF THE PROCEEDING.

A. CRIMINAL.—While contempt of court is divided into various kinds, as, for example, direct and constructive, civil and criminal, still, in every species of contempt, whatever may be the object of the redress sought in any individual case, there is necessarily inherent an element of offence against the majesty of the law, savoring more or less of criminality. And hence the almost universal doctrine is that the process by which the party charged is reached and tried, is criminal or *quasi-criminal*. Com. v. Feely, 2 Va. Cas. 1; State v. Harper's Ferry Bridge Co., 16 W. Va. 864; Craig v. McCulloch, 20 W. Va. 148; Ruhl v. Ruhl, 24 W. Va. 279; State v. Irwin, 30 W. Va. 404, 4 S. E. Rep. 418; Alderson v. Commissioners, 32 W. Va. 640, 9 S. E. Rep. 868; State v. Harness, 42 W. Va. 414, 26 S. E. Rep. 270; Barton's Law Practice (2d Ed.) 777; State v. Cunningham, 23 W. Va. 607, 11 S. E. Rep. 76; State v. Ralphsnyder, 34 W. Va. 352, 12 S. E. Rep. 721; McMillan v. Hickman, 35 W. Va. 705, 14 S. E. Rep. 227; Baltimore, etc., R. Co. v. Wheeling, 13 Gratt. 40.

Rules of Evidence—Criminal.—In a proceeding to punish for contempt, the same rules of evidence are applicable as in other criminal cases; mere prepon-

gerance not being sufficient for conviction of accused; but, as in other criminal cases, proof of the offense charged must be beyond a reasonable doubt. *State v. Cunningham*, 33 W. Va. 607, 11 S. E. Rep. 76; *State v. Ralphsnyder*, 34 W. Va. 352, 12 S. E. Rep. 721.

B. SUMMARY—INHERENT POWER OF COURT.

—The power of courts of record to punish summarily for contempts, is generally conceded to be inherent, and applies as well to constructive as to direct contempts. *Dandridge's Case*, 2 Va. Cas. 408; *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. Rep. 407; *Carter v. Com.*, 96 Va. 816, 32 S. E. Rep. 780; *State v. Frew*, 24 W. Va. 416; *State v. Hansford*, 43 W. Va. 773, 28 S. E. Rep. 792; *Elam v. Com.*, 4 Va. Law Reg. 520; *State v. Irwin*, 30 W. Va. 404, 4 S. E. Rep. 413.

Legislative Control.—Where the power to punish summarily for contempts is made inherent by the constitution which created the court, the legislature, while it may regulate, has not the power to destroy it. *State v. Frew*, 24 W. Va. 416; *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. Rep. 407; *Carter v. Com.*, 96 Va. 791, 32 S. E. Rep. 780.

But where the legislature is given power to create a court or to prescribe the jurisdiction of a court created by the constitution, in either case it has the power to confer, and take away jurisdiction at its pleasure. *State v. Frew*, 24 W. Va. 416.

Virginia Statute Unconstitutional.—In *Carter v. Com.*, 96 Va. 816, 32 S. E. Rep. 780, the court declared the Act of 1897, securing the defendant a jury trial in cases of direct contempt, unconstitutional, holding that, "in the courts created by the constitution, there is an inherent power of self-defense and self-preservation; that this power may be regulated but cannot be destroyed, or so far diminished, as to be rendered ineffectual by legislative enactment; that it is a power necessarily resident in and to be exercised by the court itself, and that the vice of an act which seeks to deprive the court of this inherent power, is not cured by providing for its exercise by a jury; that while the legislature has the power to regulate the jurisdiction of the circuit, county and corporation courts, it cannot destroy, while it may confine within reasonable bounds, the authority necessary to the exercise of the jurisdiction conferred." See discussion of the above statute in 4 Va. Law Reg. 49, 281, 345, 392.

And in *Elam v. Com.*, decided by the circuit court of Norfolk county and reported in 4 Va. Law Reg. 522, the Virginia statute (Acts 1895-6, p. 924) giving justices exclusive original jurisdiction in misdemeanor cases, was declared constitutional as it was not intended to interfere with the jurisdiction of courts of record to punish for contempts.

West Virginia Statute.—By W. Va. Code 1887, ch. 147, § 27, only those contempts enumerated therein are punished summarily and in the usual way; but all other contempts are punished by indictment, being misdemeanors by that statute. *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. Rep. 407; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. Rep. 76; *State v. Ralphsnyder*, 34 W. Va. 352, 12 S. E. Rep. 721.

In *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 364, GREEN, P., said: "It is very questionable whether the courts have not a right to punish summarily for some other sorts of contempt than those specified in this act (sec. 27, ch. 147), though it does say that summary punishment shall only be inflicted in the cases specified."

But this statute (sec. 27, ch. 147) was declared constitutional and binding upon circuit and other

inferior courts in *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. Rep. 407. See also, *State v. Hansford*, 43 W. Va. 773, 28 S. E. Rep. 792.

It was also decided in *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. Rep. 407, that an attorney who wrote and caused to be published in a newspaper a libelous charge against the judge of the circuit court could not be punished by such court by summary proceedings, under section 27, ch. 147 of W. Va. Code regulating the punishment for class of contempts therein mentioned.

C. SPECIAL.—The proceeding is also generally treated as a special one, distinct and separate from the suit out of which it has arisen. *Baltimore, etc. R. Co. v. Wheeling*, 13 Gratt. 40; *Alderson v. Commissioners*, 32 W. Va. 640, 9 S. E. Rep. 868.

II. WHAT CONSTITUTES.

A. IN GENERAL.—"Contempt of court is a disobedience to the court, or an opposing or despising the authority, justice or dignity thereof. It commonly consists in a party doing otherwise than he is enjoined to do, or not doing what is commanded or required by the process, order or decree of the court. Sometimes it arises by one or more opposing or disturbing the execution or service of the process of the court, or using force to the person that serves it. Sometimes it consists in using words imputing scorn, reproach or diminution of the authority of the court, its process, orders, officers or ministers upon executing or serving such process or orders.

"So, also, contempt may be predicated of the behavior of different persons and officials. Judges of lower courts may be in contempt by disobeying the writs of superior tribunals; officers of a court by abusing the process of the law, or by being guilty of oppression, extortion, collusive behavior, and neglect while acting under color of their offices; attorneys-at-law by practicing fraud, corruption or other dishonesty; jurymen by refusing to attend the court, neglecting their duties, or acting fraudulently, falsely or collusively in making up and rendering their verdicts; witnesses by failing to attend, or refusing to answer when directed so to do; parties by misbehavior, interference with the rights of others, tampering with jurors and officers of the court—offering bribes and the like; and any party by rudeness, insolence, bad temper or disobedience of the lawful orders of the court or judges

"The publication of an article by any person, even in a newspaper, at a place remote from that where the court is being held, concerning a case pending in court, and which has a tendency either to prejudice the public, to corrupt the administration of justice, to influence the court by a threat of 'popular clamor,' or to reflect on the tribunal, the parties, the jurors, the witnesses or the counsel, is held to be a contempt of court and punishable as such by a process of attachment. But where an article, offensive to the judge, but not coming within any of the classes named in the statute, was published in a newspaper, it was held that the court had not a right to punish it as an act of contempt." *Barton's Law Pr.* (2d Ed.) 774-5-6.

B. VIOLATION OF AN INJUNCTION.—The violation of an injunction may be punished as a contempt. *State v. The Harper's Ferry Bridge Co.*, 19 W. Va. 864; *State v. Harness*, 42 W. Va. 414, 26 S. E. Rep. 270. See also, *Barton's Ch. Pr.* (2d Ed.) 493.

The surety on the bond given by the husband of

the life tenant of a slave with condition to obey the order of the court enjoining him from removing the slave beyond the bounds of the commonwealth, is guilty of contempt for the removal and sale of such slave beyond the limits of the commonwealth. It is competent for the court to give redress by decreeing in favor of the plaintiff—the reversioner of the slaves—against both the obligors of the bond the value of the reversion in such slave. *Johns v. Davis*, 2 Rob. 729.

But an order from the chancellor granting an injunction to a judgment at common law upon the usual terms, is not sufficient to stay the proceedings until the complainant has complied with the terms of the order by giving bond and security. In such case, it is no contempt of the court of chancery for the plaintiff or the sheriff to proceed to sell under the execution, notwithstanding the chancellor's order was shown them. *Clarke v. Hoomes*, 2 H. & M. 28.

A trustee by direction of the creditor advertised lands conveyed by deed of trust to be sold on a certain day to pay debts. The debtor obtained an order of injunction against the said trustee and creditor enjoining the said defendant from selling the land under said deed of trust. The trustee by direction of the creditor after the injunction had been granted added to the advertisement of the sale therefor posted, the words, "The above sale postponed to the 5th day of July 1881," thereby offering said land for sale in spite of said injunction. *Held*, not a contempt of court. *Craig v. McCulloch*, 20 W. Va. 152.

An injunction was granted to restrain certain defendants from executing or delivering any deed of conveyance of the whole or any part of certain lands or from incumbering the same in any way whatsoever, or from granting to any party the right to cut or transport from said lands any timber, or from cutting or transporting timber therefrom, during the pendency of a certain suit. But this injunction was not to take effect or be in force until the plaintiff, or some one for him gave a bond, with securities to be approved by the clerk of the court in the sum of \$250, conditioned to pay all such costs as may be awarded the defendants should this injunction be dissolved. Before the giving of the required bond the defendants did certain acts violating the order of injunction and it was held that they were guilty of contempt. *Held*, that the injunction did not take effect until after the act was done, and that there was no breach of the injunction; consequently no contempt of the injunction order was committed. *State v. Irwin*, 30 W. Va. 404, 4 S. E. Rep. 413.

Violation of Injunction after Supersedeas Has Been Issued.—If after a supersedeas has been issued by an appellate court to an order of a circuit judge in vacation dissolving an injunction and service of the same, the party enjoined violates the injunction, such party is in contempt of the appellate court and may be punished by it for disobeying its process. In such a case the order of the lower court dissolves and ends the injunction and it is only given new life by the supersedeas issuing out of the appellate court. *State v. The Harper's Ferry Bridge Co.*, 16 W. Va. 864; *State v. Harness*, 42 W. Va. 414, 26 S. E. Rep. 270.

And where the circuit court overrules a motion to dissolve an injunction, and thus leaves the injunction in full force, in such case the act violates the process of that court and constitutes a contempt

thereof. *State v. Harness*, 42 W. Va. 414, 26 S. E. Rep. 270.

A supersedeas is only intended to stay further proceedings, to leave matters in the condition it finds them until the appellate court can hear the case, and pass on the question involved in the appeal; and therefore a receiver appointed by the court, in whose hands has been placed certain property is not guilty of contempt in dealing with the property pending an appeal and supersedeas on the order appointing him receiver. *Bristow v. Catlin* (Va.), 20 S. E. Rep. 946.

C. DISOBEDIENCE OF AN ORDER OR DECREE.—An attachment for contempt in disobedience of a decree of the chancery court, will only lie for disobedience of what is decreed, and not for what may be decreed. *Taliaferro v. Horde*, 1 Rand. 242.

And where one of two joint tenants appropriated to himself more than his share of the proceeds of a decree rendered in favor of them all, he was held not guilty of contempt for obstructing the decree of the court. *Jones v. Jones*, 1 H. & M. 2.

It is not a contempt to disobey an order or decree which the court has no jurisdiction or authority to make. *Ruhl v. Ruhl*, 24 W. Va. 282. Nor to disobey an order of a court which has no jurisdiction of the subject-matter. *Hebb v. County Court* (W. Va.), 27 S. E. Rep. 677. Nor is it a contempt to disregard a supersedeas improvidently issued and which was afterwards annulled and vacated for want of jurisdiction. *State v. Blair*, 29 W. Va. 704, 20 S. E. Rep. 658.

But where a court has jurisdiction to grant an appeal and supersedeas to an order dissolving an injunction, the supersedeas issued by the order of such court is a lawful process and disobedience of it will be punished though it is improvidently issued. In such a case a motion should be made to quash it, but it cannot be disobeyed with impunity while it remains in force. *State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864.

A road which has merely been ordered to be opened, but has never been actually opened, is not a road such as ch. 26, § 1, of the Criminal Revision Acts of 1877-8 prescribes a penalty for obstructing. Merely resisting the carrying out of the court's order to open such a road is not an offense under that section but a contempt of the court. *Bailey v. Com.*, 78 Va. 21.

It is an error to decree an attachment for contempt against certain persons for refusing to obey a decree, which is general and uncertain and the extent of which so far as it concerns them, they have no adequate means to ascertain. *Birchett v. Bolling*, 5 Munf. 442.

A defendant's being in contempt to the first process of the court is not in contempt to the decree, and forms no objection to his pleading to a *scire facies* brought to revive that decree. *Lane v. Ellzey*, 4 H. & M. 504.

A court of one country or state may enjoin an individual within its jurisdiction, from prosecuting his suit in a foreign state; and this injunction may be enforced by process of contempt. *Barton's Ch. Pr.* (2d Ed.) 51.

Advice of Counsel—Sometimes Palliates Disobedience of Order.—The advice of counsel may, under some circumstances, be a palliation of the offence of his client in disobeying the lawful orders of the court, but the extent of such palliation must depend upon the circumstances of the case and the character of the advice given. Such advice will not condone a

wilful disregard of the order of the court; but when a person acts upon hasty and inconsiderate advice or has failed to give counsel correct information as to the facts of the case the offence will be palliated to the extent only of making it a reckless disobedience of the process of the court instead of a wilful contempt. *State v. The Harper's Ferry Bridge Co.*, 16 W. Va. 864.

Interference with Control of Receiver.—"An order appointing a receiver is in the nature of an injunction or writ of sequestration, preventing any alienation or disposition of the property except with the consent and concurrence of the court. Any interference with the control and possession of the receiver, whether forcibly or by legal proceedings, without the permission of the court, is regarded as a contempt of its jurisdiction and will be punished accordingly." *STAPLES, J.*, in *Thornton v. Washington Savings Bank*, 76 Va. 482.

Obstruction of Decree by Attorney.—"An attorney, then, who would corruptly conspire with his client to obstruct the due administration of the law, and to bring the authority of a court of justice into contempt, by resisting and obstructing the execution of its lawful decrees, by whatever contrivance, even though it should be by procuring the interference of another court, which had no appellate or supervisory power, or jurisdiction of the subject-matter of the suit, in abuse of its powers, to enjoin and inhibit the officers of said court and other persons from the execution or performance of said decrees, he is at least as guilty of an offence against public justice, and of a contempt of court, as his client, and as justly liable to summary punishment." *ANDERSON, J.*, in *Wells v. Com.*, 31 Gratt. 500.

Disobedience of Mandamus.—Where a mandamus issues to county commissioners to compel them to settle and sign a bill of exceptions, one of them is not guilty of disobedience of the order in that he took the exceptions to his chambers to settle the same, instead of meeting with his colleagues *in banc* for that purpose. *State v. Cunningham*, 33 W. Va. 607, 11 S. E. Rep. 76.

Where a writ of mandamus issues to county commissioners to compel them to settle and sign a bill of exceptions "promptly and with all convenient dispatch," a delay of thirty days in doing so is not so unreasonable as to render them liable as for contempt. *State v. Cunningham*, 33 W. Va. 607, 11 S. E. Rep. 76.

A circuit court has power to award a writ of mandamus to compel a member of an electoral board to perform the duties imposed upon him by law and for failure to obey such mandamus he may be punished for contempt. *Cromwell v. Com.*, 95 Va. 264, 28 S. E. Rep. 1023.

Refusal to Appear before Commissioner or Notary.—A person who is summoned to appear before a notary and give evidence in a certain cause is guilty of contempt if he refuses to obey such summons, and may be punished therefor. *Tavener v. Morehead*, 41 W. Va. 116, 23 S. E. Rep. 675.

If a party be ordered to appear before a commissioner and disobey such order he may subject himself to process of contempt. *Barton's Ch. Pr.* (2d Ed.) 689; *Lane v. Lane*, 4 H. & M. 437.

When a fiduciary shall fail to lay before a proper commissioner a statement of his receipts for any year, upon request by any person who is interested, made to such commissioner within ten years from commencement of such year, a summons shall issue requiring the fiduciary to settle his accounts before

such commissioner. If the fiduciary fail to make a settlement as ordered, within one month upon being requested to do so, the commissioner shall report the matter to the court which appointed him; and said court shall take such measures to compel the performance as could be taken for the violation of an express order of court. *Barton's Ch. Pr.* (2d Ed.) 710.

Disobedience of Order for Jury Service.—A person, who is exempt from jury service by a statute, the terms of which have been complied with, is not guilty of contempt by not attending court and getting himself excused. A person exempt from jury service by law, is in like manner exempt from being summoned to serve on a jury. *Miller v. Com.*, 80 Va. 33.

Where a circuit superior court ordered a subpoena for witnesses to attend the grand jury then in session, and they intentionally concealed themselves from the sheriff to prevent a process from being served, until the grand jury had been discharged, it was held upon the construction of the statute of 1830-31, ch. 11, § 25, that this did not constitute a contempt punishable by the court in a summary manner. *Com. v. Deskins*, 4 Leigh 685.

Refusal to Testify before Grand Jury.—A person refusing to testify before a grand jury in a prosecution for unlawful gaming is guilty of contempt. He is not justified in refusing to testify on the ground that his answer will tend to criminate and disgrace him, since Acts 1877-78, ch. 10, §§ 20, 22, p. 51, New Criminal Procedure, secures to him absolute indemnity and complete amnesty against any possible penalty or procedure against him for any criminality or implication in the offense indicated by the pending prosecution in which he is called to testify. *Kendrick v. Com.*, 78 Va. 490.

Refusal to Answer Bill.—A person in whose hands the debt due or effects of the non-resident are attached, should be made a party to the suit; and may be punished for contempt if he refuse to answer the bill. *Barton's Ch. Pr.* (2d Ed.) 621.

Disregard of Appellate Order.—Commissioners proceeding to execute a decree after an appeal to the court of appeals has been taken, and the process has been served upon them, are guilty of a contempt of the appellate court; and their acts are null and void, as to the rights of the parties to the appeal. *M'Laughlin v. Janney*, 6 Gratt. 609.

But it was decided in the case of *Cheshire v. Atkinson*, 1 H. & M. 310, that a sheriff who carried into effect a decree of a superior court of chancery after an appeal had been granted in vacation by the judge of that court, although the sheriff had notice of the appeal, was not in contempt of the appellate court, if such proceedings took place before the record had been brought up.

D. ALLEGED MISCONDUCT OF ATTORNEYS.—Where an attorney fails to attend court at the time of a trial previously fixed with his consent, because he had already entered upon the trial of another cause with every reasonable expectation of completing it before the time fixed for the hearing of the first cause, and finding this impossible, and being unable to obtain a continuance for the second cause, notifies the court of these facts, such an one is not guilty of a contempt of court. *Wise v. Com.*, 97 Va. 779, 24 S. E. Rep. 453.

The mere drafting by an attorney of a petition in respectful language, simply expressing the opinion of its signers that great injustice had been done a certain party in the verdict of the jury, and asking

a new trial, is not a contempt. *State v. Hansford*, 48 W. Va. 773, 28 S. E. Rep. 792; *State v. Parsons* (W. Va.), 87 S. E. Rep. 548.

An attorney was found guilty of contempt on the ground that he had asked for a separate trial of one of two defendants, and, on the following day, denied having done so; that he had asked a postponement of the case on the ground that he had just been called into it, but, on the trial, had introduced a copy of the evidence taken at preliminary examination, which he claimed to have written at the time himself. *Held*, that the judgment must be set aside, where the evidence as to the first alleged ground was conflicting, and, as to the second, it appeared that he was the attorney to the preliminary hearing, for a co-defendant only. *State v. Ralph Snyder*, 34 W. Va. 352, 12 S. E. Rep. 721.

E. MISCELLANEOUS INSTANCES.—Where the editor of a newspaper charged in an editorial (among other things) that aid and comfort (under color of law) were being openly and outrageously extended to an alleged criminal, his gang and allied bullies; that the authorities of the county, including the county court, were actively, zealously, and unblushingly acting together to deliver such alleged criminal from the just grasp of the city authorities; and that all this was being done, not that the criminal might be punished, but that he might be shielded and delivered and kept at large as a terror to all law-abiding people, and to all who would put down lawless disorder, such an editor was held guilty of a contempt of court. So held by the circuit court of Norfolk county in the case of *Elam v. Com.*, decided May, 1898, and reported in 4 Va. Law Reg. 520.

Charging Members of Court with Aiding Political Party.—An editorial in a newspaper, charged, in reference to a certain case then pending before the supreme court of appeals that three of the judges of that court had promised the Democratic Caucus which passed the order out of which the suit then pending arose, more than a year before, that such order would be held constitutional; and that a decision would be rendered thereon before the meeting of the Democratic State Convention in order to simplify the situation, was held a contempt of court which it might summarily punish. *State v. Frew*, 24 W. Va. 416.

Offering insult to Judge.—A person, being interested in the result of a suit pending in court, met the judge of the court on the steps, as he was proceeding to take his seat on the bench, and accused him of corruptness and cowardice in the cause then pending. Such a person is guilty of contempt, for which he may be fined or imprisoned or both, although the court was then not actually in session. *Com. v. Dandridge*, 2 Va. Cas. 408.

Preventing Witness from Attending Court.—In *Commonwealth v. Feely*, 2 Va. Cas. 1, it was held that using means to prevent and preventing a witness from attending court, who had been duly summoned was a contempt of court, and might be punished by information.

Misbehavior during Recess of Court.—The making of an affray and riot, accompanied with great noise and turbulence at the tavern (near the courthouse), where the judge of the court was, and of which the rioters were advised, during the night of a term (but the court being then in recess), is not a contempt of court. *Com. v. Stuart*, 2 Va. Cas. 320.

Suing in False Names.—Suing in feigned names or in the names of others without their privity and consent, is an abuse of the process of the court, and

the parties so doing should be punished for contempt. *Howard v. Rawson*, 2 Leigh 733.

Filing Protest against Action of Court.—John Stokeley, a justice of a county court entered two protests against a certain action of that court. In the first, he protested against the appropriation about to be made for the completion of the jail and clerk's office, on the ground that said buildings were not completed either as to time or workmanship according to the contract expressly set forth in the bond of the undertaker, and therefore no more money should be assessed against the people until the work was completed. In his second, he protested that the court according to the opinion of the subscribers had transcended the authority given them by the law, if not by rescinding the order which had been made at last December court, and by nullifying a contract which had been made by certain citizens for the erection of a courthouse, certainly by hurrying on the order for erecting said courthouse and in infringing the interest of the people by amercing the county into a debt of upwards of eight hundred dollars more than the first contract. The lower court considered the protest as a contempt and fined him accordingly. *Held*, that such action was not a contempt. *Stokeley v. Com.*, 1 Va. Cas. 330.

F. WANT OF GUILTY INTENT.

Disclaimer of Intent Not Always a Good Defence.—It was said by KEITH, P., in *Carter v. Com.*, 96 Va. 302, 32 S. E. Rep. 780, "It is true that with respect to conduct or language where the intent with which a thing is said or done gives color and character to the act or words, a disclaimer of any purpose to be guilty of a contempt or to destroy or impair the authority due to the court, is a good defence, but this is true only of language or acts of doubtful import, and which may reasonably bear two constructions. In the case before us there could have been but one motive, and that to influence the action of the court with respect to a case before it by means of a statement known and admitted to be false."

Acting as Counsel in Good Faith.—Where a rule is made upon a person to show cause why he shall not be punished for a contempt of the court, in aiding to obstruct the execution of a decree of the court, he purges himself of the contempt by answering under oath, that in what he has done he acted as counsel in good faith, without any design, wish or expectation of committing any contempt of, or offering disrespect to, the court. *Wells v. Com.*, 21 Gratt. 500; *Postal Tel., etc., Co. v. N. & W. R. Co.*, 88 Va. 931, 14 S. E. Rep. 691; *Hutton v. Lockridge*, 21 W. Va. 261; *Wise v. Com.*, 97 Va. 779, 34 S. E. Rep. 453; *Trimble v. Com.*, 5 Va. Law Reg. 94.

Error in Judgment.—And where an attorney has acted in good faith, although he may err in judgment he is not guilty of contempt. To excuse his conduct it is not necessary to be shown that he is right in his opinions; but it is necessary to be shown that he has acted in good faith and in such a way as he believed would further his clients' interest, and not from any disrespect of the court, or from a design to oust it of its lawful jurisdiction. *Wells v. Com.*, 21 Gratt. 500; *Postal Tel., etc., Co. v. N. & W. R. Co.*, 88 Va. 930, 14 S. E. Rep. 691.

Disclaimer by Employer of Acts of Employees.—Where employees of defendant drove across railroad tracks, after an injunction had been granted restraining defendant from trespassing on said railroad, and removed some poles which had been dropped upon and near the edge of the roadbed of the railroad, and did some other trivial acts; which

acts the company disclaimed, it was held, as there was no intention to disregard the injunction, the defendant was not guilty of contempt. *Postal Tel., etc., Co. v. N. & W. R. Co.*, 88 Va. 929, 14 S. E. Rep. 691.

Act of Disobedience Not Consummated.—A decree was rendered by a certain circuit court authorizing a certain receiver to rent out certain real estate of the defendant. Upon application by the defendant a supersedeas was issued by the clerk of the supreme court of appeals which stated in accordance with the transcript of the record, that the decree superseded was rendered on a certain day by a certain court, when in fact no decree was rendered by said court on that day, but a decree was rendered on the day succeeding the one named in the process. Such process was served on the receiver. But after the service he proceeded to rent out the said real estate publicly stating at the time of the renting, that if the appellate court, on being applied to, should hold such process effective, he would return to the renter his bond and repay his cash payment and not report the renting to the circuit court. *Held*, that as receiver always intended to make application to the court to ascertain whether such process was effective, before he placed the renter in possession of the property, and before he reported the renting to the court, it would not punish such special receiver for a contempt of the court, because of his disobedience of its lawful process, the act of disobedience not having been consummated so as to injure any one, and no contempt having been intended. *Hutton v. Lockridge*, 21 W. Va. 254.

III. PROCEDURE.

A. ENTITLING THE PROCEEDING.—Before the attachment for the contempt issues the proceedings are to be entitled in the names of the parties to the suit, but afterwards in the name of the state. *State v. The Harper's Ferry Bridge Co.*, 16 W. Va. 864; *Ruhl v. Ruhl*, 24 W. Va. 279; *State v. Irwin*, 30 W. Va. 404, 4 S. E. Rep. 418; *Alderson v. Commissioners*, 32 W. Va. 647, 9 S. E. Rep. 871. See also, 6 Va. Law Reg. 862, and *Com. v. Feely*, 2 Va. Cas. 1, in which case it was held that proceedings for contempt may be instituted by information.

B. AFFIDAVIT.

Not Always Necessary.—In cases of contempt in open court it is the uniform practice for the judges to proceed upon their own information and of their own motion. *State v. Frew*, 24 W. Va. 416. In such cases they act upon the evidence of their own senses, and in cases of contempt, not in open court, if the judges have such evidence they are at liberty to act upon it. *State v. Frew*, 24 W. Va. 416. But in many cases not in open court the judges have no evidence of their own to proceed upon. In such cases a sworn statement is absolutely essential and should always be required as a foundation of the rule. *State v. Gibson*, 33 W. Va. 97, 10 S. E. Rep. 58; *Hook v. Ross*, 1 H. & M. 319.

A publication in a newspaper when charged as a contempt is of such a character as to permit the judges to act on their own motion and upon their own information. *State v. Frew*, 24 W. Va. 416.

Where a defendant in a suit in equity disobeys the process, order, or decree of the court, it is the usual and regular practice for the court to proceed for the contempt upon the *affidavit* and motion of the plaintiff in the suit. *State v. Irwin*, 30 W. Va. 404, 4 S. E. Rep. 418.

Effect of Want of Affidavit When Necessary.—Where a rule has issued on the unsworn statement of counsel, though it be defective in form or substance, yet if defendant appears and submits to rule and admits facts sufficient to support the charge of contempt the court will disregard all objections to proceedings for want of affidavit or defects in the rule although the objection be made in the answer of defendant. *State v. Frew*, 24 W. Va. 416.

C. ATTACHMENT.—An attachment for contempt has no other object than to bring the party into court. When the contempt is in open court, the party being present, there is no need of any process to bring him into court. *Com. v. Dandridge*, 2 Va. Cas. 408; *Barton's Law Pr.* (2d Ed.) 776.

Where a party uses insulting language to the judge while holding court, he may be punished therefor without any rule being issued against him. *State v. Gibson*, 33 W. Va. 97, 10 S. E. Rep. 59.

But where the contempt is not in open court, the usual course is to issue a rule to show cause why an attachment should not issue, though the attachment sometimes issues without the rule. If the party appear to the rule, to shew cause, and instead of moving to discharge it, submit to answer interrogatories, there is no necessity for the attachment. *Com. v. Dandridge*, 2 Va. Cas. 408; *Tavener v. Morehead*, 41 W. Va. 116, 23 S. E. Rep. 675; *State v. Frew*, 24 W. Va. 469; *State v. Miller*, 23 W. Va. 801; *State v. Hansford*, 43 W. Va. 773, 28 S. E. Rep. 792.

It was held in *Morris v. Creel*, 1 Va. Cas. 333, that an attachment against the clerk of the executive council of the commonwealth, who had been served with a *subpoena duces tecum*, should not issue from the superior court of a remote county until a rule had been issued, and served upon said witness to show cause why it should not issue.

It was also held in *State v. Gibson*, 33 W. Va. 97, 10 S. E. Rep. 58, that if a contempt be committed not in open court by using insulting language against the judge, a rule should be issued against defendant, and he should be allowed to prove by witnesses the language actually used by him, and for a denial of this privilege a judgment against him would be reversed in the appellate court.

A circuit court has not the power under section 27, of chapter 147, of the Code of 1887, which provides that a court shall issue attachments for misbehavior in the presence of the court, or conduct of such a character as to obstruct the administration of justice, to punish by summary proceedings, an attorney for writing, and causing to be published in a newspaper a libelous charge against the judge of such court. *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. Rep. 407.

Sheriff is the Proper Officer to Execute Attachment.—The sheriff is the proper officer to execute an order of attachment for contempt. *Hook v. Ross*, 1 H. & M. 319.

Returns upon an Attachment.—Upon an order for attachment for contempt two returns may be made: either a *non est inventus*, upon which an attachment with proclamation issues, or a *cepi corpus*; if he returns the latter, the next step is a *habeas corpus* to bring up the body; for the sheriff cannot carry him out of his county. *Hook v. Ross*, 1 H. & M. 319.

Sequestration—When Granted.—“And, if, upon an attachment for not performing a decree, the sheriff returns *cepi corpus*, and lets the party to bail, (which he should not do, where the writ is marked for the execution of a decree,) there a sequestration is granted immediately. So, if he be brought up by

habeas corpus, and will not perform the decree, but obstinately lies in prison. If upon an attachment with proclamation, the Sheriff return *non est inventus*, a commission of rebellion issues; and, if upon that, a *non est inventus* be returned, the sergeant at arms, who is the immediate officer of the Court, is sent to seek him. And this officer our law expressly authorizes the Court to appoint. And he may execute the order of the Court in any part of the State, where the party may be found, which the Sheriff could not; and he might also, as I conceive, bring up the body of the party in contempt, without committing him to the jail of the County, and waiting for a *habeas corpus*, as the sheriff must. After all this process, if a *non est inventus* be returned, a sequestration issues." JUDGE TUCKER in *Hook v. Ross*, 1 H. & M. 320.

Cannot Be Ground of an Action for False Imprisonment.—However erroneous a rule for contempt may be, it cannot be made the foundation for an action of false imprisonment, for it is a judicial act; but an action of malicious prosecution may be founded on such rule, provided the application for the same is without probable cause, actuated by unworthy and malicious motives, and founded on falsehood or misrepresentation. *Tavener v. Morehead*, 41 W. Va. 116, 23 S. E. Rep. 675.

D. EVIDENCE.—Where a party uses insulting language to the judge while holding court, he may be punished therefor without any rule being issued against him, and the judge in such case may act on his own knowledge, and absolutely refuse to hear any other evidence of the language used by such party. *State v. Gibson*, 33 W. Va. 97, 10 S. E. Rep. 59; *Barton's Law Pr.* (2d Ed.) 776.

But if the offense take place out of the presence of the court it is contemnor's right to offer evidence in his own behalf. *State v. Gibson*, 33 W. Va. 97, 10 S. E. Rep. 59; *Barton's Law Pr.* (2d Ed.) 776.

Interrogatories.—Where a contempt is committed in open court and the party charged is present, there is no need of interrogatories to ascertain what has occurred. *Com. v. Dandridge*, 2 Va. Cas. 408.

Conclusiveness of Contemnor's Answer.—It was decided in *State v. The Harper's Ferry Bridge Co.*, 16 W. Va. 864, that the answer of the accused is not conclusive; and that affidavits may be read against as well as for him.

But it is said in *Barton's Law Pr.* (2d Ed.) 778, "A person offering to purge himself of contempt must do it in person, and usually his answer must be taken as true and cannot be traversed; but it must be credible and consistent with itself, or the court may draw its own inference from the facts stated."

E. TRIAL BY JURY—WEST VIRGINIA STATUTE.—By § 28, ch. 147, of W. Va. Code, inferior courts may punish direct contempts without a jury by a fine not exceeding fifty dollars and imprisonment not more than ten days. But the statute goes on to say that in any such case the court may impanel a jury (without an indictment or formal pleading) to ascertain the fine or imprisonment proper to be inflicted and may give judgment according to the verdict. But this statute is held not to apply to the supreme court of appeals. *State v. Frew*, 24 W. Va. 416. See also, *Com. v. Feely*, 2 Va. Cas. 1.

F. JUDGMENT.—A judgment for contempt is sufficient if it set out the fact that it was for a contempt generally without stating the specific cause. *State v. Miller*, 23 W. Va. 801. See also, *Barton's Law Pr.* (2d Ed.) 777.

G. BILL OF EXCEPTIONS.—If a party who is fined for contempt desires the specific nature of the contempt and the facts out of which it is supposed to have originated set out in the record, he must make them a part of the record by taking a bill of exceptions to the judgment of the court against him, in which the nature and facts may be set out. *State v. Miller*, 23 W. Va. 801; *Page v. Clopton*, 30 Gratt. 415. See also, *Barton's Law Pr.* (2d Ed.) 773.

General Rule as to Time of Taking Not Applicable.—The rule as to notice of intention to take an exception or of taking it at the time of the ruling, does not apply to a summary judgment for contempt without the formality of a trial. Such a proceeding is wholly *ex parte*. There is no opposing party to be affected by it who might claim injury to himself on account of want of earlier notice. As the purpose of the rule is to protect the opposing party, where there is no such party the rule does not apply. *Page v. Clopton*, 30 Gratt. 415.

H. APPEAL.

Where Appeal Lies.—Proceedings for contempt are in their nature criminal, and while an appeal lies when the party charged is convicted, no appeal lies from an acquittal. *Craig v. McCulloch*, 30 W. Va. 148; *Barton's Law Pr.* (2d Ed.) 777.

Appellate Court—Authority of.—The right of appeal does not give an appellate court authority to take the place of the court below. The lower court has power to punish for contempt; but if it discharge a rule to show cause why a party shall not be punished for contempt in disobeying an order or decree of the court, its ruling on that point is not reviewable in the appellate court on appeal. *Alderson v. Commissioners*, 32 W. Va. 640, 9 S. E. Rep. 868; *McMillan v. Hickman*, 35 W. Va. 705, 14 S. E. Rep. 227.

Writ of Error.—"A contempt of court is in the nature of a criminal offense; and the proceeding for its punishment is in the nature of a criminal proceeding. The judgment in such proceeding can be reviewed, by a superior tribunal, only by writ of error, and not always in that way." *MONCURE, J.*, in *B. & O. R. Co. v. City of Wheeling*, 13 Gratt. 40; *Ruhl v. Ruhl*, 24 W. Va. 279; *State v. Irwin*, 30 W. Va. 404, 4 S. E. Rep. 418; *Miller v. Com.*, 30 Va. 23; *Kendrick v. Com.*, 78 Va. 490; *Alderson v. Commissioners*, 32 W. Va. 640, 9 S. E. Rep. 868; *State v. Miller*, 23 W. Va. 801; *Wise v. Com.*, 97 Va. 779, 34 S. E. Rep. 453. So held by the circuit court of Norfolk county in the case of *Elam v. Com.*, decided May, 1898, and reported in 4 Va. Law Reg. 530; *Stokeley v. Com.*, 1 Va. Cas. 230; *Wells v. Com.*, 21 Gratt. 500; *State v. Blair*, 20 W. Va. 474, 2 S. E. Rep. 333.

If a contempt proceeding is tried in the wrong court, and the order placed on the wrong record, the proceeding is irregular and will be reversed on writ of error. *State v. Irwin*, 30 W. Va. 404, 4 S. E. Rep. 418; *Ruhl v. Ruhl*, 24 W. Va. 279.

Writ of Error Statutory in Virginia.—It is laid down in *Wells v. Com.*, 21 Gratt. 500, that the sole adjudication of contempt and punishment thereof, belongs exclusively to each respective court; and a judgment of conviction, unless the power to supervise is given by statute, is not subject to review in any other court.

Section 4053, of Code 1887, gives the writ of error in cases of contempt with certain exceptions. The statute is in these words: "To a judgment for a contempt of court, other than for the non-performance of, or disobedience to, a judgment, decree, or order, a writ of error shall lie, when the judgment is of a County court, from the Circuit court having

jurisdiction over such County; when it is of a Circuit, or a Corporation, or a Hustings court, from the court of Appeals." *Wells v. Com.*, 31 Gratt. 504. See also, *Barton's Law Pr.* (2d Ed.) 774.

The Act of the Legislature of 1897-8, which has been adjudged unconstitutional in some of its aspects, is a valid statute in so far as it gives the appellate court jurisdiction upon writ of error in cases of contempt. *Trimble v. Com.*, 5 Va. Law Reg. 94.

Writ of Error by Statute in West Virginia.—By Acts 1882, ch. 128, § 4, a writ of error lies from a judgment for a contempt committed in open court. *State v. Miller*, 23 W. Va. 801.

Writ of Error Unnecessary.—If a person is convicted of contempt for refusing to obey an erroneous decree of the court and imprisoned therefor; and the record affirmatively shows, that the only alleged offense against him is his refusal to obey the erroneous decree, he is entitled to have that portion of the decree which erroneously commits him, set aside and reversed on appeal. *Ruhl v. Ruhl*, 24 W. Va. 286.

Effect of Writ of Error.—A writ of error from an order of court refusing to quash an execution upon a judgment for contempt does not carry with it for review by the appellate court the order or judgment on which the execution purports to be founded. *State v. Blair*, 29 W. Va. 474, 2 S. E. Rep. 333.

Bill of Review.—An attachment having been served to compel performance of a decree in chancery, which was erroneous, and was improperly obtained against one of the defendants who had not been served with process; and the said defendant having been induced, under the influence of the decree, and duress of the attachment, without knowing his rights, to pay a sum of money and execute an obligation for a further payment; on a bill of review, the money was decreed to be refunded, and the obligation to be surrendered. *Nelson v. Suddarth*, 1 H. & M. 350.

Writ of Habeas Corpus.—Proceedings for contempt cannot be reviewed in the court of appeals on application for a writ of *habeas corpus*. *Cromwell v. Com.*, 95 Va. 254, 28 S. E. Rep. 1023.

Where defendant was brought into court under a commission of rebellion for refusing obedience to former order of court, and committed to jail, a writ of *habeas corpus* was granted on motion of defendant's counsel because it was stated to the court that defendant was ready to do what was required of him; and the defendant having been brought into court under the said writ was discharged upon his stating to the court that he was willing to do anything the court should order. *Purcell v. Purcell*, 4 H. & M. 519.

IV. ADJUDICATION.

A. FINES.

Punitive.—Some contempts result from the violation of the rights of the public, and the punishment for such violation is in the interest of the public. In such cases if a fine is imposed its maximum is limited by general law, and its proceeds when collected go into the public treasury. *State v. Irwin*, 30 W. Va. 404, 4 S. E. Rep. 413.

Compensatory.—Other contempts result from a violation of the right of the individual, who is a suitor before the court, and has established a claim upon its protection. In these cases the authority of the court is exerted in behalf of the private indi-

vidual, and the fine imposed is measured by his loss or injury, and the proceeds when collected go to him as indemnity. *State v. Irwin*, 30 W. Va. 404, 4 S. E. Rep. 413.

B. IMPRISONMENT.—In the absence of statutory enactment it seems that the duration of the punishment for contempt is in the discretion of the court, whose authority has been defied. *State v. Frew*, 24 W. Va. 416; *State v. Irwin*, 30 W. Va. 404, 4 S. E. Rep. 413. See also, *State v. The Harper's Ferry Bridge Co.*, 16 W. Va. 864; *Craig v. McCulloch*, 20 W. Va. 148; *Tavennier v. Morehead*, 41 W. Va. 116, 23 S. E. Rep. 675.

West Virginia Statute.—While the West Virginia statute has made all contempts criminal in their nature, and all fines therefor go to the state, it has not taken away the wide discretion of the courts over the punishment to enable them to compel obedience to their orders, by imprisoning at pleasure, or "until the further order of the court;" so that, when the recalcitrant submits, the court may release him. *State v. Irwin*, 30 W. Va. 404, 4 S. E. Rep. 413.

C. CONTEMNOR'S DISABILITIES.

a. Affecting Favors.—A court whose authority has been put to naught will grant no favors or privileges to a party in contempt. *Fisher v. Fisher*, 4 H. & M. 484; *Lane v. Ellzey*, 4 H. & M. 504; *Hebb v. County Court (W. Va.)*, 37 S. E. Rep. 677.

In *Fisher v. Fisher*, 4 H. & M. 484, it was held that one of the defendants who was in contempt and had moved for leave to file an answer, would be granted such leave upon condition that trial would not be delayed by a general replication. "The rule of practice is, that after being in contempt, no plea or demurrer shall be admitted but upon motion in open court." Per chancellor, in *Lane v. Ellzey*, 4 H. & M. 504.

Where a defendant was in contempt for refusing to pay alimony in accordance with a decree of the court from which decree an appeal lay only in the discretion of the court, an appeal was granted defendant only on condition that he would come into court and free himself of his contempt by paying up the arrears of alimony, and by giving security for the support of his wife pending the appeal, if it should be granted. *Purcell v. Purcell*, 4 H. & M. 518.

b. Affecting Rights.—But even if a party be in contempt yet he may be allowed to show himself entitled to credits not considered by a commissioner's report which it is proper to overrule in part. *Snickers v. Dorsey*, 2 Munf. 505.

A court has no right to prevent a party in contempt from ridding himself of the alleged contempt or from showing that the order which he did not obey was erroneous. *Hebb v. County Court (W. Va.)*, 37 S. E. Rep. 677.

D. COSTS.—The costs of contempt proceedings are generally paid to the party by whose direction the proceeding is prosecuted, if he proves the contempt; but if he fails to prove the offense the costs fall on him. *State v. Irwin*, 30 W. Va. 404, 4 S. E. Rep. 413. See also, *Barton's Law Pr.* (2d Ed.) 777.

It was held in *State v. The Harper's Ferry Bridge Co.*, 16 W. Va. 864, that the parties adjudged guilty of contempt for violating an injunction of the court, should pay to the originator of the contempt proceedings, the costs expended by him in the prosecution of such proceedings.

511 *Neal v. The Commonwealth.

Millners v. Same.

Pace, Brothers & Co. v. Same.

McDearman & Co. v. Same.

Holland & Co. v. Same.

November Term, 1871, Richmond.

1. **Court of Appeals—Jurisdictional Amount—Relief from Double Taxation.***—N is assessed with a double tax for failing to take out a license as a commission merchant; and he proceeds under the act of 1870-71, § 176, p. 121, to be relieved from the tax, on the ground that he was not bound to take out such license. This is a civil proceeding; and if the amount of tax assessed against him is less than \$500, no appeal lies to the court of Appeals from the judgment of the court below against him.

2. **License as Storager and Auctioneer—Business Not Authorized by.**—H has taken out a license as a storager, and also as a tobacco auctioneer. But if H receives tobacco from the grower on consignment, sells it at auction, makes advances to the owner, charges him storage, an auction fee, and a commission on the amount of sales, independent of his charge as auctioneer, and accounts with him for the balance, he is bound to obtain a license as a commission merchant, and pay the tax assessed thereon according to law.

These five cases are alike in all respects, except in the amounts involved in them. They were applications by the appellants respectively, to the Corporation court of Danville, held by the judge thereof, to be relieved from a double tax assessed upon them as commission merchants. It appears that the appellants, during the year ending the 30th of April 1871, did business in the town of Danville, under a license as storagers; and also a license as tobacco auctioneers; and at the beginning of

512 *the year ending the 30th of April 1872, applied to the commissioner of the revenue to be reassessed for said business of storagers and auctioneers; but refused to take licenses, or be assessed as commission merchants. The appellants having refused to take out licenses as commission merchants, the commissioner of the revenue assessed them with a double tax as such merchants, and in July they applied to the court to be relieved from these taxes. At the time of these double assessments, the appellants were engaged in the business of warehousemen; in which business they were accustomed to receive on consignment, and sell leaf tobacco only, loose and in prized packages, at auction, but in no other way, and they were also accustomed to receive consignments of such tobacco and make advances thereon in money, but received no consideration in the shape of interest, or otherwise, on such advances; keeping an account with the consignors, and paying to them or receiving from them, whatever balance appeared to be due either party upon settlement of accounts of the

sale of such tobacco so consigned and received. For their services rendered in their business they made charges, for warehouse charges, commissions $2\frac{1}{2}$, tax $\frac{1}{2}$, auction fee, and freight. In the case of Holland & Co., the double tax assessed amounted to six hundred and seventy dollars; in the other cases it was less than five hundred dollars.

Upon these facts the court below held that the appellants were properly assessed with the double tax as commission merchants, and confirmed the assessments. And thereupon the appellants respectively applied to a judge of this court for a writ of error, which was awarded. The cases were heard together.

Ould and Carrington, for the appellants.

The Attorney General, for the Commonwealth.

MONCURE, P., delivered the opinion of the court.

513 *There is a question common to four out of these five cases, to wit: to all of them except the case of S. H. Holland & Co. v. The Commonwealth, which question must first be disposed of; and that is, whether this court has jurisdiction in them, the matter in controversy, exclusive of costs, in each of them, being less in value or amount than five hundred dollars.

This question depends upon two others, viz: 1st. Whether these be criminal, or civil cases; for if they be criminal cases, then there is no limitation on the jurisdiction of the court as to the value or amount of the matter in controversy. But if they be civil cases, then the question is, 2ndly. Whether they come within any of the exceptions enumerated in the constitution.

First, are they criminal or civil cases? We are of opinion that they are civil, and not criminal, cases. They are proceedings authorized by law for the correction of alleged erroneous assessments, and not prosecutions for penal offences. A tax is a debt recoverable, ordinarily, by distress, and for it, an action of debt may lie. It is not a penalty for an offence, subject to presentment, indictment or information. Those are remedies appropriate to a criminal case, and wholly inappropriate to a civil case. Though a penalty for a violation of a penal law is authorized by statute to be recovered by action of debt, as well as by presentment, indictment or information. They are concurrent remedies for the recovery of such a penalty, which is a debt due to the State as well as a punishment of an offence. The judgments complained of in these cases, were rendered on proceedings instituted by authority of law for the relief of persons aggrieved by erroneous assessments of license taxes. Acts of Assembly 1870-'71, p. 121, sections 176 and seq. These proceedings have none of the nature of criminal cases. There could be no question upon this subject, we suppose, if the assessments complained of as erroneous had been of

*See principal case cited in Miller v. Little Kanawha Nav. Co., 32 W. Va. 51, 9 S. E. Rep. 60.

simple and single license taxes. But here *the assessments were of double taxes, under section 156 of the act aforesaid, Id. p. 115. And the question is, whether the proceedings can be regarded as criminal cases on that account? We think not. The tax, though a double tax, is still in the nature of a tax for the exercise of a privilege, and not of a penalty for the commission of an offence. It is recoverable by distress, like other taxes, and not by presentment, indictment, or information, as a fine for a penal offence. The Legislature deemed it proper that a person should be assessed with a double license tax under the circumstances stated in section 156 aforesaid, and, therefore, so provided. But this double tax is still a mere tax, of the same nature of other taxes, and not a penalty for a criminal offence recoverable by presentment, indictment, or information. Section 176, aforesaid, prescribes the mode of proceeding to correct an alleged erroneous assessment of a license tax, whether it be of a single or a double tax. It would be strange if this proceeding were to be regarded as a civil case when the tax is single, and a criminal case when the tax is double. Section 148 of the act aforesaid expressly declares, that "whenever a license shall be specially required by law, and whenever the General Assembly shall levy a license tax on any business, employment, or profession, it shall be unlawful to engage in such business, employment, or profession, without a license." And other sections of the act prescribe the penalties which will be incurred by persons who engage, without license, in a business for which a license is so required. These are the penalties referred to in section 183 of the same act, Id. p. 122, which declares that the penalties prescribed in this act shall be recoverable by action of debt, presentment, indictment, or information. And neither that section nor the two following, 184 and 185, have any relation to the double tax imposed by section 156, nor to the proceedings provided by section 176 for affording redress against an erroneous assessment.

515 *We, therefore, consider these cases as civil cases; and so considering them, the next question is, Do they come within any of the exceptions enumerated in the constitution, article vi, sec. 2? That section declares, that this court shall not have appellate "jurisdiction, in civil cases, where the matter in controversy, exclusive of costs, is less in value or amount than five hundred dollars, except in controversies concerning the title or boundaries of land, the probate of a will, the appointment or qualification of a personal representative, guardian, committee, or curator; or concerning a mill, road-way, ferry, or landing, or the right of a corporation or of a county to levy tolls, or taxes, and except in cases of habeas corpus, mandamus, and prohibition, or the constitutionality of a law." Certainly none of these exceptions apply to these cases. But it is said that the third

section of chapter 182 of the Code, as amended and re-enacted by the act approved June 23, 1870, Acts of Assembly 1869-'70, p. 222, includes a "franchise," in the enumeration of the exceptions in which the matter in controversy exclusive of costs, is not required to be of the value or amount of at least five hundred dollars, to give this court appellate jurisdiction in civil cases. And it is argued, that a franchise is involved in these cases, to wit: the franchise of a license as a storager, and a license as a tobacco auctioneer. Certainly, an exception not included in the constitution, cannot be superadded by an act of the Legislature. The constitution and the act must be construed together, and where they are in conflict, the constitution must prevail, and the act must give way. The constitution enumerates certain franchises, but does not embrace all franchises, among the exceptions. When, therefore, the act mentions a "franchise," in general terms, as one of the exceptions, it must be construed to mean such a franchise as the constitution enumerates, and not one which it does not include. We, therefore, *think that these cases do not come within any of the exceptions enumerated in the constitution as aforesaid.

It follows from what we have said, that the writs of error awarded in the four cases aforesaid must be dismissed as having been improvidently awarded.

As to the fifth and remaining case, of S. H. Holland & Co. v. The Commonwealth, the matter in controversy, exclusive of costs, is greater in value and amount than five hundred dollars, and this court, therefore, has jurisdiction in that case. Considering the case upon the merits, we proceed to enquire, whether there be any error in the judgment of the Corporation court of the town of Danville, confirming the assessment of the commissioner in that case? That question depends upon, whether, according to the facts certified by the said court, the plaintiffs in error were bound to obtain a license as commission merchants, or whether the licenses obtained by them, as storagers, and tobacco auctioneers, gave them authority to engage in the business carried on by them?

The act of February 18, 1871, acts of 1870-'71, pp. 68-123, entitled "an act for the assessment of taxes on persons, property, income, licenses, &c., among other things, requires licenses to be obtained by persons who engage in the business of a commission merchant, or of a tobacco auctioneer, or of keeping for compensation, any house, yard, or lot for storage, &c.; and prescribes the penalties to be paid by persons who engage in these pursuits without license. It declares, in general terms, what a commission merchant may do. Any person licensed as a commission merchant, may sell any personal property except wine, ardent spirits and malt liquors, gold or silver coin, bonds, certificates of public or private debts, or other securities which may be left with or consigned to him for sale." "Any

person buying on commission shall be deemed a commission merchant, and subject to the provisions of this act." Id. p. 98, § 100. It also declares what a tobacco
517 auctioneer may do: "Any *person licensed as a tobacco auctioneer may sell at auction any tobacco not prohibited by law to be sold." Id. p. 103, § 115.

The act of March 24, 1871, Id. pp. 274-284, entitled "an act imposing taxes for the support of government and free schools, and to pay the interest on the public debt," among other things, declares the amount of tax to be paid for different licenses. It declares that "the specific license tax on every commission merchant or firm shall be thirty-five dollars; and there shall be a tax of three per centum on the amount of his commissions, to be ascertained," &c. Id. p. 278, § 19; and that "the specific license tax on a tobacco auctioneer to sell shall be thirty dollars."

These are the acts under which the assessment complained of in this case was made. It appears from the certificate of facts, that the plaintiffs in error, during the year ending on the 30th of April 1871, did business in the town of Danville under a license of storage, and also a license as tobacco auctioneers; and at the beginning of the year ending 30th April 1872, applied to the commissioner of the revenue to be reassessed for said business of storagers and auctioneers, but refused to take out license, or be assessed, as commission merchants; that they were, on and after the first day of May 1871, and at the time of the double assessment complained of by them, engaged in the business of warehousemen, in which said business they were accustomed to receive on consignment, and sell leaf tobacco only, loose and in prized packages, at auction, but in no other way; and that they were also accustomed to receive consignments of such tobacco, and make advancements thereon in money, but received no consideration in the shape of interest, or otherwise, on such advances, keeping an account with their consignors, and paying to them, or receiving from them, whatever balances appeared to be due

either party, upon settlement of ac-
518 counts *of the sale of such tobacco, so consigned and received; and that for their services rendered in their business, they made the following charges, viz:

Warehouse charges,	-	-	\$
Commission 2½, tax ½,	-	-	\$
Auction fee,	-	-	\$
Freight,	-	-	\$

We think that, according to the foregoing facts, the plaintiffs in error were commission merchants as well as tobacco auctioneers, and were liable to the tax imposed on each of those two classes, according to the true intent and meaning of the acts aforesaid. That they were tobacco auctioneers and storagers, and had licenses as such, did not prevent them from being commission merchants, or exempt them from the necessity of obtaining a license as such. The tax on a tobacco auctioneer and a storager

as such is very trifling in amount, comparatively. The specific tax on a license to the former is but thirty dollars, and no tax appears to be charged in the form of a percentage on the amount of his sales or of his commission. The specific tax on a license to a storager, is but twenty-five dollars on every house, except that in a city or town whose population is five thousand, the tax is \$50, and on every yard, wagon-yard or lot, ten dollars; while the specific license tax on every commission merchant or firm is \$35; and there is, moreover, a tax of three per centum on the amount of his commissions. If this specific and this per centum tax on a commission merchant could be avoided by obtaining license as a storager and a tobacco auctioneer, no one would ever obtain a license as a commission merchant for the purpose of selling tobacco on commission. And thus the large revenue, which was no doubt expected, and might well be expected, to be derived from

that source, would be entirely lost to
519 the State. Tobacco is *one of the chief staples of the State; and it is often, if not generally, sold by its growers through the agency of commission merchants. It is perhaps more generally stored with a commission merchant, and sold through his agency, than any other product of the farmer. The plaintiffs in error extensively conducted a business of that kind, except that they sold only as auctioneers. They solicited, and extensively received, consignments for that purpose; making advancements to their consignors, and charging and receiving a commission for their services, as any other commission merchants would do. The extent and value of their business is shown by the amount of the tax assessed against them as commission merchants. The double tax was \$670; half of which is \$335. Deduct \$35 for the specific tax, and we have \$300 for the percentage tax, which would make the amount of their estimated commission as tobacco auctioneers ten thousand dollars per annum, besides their warehouse charges and auction fees. We do not mean to say that a tobacco auctioneer cannot be compensated by a commission on the amount of his sales, without being a commission merchant. Such a commission as auctioneer merely, would be comparatively small in amount. He might be, as he no doubt often is, employed by a commission merchant to sell, as an auctioneer, tobacco consigned to such merchant, who would be chargeable with a percentage tax on his commission. In such a case the auctioneer generally receives a specific fee; but even though compensated by a commission for his services, he would not, thereby, become a commission merchant. But where one person combines in himself the characters both of an auctioneer and a commission merchant; where he receives tobacco from the grower on consignment, sells it at auction, makes advances to the owner, charges him storage, an auction fee, and 2½ per cent. on the amount of sales, and accounts with him for the balance, as in this

520 case, we think he is *bound to obtain a license, both as tobacco auctioneer and as a commission merchant, and to pay the tax assessed thereon according to law.

We are therefore of opinion that there is no error in the judgment in the case of S. H. Holland & Co. v. The Commonwealth, and that it ought to be affirmed.

In the first four cases the appeals were dismissed. In the last case it was affirmed.

521 *Muller & c. v. Bayly & al.

November Term, 1871, Richmond.

1. **Equitable Separate Estate—Right of Wife to Subject to Husband's Debts.***—Real estate is conveyed to a trustee for a married woman, the whole equitable estate being vested in her, free from liability for her husband's debts; and with express power in her to mortgage, convey in trust or otherwise pledge the property or any part of it, and the trustee is on her request, to sell it and pay the proceeds to her or reinvest. The wife may subject the property to pay the debt of, or raise money for, her husband.

2. **Public Sales—Irreparable Loss to Owner—Injunction.†**—That money is scarce, and that the large cash payment required at a sale under a deed of trust, will be attended with great if not irreparable loss to the owner of the property, is no ground for an injunction to the sale.

3. **Statute—Applicable Only to Pure Bill of Injunction.‡**—§ 4 of ch. 179, Code p. 736, applies only to a pure bill of injunction; not to a bill seeking other relief, to which the injunction sought is merely ancillary.

4. **Injunction—To Restrain Sale in One County—Suit in Another County.**—In a case of a pure bill of injunction to restrain a sale of real estate in one county, if the plaintiff institutes his suit in another county or corporation, where the defendants answer and do not object to the jurisdiction; the plaintiff cannot afterwards make the objection; and the court may, under its general jurisdiction, hear and determine the case.

5. **Removal of Causes—Reason for Removal Unfounded—Effect.**—Both plaintiffs and defendants being present by their counsel, the court makes an order removing a cause to the court of another county, assigning as a reason for making it, that it appears that the cause had been improperly

***Equitable Separate Estate—Right of Wife to Subject to Husband's Debts.**—It seems well settled that a married woman, as incident to her *jus disponendi*, may appropriate her equitable separate estate to the payment of her husband's debts.

The principal case was cited as authority for this proposition in *Burnett v. Hawpe*, 25 Gratt. 486; *Freeman v. Eacho*, 79 Va. 48; *Christian v. Keen*, 80 Va. 373; *Radford v. Carwile*, 13 W. Va. 654; *Patton v. Merchants' Bank*, 12 W. Va. 608.

See also, *foot-note* to *Burnett v. Hawpe*, 25 Gratt. 481; *foot-note* to *Frank v. Lillienfeld*, 33 Gratt. 377.

†**Public Sales—Irreparable Loss to Owner—Injunction.**—See principal case cited in *Muller v. Stone*, 84 Va. 337, 6 S. E. Rep. 223.

‡**Statute—Applicable Only to Pure Bill of Injunction.**—See *Winston v. Midlothian, etc., Co.*, 20 Gratt. 686.

brought in the court. If this reason was unfounded in fact, it would not invalidate the order which the court had power under the statute, Code ch. 174, § 3, p. 719, to make; and to which there was no exception.

6. **Same—Cause at Rules.**—A Circuit court may make an order to remove the cause to another court, whilst the cause is at rules.

7. **Cause Removed—Dissolution of Injunction in Vacation.**—A cause having been removed, and received by the clerk, the defendants may, upon notice, in vacation before the next term of the court to which the cause is removed, move the judge to dissolve the injunction which had been granted.

522 *8. **Same—Same.**—In such case the judge may in vacation dissolve the injunction; but he cannot then dismiss the bill.

9. **Same—Same—Appellate Practice.**—In such case upon appeal, the appellate court will amend the decree, and affirm it; there being no other error in the record.

This is an appeal from an order of a judge of a Circuit court in vacation, dissolving an injunction and dismissing a bill. The facts of the case, and the proceedings in it, so far as it seems to be material to state them, are as follows:

By a deed of post nuptial settlement between Andrew Muller and Julia D., his wife, bearing date the 6th day of April 1860, and duly recorded, the said Andrew Muller, for the considerations therein expressed, conveyed to Lucy Giles, his said wife's mother, certain real and personal estate therein mentioned, in trust for the separate use of the said Julia D. Muller, "and upon the further trust," in the language of the deed, "that the said Julia D. Muller shall have power by a writing under her hand, to mortgage, convey trust, or otherwise pledge, the said property or any of it, and when requested in writing by the said Julia D. Muller so to do, the trustee, Lucy Giles, shall sell the property herein conveyed, or any part of it, and shall either pay over the proceeds to the said Julia D. Muller in whole or in part, or shall invest the same in whole or in part, in other property to be held on the same trusts herein declared, as the said Julia D. Muller may request. And the said Julia D. Muller shall have power, by an instrument in the nature of, and executed as, a will, to dispose of said property or such as shall remain or exist at her death; and if she die not leaving a will, such property, at her death, shall belong to her husband during his life, and at his death (or, if she survive him, at her death, without will), shall belong to her children or lineal descendants, or if there be none such, to her next of kin according to law."

523 *Some years after the execution of that deed, to wit: on the 23d day of May 1868, by a deed of trust dated on that day, and duly recorded "between Lucy Giles, trustee for Julia D. Muller, wife of Andrew Muller, the said Julia D. Muller, in her separate right, and as wife of Andrew Muller and the said Andrew Muller of the

first part, and Peyton G. Bayly, trustee of the second part," the parties of the first part, by virtue of the authority to that effect vested under the deed of settlement aforesaid, conveyed unto the said Bayly, trustee, "all those certain lots or parcels of ground," &c., "lying and being in the county of Henrico, within or near to the present limits of the city of Richmond, designated by the numbers" named in the deed (fourteen in all): "In trust to secure the full and punctual payment of a certain negotiable note made by the parties of the first part, to said Andrew Muller, and by him endorsed, for the sum of three thousand dollars, bearing even date herewith, payable six months after date, and to secure any renewal or renewals, in whole or in part, of the said note that may by consent take place; and it is covenanted and agreed by and between the parties, that if default be made in the payment of the said note at maturity, or of any renewal thereof (if such renewal take place), then the said Peyton G. Bayly, trustee, when requested by the holder or holders of said note, or of any such renewal, so to do, shall sell the property herein conveyed, or so much thereof as may be necessary, having first given not less than six days, notice of the sale in one or more newspapers published in the city of Richmond. The sale shall be, for cash as to so much of the purchase money as will pay the expenses of sale," &c., "and all prior liens, if any, on the property, and also pay and satisfy the debt herein secured and intended to be secured, and if there be a surplus, upon such credit, as to such surplus, as the trustee may determine; and

524 in other respects, this deed and the trust by it created, *shall be governed by, and proceeded in, according to the Code of Virginia applicable thereto. This deed was duly executed by all the parties of the first part, and duly acknowledged by, and certified as to them.

Default having been made in the payment of the said negotiable note, the said trustee, Peyton G. Bayly, at the request of the holder thereof, and in pursuance of the said deed of trust, advertised the property thereby conveyed for sale "at public auction on the premises, on Wednesday, the 16th June 1869, at half-past 5 o'clock P. M., if fair, if not the first fair day thereafter.

But a day or two before the said day of sale, an order was obtained from the judge of the Circuit court of the city of Richmond, to enjoin the said Peyton G. Bayly, his agents and all others, from selling or otherwise interfering with the property conveyed to him as trustee as aforesaid, until the further order of the court. This order of injunction was made upon a bill addressed to the judge of said court, in which bill the said Julia D. Muller, wife of Andrew Muller, suing by said Andrew Muller, her next friend, and the said Andrew Muller, in his own right, were complainants, and the said Peyton G. Bayly, James G. Brooks and Lucy Giles were defendants.

This bill, with the said order endorsed

thereon, which was directed "to the clerk of the Circuit court of the city of Richmond," was filed in the clerk's office of the said court on the 15th day of June 1869, the day before the day fixed for the said sale. The bill, after stating the execution of the said deeds of the 6th of April 1860, and the 23d of May 1868, and the general provisions thereof, and that the defendant, James G. Brooks, was the holder of the said negotiable note secured by said deed of trust, contains the following charges: "Your oratrix further charges that the said sum of \$3,000 when received, was exclusively used by the said Andrew Muller in the payment of his individual debts, and thus the

525 *leading purpose of the deed will be defeated, which is designed to secure to her the sole and separate use, benefit, enjoyment and control of the said property; and whilst, by the terms of the said deed of settlement, power is given to her to mortgage, convey in trust, or otherwise pledge, the said property; yet, it is a power which, when exercised, must be exercised in furtherance or support of the leading object of said deed, which is for the use and benefit of your oratrix, to the exclusion of her husband and his creditors, by the express terms of said deed; and when a mortgage is made, or a conveyance in trust given, it must be, to raise money for the use and benefit of your oratrix, and not to be used, as was done under the deed in this case, to pay the creditors of her husband." "She alleges that the said Bayly, acting under the said deed to him as trustee, has advertised the whole of the said real estate to be sold on Wednesday next at public auction, and she believes and so charges, that the said property, if then sold under a forced sale, under the said deed, will be sold at a ruinous sacrifice; that owing to the scarcity of money, and the depressed condition of the business interests of this community, property is selling at very low prices, far below its real value, and, when forced sales are made, at still lower figures; and she further charges, that owing to the large amount of the cash payment, if the sale is made as advertised by said Bayly, it will be attended with great, if not irreparable loss and injury to your oratrix and her children, who will be entitled to the property in the event she does not dispose of the same by will." The bill then makes the proper persons defendants, prays for an injunction of the said sale; and concludes with a prayer for general relief.

Copies of the said deeds of the 6th day of April 1860, and of the 23d day of May 1868, were filed as exhibits with the bill.

The bond required by the injunction order having *been executed, a subpoena, with the said order endorsed thereon, was issued against the said defendants, directed to the sheriff of the said city, and returned "executed" on the defendants, Brooks and Bayly, but "not found and no inhabitant" as to the defendant, Lucy Giles, who lived in Henrico county.

On the 28th of June 1869, the defendants,

Bayly and Brooks, appeared by counsel and filed their several answers, to which the plaintiffs, by counsel, replied generally; and the cause was set for hearing as to those defendants, and a new subpoena was awarded against the other defendant, Lucy Giles, directed to the sheriff of Henrico county, and returnable to the following August rules of the said court:

On the 7th day of July 1869, in the clerk's office of the said Circuit court of the city of Richmond, an order of the judge of the said court in vacation, was received by the clerk, in the words following, to wit:

"Julia D. Muller, &c. v. P. G. Bayly, &c.

"It appearing that this cause has been improperly brought in this court, it is therefore ordered that the same be removed to the Circuit court of the county of Henrico.

C. H. Brahmhall,

"C. J. 7th circuit.

"To the clerk of the Circuit court of the city of Richmond.

"July 7th, 1869."

On the next day an order was made in the cause by the said court in term, in these words:

"And at another day, to wit: At a Circuit court of the city of Richmond, held on the 8th day of July 1869, came the parties by their counsel, and the court doth direct that the vacation order entered herein on yesterday be set aside. And it appearing that this cause has been improperly brought in this court, it is therefore ordered that the same be removed to the Circuit court of the county of Henrico."

On the 9th day of August 1869, in the clerk's office of the Circuit court of the county of Henrico, an order of the judge of the said court in vacation, was received by the clerk in the words following, to wit:

"In the Circuit court of Henrico county. In vacation.

Muller & wife v. Bayly & al. In chancery. Motion to dissolve injunction.

"This day this motion came on to be heard on the notice for the same, the bill, answer, exhibits, the order removing this cause to this court, and the objection of the plaintiff to hearing the motion upon the grounds—1st. That this cause was removed from the Circuit court of the city of Richmond in and during the vacation of this court; and, 2d. That the same had not been placed upon the docket of this court at its regular term. And after argument by counsel, it is ordered, adjudged and decreed that the injunction herein be dissolved, and the plaintiff's bill be dismissed. It is further ordered, that the action of this decree be suspended for thirty days from the date of the entry of the same by the clerk of the Circuit court of Henrico county.

"Alfred Morton, Judge, &c."

From this order the said Julia Muller, suing by the said Andrew Muller, her next friend, and the said Andrew Muller in his own right, applied for an appeal to this court, which was accordingly allowed.

Meredith, for the appellants.

E. Y. Cannon, for the appellees.

MONCURE, P., delivered the opinion of the court.

After stating the case, he proceeded: The injunction *in this case was improvidently granted, and ought to have been dissolved on motion, even without answer or demurrer. The bill made out no case for an injunction. The post nuptial deed of settlement invests the appellant, Julia D. Muller, with an absolute estate, in equity at least, in the property thereby conveyed to her sole and separate use; and so far from restricting the power of alienation, which is incident to such an estate, unless otherwise provided in the settlement, it expressly gives such power in the amplest form. After conveying the property to a trustee, "in trust for the sole and separate use, benefit, enjoyment and control of the said Julia D. Muller, free from all claim on the part of her present or any future husband or his creditors," the deed declares the conveyance to be, "upon the further trust, that the said Julia D. Muller shall have power, by a writing under her hand, to mortgage, convey in trust, or otherwise pledge, the said property, or any of it; and when requested in writing by the said Julia D. Muller so to do, the trustee, Lucy Giles, shall sell the property herein conveyed, or any part of it, and shall either pay over the proceeds to the said Julia D. Muller in whole or in part, or shall invest the same in whole or in part, in other property, to be held on the same trusts herein declared, as the said Julia D. Muller may request." In pursuance of this ample power and this express trust, the deed of trust of the 23d of May 1868, was executed to secure the debt claimed by the appellee, Brooks, in this case. All the parties in interest, in law or equity, were parties to that deed, and duly executed it—Lucy Giles, the trustee, the said Julia D. Muller, the beneficiary, and Andrew Muller, her husband. The bill charges that the debt secured by the deed is the husband's debt, and though the deed is executed in literal pursuance of the power, yet, that the power was given to be exercised for the benefit of the wife, and not of the husband, and that the execution of the deed, to secure a debt of the husband, *was therefore a perversion of the power and a breach of the trust. It does not appear from the deed of trust that the debt thereby secured was the debt of the husband only. It is therein described as the debt of all the parties of the first part of the deed—Lucy Giles the trustee, Julia D. Muller and Andrew Muller her husband. But suppose it was, as the bill avers, the debt of the husband only; or, rather, that the money derived from the creation of the debt was applied to the payment of his individual debts: does that fact, of itself, invalidate the deed? Certainly not. A wife who has an absolute separate estate, with power to dispose of

it as she pleases, and therefore with power to throw the proceeds of the sale of it into the sea if she pleases, can surely devote it to the benefit of her husband and to the payment of his individual debts. She can certainly give it to anybody in the world but her husband: and why not to her husband also? When she gives it to her husband, we must closely scrutinize the act, lest it should have been induced by undue influence; for we know that the wife is almost always, more or less, under the influence of the husband, which may be unduly exercised. But if the gift be free and voluntary on her part, and within the terms of her power, it is always a valid, and often a meritorious act. That a wife may give her separate estate to her husband, or devote it to his benefit, is now too well settled a proposition to require a citation of authority for its support. If she be induced by fraud or undue influence on his part to do so, the act will be void. But it is not pretended in the bill, that there was any fraud, or undue influence, or influence of any kind, used by the husband to induce the execution of the deed by the wife in this case. The invalidity of the deed is placed solely upon the naked ground of the incapacity of the wife, though invested with the largest possible powers, to divert her separate estate

530 from her own exclusive *enjoyment, and to devote it, or any part of it, to the payment or security of her husband's individual debts.

Then, what other ground of equity is there in the bill? Only the allegations that the time is unpropitious for a sale, or was, when the bill was filed; that money was scarce; and that, owing to the large amount of the cash payment required, the sale, if made as advertised by the trustee Bayly, would be attended with great, if not irreparable, loss and injury to the wife and her children. Certainly these allegations can afford no just ground for enjoining the sale. It is not pretended that the terms of the deed were not strictly pursued by the trustee in advertising the sale; that he required a larger cash payment to be made by the purchaser than was authorized or prescribed by the deed.

Thus it appears that there was no good ground for an injunction; that it ought not to have been granted: and having been improvidently granted, that it ought to have been dissolved on motion, even without the necessity of an answer or of a demurrer.

But it is said that the Circuit court of the city of Richmond had no right to make the order which it did make on the 8th of July 1869, for the removal of the cause to the Circuit court of the county of Henrico; and that, if the cause was improperly brought in the Circuit court of the city of Richmond, as stated in the said order, it ought to have been dismissed, according to the principle of the cases of *Randolph's ex'or, &c. v. Tucker & al.*, 10 Leigh 655; and *Beckley v. Palmer & al.*, 11 Gratt. 625;

instead of being removed to the Circuit court of the county of Henrico.

It seems difficult to perceive how the appellants could be prejudiced by removing their cause to another court instead of dismissing their bill; or how they would have been any better off than they now are, if their bill had been dismissed by the Circuit court of the city of Richmond for want of jurisdiction.

531 *But ought the bill to have been dismissed for the want of jurisdiction, supposing it to have stated a case proper for equitable relief?

It is contended, that though the bill states a proper case for equitable relief, that relief could be administered only by the the Circuit or county court of the county of Henrico, and not by the Circuit court of the city of Richmond, according to the Code, ch. 179, § 4, p. 736, which declares that "jurisdiction of a bill for an injunction to any judgment, act or proceeding, shall be in a Circuit, County or Corporation court, of a county or corporation in which the judgment is rendered, or the act or proceeding is to be done, or is doing, or apprehended," &c. It is contended that this is an injunction suit, within the meaning of that section, that the proceeding enjoined, to wit: the sale under the deed of trust, was about to take place in the county of Henrico, and not in the City of Richmond, and therefore that only the courts of the county, and not the courts of the city, have jurisdiction of the suit; though every judge of a Circuit court has, under § 6 of the same chapter, a general jurisdiction in awarding injunctions; but his order must, according to § 9, be directed to the clerk of such Circuit court as has jurisdiction under § 4, and the proceedings thereupon shall be as if the order had been made by such court or the judge thereof.

It is well settled that § 4, of chapter 179, aforesaid, applies only to a pure bill of injunction, and not to a bill seeking other relief, to which the injunction sought is merely ancillary. This was expressly decided by this court in the recent case of *Winston & als. v. The Midlothian Coal Mining Company & als.*, 20 Gratt. 686. See also 2 Rob. old Pr. 249, and the cases there cited of *Hough v. Shreeve*, 4 Munf. 490; *Singleton v. Lewis &c.*, 6 Munf. 397; and *Pulliam v. Winston*, 5 Leigh 324.

The bill in this case is something more than a pure injunction bill. It seeks

532 to invalidate the deed of trust, *upon the ground that it was not authorized by the deed of settlement. And it prays for general relief. As all the parties to the suit, except perhaps the trustee in the settlement, Lucy Giles, seem to have resided in the city of Richmond when the suit was brought, it follows, therefore, that the Circuit court of the city had jurisdiction of the suit, upon the principle of the cases just cited.

But it had jurisdiction of the suit, even if we regard it as a pure injunction suit. A court of chancery acts upon the person, and

as a general rule, has jurisdiction wherever the defendant resides or is found within its territorial limits. Sometimes a statute gives to a particular court of chancery special jurisdiction in a particular case. The statute in regard to pure injunction suits is one of that nature. But certainly that state does not take away or impair the power of a court of chancery of general jurisdiction to take cognizance of a case submitted to its decision by the consent of all parties, especially when all of them reside within its territorial limits. If a decree had been made in this suit by the Circuit court of the city of Richmond, showing that it was heard in such court by consent of all parties, surely the decree would not be void for want of jurisdiction, even though the bill were a pure injunction bill, and showed upon its face that the proceeding sought to be enjoined was about to take place outside of the boundaries of the city. So, also, if the plaintiffs in the injunction suit elect to bring their suit in the Circuit court of the city of Richmond, where all or nearly all of the parties concerned reside, instead of in the Circuit court of the county of Henrico, it would not lie in their mouths afterwards to say that the court thus selected by them, had no jurisdiction of the suit. The defendants might, perhaps, make the objection, but not the plaintiffs. True, the law in regard to the jurisdiction of an injunction bill was no doubt made chiefly,

if not entirely, for the benefit and
533 convenience of the plaintiff in the injunction, but he may waive that benefit; and by bringing his suit in another court, he does waive it, so far as he is concerned.

In this case there was nothing in the bill to show that the property about to be sold was situated outside of the city, or that the sale was to be made outside of the city. The bill was filed by the plaintiffs in the Circuit court of the city, and the two principal defendants, Bayly and Brooks, who resided in the city, filed their answers, making no objection to the jurisdiction of the court. These answers were replied to generally, and the parties were thus at issue: after which the order of removal aforesaid was made. When that order was made there was nothing in the cause showing, certainly, that the property to be sold was situated outside of the city. The advertisement describes it as within 300 yards of the corporation line; but whether without or within that line is not stated. The lots are described as being in Duval's addition, and as being designated by certain numbers in the plan of that addition.

Now, can it be predicated of this case that the Circuit court had not jurisdiction of it when the order of removal was made?

That proposition is sought to be maintained on the authority of the cases of *Randolph's ex'or &c. v. Tucker & al.*, 10 Leigh, 655, and *Beckley v. Palmer & al.*, 11 Gratt. 625, before referred to. Do they maintain it? We think not.

In the case of *Randolph's ex'or v. Tucker*

&c., which was decided by a special court of appeals, consisting of three judges of the General court, the suit was brought in the Circuit court of James City county, where none of the defendants resided; to obtain an issue of *devisavit vel non* in regard to John Randolph's will, which had been admitted to probate in the general court. The defendants resided in other, and generally distant, counties, and the transaction sought to be enjoined was
534 to take place in a distant county.

The only ground for maintaining the jurisdiction was the service of process on the defendants. Bryan and wife, who happened to be in James City; though they resided elsewhere. The ground of jurisdiction was considered colorable merely. One of the principal defendants objected to the jurisdiction of the court in his answer; and most of them, at the hearing, moved a dismissal of the bill for want of jurisdiction. The Circuit court overruled the motion, and the special court of appeals reversed the judgment and dismissed the bill. In that case, it will be observed, that the objection to the jurisdiction of the court came not from the plaintiffs, but from the defendants. If the defendants had been willing to try the case in James City, the plaintiffs, after bringing their suit in that county, would hardly have been sustained in a motion to dismiss it because they did not bring it elsewhere. That case was a peculiar one. It was not a pure injunction suit, and the injunction prayed for "was merely ancillary to the other and principal relief prayed for." That the ground of jurisdiction was merely colorable, and the palpable inconvenience of the place selected by the plaintiffs for the suit, were the reasons which induced the court to sustain the objection of the defendants, and to dismiss the bill for want of jurisdiction.

In the case of *Beckley v. Palmer & al.*, the bill, upon its face, showed that it ought to have been filed in the Circuit court of Fayette county, where the judgment sought to be enjoined was rendered, instead of the Circuit court of Raleigh, and the objection was made by, and the decision of the court was in favor of, the defendants, and not the plaintiffs, who had elected to bring their suit in the Circuit court of Raleigh. This was one of the grounds on which this court affirmed the decree of the court below dismissing the bill. There was another ground of dismissal, in regard to which

four of the five judges who sat in the
535 case concurred, or rather three of them, for Judge Daniel did not state his ground for the affirmance. It is worthy of remark, that in that case the court did not reverse all that had been done by the court below, both on the original bill and the amended bill, and dismiss both bills for want of jurisdiction; but affirmed the decree of the court below, after amending it, by formally dissolving the injunction: thus sustaining, to that extent, the jurisdiction of the court.

Those cases, therefore, cannot be regarded

as authority for holding that when the order of removal was made the Circuit court of the city of Richmond had no jurisdiction of the case.

We are of opinion, then, that it had such jurisdiction. And now we come to the question,

Is there any error in the order of removal?

There was first such an order made in vacation, but on the next day the vacation order was set aside, and the same order was made in court. The court order is the one, the validity of which we are now to consider.

The law which authorizes a suit to be removed from one Circuit court into another, is to be found in the Code, ch. 174, § 3, p. 719. "On the motion of any party to a suit in a Circuit court, the said court may order it to be removed to any other Circuit court," &c.

It does not appear on whose motion the order of removal in this case was made; nor is that necessary.

It does appear that both parties were present by their counsel when the order was made; and the presumption is that it was duly made. The order assigns as a reason for making it, that it appeared that the cause had been improperly brought in the court. Even if this reason were unfounded in fact, it would not invalidate an order which the court had power to make, and to which there was no exception. The court might have thought the cause had been improperly brought into the court, even

though the court had jurisdiction to try it. But that a *Circuit court has a right to remove a cause therein pending into another Circuit court, and that the Circuit court of the city of Richmond made such an order of removal in this case, the parties being present by their counsel, is conclusive of all question in the appellate court, as to the propriety of such order of removal, no exception having been taken to that order in the court below. That the cause was at rules when the order of removal was made, does not make that order premature. The law authorizing such removal is general in its terms, and does not require the cause to be on the court docket when removed. And now we come to consider the question,

Is there any error in the vacation order of the judge of the Circuit court of the county of Henrico, made on the defendant's motion to dissolve the injunction?

That motion came on to be heard on notice of the same, and on the bill, answers and exhibits, and the order of removal aforesaid, and on two objections taken by the plaintiffs to the hearing of said motion, to wit: 1st. That the cause was removed from the Circuit court of the city of Richmond during the vacation of the Circuit court of the county of Henrico; and, 2d. That the same had not been placed upon the docket of the latter court at its regular term. And after argument by counsel, the said judge ordered the injunction to be dissolved and the bill to be dismissed: and further, sus-

pended the effect of the order for thirty days; no doubt to afford the plaintiffs an opportunity of applying for this appeal.

That the cause was removed during the vacation of the Circuit court of Henrico, can make no difference. Nor can it make any, that the same had not been placed upon the docket of the said court at its regular term, when the said motion and order were made. The law gives to the court, to which the cause may be removed, no discretion about it. Section 4, of ch. 174, p. 719,

of the Code, provides that "when any suit is ordered to *be removed under this chapter, the clerk of the court from which, shall transmit to the clerk of the court to which, it is removed, the original papers therein," &c.; "whereupon the case shall be proceeded in, heard and determined by the court to which it is removed, as if it had been brought and the previous proceedings had in said court." The directions of this section as to the transmission of the original papers were complied with in this case, and a motion to dissolve the injunction was then made, on notice of the same, to the judge of the Circuit court of Henrico county in vacation, and was heard by him precisely as it would have been if the suit "had been brought and the previous proceedings had in said court;" all of which was in strict conformity with the law. The Code, ch. 179, § 12, p. 738, declares that "the judge of a Circuit court in which a case is pending, whereon an injunction is awarded, may, in vacation, dissolve such injunction after reasonable notice to the adverse party. His order for the dissolution shall be directed to the clerk of said court, who shall record the same in the order book." An order of dissolution could have been made in vacation by the judge of the Circuit court of the city of Richmond, at any time before the removal of the cause from that court, and by the judge of the Circuit court of the county of Henrico at any time after the removal of the cause to that court; without waiting, in either case, until the cause was put upon the docket, or until an order of court was made for that purpose.

The judge of the Circuit court of the county of Henrico having power to make the order of dissolution which was made in the case, the next question is, Was it right to make such an order? and that question has already, in effect, been answered in the affirmative.

But the judge, besides dissolving the injunction, made an order to dismiss the bill; which he had no right to do in vacation.

The Code, ch. 179, § 14, declares that "where an injunction is wholly dissolved, the bill shall stand dismissed with costs, unless sufficient cause be shown against such dismissal, when the case is in a circuit court, at the next term," &c. "The clerks of said courts shall enter such dismissal on the last day of said terms."

There are two questions connected with this case, which we have deemed it unnecessary to decide, and upon which we do not

wish to be understood as intimating any opinion; and they are, 1st, whether the plaintiff in an injunction suit has not a right of election to bring it in the place in which the judgment was rendered or the proceeding is apprehended which is sought to be enjoined, or to bring it in the place where the defendants or some of them reside; and, 2dly, if he be bound to bring it in the former, and it be brought in the latter, by mistake of the judge awarding the injunction in directing his order to the clerk of the latter instead of the former, or otherwise; whether it be necessary to dismiss the bill, on motion being made for that purpose; or whether, instead of dismissing it, the suit may not be removed into the proper court, by order of the court in which it is improperly brought. These questions may both be *res adjudicata*. But whether so or not, we mean not now, because it is unnecessary, to decide.

Therefore, so much of the said order as purports to dismiss the bill is void and must be disregarded; and we are of opinion that the said order ought to be amended in that respect, and as amended affirmed, and the cause remanded to the said Circuit court of the county of Henrico for further proceedings to be had therein as aforesaid.

Decree amended and affirmed.

539 *Brown & al. v. Molineaux, Duffield & Co. & als.

November Term, 1871, Richmond.

1. **Fraudulent Conveyances—Proof.***—An absolute deed of sale of personal effects held to be fraudulent upon the testimony of one of the grantors, and corroborating circumstances.

2. **Maxim—Not Applicable.**†—*Nemo allegans suam turpitudinem audiendus est*, if it be law, does not apply, where it is the creditors of the parties who assail the deed, and call on one of them to prove the fraud.

This was a suit in equity, brought on the 19th of December 1866, in the Circuit court of the city of Richmond, by Molineaux, Duffield & Co., merchants of New York, against Wm. J. Gentry, Byron L. Sawyer, merchants and partners under the name of Wm. J. Gentry & Co., Samuel Freedly, A. Vance Brown & als. The bill was filed on the 20th, on behalf of the plaintiffs and all other creditors of Wm. J. Gentry & Co., who would come in and make themselves parties; and set out that Wm. J. Gentry & Co. were indebted to the plaintiffs in the sum of \$2,113.31; and that Sawyer had just left the State, and was a non-resident thereof. It states that on the 5th of December 1866, Gentry and Sawyer executed what purports to be a bill or deed of sale to Samuel Freedly, for all the merchandise, boots,

shoes, trunks, &c., debts and choses in action, and store fixtures of the firm of Wm. J. Gentry & Co., in consideration of the sum of \$3,826.76. It further states that Gentry & Co. were indebted to A. Vance Brown in the sum of \$2,617.47, as appears by the books of the firm; that no consideration was paid by Freedly to Gentry & Co.;

540 and that the value of the goods which were pretended to be *sold was about \$9,000. That Freedly placed in the store of Gentry & Co., one John Cox, as his agent, with directions to sell the goods and deposit the money in bank to his credit; and that said agent is proceeding to sell off said goods at cost, and at a sacrifice, with great speed, and has already disposed of about \$1,400 worth thereof, which was deposited in the National Exchange Bank; and that the agent is wholly irresponsible.

The bill charges that the said deed of sale was collusively and by fraud obtained from Wm. J. Gentry, one of the partners of the firm, by a fraudulent combination and confederacy between the said A. Vance Brown, Samuel Freedly, and Byron L. Sawyer; that it was intended to be a deed of trust or mortgage to secure the debt due to Brown by the firm of Wm. J. Gentry & Co., and was so represented to be to Gentry at the time of its execution; it being understood that, as a further consideration for the execution of the said deed to secure the debt to Brown, he was to make further advances to the firm of Wm. J. Gentry & Co.; and they charge that these actings and doings are a fraudulent combination to deprive the plaintiffs of their rights to resort to the social effects of Wm. J. Gentry & Co. for the payment of their debt.

The plaintiffs call upon the defendants to answer, and they pray that the said deed may be declared void as fraudulently obtained, and if not void, that it may be held as a security for the debt due to Brown, as intended; and that the defendants may be restrained from selling, removing, disposing of or secreting the stock, effects and assets, and the proceeds of the sales of such as had been sold; and that a receiver be appointed; and for general relief.

The injunction was granted; and it was ordered, that unless Cox or some one for him should execute bond to the Commonwealth of Virginia, in the penalty of \$6,000,

541 with condition to have the said effects, and the *proceeds of those sold, forthcoming to answer the future order of the court, the officer of the court should take possession of them, &c. The bond was given.

Gentry, Freedly, Brown, Sawyer and Cox answered the bill separately. Gentry says that early in December Sawyer proposed to him to secure the debt due to Brown, Sawyer saying that Brown agreed, if he was secured, to make further advancements or endorsements for the firm of Wm. J. Gentry & Co., to enable them to proceed in their business; and that the only object of the deed was to secure Brown, and enable the firm to carry on their business. For the

*See monographic note on "Fraudulent and Voluntary Conveyances."

†See also, principal case cited in *Hatcher v. Crews*, 78 Va. 407.

purpose of executing the deed they went to a lawyer's office, Brown coming in soon afterwards; and after a short private conference between Brown and the attorney, the attorney finished the deed, and it was executed. That on the next morning, the 6th of December 1866, he went into the country, and returning on the 10th he found Freedly in possession of the store of the firm; at which he felt both surprise and anger. That on applying to Sawyer for information about the matter, he referred him to Freedly; who told him that he, Freedly, had not personally a cent of interest in the matter; that his only object was to secure the debt of Brown, and after that he did not care what became of the balance of the goods—respondent might have them if he chose. And Freedly further said it was necessary to sell the goods as soon as possible, to prevent the other creditors coming on and availing themselves of the proceeds of the sale thereof; and that respondent must not appear as possessing any interest in the goods by his presence in the store and assertion of ownership. Immediately upon receiving this information, respondent having his suspicions aroused, wrote to other creditors of Wm. J. Gentry & Co., telling them that things were not going right in this arrangement, and he wished them to come to Richmond and

look after their interests. He admits
542 *and fully believes the allegations of the bill charging fraud and combination between Sawyer, Brown and Freedly. He admits that the debt due to Brown is the amount stated in the bill, and that the amount stated in the deed is not correct.

This defendant further says, that he was doing business in his own name in the city of Richmond, when the defendant, Sawyer, proposed to join him as a partner in business, saying that the defendant, Brown, would endorse for him so as to enable him to put in the firm the capital sum of \$3,500, and that the firm could have any accommodation in bank they desired; and that Brown did advance and endorse for the firm, until it was indebted to him in the sum stated in the bill, except some personal items, which were loaned to the said Sawyer alone, who charged them to the firm; and that said Sawyer had exclusive control of the books of the firm, and managed all its financial matters.

Freedly, Brown and Sawyer, in their answers, which were filed in June 1867, deny that there was any fraud in procuring the deed for the sale of the goods, or any fraudulent combination between them or with any other persons to procure it. They deny that it was intended as a mortgage to secure Brown's debt. They deny that the goods were worth \$9,000, or anything like that sum. Freedly denies that he told Gentry he had no interest in the goods; or that after Brown's debt was paid Gentry might have the remaining goods. He says that Sawyer informed him the firm of Wm. J. Gentry & Co. was in pecuniary difficulty, that they owed A. Vance Brown a large sum of

money, for money loaned, endorsements, &c., and wished him, Freedly, to buy their stock of merchandise. That after various negotiations he agreed to buy their stock, consisting of boots, shoes, &c., together with all their accounts and store fixtures, for the sum of \$3,826.76, giving therefor his two negotiable notes at thirty and sixty days for the same. That he executed

543 *and delivered the notes to them; and they executed to him the bill of sale above referred to, and put him into possession of the stock of goods, &c.; and he has held and exercised ownership over them; and he has paid the notes; which he exhibits with his answer. He says both Sawyer and Gentry were present when the bill of sale was delivered, and Gentry being asked if he fully understood and assented to said sale, replied, "certainly." And when respondent took possession of the goods, Gentry was present with Sawyer, and not a word was said by either of them indicating any dissent to such possession.

Brown says that Wm. J. Gentry & Co. were indebted to him in the sum of \$3,826.76, mainly for cash advanced, and to some extent for acceptances given by him for their accommodation, which were taken up by him in consequence of their inability to meet their current liabilities. That Wm. J. Gentry & Co. being unable to meet their liabilities, he applied to them to make provision for the debt they owed him; and they preferring to regard said debt, as in point of fact it was, of the highest moral as well as legal obligation, promised from time to time, to do everything in their power to secure it; and it was finally proposed to him by said Wm. J. Gentry & Co. that they would give him the notes of Samuel Freedly at thirty and sixty days, for the amount of said debt; and he being well acquainted with Freedly, and knowing him to be solvent, agreed to accept his notes in satisfaction of the said debt due him from Wm. J. Gentry & Co. That this arrangement was made; the notes of Freedly endorsed by Wm. J. Gentry & Co. were received by the respondent, and had been disposed of by him. He denies that his debt was only \$2,113.31, as stated in the bill, and avers it was \$3,826.76. And he denies the allegation in the bill, that he as a further consideration for the execution of the said

544 bill of sale, *was to make further advances to the firm of Wm. J. Gentry & Co.

Sawyer says the deed was made in good faith; that Freedly's notes to the firm were endorsed by them to Brown in payment of their debt to him. That the deed was read by Gentry before being signed, and was then acknowledged by them before a notary and delivered; and he says, that the pretence of Gentry that he did not read the bill of sale or execute it, or that, if he did execute it, it was understood by him to be a deed of trust or mortgage, and not a bill of sale, is simply and wholly false, and well known by Gentry to be so. It was perfectly understood to be what it purported to be, an abso-

lute bill of sale, and not a deed of trust or mortgage.

Before the filing of the answers of these parties Wm. J. Gentry was examined as a witness, and he was, by the permission of the court, again examined after the answers were filed. He gives substantially the same account of the execution of the deed that he gave in his answer. From his deposition it appears that he was early in 1866, a merchant in Richmond, dealing in shoes, &c. That during the late war A. Vance Brown was a sutler in the United States army, and Sawyer was his clerk. That Brown came in several times to see him, stating that he had a young friend who wanted to go into business, and would like to get him with the witness; stating that he would furnish some twenty-five hundred or three thousand dollars. That witness acceded to the proposition, and about the last of March 1866, Sawyer came into the concern. Gentry went on to New York to buy goods; and Brown accepted some of the notes, which he paid, and the firm took up others. The money advanced by Brown was charged upon the books of Gentry & Co. to the firm, though it was in fact on account of the capital which Sawyer was to put into the concern. The debt due to Brown on the 5th

of December 1866, when the deed of
545 sale was made, as charged on *the books of Gentry & Co., was, as Gentry stated, about \$2,600.

The witness says further, that he attended to the buying of the goods and to the manufacturing department, and Sawyer kept the books, and managed the financial matters. That on the 3d or 4th of December 1866, Sawyer came to him and said Mr. Brown would not endorse any more paper until they secured him for what he had done. Of course witness could not object, and readily consented, and Sawyer had the paper prepared. That he executed the deed believing that it was a deed to secure Brown his debt; and enquiring of Sawyer why Freedly's name was inserted in it, Sawyer told him that Brown got Freedly to act in his place. Witness was willing that the firm should become bound to pay the debts of Sawyer to Brown in consideration of the promise that Mr. Brown made (as Mr. Sawyer informed witness), that he would endorse the paper of the firm for their future accommodation. Witness left the city for the county of Gloucester on the morning after the deed of sale was executed, and returned on the evening of the 8th of November, which was Saturday. The value of the goods on hand at the time the deed was made, at the cost price, excluding freight, the witness estimated as between eight and nine thousand dollars. He says that the notes executed by Freedly to Wm. J. Gentry & Co., and the endorsement to Brown are in the handwriting of Sawyer; and witness had no knowledge of their execution until after they were filed with Freedly's answer. The books of Wm. J. Gentry & Co. were in the store when witness left it.

The only other evidence in the cause, was

such as bore upon the truth and credibility of Gentry's testimony, the deed of sale, and a letter of Sawyer to Gentry, written from New York, and dated December 20th, 1866, after he had left the State.

The deed conveys to Freedly abso-
546 lutely the stock of *goods, &c., in consideration of \$3,826.76, and refers to an inventory of the goods as annexed to the deed, and to be taken as a part of it, and also to a schedule of the debts due to the firm, as also annexed; but neither appears to have been in fact annexed to it. This deed Gentry admitted he read before he signed it; but says he did not then know the difference between a deed of sale and deed of trust, as to its form. He considered and intended it as a deed to secure Brown's debt.

Sawyer, in his letter, says: Yours of the 12th inst., was duly received, and would have replied sooner could I have done so.

To begin at once. You say you are "not satisfied with the manner in which our business is and has been conducted;" and I can say the same from the very depth of my heart; but it was the best (in our opinion) that could be done. We were heavily in debt, with no prospect of ever paying it, and continually running behind; consequently, the best thing that could be done was to make Mr. B. whole, and try to effect an honorable settlement with the balance of our creditors; and to do this we adopted the above system. I think it will all come out satisfactory, and trust that you will see the day when you will agree with me. I do not see how you can conscientiously call it a 'one-sided' affair. At the time you understood it all perfectly well. So far as 'securing myself,' that is not true. I shall lose (when the debts are paid) every cent that ever belonged to me and then perhaps it will not be enough. You speak of 'securing yourself.' Had I drawn from the concern as much as you, I should think my time and labor well invested. Mr. B. and Mr. F. will attend to the note of H. A. A. All my 'actions' will bear a close investigation, and I do not see why you bring up these things now."

The cause came on to be heard on the 10th day of August 1869, when the court held that the debt of Brown was for funds and credit furnished as and for the
547 *interest of Sawyer in the concern of Wm. J. Gentry & Co.; and decreed that the deed of sale of the goods, &c., was fraudulent as to the complainants. And a commissioner was directed to take an account of the debts due by Gentry & Co. to the complainants; and also an account of the value of the goods, &c., at the time the same went into the possession and control of Freedly. And the commissioner was authorized to call for the books of Gentry & Co. and Freedly, and to examine on oath any of the parties to this suit.

And it appearing that Freedly had given the bond required by the order granting the injunction, it was further decreed that he should by the first day of the next term of

the court, bring into court the goods, &c., and proceeds of sale, and deliver and pay over the same to the sheriff of the court, who was directed to receive and hold the same until the further order of the court. And thereupon Brown and Freedly obtained an appeal to this court.

E. Y. Cannon, for the appellants.

Lyons and John Howard, for the appellees.

ANDERSON, J., delivered the opinion of the court.

This is a suit in equity by creditors of a firm, who sue for themselves, and all other creditors of the firm, who will come in and approve their debts, and comply with the terms, to set aside a deed as fraudulent which purports to be a conveyance by the members of the firm of all their effects, debts and choses in action, to one of the appellants.

It is a familiar and firmly established rule in courts of equity, that the allegations of a bill which are positively denied by the answer responsive thereto, to be availing must be proved by two credible witnesses, or by one witness and corroborating circumstances.

548 *The chief witness relied upon by the plaintiffs, to prove the allegations of the bill, is Wm. J. Gentry, a member of the firm, and a party to the suit. It does not appear from the record, that he has any interest in the controversy other than a desire that the assets of the firm should be honestly applied to the payment of its debts.

But it is objected, if there was fraud he participated in it—was a confederate in the fraud, and should not be allowed to set up his own fraud as a means of destroying the title which he passed by his bill of sale. But it is not the witness who sets up the fraud to invalidate his deed. It is a third party, who had no participation in the fraud; an innocent creditor, who alleges that the deed was executed to the prejudice of his rights, who sets up the fraud, and introduces the witness to prove it. And if he were a confederate in the fraud he would be a competent witness, for the creditor, to prove the fraud.

But it is contended that the principle *nemo audiendus est allegans suam turpitudinem*, would exclude him. If that be law at this day, which is not conceded, the deposition of the witness alleges no turpitude in himself, in his connection with the transaction. On the contrary, he represents, that he himself was deceived and made a victim of the fraud.

Neither Brown nor Sawyer, the partner of Gentry, deny or affirm, in their answers, what Gentry avers in his answer, and more fully and particularly proves in his deposition, that Brown agreed to advance for his friend Sawyer his part of the capital, from \$2,500 to \$3,000; in consideration of which promise, Gentry agreed to take him into

partnership; and that the sums entered to Brown's credit on the books of the firm, by Sawyer, who had charge and control of the books, were in fact advances made by Brown for Sawyer, in pursuance of that agreement. These facts are fully proved by Gentry, and are no where denied, or disproved, in the record. And the commis-

sioner, to whom the matters were referred *by an order of reference in the Circuit court, in his report, responsive to the first inquiry submitted to him by the court, stated, "that Wm. J. Gentry and Byron L. Sawyer, were equal partners in the firm of Wm. J. Gentry & Co.; and that the funds and credit, furnished by A. Vance Brown, were furnished as and for the interest of Byron L. Sawyer, in the said concern of Wm. J. Gentry & Co." To this part of the report, no exception was taken; and it was confirmed by the court.

This then must be regarded as an established fact in the cause. And what does it show? Why that Gentry, when he agreed to secure Brown, as he says was the purpose of the deed, assumed and secured a debt for which he nor his firm were liable. What was the inducement to this act? What was the consideration of this assumption? Sane men cannot be presumed to assume large pecuniary liabilities without some consideration.

The bill alleges that the consideration was, that further advances would be made to the firm by Brown. Brown in his answer denies that he made such a promise. The answer of Sawyer makes no express allusion to this particular allegation of the bill, or denial of it. It is proved by the witness, Wm. J. Gentry, that he was willing that the firm should become bound to pay the debts of Sawyer to Brown, in consideration of the promise that Brown made, as Mr. Sawyer informed him, that he would endorse the paper of the firm, for their future accommodation. He says he expected then that Mr. Brown would endorse a note for twenty odd hundred dollars, which they needed to pay accruing indebtedness. "The money was soon due. We were hard up (he says) and under the pressure of our creditors. I was willing to secure Mr. Brown, as above stated, if he would furnish us with the accommodation that we require. I expected him to endorse other notes for us, as we needed them." He here assigns a

550 reason for agreeing to secure *a debt to Brown, for which neither he nor the firm were liable, by pledging the effect of the firm for its payment. Was it the true motive and consideration? What other motive could he have had? The appellants show none. The record assigns no other. It is not probable that he would have performed such an act without motive. And the situation of his affairs, and the condition of his firm, made it necessary that he should have such aid and endorsation. It is therefore inconceivable that, but for this assurance, Gentry would have consented that his firm should become liable for Brown's debt, and that the effects of the

firm should be pledged for its payment. The allegation of the bill, proved by the testimony of this witness, supported by these corroborating circumstances, must be taken to be true, notwithstanding the denial of the answers.

If it be true, as alleged by Brown in his answer, that he did not procure the execution of the bill of sale, and made no representation, or promise, in respect to the same, and further, that he never agreed to make further advances to the firm of Gentry & Co., in consideration of their executing the deed aforesaid, he may not have intended that this denial should have reference to the promise previously made through Sawyer, when no such deed was contemplated, at least by him. Be that as it may, if he kept aloof and did not actively participate in the fraud; if he remained a passive spectator, while Sawyer and Freedly concocted and carried out the scheme to swindle Gentry and defraud the creditors of Gentry & Co., and only receive the fruits of the fraud, he cannot escape its consequences. If he did not undertake to make further advances to the firm, or to endorse their accommodation paper to enable them to meet their liabilities in consideration of their assumption to pay his debt, then the deed is voluntary without valuable consideration, and under the statute is fraudulent as to creditors. He says he received

the notes of Freedly, which were
551 *given to Gentry & Co. in consideration of the deed. He says it was proposed by Wm. J. Gentry & Co. (not Wm. J. Gentry), to give him the notes of Samuel Freedly at thirty and sixty days, for the amount of his debt; which he accepted: and that he had disposed of them. He does not say in what way. But as the notes were given for the sum chiefly, which he had donated to his friend Sawyer as his input in the firm of Gentry & Co., it might be inferred that he had disposed of said notes by turning them over to Sawyer as his own. In this way he would be enabled to withdraw his input capital from the firm of Gentry & Co., and carry it with him to a distant State; leaving the balance of the effects in the hands of his confederate, Freedly, with which to pay himself for the part he performed in the transaction; and leaving his credulous and confiding partner, who does not seem to be a man of much penetration or discretion, now amazed and astounded with the strange result of his financial operation, which he probably had regarded as a very ingenious financial conception, "to try (as coolly advised by his retreating partner), to effect an honorable settlement with the balance of our creditors." Great was Gentry's amazement and chagrin, when he returned from the country, to find his cherished financial conception exploded, his means and effects spirited away out of his hands, himself ejected from his own premises, except as a hireling, absolutely stripped of everything, and a stranger installed in his place of business. Such perturbation and amazement was the nat-

ural result of the assurance he felt, when he executed the deed, that he would be able to maintain his credit by Brown endorsing for the accommodation of the firm, and that their business would go on. This then must be regarded as another established fact in the cause, that such was his inducement to execute the deed.

Another fact is alleged by the bill, to wit: that the deed was intended to be a mortgage or deed of trust, to
552 *secure Brown's debt, and not an absolute sale to Freedly. This allegation is denied by the answers. But it would seem to be a necessary corollary from the position just established. If the inducement to the assumption of Brown's debt by the firm, was that the firm might meet its liabilities, maintain its credit, and continue its business by the future advances of Brown, or by his endorsing their accommodation paper, the said deed could not have been bona fide intended to be what its face purports, an absolute sale. Brown's denial is more guarded than the others. He only denies all "knowledge" that it was so intended; and that so far as he knows the allegation is not true. But the denial of Sawyer is bold and unqualified. He says the pretence set up by Gentry, "that it was understood by him, that it was a deed of trust or mortgage, and not a bill of sale, is simply and wholly false, and well known by Gentry so to be; it was perfectly understood to be, what it purported to be, an absolute bill of sale, and not a deed of trust or mortgage." How can this answer be reconciled with his letter to Gentry of the 20th of December, from New York, in answer to Gentry's of the 12th; which they have not thought proper to produce. In this letter he says, "We were heavily in debt, with no prospect of ever paying it, and continually running behind. Consequently the best thing that could be done, was to make Mr. B. whole, and try to effect an honorable settlement with the balance of our creditors; and to do this we adopted the above system." I can give no other meaning to that language than that the conveyance to Freedly was to secure Brown. First make him whole, and then to settle honorably with the balance of the creditors. But Freedly, Sawyer and Brown took all, and left nothing to settle honorably with the creditors.

The answer cannot be read as evidence for or against either party. Their affirmative statements are not proved by any evidence in the cause. The allegation
553 *now under consideration, is proved by the direct testimony of Gentry; and that is strongly corroborated by this letter, and by the conclusive presumption, arising from the consideration upon which he consented that the firm should become liable for Brown's debt; and the affirmative statements of Freedly, to the effect that the sale was negotiated with him by Sawyer, tend rather to strengthen this conclusion than to throw doubt upon it. It was Sawyer who proposed to sell him the goods. It

was Sawyer with whom he made the agreement. It was Sawyer who took his notes at thirty and sixty days. It was Sawyer who received the notes, and transferred them to A. Vance Brown. It was Sawyer who executed to him a receipt for the whole pretended price of the goods. Of all which transactions, Gentry was kept in total ignorance; the idea being held out to him, all the while, that he has only to give a pledge of the goods as a security for Brown's debt; in consideration of which Brown would continue to endorse for them, and enable them to meet their liabilities, and to go on with their business. And when he expressed surprise that the deed was made to Freedly, he was artfully told, that it was because Mr. Brown didn't wish his name to appear in the matter, as it might injure him in bank.

It is possible that Freedly may have been himself deceived by Sawyer, and have been made by him a blind instrument in the perpetration of this impudent and nefarious fraud upon Gentry and the creditors of his firm. But the facts in the cause, tending to show his complicity, will not admit of that charitable supposition. It is positively alleged in the bill, that the debt of Brown, as shown by the books, was \$2,617.47, and not \$3,826.76, as claimed by the appellants. The answers deny that the debt was only \$2,617.47, but they produce no evidence to show that it was more. Freedly had possession of the books, and if the testimony

of Gentry to this fact were not true, it could have been *shown by producing the books. But he does not produce them, or show any reason why he did not produce them. This fact must then be taken as true, that this was a contrivance not only to withdraw the social effects from the payment of the debts of the firm, and to appropriate them to refund the input capital of one of the firm, but for a much larger amount than he had actually put in.

The bill alleges, that the effects of the firm embraced in the deed were of the value of about \$9,000. The proof by Gentry is that they were worth between eight and nine thousand dollars, near nine, at first cost, according to the inventories or invoices. Freedly took possession of all the books and papers of the concern; yet he does not produce these papers in evidence, or account for their non-production. The answers deny that the goods were worth so much; but no proof is introduced by the appellants, to prove that they were not worth so much, as Gentry testifies they were worth; and the presumption arising from the non-production of the inventories, corroborates his testimony, and supports the allegation of the bill. The inference is, that the price which Freedly alleges he agreed to pay for the goods, is very inadequate, and is an indicium of fraud.

But the contract, as alleged, is inconsistent with the idea of a sale and purchase. He professes to have purchased a stock of goods, which are proved to be worth between eight and nine thousand dollars,

without taking any inventory, and the store fixtures and furniture, debts and choses in action of the concern, for the precise sum of three thousand eight hundred and twenty-six dollars and seventy-six cents. If his contract had been to purchase the goods at cost, or at such a per cent. above or under cost, and the furniture at an estimated price, and the choses in action estimated at so much, and upon an inventory taken they summed up those precise figures, it would not be incompatible with the idea of a sale and *purchase. But that was not the case. This is claimed to be what is called a lumping contract; and if so, and if it was a purchase, a valuation must have been made of the property; and being a lumping contract, it would have been fixed at a round sum. The price assumed by Freedly to pay, is the precise sum claimed by Brown to be due him, and tends to show that no valuation was made of the property (without which there could not be a sale and purchase), but that the effects of the concern were transferred to Freedly to pay that debt. And he, claiming the absolute title to the property as by a sale, in which no attempt was made to ascertain its value, is another indicium of fraud. Indeed, the whole complexion of the case is such, and Freedly, Sawyer and Brown are so mixed up in the transaction, that it is not easy to resist the conclusion of a confederation. That Freedly could have been the active instrument in carrying out this palpable fraud, and in the way in which it was carried out, and so as to conceal all knowledge of their purpose from the chief partner, without being privy to it, is incredible. We are of opinion, therefore, that the said bill or deed of sale from Wm. J. Gentry and Byron L. Sawyer, to Samuel Freedly, is fraudulent and void; and that the decree of the Circuit court must be affirmed.

Decree affirmed.

556

*Moses v. Trice.

November Term, 1871, Richmond.

[8 Am. Rep. 609.]

1. **Promissory Note—Lost—Action at Law.**—An action at law cannot be maintained upon a lost negotiable note, whether not due or over due at the time of the loss.
2. **Same—Same—Same—Statute of Limitations.**—But if at the time of the trial a recovery upon the lost note would be barred by the statute of limitations, the action may be maintained.
3. **Same—Destroyed—Proof.**—An action at law may be maintained upon a note that has been destroyed. The evidence should, however, satisfy the jury, beyond any reasonable doubt, that the note has been destroyed.
4. **Same—Renewal—Case at Bar.**—M borrows of T. early in 1864, Confederate money, and executes his negotiable note, endorsed by D, for the amount, payable in ninety days, at the Bank of Virginia. This note is renewed from time to time, until the 4th of January. M then proposes to pay off the

note to T, but at the request of T renews the note again, upon the promise of T that he will deposit the note in bank for collection; and before the note falls due M deposits more than the amount of the note in the bank, where it remains until the bank fails. A few days before the note is due the bank is burned out, the note not having been deposited in bank. **HOLD:**

1. **Same—Same—Tender.**—M's offer to pay, he consenting to renew the note, and his depositing the money in bank, was neither a tender, nor accord and satisfaction; and he is still liable to pay the amount due upon the note.

2. **Same—Same—Discharge.***—The note being a renewal of a former note, and all the notes having been given for the same loan of money, T might have sued on the original note, or for the money loaned, and therefore he is entitled to recover, though at the time the note sued on fell due Confederate currency was worthless.

3. **Scaling—Province of Jury.†**—It is for the jury to fix the time when the scale of depreciation shall be applied to the debt; and it was error in the court to instruct them that the plaintiff was entitled to recover the value of Confederate currency at the date of the original transaction.

557 *This was an action of debt in the Circuit court of the city of Richmond, brought by George W. Trice against Alfred Moses, as maker, and George Davis, as endorser, of a lost negotiable note for twenty-one thousand dollars, bearing date the 4th day of January 1865, and payable at ninety days at the Bank of Virginia. The declaration set out the making and endorsement of the note; and stated as excuse for not demanding payment at the bank, that the bank had been burned on the 3d of April, and had no place of business when the note fell due; but that on the 10th day of June the note was duly presented to Moses for payment; but that neither Moses nor Davis had paid the same, and that on the 9th of August, 1865, the note was duly protested for non-payment, and due notice given thereof to Davis.

The defendants appeared, and demurred

***Negotiable Notes—Renewal—Discharge.**—In *Bank v. Good*, 21 W. Va. 465, the court citing the principal case, said: "It is well settled in both Virginia and this state, that a note will not be regarded as an absolute extinguishment or payment of a precedent note or pre-existing debt, unless it be so expressly agreed."

The principal case is also cited and followed in the following cases: *Tardy v. Boyd*, 26 Gratt. 638, and *note*; *Kimmins v. Wilson*, 8 W. Va. 591; *Miller v. Miller*, 8 W. Va. 549; *Hopkins v. Detwiler*, 25 W. Va. 748; *Stephenson v. Rice*, 12 W. Va. 586; *Feamster v. Withrow*, 12 W. Va. 618; *Bantz v. Basnett*, 12 W. Va. 823, 828, 844, where the question is discussed at length.

See, in accord with the above, *Poole v. Rice*, 9 W. Va. 75; *Dunlap v. Shanklin*, 10 W. Va. 662; *Sayre v. King*, 17 W. Va. 562; *Farmers' Bank v. Mut. Ass. Soc.*, 4 Leigh 88; *Lewis v. Davison*, 29 Gratt. 226; *Lazier v. Nevin*, 3 W. Va. 627-8.

†**Scaling.**—See principal case cited in *Jarrett v. Nickell*, 9 W. Va. 353.

to the declaration, and pleaded "nil debet." The demurrer was sustained as to Davis; but overruled as to Moses; and the parties went to trial on the plea.

On the trial it was proved that the bank was burned out on the 3d of April 1865; and that in June, the note was put into the hands of a notary for protest; and was protested; and whilst it was in his possession, his pocketbook, with the note in it, was stolen out of his chamber at night.

It was further proved that in January or March 1864, Trice lent to Moses \$27,000 of Confederate currency of the old issue, for which, after deducting ten per cent. from the amount, Moses gave him his note endorsed by Benjamin Davis, payable in ninety days, at the Bank of Virginia. This note was renewed from time to time, as it fell due; George Davis becoming the endorser on the two last notes in place of Benjamin. Four thousand dollars was paid on the note when George Davis became the endorser. When the last note was given Moses insisted upon paying the debt, but, as he says, at the earnest request of Trice, who said he was about to go to 558 *Texas, he renewed the note, with the promise of Trice, that he would put it in the bank for collection, as Moses wanted to pay it. And it was proved that when the note fell due, and for some time previous thereto, Moses had in the Bank of Virginia on deposit, Confederate money more than sufficient to pay it.

The cause came on for trial in February 1869; and when the plaintiff offered the evidence to prove the protest and the loss of the note, the defendant moved to exclude the evidence, on the ground that an action at law cannot be maintained on a lost negotiable note. But the court overruled the motion and admitted the evidence; and the defendant excepted.

After the evidence had been introduced, the plaintiff moved the court to give certain instructions, which were refused; and he excepted; but it is unnecessary to state them. The defendant also asked for instructions, the 3d, 4th and 5th of which are as follows: 3d. If the jury believe from the evidence, that the consideration of the note sued on was Confederate States treasury notes, and that said note was made with reference to Confederate States treasury notes as a standard of value; that the defendant, Moses, in the early part of January 1865, when the note was given, was ready and offered to pay to the plaintiff the amount of said note, and was induced to retain the same at the instance and solicitation of the plaintiff, and as a matter of accommodation to him; and if the jury further believe, that before said note fell due, said Moses deposited in the Bank of Virginia, where the said note was payable, an amount of Confederate States treasury notes sufficient to pay said note, and has never withdrawn the amount; that said bank has failed, and said money has become worthless in said bank, without any

default on the part of defendant, then the plaintiff cannot recover in this action.

4th. If the jury believe from the evidence, that the promissory note on which this action is brought, was executed *by Alfred Moses, on or about the 5th of January 1865, was endorsed by George Davis, and delivered, on or about the same day, to the plaintiff; and that said note provided for the payment of \$21,000; and was by the true understanding and agreement of the parties thereto, to be fulfilled and performed in Confederate States treasury notes as a standard of value, then the jury must find for the plaintiff the value of \$21,000 of Confederate treasury notes at the date of the note sued on, with interest thereon from said date.

5th. That if the jury believe from the evidence, that the contract on which the action is founded, was according to the true understanding and agreement of the parties, to be fulfilled and performed in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value, then to the value of said notes at the proper date of scaling, nothing should be added on account of the present depreciation of United States paper currency as compared with gold.

These instructions the court refused to give; and instructed the jury as follows:

The court instructs the jury, that if they believe from the evidence, that the note in question was actually made by the defendant, Moses, in renewal of another note; that the said note has been lost and cannot now be found; that it was so lost after it had become due and payable; that the note for which the note in suit was given was also a renewed note; that the original consideration thereof was a loan of Confederate money from the plaintiff to the defendant in January or March 1864, or at any other time, and that it was the intent and understanding of the parties that the said note should be paid in Confederate money; then the plaintiff is entitled, in the opinion of the court, to their verdict for the value of said Confederate notes at the date of the original transaction; that the jury must determine from the evidence, *at what time the first note was given and the consideration passed.

On the other hand, if the jury believe from the evidence, that it was the understanding of the parties at the time of making the contract, that the said note should be payable in any other currency than Confederate notes, or with the currency then in use, they will then find a verdict accordingly. To the opinions of the court refusing the instructions asked by the defendant and giving that given, the defendant excepted.

The defendant then asked for the following instructions, numbered 6 and 7:

No. 6. If the jury believe from the evidence, that the contract for the enforcement of which this suit is brought, was, according to the true understanding and agreement of the parties to be fulfilled or

performed in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value, then it is the province of the jury to decide what period is to be taken as the proper time at which to apply the scaling provided by law.

No. 7. That the jury in ascertaining the proper period for scaling the Confederate treasury notes which they may find the contract in suit to call for, are bound to follow the intentions of the parties as implied by law from the contract in suit, unless such implication is repelled and rebutted by evidence of a different understanding, assented to by both parties to said contract.

To these instructions the plaintiff objected; but the court overruled the objection; and the plaintiff excepted.

The jury found a verdict in favor of the plaintiff for eleven hundred and thirty dollars and seventy-eight cents, with interest thereon from the 7th of April 1865; and the court rendered a judgment accordingly.

A motion for a new trial, on the ground that the verdict was contrary to the evidence, seems, from the record, to have been made by both parties, and that both parties excepted. *The defendant applied to this court for a supersedeas to the judgment, which was awarded.

Keily, for the appellant.

Lyons, for the appellee.

STAPLES, J., delivered the opinion of the court.

This case presents the question, whether an action at law can be maintained upon a lost negotiable note transferable by delivery. No decision can be found in the Virginia Reports involving this precise point. In England the doctrine is firmly established, that such an action cannot be maintained; and the sole remedy of the owner is in a court of chancery, which can adjust the equities of the parties, and require suitable indemnity as a condition of relief. *Hansard v. Robinson*, 7 Barn. & Cress. 90; *Ramuz v. Crowe*, 1 Exch. R. 166; 18 Eng. Law & Eq. R. 514. In this country there has been some conflict of opinion on the subject; but the great weight of authority is in harmony with the English doctrine. In some of the States statutory remedies have been provided, by which most of the difficulties standing in the way of actions at law have been removed. In other States having common law and equitable powers blended in the same courts, it is the constant practice of those courts to assume jurisdiction in this class of cases. Thus in Massachusetts it has been decided that the court, holding a just regulating power over the judgment and proceedings before it, has authority to prescribe an equitable security to the maker of a lost note, by a proper and suitable indemnity. *Fales v. Russell*, 16 Pick. R. 315. And so in Pennsylvania, it is held that the failure to indemnify is not in bar of the action, but is merely a prerequisite to an execution to

enforce the judgment, and the right to restrain such execution is an equitable power vested in the courts, to be administered with the machinery of common law forms.

562 *It is obvious that these principles have no application in those States where the common law and equity tribunals are separate and distinct. In these latter, we find the courts of common law steadily refusing to take jurisdiction of suits upon lost negotiable instruments. 2 Parsons on Bills and Notes, 296 and 8 and notes; 2 Rob. Prac., new ed., 220. The learned counsel for the appellee has cited a number of cases which he supposes to be in conflict with these views. Some of these cases show that when a bank note has been cut in halves, and one half lost, the holder may recover upon the other half at law. Upon this proposition there is also much conflict of decision. But, whatever may be the rule in some of the American courts, in regard to action upon bank notes, the cases of the *Bank of Virginia v. Ward*, 6 Munf. 166; *Farmers' Bank of Virginia v. Reynolds*, 4 Rand. 186, indicate that in this State no such action can be maintained; because the owner can only recover on establishing his title by the judgment of a court of equity, and giving a satisfactory indemnity to secure the bank against future loss from the appearance and setting up the other half of such note.

In *Renner v. Bank of Columbia*, 9 Wheat. R. 581, the note was lost after suit brought, not by the plaintiff or his agents, but by the officers of the court. The holder had a perfect right of action at law at the time of the institution of his suit: he could not be deprived of that right by an accident in no manner attributable to his negligence, and turned round to another forum for redress. This rule is recognized in other cases; and is not in conflict with the general principle applicable to negotiable instruments. That principle is, that the party to such an instrument, when he is called upon to pay it, has the right to insist it shall be produced and delivered up to him. And this rule is not varied because

suit is brought and payment demanded
563 under *compulsory process of law. In either case the maker has the right to call for the production of his note.

As the owner, however, in case of loss of the instrument, cannot do this, the courts allow a recovery upon the terms of his giving proper indemnity. A court of common law cannot require such indemnity as a part of its judgment. It can neither impose terms upon the plaintiff as a condition of such judgment, nor prevent the issue of an execution thereon. In *Pierson v. Hutchison*, 2 Camp. R. 211, Lord Ellenborough said, whether an indemnity would be sufficient or insufficient, is a question of which a court of law cannot judge. See also *Greenway, ex parte*, 6 Ves. R. 862; *Aran-guese v. Scholfield*, 38 Eng. L. & Eq. 424; 1 Story, Eq. Jur. § 84 and 85. Numerous other authorities might be mentioned to the

same effect. They establish that the only remedy in such cases is in a court of equity, where all the circumstances of the loss can be fully investigated, and a suitable and proper indemnity provided.

It is insisted, however, that these principles do not apply in the case of notes lost after maturity. The counsel for the appellee says it is clear that a protested negotiable note has no more negotiability, according to the law merchant, than a bond or other paper originally not negotiable. No authority is cited in support of this proposition. I will not say no cases or dicta can be found to sustain it. It is certainly in conflict with the leading decisions, and the opinions of the most accurate writers on commercial law. In *Story on Promissory Notes*, § 178, it is said "a negotiable note may be transferred at any time while it remains a good, subsisting, unpaid note, whether before or after it has arrived at maturity; and in the latter case, even though it be protested for non-payment, and bears upon its face the marks of its dishonor." In *Miller v. Davis*, 14 Gratt. 1, 13, Judge Moncure, speaking for the court, says in reference to overdue notes: "It

has long been settled that they are
564 *negotiable; and it belongs to the Legislature to make them assignable only." See also, *Baxter v. Little*, 6 Metc. R. 7; 2 Rob. Prac. new ed. 253; 2 Parsons on Bills and Notes; *Chitty on Bills*, 217; *Redf. & Big. Leading cases on Bills of Exchange and Promissory Notes*.

It is true, that the person taking a dishonored note, takes it subject to all the equities attaching to the instrument in the hands of the original parties; and it may be conceded for the sake of argument, that when the note has been lost, he holds it subject to all the objections which affected it in the hands of the party who first tortiously transferred the note. But the answer given to this reasoning is, that it is part of the contract of the maker to pay on the presentment of the instrument to him for that purpose, and he has therefore a right to its possession as his voucher against a future demand. Besides, the maker may not be able to show the note was lost after maturity; and he is not to be exposed to such risk without indemnity.

In *Hansard v. Robinson*, 7 Barn. & Cress. 90, Lord Teuterden said: "If the bill should afterwards appear, and a suit be brought against the acceptor—a fact not absolutely improbable in the case of a lost bill—is he to seek for the witness to prove the loss, and to prove that the new plaintiff must have obtained it after it became due? Has the holder a right, by his own negligence or misfortune, to cast this burden upon the acceptor, even as a punishment for not discharging the bill on the day it became due. We think the custom of merchants does not authorize us to say that this is the law. It is impossible to deny the force or soundness of these views. They are fully sustained by the adjudicated cases, by the most eminent writers on Commercial Law, and by

the opinions of three of the judges of this court; and must be regarded as the established doctrine of this State. *Miller v. Davis*, 14 Gratt. 1; 2 Green, Bill of

565 Exchange *and Promissory Notes; Story on Promissory Notes, § 450, note 2; Byles on Bills, 300; 2 Parsons on Notes and Bills, 295; Edwards on Bills, 297.

When, however, it appears that the note or bill has been destroyed, different principles apply. Whatever diversity of opinion, on this point, may have formerly existed, it is now the established doctrine that the holder, upon showing the destruction of the note after its maturity, may recover thereon in a court of law. In such case no indemnity is necessary, as the maker can in the nature of things encounter no risk in paying the note. Leading Cases upon Bills of Exchange and Promissory Notes, 679; 2 Parsons on Bills and Notes, 295; Chitty on Bills, 154. It is true that when the evidence of the destruction is merely presumptive, the maker is exposed to the danger of the reappearance of the instrument in the hands of a bona fide holder. This, however, only manifests the importance of clear and satisfactory proof of the destruction. The degree of evidence necessary to constitute such proof can never be previously defined. It is impracticable, in the nature of things, to lay down any rule on the subject. The only legal test in this, as in other cases, is the sufficiency of the evidence to satisfy the jury beyond reasonable doubt, that the note is no longer in existence.

The evidence adduced by the defendant in error, in the court below, established the loss of the note by robbery; but was not of itself sufficient to prove its destruction. It was not offered with that view, nor passed upon by the jury in that connection. The motion to exclude the evidence substantially raised the question of the right to sue at law upon a lost note; and the ruling of the court was in effect an affirmance of the right. The court no more invades the province of the jury by excluding evidence, than by pronouncing it insufficient in law. By one course the evidence is thrown out of the case, and by the other it is destroyed; which in *effect is the same thing. *Bell v. Crawford*, 8 Gratt. 110, 132. I think, therefore, the court erred in overruling the motion to exclude the evidence set out in the first bill of exceptions. For this error the judgment must be reversed, and the cause remanded for a new trial. On such trial the defendant in error may be prepared to produce the note, or possibly to trace it to the possession of the plaintiff in error; or to show that at the time of the trial a recovery thereon would be barred by operation of the statutes of limitation; or he may be able to produce satisfactory evidence of the destruction of the note, or such circumstances as would plainly justify a jury in presuming that fact. Although the evidence set out in the first bill of exceptions only proved the loss of the note by robbery, yet, if hereafter offered in connection with other facts and

circumstances, tending to prove its destruction, the court below would be warranted in permitting it to go to the jury for the purpose of creating a presumption that the instrument had been in fact destroyed.

These views render it necessary to consider the remaining grounds of error suggested by the plaintiff in error. One of these is to the refusal of the Circuit court to give certain instructions, designated in the record as defendant's instructions, No. 3, 4 and 5. The proposition involved in the fifth was settled by this court in *Magill v. Manson*, 20 Gratt. 527. Instructions No. 3 and 4 raise the question of the extent of the liability imposed by the negotiable note in controversy. It appears that in the latter part of the year 1863, or early in the year 1864, the plaintiff in error borrowed from the defendant in error about twenty-five thousand dollars, in Confederate treasury notes, and executed therefor his negotiable note with an endorser, payable in ninety days, without interest. This note was renewed from time to time, the plaintiff in error paying the interest in advance upon each renewal; and on one occasion four thousand *dollars of principal. The note in question is one of those, and the last executed upon such renewal.

The first instruction of plaintiff in error asserts the proposition, that he was discharged from the debt by his offer to pay the note maturing in January 1865; his subsequent deposit of the amount due in the Bank of Virginia, and its entire loss by the failure of the bank. It may be true that the plaintiff in error offered to make such payment; and that he was induced by the persuasions of the defendant in error to withdraw such offer and to retain the money in his own hands; but these matters constituted neither a payment, nor an accord and satisfaction of the debt. Had the plaintiff in error persisted in his tender and then deposited the notes in bank to the credit of the defendant in error, there might be some plausibility in his pretension. But so far from insisting on the tender, he waived it, and permitted himself to be persuaded to retain the money, and executed a new note for the debt. His subsequent deposit of his funds in bank in his own name, and their ultimate loss cannot affect the obligation of his contract. The court was therefore not in error in refusing this instruction.

The question intended to be raised by the other instructions relates to the time of applying the scale of depreciation; the plaintiff in error insisting that January 1865, the date of the last note, should be adopted. As the note matured after the close of the war, the rule in *Dearing's adm'x v. Rucker*, 20 Gratt. 426, cannot apply. What rule should be adopted in such case, has never been settled, nor is it necessary to consider that question now. As before stated, the original loan was made in 1863 or 1864, a note given for its repayment, which was renewed from time to time. The last note

being dishonored, there is nothing to prevent a resort to the original consideration. Upon familiar principles, if a note is taken as a conditional payment, or in renewal, and is not duly paid or discharged, the original debt revives; *and this principle applies to every renewal, which is but a continuation of the same debt. Nor is it material whether the note or bill be given for a precedent or co-temporary debt; in neither instance will it operate as an extinguishment or payment, unless it be so accepted by the creditor. If not paid at maturity, the creditor may sue upon it, or upon the original cause of action. And if between the time of drawing the bill or making the note the currency is depreciated in which it is to be paid, it should be discharged according to the value at the time when the note or bill was executed. Story on Bills of Exchange, § 418; Byles on Bills, 284; 2 Parsons on Bills and Notes, 156; 5 Rob. Prac. 845; Farmer's Bank v. Mutual Assurance Society, 4 Leigh, 69; Parker v. Cousins, 2 Gratt. 372. In this case the defendant in error might have sued for the original debt, or he might have inserted in his declaration a count for the recovery of the amount loaned. His failure to do so does not preclude the jury from applying the scale at the date of the loan, if it seemed to them right and proper under all the circumstances. If, however, any error was committed in respect of this matter, the plaintiff in error has no cause of complaint as the court on his motion instructed the jury it was their province to fix the period for applying the scale. The court, however, further instructed the jury that the plaintiff was entitled to their verdict for the value of the Confederate notes at the date of the original transaction. Under the act of 1866-'7, it is the province of the jury to fix the period at which the scale of depreciation shall be applied. In the exercise of this discretion they cannot be controlled by the court, unless indeed the contract of the parties, or some fixed rule of law, prescribes the measure of recovery. The court was therefore in error in giving this instruction; nor was the error corrected by the subsequent instruction given at the instance of the defendant, that it

569 *belonged to the jury to fix the period for applying the scale of depreciation.

For these errors the judgment must be reversed, and the cause remanded for further proceedings, in accordance with the principles herein announced.

Judgment reversed.

570 *Lewellen, Sergeant for, &c. v. Lockharts.

November Term, 1871. Richmond.

1. Keeper of Billiard Saloon—Required to Take Out License.*—The keepers of a billiard saloon may be

*Taxation—Business Reached by the Ad Valorem System.—In Com. v. Moore, 25 Gratt. 960, the court said: "In Lewellen, Sergeant &c. v. Lockharts, 21

required to take out a license, and pay a tax thereon.

2. Same—Same.—The fact that capital is invested in billiard tables and other necessary furniture of a billiard saloon, which capital may be taxed as property, under § 82 of the act of June 1870, does not exempt the pursuit from a license tax.

In September 1870, William and John Lockhart filed their bill in the Corporation court of the city of Norfolk, in which they stated that the commissioner of the revenue of said city had, on the 31st of August 1870, assessed them with the sum of five hundred and fifty dollars, "for the privilege of keeping ten billiard tables for compensation, from the 1st of May 1870, until the 30th of April 1871;" and that in pursuance of this assessment, J. Richard Lewellen, the sergeant of the city, had distrained upon three billiard tables, the property of the plaintiffs, to enforce the collection of the said assessment. They insist the statute under which this assessment was made, is in violation of § 1 of article 10 of the constitution of Virginia. They say that the capital invested by them in their tables aforesaid, and in necessary furniture, is about \$11,000; the tables alone having cost \$5,900; and therefore they do not come within the § 4 of the same article of the constitution, which authorizes a tax on incomes in certain cases. And making Lewellen a defendant, they ask that he may be enjoined from further proceedings in the distress aforesaid; and for general relief.

571 *The injunction was granted.

Lewellen answered the bill, and admitted the assessment and distress; but insisted that the act under which the assessment was made is constitutional.

The cause came on to be heard on the 12th day of May 1871, when the court perpetuated the injunction. And thereupon Lewellen, on behalf of himself and the Commonwealth, obtained an appeal to this court.

The Attorney General, for the appellants.

Scarburg & Duffield, for the appellees.

MONCURE, P., delivered the opinion of the court.

The main question, and only material one

Gratt. 570, the president, speaking for the whole court, said: 'The legislature must, in the nature of things, have a very large discretion in determining the question as to what business can be reached by the *ad valorem* system, within the meaning of the constitution. The subject is indefinite in its nature, and although the instances enumerated in the constitution afford material aid in ascertaining the meaning of its framers in the use of the general words which follow the enumeration, still much room is necessarily left for the exercise of legislative discretion in the matter.' See also, Hirsh's Case, *Id.* 785.

"I am therefore of opinion that it is for the legislature and not the judiciary to determine the question whether the business of the general merchant is such a business as cannot be reached by the *ad valorem* system."

to be decided in this case is, whether keeping a billiard saloon is a "business which cannot be reached by the ad valorem system," within the meaning of the constitution, article 10, sections 1 and 4; and, therefore, whether section 30 of the act approved June 29, 1870, entitled "an act in relation to the assessment of taxes on licenses," (Acts of Assembly 1869-'70 p. 240,) and section 41, of the act approved July 9, 1870, entitled "an act imposing taxes for the support of government and free schools, and to pay the interest on the public debt," (Id. p. 362,) are constitutional.

Those sections are as follows:

Constitution, article 10, sect. 1. "Taxation, except as hereinafter provided, whether imposed by the State, county or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of equal value."

Id. "Sec. 4. The General Assembly may levy a tax on incomes in excess of six hundred dollars per annum, and upon the following licenses, viz: the sale of ardent
572 *spirits, theatrical and circus companies, menageries, jugglers, itinerant peddlers, and all other shows and exhibitions for which an entrance fee is required, commission merchants, persons selling by sample, brokers and pawn-brokers, and all other business which cannot be reached by the ad valorem system. The capital invested in all business operations shall be assessed and taxed as other property. Assessments upon all stock shall be according to the market value thereof."

Act of June 29, 1870, sec. "30. Any person who shall keep for compensation, a saloon or table at which to play at billiards, shall be deemed to keep a billiard saloon; and if a tax is imposed upon the tables kept therein, the same shall be on every table capable of being used for the purpose and kept therein, whether used or not. Any person who shall keep a billiard saloon without a license shall pay a fine of not less than fifty dollars nor more than one hundred dollars for each day he may continue the same."

Act of July 9, 1870, sec. "41. The specific license tax on any person to keep a billiard table shall be one hundred dollars, and an additional tax of fifty dollars for each additional table kept or to be kept therein. If the license be for a bowling or billiard saloon at a watering place, and is for four months or less, the tax thereon shall be fifty per centum of the taxes aforesaid."

It is within the judicial power of this court, now as heretofore, to declare an act of the Legislature unconstitutional and void, although the present constitution provides "that the assent of a majority of the judges elected to the court shall be required in order to declare any law null and void by reason of its repugnance to the federal constitution or to the constitution of

this State." But certainly it ought plainly to appear that a law is unconstitutional to warrant the court in so declaring. This has always been the rule which has governed the court in the exercise of this
573 power, and it remains in *full, if not increased force, under the provision aforesaid.

Applying that rule to this case, we cannot say that the laws in question are unconstitutional and void. The Legislature must, in the nature of things, have a large discretion in determining the question as to what business can be reached by the ad valorem system, within the meaning of the constitution. The subject is indefinite in its nature, and although the instances enumerated in the constitution afford material aid in ascertaining the meaning of its framers in the use of the general words which follow the enumeration, still much room is necessarily left for the exercise of legislative discretion in the matter; and we certainly cannot say that such discretion has been so exercised in this case as to make the laws in question unconstitutional. Those laws are similar to, if not literally the same with, those which had existed in former years on the same subject, and which were perhaps in the mind of the convention when they used the general words aforesaid. That capital is invested in billiard tables and other necessary furniture of a billiard saloon, which capital may itself be subject to be taxed as property, under section 32 of the act of June 29, 1870, seems to make no difference. None of the pursuits enumerated in the constitution as subjects which may be taxed by way of license, can be carried on without the use of property of some value, more or less; and the question of more or less cannot be material in regard to the principle involved. The tax is intended to be laid on the pursuit, which is a game of popular amusement, considered by the Legislature as a fit subject for taxation.

We are therefore of opinion that the decree of the Corporation court is erroneous, and that it be reversed, and the injunction dissolved, and bill dismissed with costs.

Judgment reversed.

574

*Carter v. Ragland.

November Term, 1871, Richmond.

Sale of Lands—Bonds*—Confederate Contracts—Case at Bar.—In October 1862, R sold and conveyed to C land, and took his bonds payable in one, two, three and four years, secured by deed of trust on the land. It was a Confederate contract, and in October 1863, C paid R \$1,000 upon the first bond; and he paid no more. In 1867 the trustee advertised the land for sale, and C enjoined the sale, and asked that his bonds should be paid on such terms as to the court might seem proper. **Held:**

*See principal case cited in *Sanders v. Branon*, 22 Gratt. 267, and *note*.

See monographic *note* on "Bonds."

Same—Same—Election.—C may have his election to give up the land, and receive back the value of the \$1,000 of Confederate notes he paid, as at the time of payment, and account for the rents and profits; or retain the land and pay a reasonable price therefor, to be ascertained by a commissioner; subject to a credit of the proportion which the amount he has paid bears to the amount he agreed to pay; with interest on the balance from the date of the contract.

This was a suit in equity in the Circuit court of Hanover county, brought in February 1867, by James M. Carter against Evan S. Ragland and W. Goddin, to enjoin the sale of a tract of land by the latter, as trustee in a deed of trust to secure the payment of four bonds, given for the purchase money of the land. The only question was as to the amount to be paid by the obligor, Carter. The facts are stated by Judge Christian in his opinion. The Circuit court made a decree, from which Carter obtained an appeal to the District court of appeals, where it was affirmed; and Carter then obtained an appeal to this court.

Meredith, for the appellant.

Evans and Young, for the appellee.

575 *CHRISTIAN, J., delivered the opinion of the court.

— This is an appeal from a decree of the Circuit court of Hanover county.

The facts disclosed by the record, so far as it is material to refer to them, are substantially as follows:

The appellee, Ragland, purchased of one George F. Booker, on the 16th September 1862, a tract of land lying in the county of Hanover, known as "Laurel Grove," containing 340½ acres, at the price of \$25 per acre. He paid the purchase money in cash, in Confederate States treasury notes, then but slightly depreciated, and received a deed for the land.

Shortly after this purchase, Ragland authorized W. Goddin, a real estate auctioneer, to resell the land for him, so that he should sustain no loss. Goddin, early in October 1862, sold the farm to the appellant, Carter, at the same price which Ragland had paid, but upon a credit of one, two, three and four years. Carter accordingly executed his four notes payable to Ragland for the sum of \$2,147.87, with interest from the 16th September 1862, and payable at one, two, three and four years. A deed conveying the land to Carter was executed by Ragland; and the land was then conveyed by Carter to Goddin, in trust to secure the payment of these notes as they became due.

Carter immediately took possession of the land, and has been in possession ever since. He has paid towards the purchase money only \$1,000, which was paid on the 17th of October 1863, and was credited on the first bond. Two of the purchase money bonds fell due after the close of the war—one on the 4th day of October 1865, and the other on the 4th day of October 1866. But the

appellant, it seems, never paid, or offered to pay, anything more on said bonds, except the sum of \$1,000, which was paid in Confederate States treasury notes on the 17th October 1863. Thus matters stood between the parties until the year 1867, when the appellee directed *the trustee to advertise and sell the land in accordance with the terms of the trust deed. And thereupon the appellant filed his bill of injunction, asking that the sale of the land might be enjoined, and praying that the court should require the appellee to produce the bonds in court, "so that they might be paid and cancelled in such manner and on such terms as to the court might seem just and proper." An injunction was granted. The appellee answered the bill, setting out substantially the facts above stated, and insisted that he was entitled to receive, at least the fair value of the land, with interest (subject to a credit of \$1,000, paid October 17th, 1863), in satisfaction of said notes and deed of trust. Depositions were taken to prove the value of the land in the present currency; and the court below, adopting the true value of the land "as the most just measure of recovery," entered its decree dissolving the injunction, and after crediting the \$1,000 paid as of its nominal value, reduced the balance of the debt in the proportion that \$20 per acre (the amount adopted by the court as its real value) bears to \$25 per acre, the price at which it was sold, and directed the trustee to sell the land for the amount of the debt and interest thus ascertained, but upon terms of one-fourth cash, and balance at six, twelve and eighteen months, instead of for cash, as required by the said deed of trust; the appellee consenting to these terms, in order "to guard against any possible sacrifice of the property."

From this decree Carter appealed to the District court at Fredericksburg; which affirmed the decree of the Circuit court of Hanover: to which decree of affirmance an appeal was allowed to this court.

It will be observed that in this case, two of the purchase money bonds became due after the close of the war, when the currency in which they were stipulated to be paid had perished; and as to these a strict compliance with the contract of the parties has become *impossible. It is therefore clear that the nominal value of the currency agreed to be paid cannot be reduced (as in the case of *Dearing's adm'x v. Rucker*, 18 Gratt. 426) to its true value at the date of the maturity of the notes. It is equally clear that the ends of justice cannot be attained by scaling the Confederate currency to its value at the date of the contract. For this would be to permit the appellant to reap the advantage of his own default, and to have the title of the land confirmed in him for a grossly inadequate price. The most equitable adjustment of the case made by the record, is to require that the appellant, who comes into a court of equity, asking that his obligations (for which he is confessedly in de-

fault) "may be paid and cancelled in such a manner as to the court may seem just and proper," should be put upon equitable terms. Those terms, under the circumstances of this case, manifestly are, that he must either give up the land or pay for it its reasonable value. *Poague v. Greenlee*, decided at the present term, and *White v. Atkinson*, 2 Wash. 94.

The court is therefore of opinion, that the said Circuit court ought to have put the said appellant to his election, either to give up the land, and have the contract of sale vacated and annulled, and to receive the value of the Confederate States treasury notes (which he paid towards the purchase money,) as of the 17th October 1863, and to account for the rents and profits of the land for the time it has been in his possession; or if he elects to retain the land then he should be required to pay its reasonable value at the time of the sale, such value to be ascertained by a commissioner of said Circuit court, subject to a credit of the proportion which the amount he has paid bears to the amount he agreed to pay; the balance to carry interest from the 16th day of September 1862.

The court is, therefore, of opinion
578 that the said decrees *of the District court, and of the said Circuit court, should both be reversed, and the cause remanded to said Circuit court of Hanover, for further proceedings to be had therein, in accordance with the principles herein announced.

Decree reversed.

579 *Crane's Guardian v. Crane.

November Term, 1871, Richmond.

I. Arbitration Proceedings—Appeal—What Necessary for.*—There cannot be an appeal to the court of Appeals, from the award of an arbitrator, unless it be made the judgment or decree of the court from which it is taken; and the mere copy of the award in the proceedings of the court, though they be signed by the judge, does not make it the judgment or decree of the court.

In September 1867, Julia Belle Crane, an infant, by her next friend, Henry R. Crane, instituted a suit in equity in the Circuit court of the city of Richmond, against her guardian, Luther R. Spilman, and his surety, for an account of his proceedings as her guardian. Spilman answered the bill; and in November 1867, the court made a decree referring the accounts to a commissioner.

In June 1868, the commissioner returned his report, to which Spilman filed several exceptions. This report was not acted on by the court; and in July 1869, the counsel for the plaintiff and the defendant entered into a written instrument, by which, referring to the case and the court in which it was pending, they agreed that the case be referred for decision to John H. Guy,

*See monographic note on "Arbitration."

who shall consider and decide the same as if sitting as chancellor, and make a decree thereon, which shall be entered of record in the said court as if rendered by the said court; but with the privilege and right reserved to each side to appeal from the same, under the rules and regulations prevailing in appeals from the Circuit court to the court of Appeals.

On the 9th day of December 1869,
580 at a regular term *of the court, the decision of Mr. Guy in the case was entered upon the order book of the court among the orders of the court, and the orders of the day were signed by the judge in the usual manner. The entry on the order book commences as follows: Crane, for, &c. v. Crane's guardian. And now at this day, to wit: At a Circuit court of the city of Richmond, held at the court room in said city on the 9th day of December 1869, the parties by their counsel having agreed by writing, signed by them, dated July 1869, and filed with the papers in the cause, to refer to me for decision, to consider and decide the same as if sitting as a chancellor, and make a decree therein, I have examined and considered the cause on the papers, &c. He then proceeds to pass upon the defendant's exceptions to the commissioner's report, sustaining some and overruling others; and referring to a statement which he had prepared showing the amount due from the guardian according to his views, he says the sum of \$1,882.83 is hereby ascertained, declared and decreed to be due to the infant plaintiff, Julia Belle Crane, by her guardian, the defendant Luther R. Spilman, as of the 19th day of February 1868, to be duly accounted for by him to his said ward as of that date. John H. Guy.

On the 10th of December, which was the day after the decision of Mr. Guy was entered of record, the court made the following order: On the motion of the defendant Spilman, who represents to the court that he desires to present a petition for an appeal from the decree entered in this cause on the 9th of December 1869, it is ordered that the said decree be suspended for sixty days, &c.

Spilman applied to this court for an appeal, which was allowed.

As this court did not decide or express any opinion upon the merits of the case, the facts in relation to them are not given in this report.

581 *R. T. Daniel and Wm. Green, for the appellant.

Johnston & Williams, for the appellee.

ANDERSON, J., delivered the opinion of the court.

The court is of opinion, that the reference made of this cause, to John H. Guy, to consider and decide the same as if sitting as chancellor, and to make a decree thereon, which shall be entered of record in the court in which it was depending, as if rendered by the said court, but with the privilege

and right reserved to each side to appeal from the same, under the rules and regulations prevailing in appeals from the Circuit court to the court of Appeals, could not invest the said Guy with the functions of a chancellor or a judge, so as to pronounce a decree in the cause, which would have the force and effect of a decree of the court; so that a writ of execution could issue thereon, or an appeal be taken therefrom.

The court is also of opinion, that the record does not show that said paper, purporting to be a decree of John H. Guy, made by agreement of the parties, by their counsel, was adopted by the court, and entered as its decree. But that, on the contrary, it appears the same was entered on the records of the court as the decree of John H. Guy, and was signed by him, and cannot therefore be regarded as having any greater force or effect than the award of said John H. Guy, the reference to him, by the counsel of the parties, being valid; upon which we do not deem it proper, in the case as it is now presented, to give an opinion. The agreement of the parties, that the said award or decree should be entered on the records of the court as if rendered by the court (which was done), and reserving to either party the right to appeal therefrom to this court, could not take from the Circuit court its jurisdiction to decide upon the validity of the award, or upon any objections that might be offered to its being made the decree of the

court; nor give to this court, which has
582 only appellate jurisdiction, *authority to supervise the award before it had been passed upon by the Circuit court, or to entertain an appeal from the award itself, instead of a decree of the court upon the award; which it seems was not made.

The numerous authorities, cited by the learned counsel, show that a writ of error, or appeal, will lie to or from a judgment, decree or order of a court, although the same may be void for want of jurisdiction in the court by whom it was rendered, or for other cause appearing upon the record. In those cases it was shown by the record, that a judgment of the court was entered in form; and as was said by the court in *Petty v. Duvall*, 4 Greene's R. 120, although a judgment non coram iudice, it was still a judgment of a court. Upon it a writ of execution could have issued. But it is believed that no case can be found where a writ of error or an appeal has been held to lie to or from an award, or a decree of a referee, who was not invested, nor professed to be, by the constitution and laws, with the functions of a judge. It was entirely competent to the appellant to have made his objections to the said award or decree of John H. Guy in the court below, even after it had been copied into the record of the court; or if an execution issued upon it before it was made the decree of the court, to have moved in the said cause to quash it. And if such motion had been overruled by the order or judgment of the court, his right to apply to the appellate court for a super-

sedeas would be clear. But until there is a judgment, decree or order of the inferior court, by which the party is aggrieved, he is not entitled to the interposition of this court, by writ of error, appeal or super-sedeas.

The court is of opinion, therefore, that this cause is not properly before it; and, consequently, that it is not proper to decide any other questions that have been raised upon the record; the appeal having been prematurely allowed.

583 *The cause must therefore be remanded to the Circuit court, for further proceedings to be had therein.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that there cannot be an appeal to this court from the award of an arbitrator, unless it be made the judgment or decree of the court from which the appeal is taken; that the mere copy of the award in the proceedings of the court, though they be signed by the judge, does not make it the judgment or decree of the court; that the paper copied in the record, purporting to be the decree of John H. Guy, can, at most, be no more than his award, and not having been confirmed and entered as the decree of the court, there can be no appeal therefrom; and that this appeal was improvidently allowed. Therefore, it is decreed and ordered that the same be dismissed, and that the appellant pay to the appellee, Julia Belle Crane, her costs by her about her defence in this behalf expended. And, without deciding, or expressing any opinion on any of the questions argued in this case affecting the validity or correctness of the said award, which it would be premature to do, until they have been first passed upon by the court below, it is ordered that this case be remanded to the Chancery court of the city of Richmond for further proceedings to be had therein. Which is ordered to be certified to the said Chancery court.

Appeal dismissed.

584 *Straus v. Kerngood & als.

November Term, 1871, Richmond.

Partnership—Separate Assets—Garnishment—Case at Bar.—K recovers a judgment against F & H as partners, and sues out an execution of *fi. fa.* upon it which is returned "no effects." Afterwards S recovers a judgment against H for an individual debt of H. There are no assets of the partnership of F & H. but G is indebted to H. K summons G as

*Partnership—Separate Assets—Garnishment—Priority.—In *Pitts v. Spotts*, 86 Va. 72, 9 S. E. Rep. 501, the court said: "The appellant (partnership creditor) having obtained a *lien* by his judgment, and the appellees (individual creditors) being only open account creditors, he is entitled to the benefit of that *lien* and ought not to be deprived of it. The case of *Straus v. Kerngood*, 21 Gratt. 584, is, upon this point, a decisive authority." See also, the principal case cited in *Robinson v. Allen*, 85 Va. 731, 8 S. E. Rep. 385.

garnishee and obtains a judgment for the amount of his debt against G. S also summons G and obtains a judgment; the summons of S being after that of K, but he obtains his judgment first. S then files his bill to enjoin K from receiving and G from paying to K the debt of G to H. **HELD:**

Same—Same—Same—Priority.—K having first recovered his judgment against F & H and sued out execution thereon, has the prior lien upon the debt due from G to H; and a court of equity cannot deprive him of it.

On the 9th of May 1868, Kerngood & Brother recovered a judgment in the Hustings court of the city of Richmond, against Wm. Fleishman and Jonas Heller, as partners under the name of Fleishman & Heller, for six hundred and ninety-seven dollars and thirty-five cents, with interest and costs. On this judgment the plaintiffs sued out an execution of fieri facias, on the 12th of May 1868, which was returned by the sergeant of the city, "no effects." On the 21st of September following they sued out similar executions, one directed to the sergeant of the city of Richmond, and another to the sergeant of the city of Williamsburg, returnable to November rules; and both were returned, "no effects." On the same 21st of September the plaintiffs suggested that by reason of the lien of their writ of fieri facias there was a liability on the Eastern Lunatic Asylum, and a summons was issued to bring the said Asylum
585 *before the court to answer, on the first day of October term, 1868 of the Hustings court of Richmond. This process was executed on the Eastern Lunatic Asylum on the 29th of September. And on the 29th of July 1869, there was a judgment in favor of the plaintiffs against the Eastern Lunatic Asylum, for \$697.34, with interest and costs, in full of the judgment of the plaintiffs against Fleishman & Heller.

On the 28th of October 1868, Julius Straus obtained a judgment in the County court of Augusta against Jonas Heller, for twelve hundred and fifty dollars, with interest and costs, for the individual debt of Heller. And on a suggestion, &c., Straus, at the November term of said court, obtained a judgment against the Eastern Lunatic Asylum for \$775.13, with interest and costs.

It appears that on the 30th of May 1868, Jonas Heller recovered a judgment in the Circuit court of Williamsburg and James City county, against the Eastern Lunatic Asylum for the sum of seven hundred and sixty-five dollars and eighty-six cents, with interest and costs. And this is the debt which was the foundation of the judgment against the Lunatic Asylum in both of the above named cases.

In November 1869, Julius Straus presented his bill to the judge of the Circuit court of the city of Richmond, praying for an injunction restraining Kerngood & Brother from collecting, and the Eastern Lunatic Asylum from paying, the judgment recovered by the former against the latter. In his bill he sets out the foregoing facts, and insists that though the execution of Kern-

good & Brother was first sued out, his judgment against the Eastern Lunatic Asylum was first recovered; and therefore he was entitled to have the debt due to Heller from the Lunatic Asylum, applied to pay his debt. And he further insisted that his judgment being against Heller individually, and the judgment in favor of Heller
586 against *the Lunatic Asylum being due to him individually, whilst the judgment of Kerngood & Brother was against the firm of Fleishman & Heller, for which Heller was only bound as a member of the firm; he was entitled, on this ground, to have the debt due from the Lunatic Asylum to Heller applied to the payment of his judgment in preference to Kerngood & Brother. And he stated that Heller was wholly insolvent. He made Kerngood & Brother, The Eastern Lunatic Asylum, and Jonas Heller parties defendants; and prayed for an injunction, and for general relief.

The injunction was granted: And Kerngood & Brother answered, contesting the claim of Straus to preference in the application of the debt due from the Lunatic Asylum to Heller. They said there was no partnership estate of Fleishman & Heller, out of which satisfaction of their debt could be obtained; and they were entitled to have their debt paid out of the separate estate of Heller, on which by their superior diligence they had acquired a lien superior to that of Straus.

The cause came on to be heard on the 11th day of November 1869, when the court dissolved the injunction and dismissed the bill, with costs. And thereupon Straus applied to this court for an appeal; which was allowed.

Meredith, for the appellant.

Johns, for the appellees.

STAPLES, J. It is universally conceded that partnership creditors are entitled to the preference over separate creditors in the administration of partnership assets. But the converse of the proposition, that separate creditors are entitled to the preference in the administration of the separate estate, involves other considerations, and is by no means universally conceded. Upon this
587 proposition the authorities are conflicting and irreconcilable. In *this state the question has never been decided. It was the subject of an elaborate and exhaustive discussion in *Morris v. Morris*, 4 Gratt. 293, between Judges Allen and Daniel; the former insisting that the rule which confines the creditors of the partnership to the partnership estate until the claims of the separate creditors are satisfied, is peculiar to the English courts in bankruptcy, and is utterly destitute of support from the general principles of equity. Judge Daniel, on the other hand, maintained the rule as founded on the general jurisdiction of courts of chancery, to be enforced whenever, from any cause, the estate of a deceased partner is brought within the cognizance of a court of equity. It will be ob-

served, that the point of controversy between these judges, related to the proper distribution and application in equity of the separate estate of a deceased partner, which was insufficient to discharge both partnership and private debts.

The question under consideration here, whether a court of equity can deprive a joint creditor of a bona fide lien upon the separate estate of a partner, did not arise in that case. Judge Allen, however, said that a partnership creditor might levy his execution upon the separate estate of a partner, and that such levy could not be avoided by a separate creditor having no specific lien, was a proposition not to be controverted. Judge Daniel conceded it was perfectly competent for either partner to secure the payment of a firm debt, by giving a lien on his separate estate, which may wholly exclude his separate creditors, during his life and after his death, till such lien was satisfied. And I think it might be demonstrated, both on reason and upon authority, that when the joint creditor has by his superior diligence secured such a lien, a court of equity will not interfere to prevent his enforcing it, upon a mere suggestion of the insolvency of the partnership or the individual members composing it; and

588 that it is only when *the creditors are compelled to resort to a court of equity to obtain possession of the assets, that the rule will be adopted, which confines the joint creditors to the social assets until the separate creditors are satisfied. However this may be, that rule is subject to several very important exceptions. One of these exceptions is, that the separate creditor is only entitled to priority when there is partnership property, or a living solvent partner. When there is neither one nor the other, the joint creditors are entitled to participate *pari passu*, with the separate creditors in the separate estate. In such case all the creditors, joint and several, stand upon common ground without a preference accorded to either. They are, however, mere equities, duly respected and enforced in courts of chancery in cases appropriate to the jurisdiction of those courts. But when the partnership creditor, by virtue of his judgment or execution, acquires a lien upon the separate estate of a partner, he has obtained a legal advantage of which he cannot be deprived by any one having only equal equity with himself. The equities being equal, the legal priority must be respected by every court.

I have seen but one case in which this precise point was involved. In *Bardwell v. Perry*, 19 Verm. R. 292, 302, Redfield, J., delivering the opinion of the court, uses this language: "In this particular case, there being no joint estate or solvent partner, the orators could not exclude the defendants from a share in the separate estate of each partner, even under the English bankrupt laws. The parties, therefore, standing precisely equal in point of equity, and the defendants having first attached the property, and thereby gained a prior

right at law, must be permitted to pursue that right.

In this case the appellees sued at law, obtained a judgment and execution against both partners, and thus acquired a lien upon the joint and separate estate of their debtors.

This lien was fully consummated by 589 *process of garnishment against a debtor of one of the partners, and a judgment against such garnishee. The appellant is a separate creditor of the same partner, and has also a judgment and execution, but subsequent to that of the appellees. It is to be inferred, and was conceded in the argument, that the partnership and the individual partners are insolvent. It will thus be seen that the appellees have the prior statutory lien, the legal validity of which cannot be questioned. Their equity to the payment of that debt is equal to that of the appellant. Upon what principle is it they are to be deprived of this lien? It is said that the insolvency of the partners raises an equity in behalf of the private creditors. Is not this practically a repeal of the statute giving the lien of an execution, or can the courts incorporate into that statute an exception the Legislature has omitted? Can they annul a lien fairly obtained, wrest the property from the custody of the law, and proceed to distribute it upon certain arbitrary equitable rules, because the debtor happens to be in failing circumstances? Suppose the joint creditor acquires his lien when the partner is perfectly solvent. It will scarcely be maintained that his subsequent insolvency will invalidate the lien. If the rights of the joint creditor depend upon the pecuniary condition of the debtor, the courts must accurately determine, not only what constitutes insolvency, but precisely when it commences, in order to determine the validity of the respective liens: certainly a difficult undertaking in States having neither bankrupt laws nor statutory insolvencies.

Upon the death of a partner, the joint creditor loses all remedy against his estate at law, and must resort to a court of equity for payment. In such case there may be some foundation for the rule requiring him to submit to an equitable administration of the assets. And so, where there are two funds, joint and several, the courts will not allow a creditor, having control of 590 both, to *attach himself upon one fund, to the prejudice of him who has no other. This is upon the familiar principle of marshalling assets, and is no interference with vested rights. When, however, the creditor is not seeking the assistance of a court of equity; when he has acquired a valid legal right to satisfaction from the estate of his debtor, it is impossible to take that estate from him and appropriate it to another creditor, without a judicial repeal of the statute.

I shall not stop to examine the only two cases cited by counsel, in which this doctrine was broadly maintained. One of them was decided by a chancellor of South Carolina, and the other a vice-chancellor of New

York. Opposed to these cases, there is an array of authorities imposing in number and respectability. *Meech v. Allen*, 17 New York R. 300; *McCulloh v. Dashiell's adm'or*, 1 Harris & Gill R. 96; *Cleghorn v. Insurance Bank of Columbus*, 9 Georgia R. 319; *Kerby v. Schoonmaker*, 3 Barb. Ch. R. 46; *Allen v. Wells*, 22 Pick. R. 450; 1 Am. Lea. Cases, edition of 1871, page 472. In regard to the case of *Jackson v. Cornell*, decided by the vice-chancellor of New York, Judge Joynes, in *Gordon v. Cannon*, 18 Gratt. 387, 415, said that case was overruled by Judge Scarburgh in the Circuit court of Petersburg in 1850, upon the ground that there was no such rule in equity as that announced by the vice-chancellor; and upon an application to this court for an appeal, the appeal was refused. In *McCullough v. Sommerville*, 8 Leigh, 415, the social and separate effects were conveyed for the payment of partnership and separate debts indiscriminately. This court reformed the deed, applying the social effects to the joint debts, and the separate estate to the separate debts, according to the presumed intention of the parties.

The learned counsel for the appellant insisted that as a bankrupt system now prevails in the United States, the proceedings in the State courts should conform to the *rules in bankruptcy in respect to the administration of partnership and separate assets. It would certainly be going very far to say, that in any case of an insolvent partnership, a State court should assume jurisdiction to administer the assets by analogy to the rules in bankruptcy. But it is unnecessary to discuss that question. It is true that according to the practice in the United States courts, under the provisions of the statute, when the partnership is in bankruptcy, the social effects are applied to the social demands, and the separate effects to the individual claims. But those courts adopt the rule of excluding the partnership creditors from the separate estate, only where there are partnership assets, or a living solvent partner. They also recognize and enforce all liens bona fide acquired by any creditor under the State laws, prior to the commencement of proceedings in bankruptcy. But if the State courts may disregard all such liens in cases of insolvent partnerships, so far from conforming to the rules of the bankrupt courts, they would repudiate legal priorities which the latter courts respect in the administration of partnership assets. It seems to me, therefore, that the learned counsel for the appellant derives no support from the bankrupt laws of the United States.

It was also insisted, that as the partnership creditors have a prior right to the partnership assets, a similar preference should be given the separate creditors with respect to the private property of the individual partners. It is true, that upon the dissolution of the partnership by the death or bankruptcy of one of the partners, the joint creditors have a quasi lien upon the joint effects. This lien, however, does not result

from any preference accorded to them, but from the equities existing between the partners themselves. Each partner may insist upon the application of the joint effects to the joint creditors, and that the separate creditors shall be excluded until the joint liabilities are fully satisfied. In this way the joint creditors must be first paid in order to the administration *of justice to the partners. Whatever equities the joint creditors have, arise out of the equities between the partners themselves; whatever liens they assert depend upon the lien of the partners upon the partnership funds for the payment of the partnership debts. Whether the separate creditor may insist upon his priority when the separate estate of a deceased partner is in a court of equity for distribution, which was so elaborately discussed in *Morris v. Morris*, is a question not necessary nor intended to be decided now.

If, however, the appellant were correct in his view of the law, his bill is not framed in accordance with the principles he invokes. There being no partnership assets, and no solvent partner, according to the equitable doctrine all the creditors should be permitted to participate *pari passu* in the separate estate, and with that view all of them should have been parties to the bill. The appellant has brought the appellees only before the court; and by his pleading presents the single issue, whether he is not entitled to satisfaction out of the fund in controversy, notwithstanding the legal priority of the appellees.

I think the Circuit court did not err in dissolving the injunction, and dismissing the bill.

The other judges concurred in the opinion of Staples, J.

Decree affirmed.

593 **Yeaton v. Bank of the Old Dominion*.

January Term, 1872, Richmond.

Absent. ANDERSON, J.

1. **Private Corporations—Charter—Power of Legislature to Modify.***—Under the power reserved in the charter of a private corporation, to repeal, alter or modify the charter, the Legislature may repeal the charter, but cannot modify it without the consent of the corporation. But if the corporation refuses to consent to the modification, it must discontinue its business as a corporate body.
2. **Banks—Amendment of Charter—Effect of Assent by Branch Bank.**—The Bank of D, located in Alexandria, within the Federal lines, has a branch at P within the Confederate lines. The acts of March 29th, 1862, and May 16th, 1862, of the Richmond government, not having been assented to by the mother bank, though acted on by the branch at P, did not operate to amend the charter of the Bank of D.
3. **Same—Notes Issued by Branch Bank.**—Y, a debtor before the war, of the Bank of D, at Alexandria, cannot, after the war, pay his debt by notes issued

*See monographic note on "Corporations."

under the acts of March 29, and May 16, 1862, by the branch bank at P.

4. **Same—Acts of Branch Bank—Ratification by Mother Bank.**—The Bank of D, after the war, took possession of the assets of the branch bank at P; they being much less than the indebtedness of the branch bank to the mother bank. The Bank of D did not thereby sanction and ratify the acts of the branch bank, done under the acts of March and May 1862.

This was an action of assumpsit, brought in October 1867, in the Circuit court of Alexandria, and afterwards transferred to the Circuit court of the city of Richmond, by The Bank of the Old Dominion against Wm. C. Yeaton, to recover the sum of \$561.07, with interest. The defendant filed the pleas of "non assumpsit" and "tender;" upon which issues were taken. The parties having agreed the facts, waived a jury, and submitted the case to the court: and
594 the cause coming on to be *heard on the 13th of March 1869, the court rendered a judgment in favor of the plaintiff. To this judgment Yeaton obtained a supersedeas from this court. The facts are stated by Judge Christian in his opinion.

Brent & Wattles and Neeson, for the appellant.

Claughton, for the appellee.

CHRISTIAN, J. This is a supersedeas to a judgment of the Circuit court of the city of Richmond. The case was submitted to that court without a jury, upon a case agreed, submitting the following facts in lieu of a special verdict.

That the defendant, William C. Yeaton, was indebted to the plaintiff, the Bank of the Old Dominion, in the sum of \$561.07, with interest on \$111.07, part thereof, from 20th January 1862, and on \$450, the residue thereof, from 31st January 1863. That upon the trial of the cause, the defendant tendered certain notes issued by the branch Bank of the Old Dominion, at Pearisburg, equal in amount to the claim of the plaintiff; that the Bank of the Old Dominion was located in the city of Alexandria; that the United States authorities took possession of the city of Alexandria on the 24th day of May 1861, and held such possession until the close of the war; that there was at no time a quorum of the board of directors of the said Bank of the Old Dominion within the Confederate lines during the war; that there was a majority and quorum of the said board of directors in the city of Alexandria certainly until the 29th October 1863; that the restored government of Virginia extended over the city of Alexandria during the war and at its close; and that nearly all the directors of the Bank of the Old Dominion took the oath to support the restored government of Virginia and acknowledged its supremacy, repudiating the Richmond government; that the branch Bank of the

595 Old Dominion at Pearisburg did business as a bank during *the war up to its close; but a majority of its stock-

holders, both in number and amount of stock, resided in the city of Alexandria and States north of the Potomac; that neither the board of directors nor the stockholders of said bank ever accepted any change or modification of the charter of said bank subsequent to the 24th day of May 1861; that the said branch bank at Pearisburg, in obedience to an act of the General Assembly of the Richmond government, passed 29th March 1862, issued notes of denomination less than five dollars, and these notes were exchanged for Confederate States currency; that said branch bank issued in said small notes the sum of \$27,093.25; and that the said branch bank was indebted to the mother bank in the sum of \$37,086.25 on the 7th day of June 1861, on account current, and that \$51,000 of the stock of said branch bank was owned by said mother bank; that at the close of the war the mother bank received from the branch bank the following assets—\$4,000 in gold, \$10 in silver, \$1,134 in Virginia currency, and \$6,060 in Bank of the Old Dominion notes.

The above being the facts agreed in lieu of a special verdict, the Circuit court of the city of Richmond entered a judgment for the plaintiff, for the sum of \$561.07, the debt demanded in the declaration, with the lawful interest due on the same.

To this judgment a writ of error and supersedeas was awarded by this court.

The plaintiff in error is seeking by his plea of payment and tender, (with which he files the notes issued by the president and cashier of the branch bank of the Old Dominion at Pearisburg,) to discharge his obligation to the Bank of the Old Dominion at Alexandria, in a currency greatly depreciated, if not utterly worthless, at the time of the tender.

It is insisted by the learned counsel for the appellant, that he is authorized to
596 make such tender in discharge *of his indebtedness to the Bank of the Old Dominion, by virtue of certain acts of the Legislature, assembled at Richmond, passed March 29th, 1862, and amended May 16th, 1862.

The first named act authorized the several banks of circulation of this Commonwealth "to issue notes of a less denomination than five dollars, and not less than one dollar, including fractional amounts between one and five dollars, to an amount not exceeding ten per centum of the capital of said banks respectively." The act of May 16th, 1862, amendatory of the above recited act, contained the following provision: "Provided further, that if any bank be disabled from complying with this act by reason of its being within the liens of the enemy, each branch of such bank not within the lines of the enemy, is required (under certain penalties), within ninety days from the passage of this act, to issue such notes (that is, notes of less denomination than five dollars), to an amount equivalent to ten per centum of the capital of such branch, independently of the bank of which it is a branch.

It is contended that these acts are to be regarded as amendments of the charter of the Bank of the Old Dominion, made under the authority of the 53d section of ch. 58, of the Code (1860), which reserves to the Legislature "the right to repeal, alter, or modify the charter of any bank at its pleasure." And it is further insisted, that under that provision of the Code (sec. 16, chapter 58,) which provides that all notes of a bank "shall be received in payment of debts due to the bank, whether contracted at the parent bank or the branch bank," the notes issued by the branch bank at Pearisburg, and tendered with the plea of the plaintiff in error, should have been received by the court below in full satisfaction of the debt sued upon.

It must be observed in the first place, that the branch bank at Pearisburg (which 597 it is claimed was authorized *under the act of May 16th, 1862, to issue these notes), was not an independent corporation operating under a charter of incorporation from the Legislature, but was simply the agent or branch of the Bank of the Old Dominion, subject to the charter of its principal or mother bank. So that this last named act cannot be in any view regarded as a modification of the charter of a bank, according to the right reserved in the 53 section of ch. 58 of the Code.

The branch bank having no charter, but being subject to the charter of the mother bank, the reserved right of the Legislature "to alter, modify, or repeal the charter of any bank," can only be exercised by acts affecting the charter of the mother bank.

It is clear that the proviso of the act relied upon, which authorizes a branch bank, independently of the mother bank, to issue notes of less denomination than five dollars, cannot be regarded as a modification of the charter of the Bank of the Old Dominion. The question then recurs, does the act of March 1862, as amended by the act of May 1862, independent of the proviso just referred to, operate as a modification of the charter of the Bank of the Old Dominion, under the reserved rights of the Legislature so as to bind that bank?

It must be borne in mind that the city of Alexandria, where the Bank of the Old Dominion was located, was taken possession of by the United States authorities on the 24th May 1861, and that the restored government of Virginia extended its jurisdiction over that city during the war and at its close; and it is shown by the facts agreed, that a majority of the stockholders, both in number and amount of stock, resided in the city of Alexandria, in the District of Columbia, and in States north of the Potomac; and that neither the directors nor the stockholders of said bank ever accepted any modification or change of the charter of said bank subsequent to the 24th day of May 1861.

598 *The power of the Legislature "to repeal, alter or modify the charter of any bank at its pleasure," must be held to be limited to this extent. It may certainly

repeal the charter of any bank, but it cannot compel a bank to accept an amendment or modification of its charter. Nor is any such amendment or modification of its charter binding upon the bank without its acceptance. Banks are private corporations, created by a charter, or act of incorporation from the government, which is in the nature of a contract, and therefore, in order to complete the creation of such corporations, something more than the mere grant of a charter is required; that is, in order to give to the charter the full force and effect of an executed contract, it must be accepted. It is clear that the government cannot enforce the acceptance of a charter upon a private corporation without its consent. *Angel & Ames on Corporations*, § 81; *Rex v. V. Ch., &c., of Cambridge*, 3 Burr. R. 1647, 1661; 3 Hill's R. 531. As was said in *Ellis v. Marshall*, 2 Mass. R. 279: "That a man may refuse a grant, whether from the government or an individual, seems to be a principle too clear to require the support of authorities." The terms offered by the government may, therefore, be acceded to or refused by the body corporate, and, if not acceded to, they have no binding effect. *Dartmouth College v. Woodward*, 4 Wheat. R. 518; 1 Greenl. 79; 10 Wend. R. 266; 1 Story's Eq. 207. These well settled principles are everywhere recognized as applicable to the original charters of incorporation; and upon principle and authority they apply with equal force to any amendment or modification of the charter as well as to the original charter. Though the Legislature may have the reserved power to amend or modify a charter of incorporation, it can no more force the corporation to accept such amendment or modification, than it could have forced upon them the acceptance of the original charter without their consent.

Under the reservation they can repeal 599 or *destroy the charter, without any consent on the part of the corporators, but as long as they remain in existence as a corporate body, they necessarily have the power to reject an amendment or modification of their charter. The power reserved by the Legislature gives the right certainly to repeal or destroy, but so far as the right to modify or alter is concerned, it is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the consent of the other contracting party. These principles grow out of the nature of charters or acts of incorporation, which are regarded in the nature of contracts. The amendment or modification must be made by the parties to the contract, the Legislature on the one hand, and the corporation on the other, the former expressing its intention, by means of a legislative act, and the latter assenting thereto by a vote of the majority of the stockholders, according to the provisions of its charter, or by other acts showing its acceptance.

The reservation of the right to alter, amend or repeal the act by which the corporation is created, may be prudent and

salutary; but it seems to be a necessary implication, that if the Legislature should undertake to make what in their opinion is a legitimate alteration or amendment, the corporation has the power to reject or accept it, whatever may be the consequences. One consequence undoubtedly is, that the corporation cannot conduct its operations in defiance of the power that created it; and if it does not accept the modification or amendment proposed, must discontinue its operations as a corporate body. But such amendment or modification cannot be forced upon the corporation without its consent. *Sage, &c. v. Dillard, &c.*, 15 B. Mun. R. 340; *Allen v. McKean*, 1 Sumner's R. 277; *Durfee v. Old Colony and Fall River R. R. Co.*, 5 Allen's R. 230. Every amendment

or modification of a charter of incorporation *is nothing more than a new contract, which is not binding upon the corporate body until accepted by them. Applying these doctrines, which seem to be well settled, to the case before us, it is manifest that the Bank of the Old Dominion cannot be held bound by the acts of 1862 as amendments of its charter; the facts agreed being "that neither the board of directors nor the stockholders of said bank ever accepted any change or modification of the charter of said bank subsequent to the 24th of May 1861." This would be true upon the authorities cited, even if the Bank of the Old Dominion had been located within the territorial jurisdiction of the Richmond Legislature. But when it is remembered that this bank was located at Alexandria, which was taken possession of by the Federal authorities on the 24th May 1861, who held such possession until the close of the war; that the restored government of Virginia extended over the city of Alexandria during the war and at its close; that the majority of its stockholders, both in number and amount, resided in Alexandria and in States north of the Potomac; that a majority of its directors lived in the city of Alexandria and acknowledged allegiance to the so-called restored government; in the light of all these facts, it is manifest that this corporation thus situated in respect to its location, its stockholders and board of directors could not, in any respect, be affected by any legislation of the Richmond government. That government, it is true, as a de facto government, exercised its authority within the limits of its jurisdiction, over all matters, civil and local, and obedience to its authority was not only a necessity, but a duty. *Thorington v. Smith*, 9 Wall. U. S. R. 1. But its jurisdiction could certainly not be extended beyond its territorial limits, into sections of the State in the permanent occupancy of the Federal armies, and under the acknowledged authority of the so-called restored government of

601 *Virginia. *Bank of the Old Dominion v. McVeigh*, 20 Gratt. 457.

It is no answer to this view that the branch bank at Pearisburg was within the territorial jurisdiction of the Richmond government, and subject to its authority.

This bank was not an independent corporation. It had no charter; it was but a branch of its mother bank at Alexandria, subject to its charter. It was but the agent, the mother bank being its principal. It could do no act to bind its principal, without the consent and authority of that principal. Nor could the Legislature authorize the branch bank which owed its existence to the charter of the mother bank, to issue small notes, or to do any other act as a bank, without the consent of the mother bank. The only authority which the Legislature could exercise was that which it reserved under the power "to repeal, modify or alter" the charter of the mother bank. I have already shown that this was not done by the acts of 1862, which could not operate upon the Bank of the Old Dominion as a change or modification of its charter.

But there is still another view of this case, which according to the principles settled by this court in the recent case of *Bank of the Old Dominion v. McVeigh*, 20 Gratt. 457, would seem to be conclusive. The obligation of the plaintiff in error was to pay to the Bank of the Old Dominion five hundred and sixty-one dollars and seven cents in gold, or its equivalent. He is seeking to discharge that obligation with the depreciated and worthless notes of the branch bank of the Old Dominion at Pearisburg, which he purchased for that purpose, with the knowledge that the defendant in error repudiated the same. The authority to do this is derived, it is claimed, under the § 16, ch. 58, Code 1860, and the act of May 16th, 1862. The provision of the Code is as follows: "Though a bank have a branch, all its notes shall be signed by the president and countersigned by the cashier of the parent bank. All such

602 notes shall be received in *payment of debts to the bank, whether contracted at the parent bank or branch." The act of May 1862, providing for the issue of notes of less denomination than five dollars by branch banks, provides that "notes hereby authorized to be issued may be signed by such officer or officers of such bank or branches as may be designated for that purpose by the respective boards of directors." It is shown by the facts agreed, that the notes tendered in payment of the debt due, were notes signed by the president and cashier of the branch bank. Now, the obligation of the plaintiff in error was to pay the sum of \$561.07 in gold, or its equivalent. It being a debt due to a bank he might discharge it in the notes of the bank or its branch. But what notes are the banks required to receive in payment of debts "whether contracted at the branch bank or parent bank?" Only notes which are signed by the president and countersigned by the cashier of the parent bank. "All such notes (i. e. notes signed by the president and countersigned by the cashier of the parent bank), shall be received in payment of debts to the bank, whether contracted at the parent bank or branch" is the language of statute. The notes tendered

were such notes as the law required the bank to receive in payment of its debts. Under the contract sued upon the obligation could only be discharged by the payment or tender of gold or its equivalent, or by payment or tender of notes of the bank or one of its branches, signed by the president and countersigned by the cashier of the parent bank. The act of May 1862, does not in terms require the banks to receive the small notes issued under its authority to be received in payment of debts due to it: but if it did do so in terms or by necessary implication it would be void, because it would impair the obligation of contracts, in requiring the bank to receive, not the notes which, under its charter it agreed (by accepting the conditions of the charter), to receive in payment of debts due to it, but

603 to receive a worthless currency issued by its branch without its consent, not in conformity to its charter, but in direct violation of it. Surely it cannot be held that under the reserved power of the Legislature "to alter, modify, or repeal a charter of any bank," it has the power to change or modify an act of incorporation in such a way as to affect in a material particular, a contract which the corporation has entered into with a third party. Such an exercise of legislative power would be unconstitutional and invalid, because it would impair the obligation of a contract. 5 Allen 247-'8; 2 Gray 547; Bank of the Old Dominion v. McVeigh, 20 Gratt. 457.

But it is argued by the counsel for the plaintiff in error, that it is now too late for the parent bank to raise the question as to the validity of the acts of 1862, because after the war the parent bank took possession of all the assets of the branch, and thereby sanctioned and ratified its transactions.

It is shown by the facts agreed, that the operations of the branch bank had been unprofitable, those operations having been made in Confederate currency; and that while the assets turned over to the parent bank were about \$10,000, the branch bank was indebted to the parent bank in the sum of \$37,000. The parent bank had the unquestioned right to appropriate the assets of the branch bank, but I cannot perceive how the exercise of a rightful act, could give its sanction to operations of its branch, done not only without the authority of the parent bank, but under an act of the Legislature which was in itself invalid, so far as it could affect the parent bank. I am of opinion, upon the whole case, that the judgment ought to be affirmed.

STAPLES, J., concurred in the judgment of the court; but he did not concur in the views of Christian, J., upon the power of the General Assembly to modify the charters of corporations.

MONCURE, P., concurred in the opinion of Christian, J.

Judgment affirmed.

604 *City of Richmond v. Richmond & Danville R. R. Co.

January Term, 1873, Richmond.

Absent, ANDERSON, J.

1. **Charters—Exemption from Taxation.**—The charter of the R. & D. Railroad Co. provides that "all machines, wagons, vehicles or carriages belonging to the company, with all their works, and all profits which may accrue from the same, shall be vested in the respective shareholders forever, in proportion to their respective shares, shall be deemed personal estate, and exempt from any charge or tax whatever." **HELD:**

1. **Same—Same.**—The real estate owned and used by the company for the purposes of their business, is embraced in the provision, and is personal estate.

2. **Same—Same.**—All the said property, real and personal, is exempt from taxation, both State and municipal.

3. **Same—Same—Constitutionality.**—The exemption from taxation of the real estate of the company in the city of Richmond, is not unconstitutional as being in conflict with the charter of the city, previously granted, giving the city the power to tax real estate for the purposes stated in the city charter; the city having ample means of taxation left for the payment of her expenses and debts.

4. **Same—Same—Contracts.**—A city charter is not a contract between the State and the city, securing to the city the absolute power of taxation beyond the control or modification of the Legislature.

5. **Same—Same—How Powers Surrendered.**—The power of exemption, as well as the power of taxation, is an essential element of sovereignty; and can only be surrendered or diminished in plain and explicit terms.

6. **Municipalities—Taxation—Delegated Powers.**—Municipal corporations are mere auxiliaries of the government, established for the more effective administration of justice; and the power of taxation confided to them is a delegated trust.

***Charters—Exemption from Taxation—How Powers Surrendered—Delegated Powers.**—In *Probasco v. Moundsville*, 11 W. Va. 506, the court said: "In the case of *City of Richmond v. R. & D. R. R. Co.*, 21 Gratt. 604, it was held that the power of exemption, as well as the power of taxation, is an essential element of sovereignty; and can only be surrendered or diminished in plain and explicit terms. In that case it was decided, that the exemption from taxation of the real estate of the R. & D. R. R. Co. in the city of Richmond was not unconstitutional, as being in conflict with the charter of the city, previously granted, giving the city the power to tax real estate, etc."

The principal case is cited and followed in the following cases: *Chesapeake & O. R. Co. v. Miller*, 19 W. Va. 418; *Antoni v. Wright*, 23 Gratt. 853; *Williamson v. Massey*, 33 Gratt. 240; *Va. & Tenn. R. Co. v. Washington County*, 30 Gratt. 474, and *note*; *Town of Danville v. Shelton*, 76 Va. 334; *City of Richmond v. Crenshaw*, 76 Va. 940; *Supervisors of Stafford County v. Luck*, 80 Va. 227; *Com. v. Richmond & Petersburg R. Co.*, 81 Va. 359; *Whiting v. Town of West Point*, 88 Va. 910, 14 S. E. Rep. 698; *Ill. Cent. R. Co. v. City of Decatur*, 13 Sup. Ct. Rep. 296; *Williamson v. State of N. J.*, 9 Sup. Ct. Rep. 457; *Territory of New Mexico v. U. S. Trust Co.*, 19 Sup. Ct. Rep. 133.

The Council of the city of Richmond, in 1865 and *1866, assessed with taxes for these years, the real estate in the city of Richmond, owned by the Richmond and Danville Railroad Company, and used by the company as a part of its works; and the company refusing to pay the tax, the collector of the city levied upon one of the locomotives belonging to the company to enforce its collection. The company thereupon, in September 1866, obtained from the judge of the Circuit court of the city, an injunction to restrain the city of Richmond and the collector from proceeding to collect said taxes. There are several grounds stated in the bill, on which it is insisted that the injunction should be sustained; but only one of them was considered by the court below, or by this court. That is, that by the charter of the Richmond and Danville Railroad Company, all its property was exempted from taxation. The third section of the charter provides that "all machines, wagons, vehicles, carriages, belonging to said company, together with all their works, and all profits which shall accrue from the same, shall be vested in the respective shareholders forever; shall be deemed personal estate, and exempt from any charge or tax whatsoever."

The city of Richmond answered the bill, and insisted, first: that the exemption from taxation referred to in the charter of the company, was an exemption from State taxation, and not from municipal taxes; and, second, if it was intended to apply to the city taxes, it was unconstitutional, as impairing the obligation of the contract made by the State with the city of Richmond, in the charter of the city and subsequent acts of legislation, passed before the grant of the charter to the Richmond and Danville Railroad company; by which charter and subsequent legislation, the city of Richmond was authorized to tax all real and personal estate in the city, to borrow money, and issue its bonds; and by virtue of which legislation the city had subscribed

to various works of internal improvement, and had executed *other works in the city, which are set out in the answer; for the payment of which subscriptions and expenses, she had sold her bonds to a large amount; many of which, constituting a large indebtedness of the city, were still unpaid; and for the payment of the interest and principal of which the city was authorized, and was compelled to tax the property, real and personal, in the city. The statements in the answer as to the subscription by the city to the several works of internal improvement therein mentioned, and the creation of debts by the city to pay these subscriptions, and that said debts are now due, were admitted to be true.

The case came on to be heard on the 21st day of July 1868, when the injunction was perpetuated. And thereupon the city of Richmond applied to this court for an appeal; which was allowed.

R. T. Daniel and Meredith, for the appellant.

Hallyburton and Ould, for the appellee.

STAPLES, J. The city of Richmond, by its officers and agents, assessed with taxes, for the years 1865 and 1866, certain lots supposed to lie within the corporate limits, the property of the Richmond and Danville Railroad Company, and occupied by its railroad tracks, depots and other structures. The company refusing to pay said taxes, the city collector levied upon a locomotive belonging to the company, to enforce their collection. The company thereupon applied for and obtained an injunction from the Circuit court of said city, restraining all proceedings under the levy, upon the ground that its property is exempt from every species of taxation whatever. This injunction was afterwards perpetuated by a decree of said Circuit court; from which an appeal was taken to this court. The company bases its claim to this exemption upon the provisions of the third section of its charter.

The city, on the other hand, resists this *pretension on various grounds, which will now be considered.

It is insisted, that it was not the intention of the Legislature to change the legal character of the property held by the company, but merely to define the nature of the shares therein; and that such shares only are exempt, and not the property of the corporation. The section of the charter referred to is as follows: "All machines, wagons, vehicles or carriages belonging to the company, with all their works, and all profits which shall accrue from the same, shall be vested in the respective shareholders forever, in proportion to their respective shares, shall be deemed personal estate, and exempt from any charge or tax whatsoever." Very slight consideration of this language will show that the construction sought to be placed upon it, is too restricted. The Legislature, clearly, did not mean to declare that the shares should be vested in the shareholders, and should be deemed personal estate. Such a provision in regard to the shares was wholly unnecessary. The obvious meaning is, that the property designated, that is, the machines and carriages belonging to the company, "with all their works," should be deemed personal estate, and exempt from any charge or tax whatsoever. If authority upon this point were necessary, it may be found in the case of the Mayor, &c., of Baltimore v. Balt. & Ohio R. R. Co., 6 Gill's R. 288. It was held in that case, that the real and personal property of the company was exempt from taxation, under a clause in the charter which provided "that the shares of its capital stock should be deemed personal estate, and exempt from the imposition of any tax or burden. The court say, the design contemplated by the Legislature, in the insertion of this clause, was to confer a substantial, not a nominal, benefit on the stockholders, and to induce capitalists to risk their money in a novel and hazardous enterprise.

To impute to the Legislature, in the case before us, *an intention to exempt the shares of stock from tax-

ation, and at the same time to reserve the right to tax everything which constituted it a stock, and gave it its value, would be gratuitously to cast an imputation upon the Legislature inconsistent with every principle of judicial courtesy.

It was also insisted, that the clause in question does not have the effect to exempt the real estate of the company, or in any manner to change it in to personal property. The correctness of this proposition depends upon the construction of the phrase "with all their works." The word "works" is one of very extensive signification. In military engineering, it means fortresses, fortifications, ramparts, bastions and the like. In civil engineering it is often applied to depots, engine-houses, bridges, embankments and other structures essential to the franchise and the proper conduct of a railway, or other work of public improvement. It is very clear that it is in this sense the word is used in the present charter, and was intended to apply to all the property, real and personal, owned by said company, and necessary to the management of the road. If the exemption does not embrace the real property of the company, the Legislature has perpetrated the folly of declaring that mere chattels should be deemed personal estate. It would be attributing to the Legislature the grossest inconsistency to suppose it intended to release from all taxation the machinery and rolling stock of the company, and leave it exposed to the burdens of taxation of its depots, engine-houses, coal yards and other necessary structures. The consideration which dictated the exemption of the personal property, equally applied to the realty.

The terms employed in this section were not hastily or unadvisedly selected. They had been repeatedly used in the various charters granted by the Legislature to internal improvement companies. The
609 identical language is *found in the first charter ever granted in the State, for the construction of a railway: I allude to the Chesterfield railroad. It may be seen in the charter of the Petersburg Railroad Company; the second railway of the State. And when in consequence of the increasing number of applications for charters, the Legislature adopted a general railroad law in 1837, the very identical language with the exception of the exemption clause is again employed. For nearly twenty years every railroad company in the State was incorporated subject to the provisions of this law. It is manifest that the legislative intent was to declare that the property of railway companies, real or personal, should be vested in the respective shareholders as personal estate. And in the Richmond and Danville Railroad Company charter, it is this identical property which is exempt from taxation.

The next ground assumed by appellant, is, that the exemption applies exclusively to State taxes, and not to levies and assessments by the city of Richmond. In the case of the Mayor &c., of Baltimore v. Baltimore

and Ohio Railroad Company, before cited, the Supreme court of Maryland say, that the comprehensive phrase "shall be exempt from the imposition of any tax or burden, excludes not only the State's right to tax the stock, but the right of every corporation created by it." There are numerous decisions to the same effect, which fully sustain the principal of exemption in this class of cases. Bank of Cape Fear v. Edwards, 5 Ired R. 516; Camden and Amboy R. R. Co. v. Hillegas & als., 3 Harr. R. 11; State v. Bently, 3 Zalriskie's R. 532; State v. Comm'rs of Mansfield, 3 Zalriskie's R. 510, 529; State Bank et al. v. City Council of Charleston, 3 Rich. R. 342; Tax Cases, 12 Gill & John. R. 117.

It was contended, however, that these cases are in conflict with the decision of this court in the Orange & Alex. R. R. Co. v. City of Alexandria, 17 Gratt. 176. I do not think so. That decision was based
610 upon the ground *that the act of the Legislature did not relieve, and was not intended to relieve, railroad companies from taxation, but only compounded for the State tax by allowing companies in lieu of it, to pay a tax on the transportation of passengers. Judge Joynes conceded that an exemption from taxation given in general terms, might well be held to extend to municipal as well as State taxation; on the ground that exemption is designed to secure an advantage to the company, and thus encourage the enterprise. In the present case the language is, "exempt from any charge or tax whatsoever." It is impossible to employ terms more comprehensive, and more appropriate to the legislative intent of exempting the company from every species of taxation.

And this brings me to the last and most important ground relied on by the appellant. It is insisted that if it was the intention of the act chartering the Richmond and Danville Railroad Company to exempt from city taxation the property of the company within the corporation limits, it is to that extent unconstitutional and void, inasmuch as it seeks to impair the contract between the State and the city of Richmond; the executed grant under which, long before and ever since the company was chartered, the city has exercised, and continues to exercise, the power to tax real and personal property therein, whether held by corporations or individuals.

In the discussion of this proposition, I do not deem it necessary to consider the question so elaborately argued by counsel touching the power of the Legislature to alter, amend, and even to abolish the charters of municipal corporations; nor is it necessary, in my view of this case, to consider whether the various matters relied on by the appellant constitute a contract between the State and the city of Richmond, in the sense of the constitutional provision which prohibits the obligation of contracts being violated. When the appellant has
611 succeeded in establishing the existence of such a contract, it must *also es-

tablish that the effect of the law in question is to impair its obligation. It is well settled, that whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract; and it does not impair it provided it leaves the parties a substantial remedy according to the course of justice as it existed at the time the contract was made. Cooley's Constitutional Limitation, p. 286, and cases cited.

It was not seriously maintained in the argument, that the ability of the city of Richmond to meet all its liabilities had been or would be materially affected by this exemption. We are sufficiently acquainted with its resources, its wealth and population, to know that the tax thus withdrawn from its treasury bears but a small proportion of the aggregate amount realized from all the sources of taxation within the corporation limits. We know, also, that the real estate of the Richmond and Danville Railroad Company within said limits, constitutes a very small part of the taxable property subject to the jurisdiction of the city.

The only effect of this exemption is that the deficiency thus created must be made up by larger contributions from those already taxed, or by an augmentation of the subjects of taxation. To what extent this will be necessary depends upon a variety of causes; the growth of the city, the increase of its population, capital, trade, manufactures and commerce. It will not be seriously contended that in any probable event, the loss of an annual revenue of six or eight hundred dollars will seriously impair the credit of the city, or impose upon its inhabitants an unequal and oppressive weight of taxation. For this loss, whatever it may be, the city is in a great measure indemnified by the expenditures of the State in works of internal improvement, and the various institutions within the corporate limits, deriving their existence and support

612 from the bounty and patronage of *the State. Notwithstanding its many calamities, the city of Richmond has steadily advanced in wealth and population; and no one familiar with its history and its advantages, doubts its continued growth and improvement. That the construction of the Richmond and Danville Railroad has greatly contributed to this gratifying result no one will deny. Its beneficent influences are daily experienced in every branch of trade and manufacture and commerce throughout the city. The effect of the exemption is not merely to enable the company to furnish a cheaper and more rapid transportation, but has its influence in increasing the revenues and dividends, and enhancing the public confidence in the bonds of the company; in all of which the city of Richmond is materially interested.

If the city is left in possession of the power of taxation, and of the means not materially diminished, necessary to meet all its engagements; or, if diminished in

one respect, supplied from other sources; if all its remedies are substantially preserved, how is the obligation of the contract impaired. Conceding that the charter constitutes an inviolable contract with the State, is it to be maintained that its effect is to deprive the State of all power to relieve any citizen of Richmond, or any property therein, of taxation, no matter how strong may be the considerations of humanity, or how imperiously the public interest may demand such exemptions. If such be the force of city charters, they have an operation far beyond what is universally attributed to them in the Legislature. The amended charter of the city of Lynchburg, granted in 1852, contains substantially the same provisions in regard to subscriptions to works of internal improvement, the contraction of loans, and the assessment and collection of taxes.

It is probable that the same powers, substantially, are vested in the corporate authorities of every city in the Commonwealth, and that upon the faith of these grants

613 *debts have been contracted, and bonds and certificates issued and negotiated.

Even where no subscriptions have been made to works of internal improvements, these cities and towns have found it necessary to contract loans for corporate purposes, the erection of public buildings, the opening and repair of streets, the establishment of waterworks, asylums, and other institutions required by the necessities of a city, or suggested by an enlightened and beneficent public policy. Are all these charters and statutes to be regarded as contracts between the cities, on the one hand, and the State on the other, securing to the former the absolute power of taxation beyond control or modification by the Legislature?

If the proposition now asserted be correct, the State herself cannot acquire title to real estate in the city of Richmond, free from the city claim for taxes. Should the Legislature desire to endow a college, or bestow its charity upon an institution for the deaf and dumb or insane within the corporate limits, the specific lien of the city for taxes must attach to the property selected for that object, and can only be released by its corporate authorities. The present constitution provides that "the Legislature may exempt all property used exclusively for State, county, municipal, benevolent, charitable, educational and religious purposes." Will Mr. Daniel maintain, that this provision is utterly null and void, so far as it may affect property in the city of Richmond? Such is the result of his reasoning. A constitutional provision may impair the obligation of a contract as effectually as a legislative enactment.

The power of exemption, as well as the power of taxation, is one of the essential elements of sovereignty. The right of a Legislature to surrender the power of taxation, in specific cases, has been the subject of one of the ablest and most exhaustive judicial discussions ever known in the Su-

preme court of the United States, 614 and *is now regarded as established upon the most solid foundations of public policy and expediency.

This power of exemption has been and is continually exercised for wise and beneficent purposes by State Legislatures. When the citizen is called on to invest his funds in public enterprises, and institutions of an eleemosynary or literary character, he must understand the nature of the privileges granted him, and the character and rate of taxation to which his investments may be exposed. And so with regard to railways. Their influence is felt in the progress and extension of manufactures and commerce, in an ever increasing demand for the products of agriculture, and in the rapid development of the resources of the country. An enlightened policy, appreciating these advantages, invites the investment of capital in such enterprises by granting liberal exemptions from taxation. A power thus essential to a State, which may be exercised so advantageously for the promotion of piety, education and works of public improvement and utility, should never be held to be surrendered by mere implication, but only by plain and express language.

It is a well settled rule that when privileges are granted to a corporation, the grant is to be construed strictly against the corporation and in favor of the State. See *Rice v. Railroad Comp.*, 1 Black. U. S. R. 358. In the *Charles River Bridge v. Warren Bridge*, 11 Peters U. S. R. 420, it was held by the Supreme court of the United States, that the charter of a bridge corporation not containing any express contract that the State would not authorize another bridge to be built, to the injury of the corporation, no such contract could be implied, and that a law empowering another corporation to erect and maintain a free bridge, was not a law impairing the obligation of a contract, though the effect was practically to deprive the first bridge of all its tolls. Chief Justice Taney said, that whenever

any power of the State is said 615 *to be surrendered or diminished, whether it be the taxing power, or any other affecting the public interests, it must be done in plain and explicit terms; that such surrender is never to be assumed; that the entire community are interested in questions of this character, and they have the right to require that the power of promoting their comfort and convenience, and of advancing public prosperity by providing safe, cheap and convenient ways for the transportation of produce and the purposes of trade, shall not be construed to have been surrendered or diminished by the State unless it shall appear by plain words it was intended to have been done. *Jefferson Branch Bank v. Skelly*, 1 Black. U. S. R. 436. These views forcibly apply to the present case. They evince the manifest reluctance of the courts to construe charters of incorporation, whether public or private, as contracts on the part of the State for the surrender of important attributes of

sovereignty, and the power of advancing the public interest by appropriate and necessary legislation.

It has been strongly argued, that if the State may exempt the property of one citizen or corporation, it may by successive acts of legislation divest the city entirely of the power of taxation, and the means of discharging its obligations. The same argument was made in the case of the *Providence Bank v. Billings and Pittman*, 4 Peters U. S. R. 514. The right to tax the bank was resisted upon the ground that if the State could impose a tax on the bank, it might tax so heavily as to render the franchise of no value, and thus destroy the institution; and that a power which may in effect destroy the charter, is inconsistent with it, and is impliedly renounced by granting it. Chief Justice Marshall, in combating this view, said: "If the power of taxation is inconsistent with the charter because it may be so exercised as to destroy the object for which the charter is given, it is equally inconsistent with every charter, because it is equally capable of work- 616 ing the destruction of *the objects for which every other charter is given."

Indeed, the same objection may be urged to the exercise of every power by the Legislature demanding the judgment and discretion of the representative body. The power of taxation itself, and the right of eminent domain may be perverted to purposes of injustice, but this possible abuse furnishes no argument against their exercise within reasonable limits, and with a due regard to private rights.

The case of *Von Hoffman v. City of Quincy*, 4 Wall. U. S. R. 535, has been relied on as sustaining the pretensions of the appellant. It will be borne in mind, however, that was a proceeding against the city of Quincy by a creditor, to enforce the collection of his debt, no portion of which had been paid. The city was prohibited by an act of the Legislature from levying a sufficient amount to meet its liabilities. So far as the creditor was concerned, that act was practically an entire abrogation of the power of taxation which had been granted by previous statutes, and upon the faith of which the city was enabled to issue and negotiate its bonds. The court held the repealing act null and void, as impairing the obligation of the contract, inasmuch as it deprived the creditor of every remedy for the enforcement of his demand.

In the case of *Gilman v. City of Sheboygan*, 2 Black. U. S. R. 70, the Supreme court fully recognizes the broad line of distinction between statutes which destroy and statutes which modify existing remedies. It was there held that where a State Legislature authorizes a city to borrow money, issue bonds, and tax all the property in the city to pay them, this is not a contract with the bondholders that the State shall not exercise her power to modify the taxation, or exempt portions of the property from all taxation. If such a contract existed, and if a subsequent law exempted all the per-

sonal property in said city from taxation, a real estate owner therein *has no right to complain on the score of bad faith to the bondholders, if the bondholders themselves are silent. The court further hold that the imposition, modification and removal of taxes, and the exemption of property from such burdens, is an ordinary exercise of State sovereignty; and if the State could enter into an engagement to surrender this power, that fact should never be assumed unless the language be too clear to admit of a doubt." This language is directly applicable to the case under consideration: for if one tax payer cannot be heard to complain under such circumstances, neither will all of them combined, nor the corporate authorities representing them, be permitted to make such complaint. *Wade & als. v. City of Richmond*, 18 Gratt. 583; *Langhorne & Scott v. Robinson*, 20 Gratt. 661; *Thurston v. Hooper*, 14 Calif. R. 1; *People v. Woods*, 7 Calif. R. 579; announce the same principles.

These cases show that a legislative enactment, authorizing a municipal corporation to issue bonds and to exercise the power of taxation in order to pay them, may constitute a contract between the State and the holders of such bonds, but they do not show that such enactments constitute contracts between the State and such municipal corporations. The authorities also establish that these corporations are mere auxiliaries of the government, established for the more effective administration of justice; and that the power of taxation confided to them is a delegated trust. In the exercise of this power they act as agencies of the State, and not by virtue of any inherent authority. And whether the Legislature may or may not utterly destroy this power of taxation in particular cases, still it must be exercised under the control and authority of the State. The manner of apportionment, the form of assessment and collection, the species of property which shall be the subject of taxation or exemption, are matters purely within the legislative discretion, except where the constitution *ordains the rule. If, then, it appeared in this case, that the effect of the exemption is to impose undue burdens upon the other property holders of the city of Richmond, the courts can afford no redress. The only remedy is by an appeal to the Legislature, whose wisdom and justice may devise proper and adequate measures of relief.

There is another view of this case deserving a brief consideration. When the city of Richmond subscribed to the stock of the Richmond and Danville Railroad Company, it must have been apprised of the provision in the charter exempting the property of the company from taxation. It knew the terms and conditions upon which the State granted that charter, and invested her funds; and in making its subscription, in voluntarily becoming a shareholder in the company, the city should be held to have acceded to these terms and conditions. Under such circumstances it would be gross

injustice to permit the city to repudiate a provision operating to the advantage of the State and the private stockholders, whose funds were invested upon the faith of such provision.

For these reasons I am of opinion there is no error in the decree of the Circuit court; and that the same should be affirmed.

MONCURE, P., and CHRISTIAN, J., concurred in the opinion of Staples, J.

Decree affirmed.

619 *Morgan's Adm'x v. Otey & als.

January Term, 1872, Richmond.

Absent, ANDERSON, J.

1. *Sale of Real Estate—Currency*—Case at Bar.*—T, trustee of V, in August 1863, sells real estate to M, part for cash and the balance on a credit of one and two years. The cash payment and the first note is paid in Confederate money; but the evidence is that the payments were to be made in the currency of the day when they respectively fell due; and the last note falling due in August 1865, is to be paid in the currency of that day.

This was a bill for an injunction, in the Circuit court of the city of Richmond, filed in March 1868, by Mary Morgan, adm'x of John Morgan, deceased, against Thomas Otey, John Otey and Virginia, his wife, and Wm. Fowlkes, trustee, to enjoin the sale of a house and lot under a deed of trust executed by John Morgan to Fowlkes, to secure a part of the purchase money of the lot. The injunction was granted; and on the 10th day of January 1870, the cause coming on to be heard, the injunction was dissolved; and the trustee was directed to proceed to sell the house and lot upon the terms of the trust. And thereupon Mrs. Morgan applied to this court for an appeal; which was allowed. The case is stated by Judge Christian, in his opinion.

Gilmer, for the appellant.

H. A. & J. S. Wise, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

This is an appeal from the Circuit court of the City of *Richmond. The following facts are disclosed by the record:

On the 13th day of August 1863, John Morgan purchased of Thomas Otey, trustee for Virginia H. Otey, a house and lot then situated in the county of Henrico, but now, and at the time when the bill was filed, in the city of Richmond, (the corporate limits of the city having been extended since the said sale), for the sum of \$3,750. Of this sum \$2,000 was paid in cash, (in Confederate treasury notes), and for the balance two

*See principal case cited in *Teel v. Yancey*, 23 Gratt. 702. See also, *foot-note* to *Kraker v. Shields*, 20 Gratt. 377.

bonds were given of \$875 each; one payable twelve months after date, and the other, two years after date; and both bearing date August 13th, 1863. The first mentioned bond was paid at maturity. The second, which fell due on the 13th August 1865, is the subject of controversy in this suit, and is in these words: \$875. Richmond, Aug. 13th, 1863. Two years after date, I promise to pay to Thomas Otey, trustee for Virginia H. Otey, or order, the just and full sum of eight hundred and seventy-five dollars, value received, with interest thereon from the 13th day of August 1863, till paid; for the true payment of which, I bind myself, my heirs, &c. As witness my hand and seal, this 13th day of August, 1863. John Morgan, [Seal]. On the same day, to wit: on the 13th August 1863, a deed was executed by Thomas Otey, trustee for Virginia Otey, conveying the said house and lot to the purchaser, John Morgan; who, thereupon, executed a deed of trust, by which he conveyed the same property to Wm. Fowlkes, trustee, to secure the payment of the balance of the purchase money.

In March 1868, the last bond due August 13th, 1865, being still due and unpaid, the trustee was directed to execute the trust; and he accordingly advertised the property to be sold on the 20th March 1868. On the 13th of March 1868, a bill was filed by Mary Morgan (the said John Morgan having departed this life), his adm'x, to enjoin this sale. An injunction was awarded

621 *by the Circuit court of the city of Richmond. This bill alleged that when the note fell due on the 13th August 1865, in the language of the bill, "the said John Morgan tendered to the vendor the pro rata value of the said note reduced to Federal currency, according to the judgment and rulings of the court of conciliation, then in operation in the city of Richmond; which said tender and offer was refused and declined." The bill further alleged, that "the husband of the said Virginia Otey, when the first note fell due, expressed to the said John Morgan a desire to receive the amount of the second and last note now due and unpaid, as he was about to purchase a farm; that in consequence of such desire so expressed and made known, her husband raised the amount at some inconvenience, which he offered to the said John Otey; which he declined to receive, but stated that he, the said John Morgan, might hold the said sum of money, and he, the said John Otey, would call for it when he wanted it; that the said John Morgan did keep and hold said sum of money, and had and held it when Richmond was evacuated: and thus it was left on his hands an entire loss." "Notwithstanding all which (the bill proceeds to allege), your oratrix is advised, believes and so charges, that when the note fell due on the 13th day of August 1865, her said husband tendered to the said John Otey the value of the face of said note, reduced to Federal currency; which both he and the said Thomas Otey, trustee, refused to receive; asserting a demand for

\$875 in greenbacks; the payment of which was of course refused."

To this bill (upon the filing of which an injunction was awarded, as before stated), John Otey and Virginia H. his wife, Thomas Otey, trustee of the said Virginia Otey, and William Fowlkes, the trustee in the deed of trust executed by John Morgan, are made parties defendants. The bill is answered by John Otey and wife, and by

622 Thomas Otey, trustee for Virginia H. Otey. *Both answers deny the material allegations in the bill. The answer of John Otey and wife avers, "it is not true, as alleged by the plaintiff's bill, that when the last bond fell due, the said John Morgan tendered to the vendor the value of the said note reduced to Federal currency, according to the rulings of the court of Conciliation, then in operation in the city of Richmond; but the said John Morgan did tender to your respondent, John Otey, the amount of the said single bill in Confederate treasury notes, and insisted upon paying the said single bill in that currency; and your respondent, John Otey, then informed him that the said single bill could only be paid in such funds as were current at the time said single bill fell due, because such was the distinct understanding and agreement at the time the said property was sold; and the said property would have been sold upon no other terms, as your respondent believed, at the time of said sale, that the Confederacy would not last even until the first single bill became due; but the Confederacy being then in existence, and Confederate money being still the principal if not the only currency in circulation, though very greatly depreciated (\$875 in Confederate money being worth only \$44 in gold), the payment of the first note was made and received without objection in Confederate money; your respondent being willing to carry out in good faith the bargain in respect to the said sale of the real estate in the bill mentioned." The respondents, Otey and wife, deny the allegations of the plaintiff's bill, that when the first bond became due, the said John Otey expressed a desire to receive the whole balance due, because he was desirous of purchasing a farm; and that the said amount was tendered to him, and that he declined to receive it; but stated that the said Morgan might hold it, and the said Morgan in consequence lost the whole amount upon the termination of the late war. The respondents then solemnly aver that the understanding and agreement, at the time

623 of *the sale, was, that the deferred payments should be made in such funds "as may be current at the time the same should fall due." The answer of Thomas Otey, the trustee, adopts as his own the answer of his co-defendants; and "further answering says, that he never saw the said John Morgan but once, and that was when they were in the clerk's office together for the purpose of having recorded the deed and deed of trust for the property sold to said Morgan; and

that neither the said Morgan, or anybody else for him, ever saw him or spoke to him upon the subject of paying either of the single bills executed for said property." He further avers in his answer, that "he knows that the understanding was that the notes for the deferred payments were to be paid in the funds which should be current when they became due; and that the property would not have been sold on any other terms."

If the case had stood alone upon the bill and answers, there could have been no doubt of the defendant's right to a decree according to his version of the contract—that is, for whatever money might be current at the time of the maturity of the obligation. How was that right affected by the evidence? The positive averment of both answers is to the same effect, "that it was the understanding and agreement of the parties at the time of the sale of the property, that the deferred payments were to be made in the money which might be current at the time the same should fall due." There is literally no evidence tending to contradict these statements in the two answers. But, on the contrary, both the evidence and the circumstances of the transaction sustain the averments of the answers. And, indeed, there is nothing to support the allegation of the bill, that the contract was entered into with reference to Confederate currency, except the presumption growing out of the fact that the contract was entered into in the year 1863.

This presumption is entirely over-
624 thrown by the circumstances of *the case, and the direct evidence, independent of the answers. The property was worth, according to the testimony of Wellington Goddin, a real estate agent of great experience, at least the sum of \$1,200 in gold at the time of the sale. It was sold for only \$3,750, while \$1,200 in gold was on the day of sale worth \$14,000 in Confederate money. This fact, together with the further fact, that the long credit of two years was given for the last deferred payment, are very strong circumstances to support the position of the defendants. It is impossible to conclude, except upon the most explicit evidence, that any man of common discretion, especially a trustee holding property for a married woman, should sell it for \$3,750 in Confederate currency, when it was worth upwards of \$14,000 in that currency; and it can only be explained by the assertion of the defendants, "that the deferred payments were to be made in the money that might be current at the time the same should fall due;" that they were willing to receive a part of the purchase money in Confederate currency, under the belief and expectation that by giving long credits for the deferred payments, they would be received in a sound currency, and that in this way the fair value of the land would be realized.

And this construction of the contract insisted upon by the defendants, is not only supported by the circumstances of the trans-

action, but by the positive testimony of the witnesses. Wellington Goddin, one of the witnesses examined by the defendants, says: "Some time in the year 1863, I was frequently consulted by Mr. John Otey in reference to selling for him certain real estate in or near the city, owned by his wife. His instructions were to the effect, that I was to require a reasonable amount in cash, and the residue upon long credits; . . . he stating, that he was unwilling to receive the Confederate currency in full payment of the purchase money in cash; but
625 hoping by the time the *credit payments became due, he would get a better currency than Confederate currency then was." Upon cross-examination, the same witness says further, "my interpretation of it (that is his meaning), was, that he was to receive, when the obligations became due, such currency as the government under which we were then living was issuing. I do not remember that he mentioned what government he thought would be in existence here at the time alluded to; but I well remember, that he expressed great doubt whether the Confederacy would succeed or not." I think it is clearly established, both by the answers (which are not contradicted by any testimony in the cause), and by the facts and circumstances surrounding the whole transaction, that it was the intention of the parties, that the bonds for the deferred payments should be paid in the money current at the time they respectively matured.

I am of opinion, therefore, that the last bond of \$875 having matured on the 13th of August 1865, must, in accordance with the principles settled by this court in the case of Kracker v. Shields, 20 Gratt. 377, be paid in the present currency. This is required by the terms of the contract, the justice of the case, and the presumed intention of the parties. I am, therefore, for affirming the decree of the court below.

Decree affirmed.

626 *Omohundro's Ex'or v. Omohundro.

January Term, 1872, Richmond.

Absent, ANDERSON, J.

1. Bonds—Payable "When Called for."—S borrowed of R. his brother, Confederate money, and gave a bond for it as follows:

On demand, I promise to pay R the sum of \$12,800, value received, borrowed money this date, to be paid when called for, in Confederate money, or whatever money may be current of the State, or our banks pay out to depositors. Witness my hand and seal. The bond bears date May 22d, 1863. HELD:

1. Same—Same—When Debt Can Be Paid.*—The debtor had a right to discharge it immediately with Confederate treasury notes.

2. Same—Payable "On Demand."†—Where in a bond for the payment of money the words "on de-

*See Stover v. Hamilton, 21 Gratt. 273.

†Bonds—Payable on Demand.—It is well settled that a bond payable on demand is payable at once. The

mand" are used, it is payable at once, unless there be some plain provision in the bond that it shall not be so paid.

3. **Same—Alternatives Allowed Debtor.**—The alternatives allowed the debtor were for his benefit, and do not restrict his right to pay at once by Confederate treasury notes.

4. **Same—Payable in a Commodity.**—If it be a bond for a commodity, though a special demand may be necessary to entitle R to sue, the debtor may pay without such demand.

5. **Same—Effect of "To Be Paid When Called for."**—The words "to be paid when called for," do not change the legal effect of the instrument.

6. **Same—Failure to Present for Payment—Case at Bar.**—The executor of S, who does not know of the existence of the bond, pays to R a debt which S owed him, and asks him if he has any other claim against S, and R says none but what the women can settle. He is told by the executor to produce them, that he is ready to pay them; but R does not, nor does he mention the bond; and after the close of the war he demands payment of the bond. He is concluded by his failure to present the bond for payment when called upon to do so, and can only recover the value of the currency at the date of the bond, with interest from that date.

627 *This was an action of covenant in the Circuit court of the city of Richmond, brought in June 1866, by Richard Omohundro, Jr., against Richard Cooper, as executor of Silas Omohundro, deceased. The action was founded on the following paper:

\$12,800. Richmond, May 22d, 1863.

On demand, I promise to pay to R. Omohundro, Jr., the just and full sum of twelve thousand eight hundred dollars, for value received, borrowed money this date, to be paid when called for in Confederate money or whatever money may be current of the State or our banks pay out to depositors.

As witness my hand and seal.

Silas Omohundro, [Seal.]

The cause came on for trial in November 1869. The plaintiff introduced the single bill, and also proof of a written demand by himself, upon the defendant, of payment of the money, June 2d, 1866; and that after the 10th of April 1865, Confederate currency was worthless, and the only currency in use in Virginia was Federal money.

The defendant proved that Silas Omohundro died in June 1864, and that the defendant qualified as his executor a short time afterwards, and advertised in the Richmond papers, for all creditors of his testator to present their claims. That the plaintiff came forward and claimed a debt of \$1,200 as due to him by Silas Omohundro. That the defendant found an entry admitting the said debt, upon a memorandum book of the said Omohundro, and paid it, as per

principal case is cited as authority for this proposition in *Moon v. Richardson*, 24 Gratt. 221; *McVelgh v. Howard*, 87 Va. 603, 13 S. E. Rep. 81; *Bacon v. Bacon*, 94 Va. 687, 27 S. E. Rep. 576. See also, *Stover v. Hamilton*, 21 Gratt. 273, and *foot-note*; *Bowman v. McChesney*, 22 Gratt. 609, and *foot-note*.

receipt of August 1864. That at the time that payment was made, the defendant asked the plaintiff if he had any other claim against the estate of Silas Omohundro, his testator; and the plaintiff replied he had not, except what the women could settle; and then the defendant asked him to bring it forward, as he *was prepared to pay all the debts of his testator. But the plaintiff did not produce the single bill upon which the action is founded, or any other claim, or refer to or describe the said bill, or make any claim upon it until the latter part of the year 1865, when he demanded payment of it. It appeared that at the time the bond was executed, Confederate money was at five and a half for one of gold.

When the evidence had been introduced, the plaintiff moved the court for an instruction to the jury as follows: If it appears from the evidence, that on the 2d of June 1866, Confederate currency had become of no value, and had ceased to circulate, and has so continued ever since, and that the paper currency of the United States and of the national banks was then the only currency current in the State, and the only currency paid out to depositors by the banks in the State; and that on that day the plaintiff demanded of the defendant, as executor of Silas Omohundro, \$12,800 in money current of the State or the banks paid out to depositors, in discharge of the contract on which this suit is brought, which was then unsatisfied, which demand the defendant refused, then the plaintiff is entitled to recover the sum in currency of the United States, with interest from the day aforesaid.

To the giving of this instruction the defendant objected, and asked the court to give in lieu of it the following: If from the evidence the jury shall believe that the defendant advertised in the year 1864, in the public newspapers, calling upon the creditors of his testator to come forward and present their claims for payment, and afterwards the plaintiff came forward and demanded payment of a debt due him by open account, of a date posterior to the date of the covenant upon which this suit is founded, and received payment in the year 1864, as shown by the receipt exhibited,

and was then requested by the defendant to bring forward any other *claim he had, if any, as the defendant was prepared to pay off all claims against his testator's estate, and the plaintiff then did not produce the covenant upon which this action was founded, but said he had no other claim against the estate of S. Omohundro, and did not thereafter produce the said covenant or make any demand for payment until after the fall of the Confederacy, in June 1866, then the jury must find for the defendant.

The court overruled the motion of the defendant, and gave the instruction asked for by the plaintiff, and refused to give that asked for by the defendant: and to both these rulings the defendant excepted.

The defendant asked for four other in-

structions, which were refused; and he excepted; but it is unnecessary to state them. The jury then found a verdict in favor of the plaintiff for \$12,800, with interest from the 2d day of June 1866; and the defendant moved the court for a new trial on the ground of misdirection by the court, and also on the ground that the verdict was contrary to the evidence. But the court overruled the motion and rendered judgment upon the verdict; and the defendant excepted; and the court certified the facts as hereinbefore stated. On the application of the defendant a supersedeas to the judgment was awarded.

Lyons, for the appellant.

R. T. Daniel and Guy, for the appellee.

STAPLES, J., delivered the opinion of the court.

This case comes before us upon a writ of error and supersedeas to a judgment of the Circuit court of Richmond city. The action was brought upon a writing obligatory executed by the intestate of the plaintiff in error to defendant in error, and bearing date the 22nd day of May 1863. It is in the following language:

"On demand, I promise to pay R. Omo-hundro, jun., the just and full sum of twelve thousand and eight hundred
630 *dollars, for value received, borrowed money this date, to be paid when called for in Confederate money or whatever money may be current of the State, or our banks pay out to depositors. As witness my hand and seal."

It is insisted, that this is an obligation to pay the nominal amount in legal currency of the United States.

At the date of this contract Confederate notes were depreciated in the ratio of five dollars and fifty cents for one, as compared with gold. The claim is therefore to a recovery of twelve thousand and eight hundred dollars in a sound currency, in consideration of an advance of that which was of the value of twenty-five hundred dollars only when the advance was made. A construction leading to consequences so oppressive and ruinous to the borrower, should never be adopted unless imperatively required by the express terms of the contract. In such case there should be nothing equivocal or doubtful; no language employed which may authorize another or different interpretation.

What the parties intended by their written agreement in this case is not very clear; it is plainly to be inferred, however, that they did not intend that the time and mode of payment should depend wholly upon the pleasure of the creditor. The obligation was not only given in consideration of a loan of Confederate treasury notes, but the privilege is expressly reserved of repaying the loan in the same kind of currency. It is true that the instrument contains alternative provisions; but they were intended for the benefit of the borrower. The object was to confer upon him a right of election,

not to deprive him of the privilege of returning the same kind of money he had received.

But whatever may have been the object, the debtor had the right, immediately upon the execution of the bond, of discharging the debt with Confederate treasury notes,

if it suited his interests or his inclination so to do. *This right, it seems to me, necessarily results from the stipulation for the payment of the debt "on demand." These words have a plain, distinct, clearly defined, legal and popular signification, well known to the courts and to the people. When an obligation for money or its equivalent is executed containing this provision, the parties perfectly understand that the debt is payable presently; that it is due immediately, and bears interest from its date. This is the general acceptance in other States; and numerous cases may be cited to show that the courts will not change this rule of construction, unless other provisions of the contract peremptorily require a different interpretation. Thus in *Brett v. Ming*, 1 Florida R. 447, 454, a promissory note by which the debtor stipulated "to pay on demand the 1st of January," was held to be payable immediately; and the provision in respect to "the 1st of January" to apply to the interest exclusively. And in *Newman v. Kettelle*, 13 Pick. R. 418, the Supreme court of Massachusetts decided, that a promissory note, payable on demand, but not to draw interest during the life of the promisor, will support an action immediately; and the statute of limitations commences from the date of the instrument. See also *Bacon v. Page*, 1 Conn. R. 404; *Mason v. Patton*, 1 Missouri R. 279.

The case of *Boulware v. Newton*, 18 Gratt. 708, is not in conflict with these views, or the authorities here relied on. The decision there was based upon a plain and positive provision of the contract, by which the obligor could not be called on to pay until after three months' notice; and the obligee could not be required to receive the money except at his pleasure.

It is claimed, however, that this rule of construction only applies to obligations given for the payment of money, and not for the payment or delivery of a mere commodity; that here the contract being of the

latter description, a special demand
632 was necessary. Admit *this proposition to be true, in what manner will it benefit the creditor. It may be, that if this were a chattel note, he could maintain no action thereon without a special demand, but it would by no means follow that the borrower would not have a present right of discharging his obligation at any time, by delivery or tender of the currency contracted to be paid.

I think it is clear he would have had such right in this case, even if this be considered a contract for the delivery of a mere chattel. But can it be so considered? The principle of all the cases is, that if a thing be received as money, it may be treated and re-

covered as such, whether in a count for money had and received, or in an action upon the security given for its repayment. Chitty on Contracts, 525, and cases cited. The parties here, have by their contract treated the Confederate currency as money; and it must be so regarded for all the purposes of this action.

I hold, then, that this is a contract for the payment of Confederate money; which the creditor had the right to demand immediately, or to recover without such demand; and the debtor the correlative right to pay without terms at his pleasure. This is clearly the proper construction of the agreement, unless the words, "to be paid when called for," impart a different meaning to the covenant. Had they been omitted altogether, the legal effect of the obligation would not have been substantially different. In the case of *Kinsbury v. Butler*, 4 Verm. R. 460, the Supreme court of that State held, there is no difference between a note, payable when demanded, and a note payable on demand. In either case the instrument imports an obligation to pay presently, without special demand.

True, it is the duty of the court, in construing a contract, to give effect, if possible, to every word used by the parties, but it is not required to give a different interpretation to phrases having substantially the same meaning. As was said by Mr. Justice Story, in *Washburn v. Gould*, 3 Story's R. 122, 162, "there is no magic in particular words, and we must understand them as they stand and are used in the particular instrument; and in searching for the true interpretation we must look at all the provisions of the instrument, and give such effect to it as its obvious objects and designs require, without merely weighing the precise force of single words." The words, "to be paid when called for," may imply that no interest should accrue until demand made, or that the debtor should not be considered as in default until such demand; or that the money would be promptly paid when called for. If they are to be construed as a promise to pay only when it suited the purposes of the creditor to make the demand, and in such currency as might then be in circulation, then this consequence follows: The debtor reserves the right to discharge his obligation in Confederate money, and at the same time incorporates into his contract a provision which practically makes the right dependent upon the pleasure of the creditor. A refusal or failure on the part of the latter to demand payment until Confederate currency ceased to circulate, was all that was necessary to defeat an important provision, obviously intended for the benefit of the debtor. It is clear that this cannot be the true interpretation of the contract. Why was the privilege of paying in Confederate money reserved? Why was it not merely provided that the debt should be discharged in the currency in circulation when the demand should be made?

If it be said that the intent was to pay in

Confederate money, if in circulation when the creditor made his demand, the answer is, that such a provision was altogether unnecessary. The debtor in such case had the right so to pay, with or without such stipulation.

The most liberal construction that can be given to this covenant for the creditor, is that it constitutes a contract
634 *to pay in such money as may be current when the payment is made. Concede that this is the true interpretation. Is the creditor in a condition to insist upon a literal compliance with these terms? If the debtor or his representative had made an actual tender of the Confederate money, and the creditor had refused to receive it, it is clear that such tender would have relieved the former of any obligation to pay in any other currency. In August 1864, after the death of the debtor, the plaintiff in error, his personal representative, called on the creditor to ascertain whether he had any claim against his intestate's estate other than the account already presented and paid. He not only failed to produce the bond in controversy, but declared he had "no claim against the estate except what the women could settle." He thus not only prevented a payment, but precluded the possibility of a tender during the existence of the Confederate currency. Under these circumstances it would be the grossest injustice to permit him to insist upon the payment of the debt in a sound currency. In *Jones v. Cliff*, 1 Crompt., and *Mees*, R. 539, it was said by Lord Lyndhurst, a party can only be obliged to make a tender where by making it he could obtain possession of the goods. And *Jones v. Barkley*, 2 Doug. R. 684, shows that where a party is ready to do what is to be done by him, and the performance is prevented by the act of the other party, it is not necessary that a strict tender should be proved. And in *Gilmore v. Holt*, 4 Pick. R. 258, the Supreme court of Massachusetts thus laid down the rule: If a person who is bound to pay money, be prevented from making a tender by any contrivance or evasion of the other party, it will be equivalent to a tender or a sufficient excuse for not making it. These cases proceed upon the general principle that he who prevents the performance of an act, shall not be permitted to avail himself of the non-performance occasioned by his own conduct.

The case of *Miller & Franklin v. The City of Lynchburg*, *20 Gratt.
635 330, in some of its features, is similar to this. Under an ordinance of the city of Lynchburg, adopted in 1862, certain notes were issued by the Common Council, and the faith of the city pledged to redeem them in current bankable funds, when presented in sums of one or more dollars. This court held this a contract to redeem in Confederate currency, and that the holders of these notes having failed to demand payment until the currency had become worthless, were not even entitled to recover the value of the notes so issued.

The peculiar features of that case, which justified the court in holding the obligation of the contract discharged, do not exist here. The conduct of the defendant in error in refusing to disclose the existence of his claim, cannot have the effect of satisfying the debt. As the case is now presented by the record, he is entitled to the value of the currency advanced by him, scaled as of the date of the contract, with interest thereon from that period. While, therefore, the court erred in giving the instruction asked for by the defendant in error, it was correct in refusing to give those asked for plaintiff in error.

For these reasons, I am of opinion the judgment of the Circuit court should be reversed, the verdict set aside, and a new trial awarded, and the cause remanded to the said Circuit court, to be proceeded with in accordance with the principles herein announced.

Judgment reversed.

636 *Walker's Ex'or & als. v. Page & als.*

January Term, 1872, Richmond.

1. Judicial Sales—Confederate Notes—Judicial Notice.—

In March 1863, the fact, that Confederate States treasury notes was the only currency in circulation in this State, is so notorious, that it may be taken notice of judicially by the courts, as a matter of current public history. And all decrees made for the sale of property at as late a period of the war as 1863, and all judicial sales made under such decrees, must be taken as made for this currency; unless such decree in plain terms directed otherwise.

2. Same—Authority of Court to Decree Sales for Confederate Money.†—That the courts of this Commonwealth, during the war had the authority to decree sales for Confederate money, and to make investments of funds under their control in Confederate securities, is no longer an open question. Transactions in Confederate currency during the war, and investments in Confederate securities (when properly made), must now be held to be as valid and binding as if made in time of peace in a sound currency.

3. Same—Decree against Infant—Right to Show Cause—What Cause May Be Shown.‡—The right of an infant to show cause against a decree which affects his interests, after he arrives at age, must be limited to this extent, to show cause existing at

*For monographic note on Judicial Sales, see end of case.

†Judicial Sales—Authority of Court to Decree Sales for Confederate Money.—For the proposition that courts of this commonwealth had authority to decree sales for confederate money during the war, see the principal case cited in the following cases: Mead v. Jones, 24 Gratt. 358; Wrightsman v. Bowyer, 24 Gratt. 435; Frazier v. Frazier, 26 Gratt. 506; Crockett v. Sexton, 29 Gratt. 57.

‡Sale of Infant's Lands—Decree against—Right to Show Cause—What Cause May Be Shown.—In Lafferty v. Lafferty, 42 W. Va. 783, 26 S. E. Rep. 262, the third headnote of the principal case was approved and followed, the court saying: "Obviously, on an

the rendition of the decree; and not such as arose afterwards. The question must always be, can any cause be shown why the decree at the time it was rendered, was not a legal and binding decree.

4. Same—Infant's Lands—Case at Bar.—C dies in 1855, leaving a widow and children, some of them infants. Dower is assigned to the widow; and the guardian of the infants files a bill for the sale of the interest in the dower property, making the widow and adult children defendants. In March 1863, there is a decree for a sale of the whole property, and the sale is made and the proceeds invested in Confederate bonds, the widow to receive the interest during her life. After the infants come of age, they seek to set aside the sale on the ground that it was not for their interests. HELD:

Same—Same—Rights of Purchasers.—If the court which pronounced the decree had jurisdiction of the subject and the parties; if its proceedings were regular and in accordance with the requirements of law: and the decree is sustained and justified by the evidence then introduced, *the infants will not be allowed, as against a bona fide purchaser, to go out of the record, to show that upon facts and events arising subsequent to the rendition of the decree, their interests were not promoted by a sale of their real estate.

5. Same—Same—Sale Sustained.—In this case all the papers in the cause were destroyed, except the decrees; but the decrees showing by their recitals that the proceedings had been regular, and that the court was satisfied the sale was for the interest of the infants, and the investments and conveyances having been made, according to the decree, the sale and investments will be sustained.

6. Chancery Practice—How Meaning of Decree Ascertained.§—When a doubt arises as to the meaning and effect of a decree, it may be ascertained by reference to the bill and other proceedings, especially where they are referred to in the decree.

7. Appellate Practice—Appeal—Parties Standing on Distinct Rights—Effect of.¶—Where the parties in a cause stand upon distinct and unconnected

application to show cause against a decree, for error of law, we can look into pleadings and evidence, just as on an appeal, in order to see whether there is error. But, though new defense may be made against the decree, the cause shown against it must be cause existing at its date,—not such as arises afterwards; the question being whether any cause existing at its date shows that the decree ought not to have been pronounced. Walker's Ex'or v. Page, 21 Gratt. 636."

For the above proposition the principal case is cited and followed in the following cases: Zirkle v. McCue, 26 Gratt. 530; Lancaster v. Barton, 92 Va. 623, 24 S. E. Rep. 251; Durrett v. Davis, 24 Gratt. 303.

§Chancery Practice—How Meaning of Decree Ascertained.—In Norvell v. Léssueur, 33 Gratt. 227, the sixth headnote of the principal case was approved and followed, the court saying: "The decree simply refers to the pleadings. But this court has held that the bill and answer are parts of the record, and may be looked to to explain the decree. Walker's Ex'or v. Page, 21 Gratt. 636." See, in accord, Burgling v. McDowell, 30 Gratt. 242, citing the principal case.

¶Appellate Practice—Appeal—Parties Standing on Same Rights—Parties Not Appealing—Effect of.—In Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S. E.

grounds, where their rights are separate, and not equally affected by the same decree or judgment, then the appeal of one will not bring up for adjudication the rights or claims of the other.

8. Same—Same—Parties Standing on Same Rights—Effect of.—Where the parties appealing and the parties not appealing stand upon the same ground, and their rights are involved in the same question, and equally affected by the same decree or judgment, the court of Appeals will consider the whole case, and settle the rights of the parties not appealing as well as those who bring their case up by appeal.

This was a suit in equity in the Circuit court of the city of Richmond, brought in December 1868, by Wm. M. Page and Emily C., his wife, and George A. Thomas and Mary Eliza, his wife, against David N. Walker, ex'or of John S. Walker, deceased; John M. Otey, Frederick Brauer, Henry Metzger and others. The case is fully stated by Judge Christian in his opinion.

Steger, for the appellants.

Page & Maury and John Dunlop, for the appellees.

CHRISTIAN, J. This is an appeal from a decree of the Circuit court of the city of Richmond.

The facts disclosed by the record are as follows:

Richard A. Carrington died intestate, some time during the year 1855, seized of a large real estate in the city of Richmond. He left surviving him a widow and four children.

Soon after his death a certain portion of his real estate was, in pursuance of an order of the court of Hustings of the city of Richmond, assigned to his said widow for her dower, which is described by the commissioners who made the assignment as "the house and lot on the west side of Seventeenth street, between Main and Cary, having a front of 50 feet, and now occupied by Stearns & Brummel; * * the lot No.

Rep. 556, the seventh and eighth headnotes of the principal case were approved and followed, the court saying: "Where parties stand on distinct and unconnected grounds, and are not equally affected by the same decree or judgment, appeal by one will not bring up for adjudication the rights of others; but where those appealing, and those not, stand on the same ground, and their rights are involved in the same question, the whole case will be considered, and settle the rights of parties not appealing, as I understand, if they are involved in the same question. Walker v. Page, 21 Gratt. 636."

For the above proposition the principal case is cited and followed in the following cases: Morgan v. Ohio R. R. Co., 39 W. Va. 17, 19 S. E. Rep. 591; Newman v. Mollohan, 10 W. Va. 499; Hall v. Bank of Va., 15 W. Va. 334; Burton v. Brown, 23 Gratt. 17, and note; Campbell v. Campbell, 23 Gratt. 673; Burkholder v. Ludlam, 30 Gratt. 258; Blackwell v. Bragg, 78 Va. 541; Saunders v. Griggs, 81 Va. 517; Rorer v. Roanoke Nat. Bank, 83 Va. 608, 4 S. E. Rep. 820; Nicholson v. Gloucester Charity School, 93 Va. 103, 24 S. E. Rep. 899.

26, on Union street, * * and the vacant lot N on Valley street."

On the 2d day of March 1863, R. M. Cary, who had qualified as the guardian of two of the infant children, Mary E. and Emily C. Carrington, filed his bill in the Circuit court of the city of Richmond, against the widow and heirs of the said Richard A. Carrington; the two last named being infants. The bill and all the other papers in that suit were destroyed, except three decrees, which have been preserved, and are copied in the record before us, as exhibits in this suit by the appellees.

The first decree was entered on the 2d March 1863, and shows that the guardian, R. M. Cary, filed his bill against the widow and heirs of the said Richard A. Carrington, and on his motion a guardian ad litem was appointed to the infant defendants, to defend them in this suit; and the said infant defendants, by their guardian ad litem as aforesaid, the said guardian ad litem, the said infants (who are over the age of fourteen years), and the adult defendants, by counsel, filed their answers to the said bill, to which the plaintiff replied generally; and by consent of parties the cause was ordered to be docketed. On the 9th March 1863, the following decree was entered:

"This cause came on this day to be again heard on the bill, answers, replications, exhibits, examination of witnesses, and was argued by counsel. On consideration whereof, the court doth adjudge, order and decree that Geo. W. Randolph, esq., who is hereby appointed a commissioner for that purpose, shall, after advertising, &c., &c., expose to sale at public auction, on the premises, to the highest bidder, the dower estate of Mrs. Louisa Carrington in the bill mentioned." The decree then provides the usual terms of sale of real estate at that time, and provided that purchasers might anticipate the payments, and pay the whole, or any part thereof, in cash, when the interests should be rebated.

The only remaining decree which has been preserved, is one entered on the 22nd May 1863, in which the cause came on to be heard on the papers formerly read, the report of Commissioner Randolph, with the account of sales, the two statements of Jno. A. Lancaster & Co., the report of the surveyor and the bond of nineteen thousand dollars, therein mentioned, and with a report filed on that day. On consideration whereof, it was adjudged and decreed that "the sale of the real estate reported by the said commissioner and the investment made by him be confirmed." And the commissioner was directed to convey the said real estate to the purchasers respectively.

There are filed with the bill of the appellees, two deeds executed by Geo. W. Randolph, commissioner, to the purchasers, as directed by the last recited decree. One of these deeds, after reciting the decree, and the sale made in pursuance thereof, conveys to Frederick C. Brauer "a lot on the west side of 17th street, between Main and Cary

streets, in the city of Richmond, fronting fifty feet on 17th street, and running back one hundred and thirty feet, with a large brick warehouse thereon, formerly occupied by Stearns & Brummel; the said lot being a part of the dower estate of Mrs. Louisa Carrington." The other deed, after like recitals, conveys to Henry Metzger lot N, by certain metes and bounds, the said lot being a part of the dower estate of Mrs. Louisa Carrington, the widow of R. A. Carrington, dec'd.

The property conveyed to Brauer, to wit: the warehouse *and the larger portion of the lot on 17th street, was sold in 1865, and conveyed by Brauer and wife to D. N. Walker, executor of John S. Walker, and trustee for Lucy W. Walker and her children, and the remaining portion of that lot was sold and conveyed to John M. Otey on the 6th November 1868.

In January 1869, Emily C. Carrington and Mary Eliza Carrington (who were both infants when the proceedings above referred to were had in the Circuit court of the city of Richmond in the year 1863), having arrived at age and married, the one with William M. Page, and the other with George A. Thomas, a bill was filed by the said William M. Page and wife, and George A. Thomas and wife, against the purchasers of the real estate sold by George W. Randolph, commissioner, and those who claim under said purchasers and in possession of the same.

After setting forth the proceedings in the suit above referred to, the sale under the decree by George W. Randolph, commissioner, the confirmation of that sale and the investment of the proceeds in Confederate States bonds, they ask that the sales may be set aside, because the commissioner was not authorized to receive Confederate currency, and was not authorized to invest the proceeds of sale in Confederate bonds; and they insist "that the conveyances to the purchasers at that sale were of no binding force or validity, as against any of the parties to said suit who were entitled to said real estate, except such as were capable of assenting thereto; and that at the date of said transactions, the female complainants being both infants, were legally incapable of assenting thereto, and have, since they attained lawful age, never in any way ratified or assented to the same; without which they humbly insist they cannot be deprived of their real estate."

The bill was answered by the defendants, Metzger, Brauer, David N. Walker, trustee of Lucy Walker and *her children, and John M. Otey, and was taken for confessed as to the other adult defendants, and came on to be heard upon the bill and answers and examination of witnesses; and the said Circuit court "being of opinion that the decree of the 22d May 1863, in the bill mentioned, confirming the sale and directing conveyances of the real estate as alleged in the bill, held by the defendant, Louisa Carrington, as her dower, (a copy whereof is filed as an exhibit in

this cause), is not binding upon the female complainants," &c., it was adjudged and ordered "that the said decree, so far as it was intended to divest the rights and interests of the female complainants in the said real estate be set aside; and that the deeds of conveyance made in pursuance of said decree, so far as they were intended to convey the rights and interests of the female complainants, be and the same are hereby set aside and annulled, and the said female complainants are hereby declared to be entitled to the same rights and interests in the said real estate, as they would be entitled to respectively if said sales and conveyances had never been made.

It is from this decree that an appeal has been allowed to this court.

It will be observed that the plaintiffs in their bill place their claim for relief upon two grounds: 1st. That Commissioner Randolph was not authorized to sell and convey the real estate in which they had a reversion, for Confederate money, and had no authority to make for them an investment in Confederate bonds; and 2d. That if such proceedings were binding upon those who assented to them, being of lawful age, they were not bound by them, because they were infants; and having now attained lawful age, they may now impeach the validity of the judicial proceedings which divested them of their real estate without their consent. These are the grounds taken by the plaintiffs in their bill. There are

other *grounds urged in argument in this court, which will be fully considered presently.

The decree directing a sale was pronounced by the Circuit court of the city of Richmond, on the 9th day of March 1863. At that time, the fact that Confederate States treasury notes was the only currency in circulation in this State, is so notorious, that if there was no proof on the subject, in the record, it might be taken notice of judicially, by this court, as a matter of current public history. And all decrees pronounced by the courts of this Commonwealth for the sale of property at as late a period of the war as the year 1863, and all judicial sales made under such decrees, must be taken to be rendered and made for the currency which then constituted the only circulating medium of the country, unless such decree in plain terms, directed otherwise.

It is impossible to conceive that the able and experienced judge who entered the decree referred to, intended that the commissioner he appointed to execute his decree should sell the property for any other currency than that which was the only circulating medium. There was nothing in the terms of the decree to show such a purpose. It directed its commissioner to sell the property at public auction to the highest bidder, "requiring cash sufficient to defray the expenses of sale, and negotiable notes well endorsed, payable in six, nine and twelve months, for the remainder;" and allowed the purchaser to anticipate the payments, and pay the whole amount of the

purchase money in cash. By the express terms of this decree, the commissioner was fully authorized to receive the purchase money in Confederate States treasury notes. That the courts of this Commonwealth during the war had the authority to decree sales for Confederate money, and to make investments of funds under their control in Confederate securities is no longer an open question. It is definitively settled by legislative enactment, by repeated decisions of this court recognizing *the validity of such decrees and investments, and by the Supreme Court of the United States. Transactions in Confederate currency during the war, and investments in Confederate securities (when properly made), must now be held to be as valid and binding as if made in times of peace in a sound currency. To hold such transactions null and void would unsettle half the titles to real estate throughout the Commonwealth, and would beget universal discord, confusion and chaos.

But it is insisted by the learned counsel for the appellees, that when the decree was entered the plaintiffs in this suit were infants, and that they now have the right to show cause against the decree of March 9th, 1863; and that they now have the right to show that this decree was not warranted, because it was not to the interest of the infants that the real estate should have been sold at the time the said decree was rendered.

The right of an infant to show cause against a decree which affects his interests, after he arrives at age, must be limited to this extent, to show cause existing at the rendition of the decree; and not such as arose afterwards.

The question always must be, can any cause be shown why the decree, at the time it was rendered, was not a legal and binding decree? In this case it is proposed to show by the infants, after they arrive at age, that it was not to their interest to sell the real estate in the decree mentioned, and that, therefore, the court was not warranted in decreeing the sale. And it is urged that it did not promote the interests of the infants, because the land sold was a reversion expectant on the expiration of their mother's dower estate; that such sale was to the widow's benefit, but not the infants'; that it secured to her a larger income than the rental value, but was a sacrifice of their reversionary interest, and a total loss to them of real estate worth \$10,000 and upwards in gold.

It is to be observed, that the jurisdiction of the court *and the regularity of the proceedings are not questioned; nor is it pretended that there is any error upon the face of the record, or that the case made by the record did not warrant the decree.

But the stress of the argument is, that the interest of the infants was not promoted by the sale, because the sale was made for Confederate currency, and because the proceeds of sale were invested by the court for

the infants in Confederate securities. This argument is not based upon the evidence before the court at the time the decree was entered for a sale of the property; is not made in the light of the facts then existing and proved before the court, but upon facts existing subsequent to the decree, and in the light of events that happened afterwards. It is easy to show now, after the close of the war, after Confederate currency and Confederate securities have perished, that, as subsequent events have transpired, the interests of the infants have not been promoted by a sale of their real estate. And if such considerations could govern the adjudications of this court, then every sale of real estate in which infants were interested, made under decrees of courts during the war, must be vacated and annulled: for in every case, as events have happened, their interests cannot be said to have been promoted by a sale of their real estate.

This very state of things strongly illustrates the necessity and wisdom of the rule, that the privilege accorded to the infant to show cause against a decree disposing of his real estate, is limited to a cause existing at the time the decree was pronounced. He may show cause within six months after attaining full age, against a decree in a suit, to which he was a party as an infant. But what cause can be shown to entitle him to vacate the decree? Can he show that in the light of subsequent events it has turned out that his interests have not been promoted by a sale of his real estate?

645 Can he, upon arriving at age, *introduce evidence to contradict the evidence upon which the court acted in deciding that his interests would be promoted by a sale? Will he be permitted, years after the decree has been pronounced by a court of competent jurisdiction, under regular proceedings, upon satisfactory evidence, and when the property has for years been in the hands of a bona fide purchaser, to show, not that the case made by the record did not warrant the decree, but that upon evidence taken long afterwards, and in the light of facts, not as they existed at the time of the decree complained of, but in the light of subsequent events the decree was not warranted? And especially when these subsequent events were the results of civil and political revolutions, over which the parties and the courts of chancery had no control, and could not possibly foresee?

Certainly the infant, upon arriving at age, can show no such cause as this, to entitle him to vacate a decree made against him while an infant. He may show error upon the face of the record; or he may show that the court had no jurisdiction to enter the decree; or if it had jurisdiction, that the proceedings were irregular and not binding upon the parties; or he may show that the case made by the record did not warrant the decree. But whatever cause he may properly show, he certainly cannot reopen the case, and introduce evidence to contradict that already given and acted upon by the court that entered the decree.

If the court which pronounced the decree had jurisdiction of the subject and the parties; if its proceedings were regular and in accordance with the requirements of law; and the decree is sustained and justified by the evidence then introduced, the infant will not be allowed, as against a bona fide purchaser, to go out of the record to show that, upon facts and events arising subsequent to the rendition of the decree, his interests were not promoted by a sale of his real estate.

To establish a contrary doctrine
646 would in effect defeat *the very object of the law, and effectually prevent the sale of any real estate belonging to infants.

For who would purchase, at a judicial sale, real estate belonging to infants, if their title could be destroyed years afterwards by the introduction of evidence to contradict that upon which the decree was based? How could a purchaser ever know when a decree was valid and binding; for it would be simply impossible for him to conjecture what evidence might be hunted up to contradict the evidence upon which the decree was founded.

In the case before us the record of the proceedings have been destroyed, except the decrees before referred to. But in the decree directing the sale, the cause came on to be heard upon the bill, answers, replications, exhibits and examination of witnesses. We are not informed what was the testimony before the Circuit court of the city of Richmond, to show that the interests of the infants would be promoted by a sale of the real estate in the proceedings mentioned; but we are bound to presume that the evidence was of such a character as to satisfy the intelligent, careful and experienced judge who entered the decree for sale, that the interest of the infants would be promoted by that sale. It is worthy of remark, too, that the mother of these infants was a party to the suit in which the decree was entered, that the infants were represented by a guardian ad litem, and all of the parties represented by counsel distinguished for his professional and personal integrity, who was the commissioner that made the sale, and invested the proceeds under the order of the court. It is to be presumed, then, that the interests of the infants were well considered, and that under the circumstances which then surrounded the transaction, and in the light of the events then transpiring, the court was satisfied upon the evidence then before it, "that the interest of the infant defendants would be promoted" by a sale of the real estate. It is true, that

subsequent events caused the sacrifice
647 of *the property, and total loss of the investment made for their benefit; but these were events beyond all mortal prescience, and could not be anticipated. If the Confederacy had been a success, then, in point of fact the sale and investment would have "promoted the interests of the infant defendants;" for they would have found themselves in possession of property of double the value of that which was sold.

It was their misfortune that their property was sold and the proceeds invested in what has proved utterly worthless. But the sale was decreed, and the investment made by a court of competent jurisdiction, upon lawful and regular proceedings, and the real estate has passed and the title vested in bona fide purchasers who were only bound to see that all the parties necessary to convey the title were before the court, and that the sale was in accordance with the decree. Their title cannot now be divested by showing, that by events subsequent to that decree, it has turned out that the interests of the infants were not promoted by the sale.

I proceed now to notice briefly another ground upon which the decree of the court below is sought to be maintained. It was not taken in the bill or in the pleadings in the cause, but was relied upon with much confidence by the learned counsel for the appellee in their argument before this court. It is now insisted, for the first time, that the fee simple in the real estate referred to, was not decreed to be sold by the decree of March 9th, 1863, but only the life estate of Mrs. Louisa Carrington. The decree directs Geo. W. Randolph, esq., who was appointed a commissioner for the purpose, "to expose to sale at public auction, on the premises, to the highest bidder, the dower estate of Mrs. Louisa Carrington in the bill mentioned." It will be remembered that the bill in the suit of Carrington v. Carrington has been destroyed. If it were in existence, it could certainly be looked to to ascertain the effect and meaning of the decree; but

648 it is manifest *from the papers in said suit, which have been preserved, that the words "the dower estate of Mrs. Louisa Carrington," must be taken as a description of the property which had been assigned to Mrs. Carrington as her dower.

In the first place, the bill was filed by the guardian of Mary E. and Emily C. Carrington, infants over the age of fourteen years, against the said infants and their mother, Louisa Carrington, George M. Carrington, George W. Jones, and Louisa, his wife, who were all of the heirs of the late Richard A. Carrington. We can only gather the objects of the bill from the proceedings; and it is obvious that that object was to have the interest of the infant defendants, Mary E. and Emily C. Carrington, in real estate sold. It could not have been to sell the dower interest of the defendant, Louisa Carrington, for with that the plaintiff, who was the guardian of the infants, had nothing whatever to do, nor was it necessary to invoke the aid of a court of Chancery to sell her dower interest.

On the 22d of May 1863, the cause came on again to be heard upon the report of Commissioner Randolph, with the account of sales, the two statements of John A. Lancaster & Co., the report of the surveyor, and the bond of \$19,000. When the court decreed that the sale of the real estate (not of the dower interest therein), reported by said commissioner, and the investments made by him, be confirmed, and directed a convey-

ance of the said real estate to the purchasers.

The records still preserved show the investments in this suit to consist of two bonds of the Confederate States, one for \$19,000, the other, for \$1,300, payable to George W. Randolph, commissioner, interest to Mrs. Louisa Carrington for life, afterwards, as the court may direct. I think this, of itself, would conclusively show that the whole fee simple in the property was sold, and not merely Mrs. Carrington's dower interest; for in that case she would have been absolutely entitled to the whole funds. But in addition to this, the deeds executed by Commissioner Randolph to the purchasers convey to them the lots by metes and bounds, and not the dower interest of Mrs. Carrington in those lots.

I think, therefore, it is evident that the term, "dower estate," was used in the said decree to describe the property to be sold, and not the interest in that property. The term "dower estate" was employed for brevity, to designate the particular part of the estate of Richard A. Carrington, which was ordered to be sold.

This is the obvious meaning of the decree gathered from all the proceedings, and this is its plain meaning as understood by the appellees when they filed their bill. The point is made for the first time, in argument of the learned counsel here, and is an argument growing out of the pressing exigencies of their case. But superadded to all this is the direct evidence of the auctioneer, W. Goddin, who sold the property, that the fee simple and not the dower was sold, together with the pregnant fact that George W. Carrington and George W. Jones and wife, who were the adult parties to the suit of "Carrington v. Carrington," have never asserted any claim whatever, for their remainders in fee to said property.

It is clear that where a doubt arises as to the meaning and effect of a decree, it may be ascertained by reference to the bill and other proceedings, particularly where these are referred to in the decree itself. Looking to the proceedings and the papers in the cause which have been preserved from destruction, I am of opinion that the decree of the 9th March 1863, directed a sale of the fee simple of the real estate in which Mrs. Louisa Carrington had been assigned her dower, and that the title acquired by the purchasers is a complete and perfect title, of which they cannot now be divested at the suit of the appellees.

I am, therefore, of opinion that the decree of the Circuit court of the city of Richmond, pronounced on the 10th day of December 1869, should be reversed, and the bill of the appellees should be dismissed.

The other judges concurred in the opinion of Christian, J.

After the opinion in this case had been delivered, and the decree dismissing the bill generally had been entered, those of the appellees who had been plaintiffs in the court below, moved the court to modify the

decree, so as to leave the decree of the Circuit court as to the defendant, Metzger, a purchaser at the sale by the commissioner, of one of the lots sold, in force; Metzger not having appealed from that decree.

CHRISTIAN, J., delivered the opinion of the court.

After the opinion in this case was delivered, and the order entered, reversing the decree of the court below, and dismissing the bill, Messrs. Maury and Dunlop, of counsel for the appellee, moved the court to amend the order, so that the bill should not be dismissed as to Henry Metzger, one of the defendants in the suit in the Circuit court. It is now insisted that the decree of the said Circuit court ought not to be reversed as to him, because he did not appeal from the said decree.

The act of the General Assembly, approved June 23d, 1870, entitled "an act to amend the provisions of the Code in regard to the Supreme court of appeals, so as to make them conform to the new constitution," contains among others, the following provision: "§ 12. Every appeal, writ of error, or supersedeas, shall, when it is to or from a judgment, decree, or order of any county court, be docketed in the Circuit court which has jurisdiction over such county; and when it is to or from a judgment, decree, or order of any other court, be docketed in the court of Appeals. The clerk of the court wherein it is docketed, shall issue a summons against the parties interested, other than the petitioners, that they may be heard, and also issue any supersedeas which may be awarded." Under this provision of the statute, Metzger, who was a co-defendant with Walker's ex'or and Otey and wife, was before this court as one of the appellees.

Among the rules adopted by this court is the following: "Rule IX. In any appeal, writ of error, or supersedeas, if error is perceived against any appellee or defendant, the court will consider the whole record as before them, and will reverse the proceedings either in whole or in part, in the same manner as they would do were the appellee or defendant to bring the same before them, either by appeal, writ of error, or supersedeas, unless such error be waived by the appellee or defendant; which waiver shall be considered a release of all error as to him."

It is not pretended that there was any waiver operating as a release of error as to the appellee, Metzger. But it is urged, that inasmuch as he did not unite in the appeal, the bill ought not to be dismissed as to him; but that he is still bound by the decree of the said Circuit court. That decree set aside and annulled a sale of real estate, and the conveyances made under it, by authority of the decree made by the same court (but not the same judge), in March 1863.

Metzger was a purchaser of a part of that real estate made at the same sale, by the same commissioner under said decree, at

which and from whom Brauer, the vendor of Otey and Walker, was a purchaser.

This court having reversed the decree of the said Circuit court, annulling the said sale, and setting aside the conveyances under it, has, in effect, affirmed that the said sale and conveyances were lawfully and regularly made, and conferred upon the purchasers under it a valid and legal title.

652 *If the decision in this case had been based upon the ground alone, that Otey and wife, and Walker's ex'or were bona fide purchasers without notice, while Metzger could not claim upon the same ground, then there might be some reason for the motion urged by the appellee's counsel. But this court having decided that the decree of March 1863, was a valid decree, made by a court of competent jurisdiction, and binding on the infant defendants; and that the purchasers under said decree obtained a valid title, Metzger, the party not appealing, stood on the same ground with the parties who appealed, and their rights were all involved in the same question, and equally affected by the decree. There was a common ground of defence upon which all the parties stood, and the appeal of any one of them necessarily brings under review the propriety of the whole decree, and devolves upon this court the duty of correcting and reversing it in favor of Metzger, as well as of the other defendants, who appealed from the decree. The statute declares that where this court shall reverse the decision of an inferior court, "it shall enter such judgment, decree, or order as the court, whose error is sought to be corrected, ought to have entered," and this court being of opinion that the decree of the said Circuit court was erroneous in annulling and setting aside the sales under the decree of March 1863, and thereby declaring that said decree was valid, and that the sales made under it conferred a good title upon the purchasers, can of necessity enter no other decree than one dismissing the bill, which is the decree that the said Circuit court ought to have entered. And the bill must be dismissed as to all the defendants whose rights are equally affected by the decree reversed.

The rule established by the practice and decisions of this court may be stated to be this: where the parties stand upon distinct and unconnected grounds, where their rights are separate, and not equally affected

653 by the same decree or judgment, then the appeal of one will not bring up for adjudication the rights or claims of the other. *Tate v. Liggat & Matthews*, and *Liggat & Matthews v. Morgan*, 2 Leigh, 84, 107. But where the parties appealing, and the parties not appealing, stand upon the same ground, and their rights are involved in the same question, and equally affected by the same decree or judgment, this court will consider the whole case, and settle the rights of the parties not appealing, as well as those who bring their case up by appeal. *Lewis v. Thornton*, 6 Munf. 87, 97; *Lenows*

v. Lenow, 8 Gratt. 349; *Liggat & Matthews v. Morgan*, 2 Leigh, 84; *Purcell v. McCleary*, 10 Gratt. 246.

For the reasons above stated, the motion of the appellee's counsel in this case must be overruled.

Decree of the Circuit court reversed; and the bill dismissed as to all the parties.

JUDICIAL SALES.

- I. Definition.
- II. What Constitutes a Judicial Sale.
- III. Jurisdiction of Court.
 - A. Of Subject-Matter.
 - B. Of the Parties.
- IV. Necessary Parties to Sale of Lands.
 - A. Who Are Necessary Parties.
 - B. Who Are Not Necessary Parties.
- V. Enquiry into Rents and Profits.
 - A. Old Rule.
 - (a) Reasonable Time to Discharge Debt.
 - B. Statutory Rule.
 - (b) Five Years.
- VI. Taking Account of Liens.
 - A. The Rule.
 - B. Reason for the Rule.
 - C. Notice.
 - D. Who May Not Take Account of Liens.
 - E. When Not Necessary.
 - F. In General.
- VII. Requisites of Decree (See Account of Liens).
- VIII. Sale Must Follow Decree.
- IX. Collateral Attack of Decree of Sale.
- X. Notice of Sale.
- XI. Discretion of Court in Sale.
- XII. Terms of Sale.
- XIII. Redemption.
- XIV. Who May Sell.
- XV. Bond of Commissioner.
 - A. Necessity for.
 - B. Validity.
 - C. Liability.
- XVI. Deed of Commissioner.
- XVII. Objections Waived Unless Taken in Lower Court.
 - A. In General.
 - B. To Commissioner's Report (See Commissioners in Chancery).
 - C. To Confirmation.
- XVIII. Expenses.
- XIX. Proceeds of Sale.
 - A. Disposition.
 - B. Right of Commissioner to Collect Proceeds.
- XX. Bidders.
 - A. Who May Bid.
 - B. Combinations among Bidders.
 - C. Puffers.
- XXI. Opening Biddings.
 - A. Procedure.
 - B. Discretion of Court.
 - C. Upset Bids.
- XXII. Setting Aside Sale.
 - A. After Confirmation.
 - B. Before Confirmation.
 - C. In General.
 1. Sale Set Aside.
 2. Sale Not Set Aside.

XXIII. Purchasers.

- A. Rights of Purchasers.
- B. Liability of Purchasers.
- C. The Title That Passes to the Purchaser.
 - 1. Commissioner's Deed.
 - 2. In General.
 - 3. Effect upon Reversal of Decree.
 - 4. Rule of *Caveat Emptor*.
- D. Right of Possession.
- E. Depreciation of Property between Sale and Confirmation.
- F. Payment to Unbonded Commissioner.
- G. Who May Not Purchase.
- H. Purchasers by Estoppel.

XXIV. Re-sale.**XXV. Rights of Tenants in Possession.****XXVI. Appeal.**

- A. Who May Appeal.
- B. Who Cannot Appeal.
- C. In General.

XXVII. Confirmation.

- A. Effect.
- B. Discretion of Court.
- C. Who May Object.
- D. When Withheld.
- E. In General.

XXVIII. Right of Dower.**Cross References.**

Attachments, appended to Lancaster v. Wilson, 27 Gratt. 624.

Bonds.

Commissioners in Chancery, appended to Whitehead v. Whitehead, 23 Gratt. 376.

Creditor's Bill.

Dower, appended to Davis v. Davis, 25 Gratt. 587.

Executors.

Guardian and Ward.

Fraudulent and Voluntary Conveyances.

Infants.

Partition.

Suretyship.

Sale of Delinquent Lands.

Vendor and Purchaser.

I. DEFINITION.

A judicial sale is one which is made by a court of competent jurisdiction in a pending suit, through its authorized agent. Terry v. Coles, 80 Va. 695; Alexander v. Howe, 85 Va. 198, 7 S. E. Rep. 248; Hess v. Rader, 26 Gratt. 746; Palmer v. Garland, 81 Va. 444.

II. WHAT CONSTITUTES A JUDICIAL SALE.

Will appointed a commissioner to sell land at public auction, but he is not to act under the decree until he gives bond, etc., faithfully to perform this and any future decrees made in the cause. He does not execute the bond, but he sells the land at private sale to H which he reports to the court. The court confirms the sale, and directs him to collect the money and invest it; and H pays him the whole purchase money; only a part of which he invests, and dies insolvent. *Held*,

The sale having been made by a commissioner under a decree of the court, and that sale having been confirmed by the court, it is a judicial sale.

Whether made at public or private sale, it only becomes a sale at all, when confirmed by the court, that constitutes such sale a judicial sale. Hess v. Rader, 26 Gratt. 746.

For the distinction between a judicial and private sale, see Christian v. Cabell, 22 Gratt. 82; Ware v. Starkey, 80 Va. 191.

III. JURISDICTION OF COURT.

A. OF SUBJECT-MATTER.—A court, in a suit properly therein, may make a decree or order for the sale of property in any part of the state. Va. Code 1887, § 3397; W. Va. Code, ch. 132, § 1.

Jurisdiction of the person as well as of the subject-matter are pre-requisites and must exist before the court can render a valid judgment or decree, and if either of these is wanting all judicial proceedings are void. The notice by publication against a non-resident defendant, prescribed by the statute, is in the nature of a substituted process and must be duly published before the court can acquire full jurisdiction to make any order or decree affecting a defendant or disposal of the attached property, and as to persons who cannot legally see or obey it, such publication is without any effect whatever. Judicial proceedings, during the late war, taken within the Union lines against defendants, who were absent in the Confederate lines and who did not appear to have any notice other than publication in the newspaper which they could not lawfully see, are absolutely void. Haymond v. Camden, 23 W. Va. 180.

If the court has jurisdiction of the parties and the subject-matter, its decree, though erroneous, is binding until reversed, even though it had no jurisdiction to entertain the suit. Peirce v. Graham, 85 Va. 227, 7 S. E. Rep. 189.

It is well settled that the courts of this state are without jurisdiction to sell and convey land situated beyond the limits of the state. Gibson v. Burgess, 82 Va. 650; Poindexter v. Burwell, 82 Va. 507.

A judgment or decree of a court of another state has no effect to pass title to or affect land in this state, nor can a sale or conveyance under it by a trustee or commissioner appointed by it do so. Wilson v. Braden (W. Va.), 36 S. E. Rep. 367.

A trustee appointed or substituted by a court of another state has no power as such to convey land in this state. Wilson v. Braden (W. Va.), 36 S. E. Rep. 367.

When a conveyance of land made by a special commissioner under a sale under a decree of a court is offered in evidence to pass title, it must be accompanied by either the whole record of the cause, or enough to show that the parties holding title, affected by the deed, and also the land itself, were before the court, and that it was decreed to be sold, and was sold, and the sale confirmed by the court, and that authority was given by the decree to the commissioner to make the conveyance. The recital in the deed of these important facts is no evidence of them, against strangers to the deed, contesting its effect. Wilson v. Braden (W. Va.), 36 S. E. Rep. 367.

Where in a chancery suit land was sold, and the sale confirmed, and a rule issued against the purchaser to show cause why the land should not be resold, to which rule the purchaser answers, and the evidence to overrule and support his answer is all taken, and the plaintiff in the original cause then dies, and the court, the original cause not having been revived, enters a decree on the proceedings under the rule, it was held, that the court had jurisdiction to render such decree. Crislip v. Cain, 19 W. Va. 438.

Taxes Illegally Assessed—Sale.—Where the assessment of a tract of land for taxation is illegal, a sale

of such tract of land, made by the sheriff for non-payment of the tax so assessed, is void. For there can be no valid sale made by a sheriff of a tract of land as delinquent for the non-payment of taxes where there has been no legal assessment of such taxes. *Cunningham v. Brown*, 30 W. Va. 588, 20 S. E. Rep. 615.

B. OF THE PARTIES.—The court of equity may compel parties residing within its jurisdiction to account for any lands in another state descended to them as heirs, as a trust subject for the payment of the debts of their ancestor. *Dickinson v. Hoopes*, 8 Gratt. 353; *Barger v. Buckland*, 28 Gratt. 850.

Where Owner Was Not Summoned—Decree of Sale Void.—If the court of equity make an order to sell real estate when it has no jurisdiction to make such order, the owner of such real estate not having been summoned, the appellate court will reverse the decree *in toto*, as also the order confirming the sale made under such decree. *Camden v. Haymond*, 9 W. Va. 680.

IV. NECESSARY PARTIES TO SALE OF LANDS.

A. WHO ARE NECESSARY PARTIES.

1. PERSONS BENEFICIALLY INTERESTED.—All persons beneficially interested in the object of a suit for the sale of real estate under decree of court ought to be made parties, so that all questions arising may be fully and finally settled. *Yost v. Porter*, 80 Va. 855.

When it is uncertain whether or not certain persons have an interest in land, it is error to decree the sale of such land without making such persons parties to the suit. *Donahue v. Fackler*, 31 W. Va. 124.

Reversioners and Remaindermen.—Owners of vested estates in reversion and remainder, whether by legal or equitable title, are indispensable parties to a chancery suit to sell the fee; and the presence as parties of a tenant for life, or of the trustee holding for them, does not make them parties by representation, and a sale under the decree will not affect or pass their right in the land. *Williamson v. Jones*, 48 W. Va. 562, 37 S. E. Rep. 411.

Attachment—Trustees.—Where an attachment is sued out against a non-resident corporation, and such corporation has the equitable title, of the real estate attached in the cause, a personal decree may be rendered against such corporation, which appears in the cause; but the property which is attached will not be sold in the absence of the trustees who held the legal title; they must either be served with process, or, if non-residents, an order of publication must be issued against them and be duly published. *Chapman v. Pittsburgh, etc., R. Co.*, 18 W. Va. 184.

Trustees—Necessary Parties.—The legal title to the land levied on in this case being in the trustees it was error in the court below to decree the sale of the land to pay the debt before the trustees were made parties to the cause. *Baker v. Oil Tract Co.*, 7 W. Va. 458.

Foreclosure—Devisees—Heirs.—In a suit in chancery, to foreclose a mortgage, against purchasers claiming under a devisee of the mortgagor, not only the persons from whom they *immediately* derive their title, but also the said devisee, or his heirs, and all other devisees of the equity of redemption, ought to be made parties; notwithstanding such equity was devised to some of them upon *conditions*; for whether such conditions were complied with, cannot be legally investigated, until they are made parties. *Mayo v. Tomkies*, 6 Munf. 530.

Resale of Land.—The purchaser, at a judicial sale as well as his immediate and remote vendees, should be made defendant to the bill filed, to sell the land for the purchase price, and such land should be sold according to the equities between the said defendants. *Glenn v. Blackford*, 23 W. Va. 182; *McClintic v. Wise*, 25 Gratt. 448.

Absence of Necessary Parties—Effect on Purchaser.—There is no doubt that a purchaser could get no title and would not be protected by said section eight, if the owner of the property was not before the court. It is also clear, that the purchaser would not be protected under said section if parties, who, the record of the suit shows, were necessary, being interested in such property by having liens thereon were not before the court. If the persons whom it was necessary to make formal defendants to the suit, were not parties either formally or informally, and were not before the court the purchaser would not be protected in his purchase under said section eight of chapter 182. *Underwood v. Pack*, 23 W. Va. 709.

Land of Foreign Corporation—Attachment—Effect on Domestic Company Not Party to Suit.—Where land upon which there is a railroad track, in the proceeding against a foreign corporation and with no charter privilege from this state, in which the road is situated, is attached at the suit of creditors, and it does not appear in the record, that any railroad chartered in this state has any interest therein, the court will regard the land attached as ordinary real estate; but no decree with reference thereto or sale of the land thereunder can affect the rights of any railroad chartered in this state or any interest of such railroad in such land, of whatever character that interest may be, such railroad company not being a party to the suit. *Chapman v. Pittsburgh, etc., R. Co.*, 18 W. Va. 184.

In a suit by creditors for the sale of the land of their debtors, a decree is made with their consent for the sale, but the sale made is set aside, and the land rented out. After this, one of the debtors dies intestate, leaving heirs. Then another decree is made, reviving the suit against his administrator, and directing a *scire facias* against the heirs; and with the consent of the parties before the court, commissioners are directed to execute the previous decree of sale. They sell and the sale is confirmed, and the purchase money being paid a conveyance is ordered and made, and this is confirmed. These decrees and the sale having been made when the heirs were not before the court, the decrees are erroneous, and these and the sale must be set aside. *Sexton v. Crockett*, 23 Gratt. 857.

2. ABSENT PARTIES—RIGHT TO OBJECT.—The court of appeals having reversed a decree of the court below for the sale of land and another confirming the sale and distributing the proceeds, in the absence of the owners of one-half of the land, and having sent the case back, that they may be made parties and have an opportunity to defend their interests; though the decree is in other respects confirmed, these absent owners, when made parties have a right to except to the sale and its confirmation, and are not precluded by the affirmation of the decree in other respects than those on which it is reversed. *Crockett v. Sexton*, 29 Gratt. 46.

3. WAIVER OF OBJECTION.—The appellate court will reverse any decree ordering the sale of land or the distribution of the proceeds of such sale where all the judgment creditors are not made parties to

the suit either formally or informally, which fact is disclosed by the record. But if all the judgment creditors are made parties to such a suit informally by having been summoned by publication before a commissioner to present their judgments, the appellate court will not reverse the decree ordering the sale of lands of the debtor merely because the record disclosed that some of the judgment creditors had not been made formal defendants, who ought to have been so made, unless it appears that the objection was made to the rendering of such decree in this account in the court below, before such decree was entered. *Neely v. Jones*, 16 W. Va. 625.

B. WHO ARE NOT NECESSARY PARTIES.

1. **LESSEES.**—When proceedings are had to sell the fee in land, it is generally not necessary to make the lessee of the land a party to the suit. *Chapman v. Pittsburgh, etc., R. Co.*, 18 W. Va. 184.

2. **PENDENTE LITE PURCHASER.**—*Pendente lite* purchasers need not be made parties. Where judgments are docketed or deeds of trust recorded, or liens otherwise acquired, and a chancery suit to enforce same is pending, there need be no notice of the pendency of such chancery suit, under section 13, ch. 139, Code 1891, to bind purchasers purchasing after the docketing of such judgment or recordation of such deeds of trust or lien. They are *pendente lite* purchasers, under the common-law rule. *Shumate v. Crockett*, 43 W. Va. 491, 27 S. E. Rep. 240.

Whilst suit is pending the purchaser conveys the property in trust to secure a debt. The *cestuis que trust* are *pendente lite* purchasers, and are not necessary parties. *Goddin v. Vaughn*, 14 Gratt. 103.

V. ENQUIRY INTO RENTS AND PROFITS.

A. OLD RULE.

(a) Reasonable Time to Discharge Debt.

1. **OWNER MUST CLAIM PRIVILEGE OF RENTING.**—To have real estate rented rather than sold under the law prior to the act of March 26, 1882, was a privilege and not an absolute right accorded to the debtor; and, therefore, to entitle him to the benefit of this privilege he must exercise reasonable diligence in claiming it in the court below, and where he has not done so, and shows no sufficient reason why he has not done so, he cannot be permitted at the last moment to avail himself of such privilege and have the cause sent back to a commissioner or otherwise delayed. *Arnold v. Casner*, 22 W. Va. 458; *Hill v. Morehead*, 20 W. Va. 429; *Rose v. Brown*, 11 W. Va. 122.

The inferior court must be called on to say, whether in a reasonable time the rents and profits of the real estate will pay the liens charged upon it; and this discretion must first be exercised by the court below, before this court will review the decree of sale of said court; and upon such review this court will not reverse it, unless it appears that the court erred in the exercise of that discretion. *Hughes v. Hamilton*, 19 W. Va. 396; *Rose v. Brown*, 11 W. Va. 122, 143.

An interlocutory decree directs a sale of lands to satisfy a debt, in a case where it might have been proper to decree satisfaction out of the rents and profits; but this was not a point controverted in the court below, or in any way brought to the notice of the court, and though the party had ample opportunity to apply to the court to alter the decree in that particular, he did not apply for such alteration, and upon appeal to this court, *held*, the decree shall not be reversed for such cause, but affirmed and the

cause remanded with direction to alter the decree and direct satisfaction out of the rents and profits, if such alteration be asked, and if the debt can be satisfied out of the rents and profits within a reasonable time. *Manns v. Flinn*, 10 Leigh 93; *McClung v. Beirne*, 10 Leigh 394.

The lower court must be called upon to say, whether in a reasonable time the rents and profits of the real estate will pay the liens charged thereon; and this discretion must first be exercised by the court below, before the appellate court will review the decree of the lower court, and upon such review the appellate court will not reverse it, unless it appear that the court erred in the exercise of that discretion. The rental of the property must be asked by the debtor before the decree of sale is entered, unless he shows to the court below good and sufficient reason, why he did not ask it, before the decree of sale was entered. *Hill v. Morehead*, 20 W. Va. 429; *Rose v. Brown*, 11 W. Va. 122.

Upon a bill by creditors of a decedent against his administrators and heirs, to marshal assets, the court may decree a sale of the lands descended to the heirs, but it is not bound and ought not to decree such sale, if the rents and profits of the lands will satisfy the debts within a reasonable time. *Tennent v. Pattons*, 6 Leigh 196.

If none of the parties ask an enquiry to ascertain whether the rents and profits will pay the debt in a reasonable time, there may be a decree for the sale of the property. *McClung v. Beirne*, 10 Leigh 394.

When, however, the cause is remanded, the appellate court may give the debtor, or other party interested, a right to apply to the court below, to have the enquiry made, whether the rents and profits will satisfy the liens on the real estate in a reasonable time, and to have the judgment of such court thereon. *Rose v. Brown*, 11 W. Va. 122.

B. STATUTORY RULE.

(b) Five Years.

Must Appear to the Court That the Rents Will Not Discharge the Debt.—Jurisdiction to enforce the lien of a judgment shall be in equity. If it appear to the court that the rents and profits of the real estate subject to the lien will not satisfy the judgment in five years, the court may decree the said estate, or any part thereof, to be sold, and the proceeds applied to the discharge of the judgment. Va. Code 1887, § 3571; W. Va. Code, ch. 139, § 7.

Before a sale of realty can be decreed to pay judgment liens, the court must, in some way, be convinced that the rents and profits will not in five years satisfy those liens. When the insufficiency is alleged and not denied, there need be no enquiry; but where not alleged, or if alleged, the allegation is denied, there must be an enquiry before a sale can be decreed. *Muse v. Friedenwald*, 77 Va. 57; *Johnson v. Wagner*, 76 Va. 587; *Horton v. Bond*, 23 Gratt. 815; *Ewart v. Saunders*, 25 Gratt. 203; *Dillard v. Krise*, 86 Va. 410, 10 S. E. Rep. 430; *Etter v. Scott*, 90 Va. 762, 19 S. E. Rep. 776; *Conaway v. Odbert*, 2 W. Va. 25; *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. Rep. 244; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. Rep. 103.

It is error to decree a sale of property to pay the judgment without any inquiry as to the rents and profits of real estate. As there is no averment in the bill or answer touching this question, no proof showing that the rents and profits would not be sufficient to pay the judgment in five years, it is clearly erroneous to proceed to sell the property, without first ascertaining whether the rents and

profits are sufficient to pay said judgment within the said time prescribed. *Coal River, etc., Co. v. Webb*, 3 W. Va. 438; *Etter v. Scott*, 90 Va. 762, 19 S. E. Rep. 776.

The report shows on the testimony of several witnesses that the rents and profits will not pay the debts in five years, the annual rent being \$256 and the debt being \$2,500, and the report is confirmed and a sale of the land decreed. It was held that this was not error. *Cooper v. Daugherty*, 85 Va. 343, 7 S. E. Rep. 387.

It appearing that none of the decrees for renting the land had been executed, and that the real estate would not in five years rent for enough to discharge the liens, a decree annulling them and ordering the sale of so much of the property as may be necessary, is proper. *Preston v. Aston*, 85 Va. 104, 7 S. E. Rep. 344; *Kennerly v. Swartz*, 83 Va. 704, 8 S. E. Rep. 348.

Where, after renting of land had been decreed at a previous term it appeared that the rents would not, in five years, pay the liens, the decree was set aside and a sale decreed, an account of liens having first been taken. *Kennerly v. Swartz*, 83 Va. 704, 8 S. E. Rep. 348.

Where the Decree is Interlocutory—Appellate Court Will Amend.—There being no averment in the bill or admission or proof that the rents and profits of the land retained by the debtor will not pay the debt in five years, it was error to decree a sale of the land before having this enquiry made. But the decree appealed from being interlocutory, this court will amend the decree in this respect, and as amended affirm it, with costs to the appellee. *Price v. Thrash*, 30 Gratt. 515; *Ewart v. Saunders*, 25 Gratt. 203; *Brengle v. Richardson*, 78 Va. 406.

Where Papers Fail to Allege Sufficiency of Rents and Profits—Order of Reference.—The debts of both trust and judgment creditors ought to be ascertained, and the property sold, if the rents and profits will not satisfy the liens in five years, and a reference, if it does not appear in the papers, ought to be had to determine this latter question. *Laidley v. Hinchman*, 3 W. Va. 423.

Discretion of Commissioner—When Decree is Silent.—Where a decree directs property to be sold or rented, without direction whether it shall be offered in whole or in parcels, the commissioner must in the interest of the parties to the suit, in his discretion offer it for sale or rent in that manner, which will in his judgment bring the most money. *Rose v. Brown*, 17 W. Va. 649.

Sale or Renting Lands.—It is improper to decree renting and sale simultaneously, if the rents prove insufficient. The renting should be first decreed, and if report shows it to be insufficient, sale may be decreed. *Dalingerfield v. Smith*, 83 Va. 81, 1 S. E. Rep. 599.

Whether Rents Will Discharge—How Ascertained.—Upon a bill filed by a judgment creditor to subject the land of his debtor to satisfy his debt, the court in order to ascertain whether the rents of the land will pay the debt in five years, should generally direct the commissioner to offer it first for one year, and if that will not pay the debt, then for two, and so on, if necessary up to five years, closing the contract whenever the rents will pay the debt. The terms of payment of the rent to be fixed by the court, looking to the kind of property and the usage of the country. If it will not rent for enough in five years, the commissioner should report the fact to the court. *Compton v. Tabor*, 23 Gratt. 121.

Where a creditor's bill alleges that the debtor's land will not rent for enough to pay the liens in five years and the answer denies the allegation, the court must ascertain their annual value with reasonable certainty before decreeing their sale. *Dillard v. Krise*, 86 Va. 410, 10 S. E. Rep. 430; *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. Rep. 244.

Renting—Circumstances Must Be Favorable.—In a suit to sell lands to pay debts, the commissioner reported that the rents and profits would pay the debt in five years. An ineffectual attempt was made to rent the land, but at a distance from the property and at a time of the year when it was very hard to rent land. *Held*, that it was error to decree a sale of the land under the circumstances. *Mustain v. Pannill*, 86 Va. 33, 9 S. E. Rep. 419.

No Enquiry Necessary When Not Asked by Those Interested.—The exception that the commissioner ought to have ascertained the rents and profits should not have been sustained, because he reports that no evidence was brought before him on the subject. If the debtor and his wife, who were more interested in that matter than anybody else, did not choose to present evidence of that fact, the commissioner could not be expected to hunt up evidence thereof. *Duncan v. Custard*, 24 W. Va. 739.

In a suit in equity to subject land to satisfy a judgment, the bill states the valuation of the land, and that the judgment could not be satisfied by the rents and profits in five years; the answer says nothing on the subject and an enquiry is not asked for, but the court in its decree expressed the opinion that the rents and profits were not sufficient and ordered a sale. As the statute prescribes no particular mode by which it shall appear that the rents and profits will not satisfy the judgment in five years, if none of the parties ask for such enquiry, there may in a proper case, be a decree for the sale of the land without it. *Ewart v. Saunders*, 25 Gratt. 203.

The bill having charged that the rents and profits of the land would not pay the debt in five years, and the bill having been taken for confessed, it was not error to decree a sale of land without directing an enquiry whether the rents and profits would pay the debt in five years. *Barr v. White*, 30 Gratt. 531, and *note*.

Under the law as it was in 1868 in West Virginia, it would seem that it was not necessary to allege that the rents and profits would satisfy the debt in five years. *Handly v. Sydenstricker*, 4 W. Va. 606.

Enquiry Not Necessary in Suit to Enforce a Deed of Trust or a Vendor's Lien.—In a suit to enforce a deed of trust or a vendor's lien, it is not error to decree a sale of the land without enquiry into the rents and profits. And this is true even though the vendor has a judgment for the amount of his lien. *Kyger v. Sipe*, 89 Va. 507, 16 S. E. Rep. 627; *Neff v. Wooding*, 83 Va. 432, 2 S. E. Rep. 731; *Kane v. Mann*, 93 Va. 239, 24 S. E. Rep. 938; *Coles v. Withers*, 83 Gratt. 186; *Armentrout v. Gibbons*, 30 Gratt. 632.

Nor in a suit by the state to set aside a fraudulent conveyance made by its judgment creditor, and to subject the land to the payment of such judgment, is it necessary to allege and show that the rents, issues and profits of the land will not pay the debt in five years. *State v. Bowen*, 38 W. Va. 91, 18 S. E. Rep. 375.

VI. TAKING ACCOUNT OF LIENS.

A. THE RULE.—It is error to decree a sale of land before taking an account of the liens thereon, and their respective priorities. *Kendrick v. Whitney*, 28 Gratt. 646; *Schultz v. Hansbrough*, 33 Gratt. 567,

and *note*; Alexander v. Howe, 85 Va. 198, 7 S. E. Rep. 248; Daingerfield v. Smith, 88 Va. 81, 1 S. E. Rep. 599; Barton's Ch. Pr. (2d Ed.) 189, 859, 1155, 1156; Marling v. Robrecht, 13 W. Va. 462; Moran v. Brent, 25 Gratt. 104; Simmons v. Lyles, 27 Gratt. 922; Wiley v. Mahood, 10 W. Va. 206; Cralle v. Meem, 8 Gratt. 530; Buchanan v. Clark, 10 Gratt. 165; Livesay v. Jarrett, 3 W. Va. 283; Murdock v. Welles, 9 W. Va. 552; Fidelity Loan Co. v. Dennis, 93 Va. 504, 25 S. E. Rep. 546; Hutton v. Lockridge, 22 W. Va. 160; Horton v. Bond, 28 Gratt. 815, and *note*; Effinger v. Kenney, 79 Va. 551; Adkins v. Edwards, 83 Va. 300, 2 S. E. Rep. 435; Anderson v. Nagle, 12 W. Va. 113; McClaskey v. O'Brien, 16 W. Va. 793; Scott v. Ludington, 14 W. Va. 387; Hill v. Morehead, 30 W. Va. 429; Trimble v. Herold, 20 W. Va. 602; Rohrer v. Travers, 11 W. Va. 147; Cole v. McRae, 6 Rand. 644; Payne v. Webb, 23 W. Va. 558; Hoge v. Junkin, 79 Va. 220; Iaege v. Bossieux, 15 Gratt. 84; Smith v. Flint, 6 Gratt. 40; Strayer v. Long, 83 Va. 715, 3 S. E. Rep. 373; Houck v. Dunham, 92 Va. 211, 23 S. E. Rep. 238; New v. Bass, 92 Va. 333, 23 S. E. Rep. 747; Laidley v. Hinchman, 3 W. Va. 423; Pecks v. Chambers, 8 W. Va. 210; Bristol Iron, etc., Co. v. Caldwell, 96 Va. 47, 27 S. E. Rep. 838, 3 Va. Law Reg. 460; Sims v. Tyrer, 96 Va. 14, 30 S. E. Rep. 443, 4 Va. Law Reg. 377; Beaty v. Veon, 18 W. Va. 291.

B. REASON FOR RULE.—Where there are various liens on lands of a judgment debtor, it is error to decree a sale of his lands to satisfy the same without first ascertaining the amount of said liens and their priorities, for the reason that to decree such sale before ascertaining the amount of the several liens and their respective priorities has a tendency to sacrifice the property, by discouraging the creditors from bidding as they probably would if their right to satisfaction of their debts, and the order in which they were to be paid out of the property, had been previously ascertained. Keck v. Allender, 37 W. Va. 201, 16 S. E. Rep. 520; Cole v. McRae, 6 Rand. 644; Kendrick v. Whitney, 28 Gratt. 646; Marling v. Robrecht, 13 W. Va. 440.

But an order of reference is not to be awarded to enable a plaintiff to make out his case. It should not be made for the purpose of furnishing evidence in support of the allegations of the bill, nor until he has the right to demand it. Millhiser v. McKinley, 98 Va. 207, 35 S. E. Rep. 446; Baltimore S. Packet Co. v. Williams & Co., 94 Va. 425, 26 S. E. Rep. 841; Lee County v. Fulkerson, 21 Gratt. 182; Sadler v. Whitehurst, 83 Va. 46, 1 S. E. Rep. 410; 2 Barton's Ch. Pr. (2d Ed.) 630.

C. NOTICE.—The general rule is that the sale of real estate should not be decreed to be made until the lienholders have been convened as prescribed by section 7, ch. 139, of the Code, and the amounts and priorities of their liens ascertained. A departure from this rule can only be justified by some good reason, expressly given, or otherwise plainly appearing. Lough v. Michael, 37 W. Va. 679, 17 S. E. Rep. 181.

When notice of taking an account is ordered to be given by publication in a newspaper under sec. 3321, of Va. Code, there must be at least twenty-eight days between the first insertion and the day of taking the account. Dillard v. Krise, 86 Va. 410, 10 S. E. Rep. 430.

Three days' notice of the taking of an account is not sufficient time, but a decree will not be reversed on that ground, where the party is not injured thereby. Nor where a report is retained within 10 days before the commencement of the term at which

it is acted on, unless it be shown to have been acted on within that period. Moore v. Bruce, 85 Va. 139, 7 S. E. Rep. 195.

In suits affecting the interests of infant parties, it is not sufficient to notify them of taking account by publication. The notice must be given to their guardian *ad litem*. Strayer v. Long, 83 Va. 715, 3 S. E. Rep. 372.

D. WHO MAY NOT TAKE ACCOUNT OF LIENS.—A commissioner who is a creditor and a party to a suit to subject the debtor's lands to pay his lien debts, is incompetent to take an account ordered therein. Dillard v. Krise, 86 Va. 410, 10 S. E. Rep. 430; Simmons v. Lyles, 27 Gratt. 923; Bowers v. Bowers, 29 Gratt. 697.

E. WHEN NOT NECESSARY.—It is not necessary to refer a cause, in which it appears that there are only two judgment liens, to a commissioner to ascertain the amount and priorities of the liens, when the pleadings in the case and the proofs show clearly what they are.

And where the lower court has failed upon such pleadings and proofs to ascertain the amounts and priorities of the liens under such circumstances, while the appellate court will reverse the decree, it may enter such decree as the lower court ought to have entered. Anderson v. Nagle, 12 W. Va. 98; Weinberg v. Rempe, 15 W. Va. 858; Beck v. Bock, 24 W. Va. 590.

And where the debtor consented to the first sale before an account of his debts and their priorities had been taken and not having withdrawn that consent, and the account having been taken, though not confirmed, which showed that the proceeds of both sales was not sufficient to pay his debts, and he did not in his petition show errors in that report or that he had been injured by the sale of the last tract sold, the failure to have an account of his debts and their priorities before that sale was not good ground for setting it aside, as against the purchasers. Crawford v. Weller, 23 Gratt. 835, and *note*.

Deed of Trust—Mortgage.—Where there are conflicting claims to priority of payment out of the proceeds of the sale of real estate about to be sold to satisfy the liens thereon, the court should ascertain the priority of the liens, and determine the rights of creditors before decreeing a sale, but this rule has no application to a decree for the sale of lands made under a deed of trust or mortgage where the parties have contracted for a sale without an account of liens, and no question of priority of liens is raised by answer, or otherwise. Heth v. City of Radford, 4 Va. Law Reg. 388; Artrip v. Rasnake, 96 Va. 277, 31 S. E. Rep. 4.

Suit by State.—In a suit by the state to subject lands to the payment of a debt, it is not necessary to ascertain the liens existing upon the land before making a distribution of the proceeds of a sale of land made therein, and the party filing the bill and setting aside the conveyance is entitled to be first satisfied out of such proceeds, unless there are prior liens. State v. Bowen, 88 W. Va. 91, 18 S. E. Rep. 375.

Renting.—Before a decree is rendered for the rental of land to discharge a lien thereon, it is not necessary to have the amounts and priorities of all the liens thereon ascertained and fixed. Douglass v. McCoy, 24 W. Va. 722.

F. IN GENERAL.—Where the sale is a judicial sale it is erroneous and premature to decree a sale of the land before the priority of liens is ascertained where it appears that such liens exist. Alexander v.

Howe, 85 Va. 198, 7 S. E. Rep. 948; Lipscombe v. Rogers, 20 Gratt. 658.

Sale of Heir's Interest.—A decree to sell the share of an heir in his ancestor's lands, to pay his debts, without first ascertaining the amount of such share by an account taken of the ancestor's debts and of the advancements to the several heirs is premature and erroneous. Hoge v. Junkin, 79 Va. 220; Ryan v. McLeod, 32 Gratt. 367; Bowden v. Parrish, 86 Va. 67, 9 S. E. Rep. 616.

Land Chargeable.—It is error to decree the sale of land for the payment of a debt unless the creditor asking the sale, shall show that the land is legally chargeable in equity, for such payment and even then, until the amount of the debt shall be ascertained. Smith v. Flint, 6 Gratt. 40.

And the judge may order an account in vacation, where he has before him the bill and exhibits which make a *prima facie* case. Acts 1884, p. 57. Moore v. Bruce, 85 Va. 139, 7 S. E. Rep. 195.

Where there are a number of judgment liens against the lands of the debtor, it would be error to decree that the land should be sold to pay the lien of the plaintiff only; the decree should provide for the payment of all of the liens audited against the land. Scott v. Ludington, 14 W. Va. 387; Laidley v. Hinchman, 3 W. Va. 423; Anderson v. Nagle, 12 W. Va. 98.

Estate of a Married Woman.—The court, having taken control of specific personal estate of the married woman for the purpose of subjecting it to the payment of the claims for that purpose, should, as the law then was, have ascertained and determined their respective priorities, and then applied the proceeds of sale had under the direction and control of the court to the satisfaction of these claims, in the order in which they have been ascertained to be entitled. Osborn v. Glasscock, 39 W. Va. 749, 30 S. E. Rep. 702.

Ascertainment of Personal Estate of Decedent.—It is error for the circuit court to decree a sale of the lands of the intestate for the payment of his debts until the administration accounts of all his personal representatives have been settled, and the amount and priorities of all debts and liabilities against his estate has been ascertained and decreed for, and until it has been ascertained what amount, if any, of his personal estate remains in the hands of his personal representatives applicable to the payment of his debt. Hart v. Hart, 31 W. Va. 688, 8 S. E. Rep. 562; Kilbreth v. Roots, 33 W. Va. 600, 11 S. E. Rep. 21; Cralle v. Meem, 8 Gratt. 496.

Application for Further Relief.—As it is the duty of the court before it decrees a sale of lands to definitely fix the *amounts* and *priorities* of the liens, it is error to provide that any of the parties may apply for further relief, if it should appear that a credit allowed to a judgment was improper. Scott v. Ludington, 14 W. Va. 387; Beard v. Arbuckle, 19 W. Va. 135.

Cloud upon Title.—The general rule is that before a sale is decreed, any cloud on the title, or impediment to a fair sale, ought to be removed as far as practicable. Thomas v. Farmers' Nat. Bank, 86 Va. 291, 9 S. E. Rep. 1122.

But in a suit to sell lands to pay liens, the answer is filed and treated as a petition, in which answer it was averred that a portion of the land was in the possession of another; that unlawful detainer was pending against him to recover such portion, that the sale under such circumstances would be at a sacrifice, and that the debtor was in a position to effect a desirable private sale; it was held that

the unlawful detainer seeming to be a mere contrivance for delay, the court will not stay the sale. Brown v. Lawson, 86 Va. 284, 9 S. E. Rep. 1014.

Unascertained Lien—Consent of Creditor.—It is error to decree a sale of lands to discharge liens thereon before the amounts of the liens and their priorities have been ascertained and fixed, which error will not be cured by the consent in the decree of the creditor whose lien is unascertained, that the lands shall be sold before the amounts of such liens are ascertained. Beard v. Arbuckle, 19 W. Va. 135.

Failure to Ascertain Priorities.—A decree which simply confirms a commissioner's report of debts, and directs a sale of land therefor in default of payment, though that report specifies the debts and priorities, is erroneous, because the decree does not itself adjudicate and declare what debts are to be paid, and fixed their order and priority as to the land to be sold therefor. Hull v. Hull, 35 W. Va. 155, 13 S. E. Rep. 49.

VII. REQUISITES OF DECREE (SEE ACCOUNT OF LIENS).

Failure to Fix Priorities.—If before the confirmation of a sale the report of the commissioner be excepted to on the grounds that the decree ordering the sale, failed to fix the amounts and priorities of the liens charged thereon, and it clearly appears to the court, that the debtor was materially injured in the sale of the land thereby, the land on that account being sold for a price materially less than it otherwise would have sold for, the court in the exercise of a sound discretion may for such reason refuse to confirm such sale, and set it aside. Trimble v. Herold, 20 W. Va. 602; Hill v. Morehead, 20 W. Va. 429; Hart v. Hart, 31 W. Va. 688, 8 S. E. Rep. 562; McClaskey v. O'Brien, 16 W. Va. 791.

Order of Publication.—Where the decree does not state that the order of publication as to the absent defendants was duly executed, or what is tantamount thereto; and the record does not disclose the fact, that as to such absent defendants the order of publication was executed, and such absent defendants are material parties to the bill and have not appeared in the cause, the decree will be reversed for that reason. Scott v. Ludington, 14 W. Va. 387.

Bond of Commissioners.—The decree should provide for the execution of a bond by the special commissioner before he shall receive any money. Sec. 3398, Va. Code and Code of W. Va., ch. 132.

Certainty of Decree.—Where the bill and proceedings specify the land, a decree for the sale of the land in the bill and proceedings mentioned, or so much as may satisfy the purposes of the decree, is sufficiently certain. That is certain which may be made certain, applied to this case. Barger v. Buckland, 28 Gratt. 850.

Property of Greater Value Than \$500—Advertisement.—See sec. 1a. I Code of W. Va. ch. 132 providing that if it shall appear to the court that the land is of a greater value than \$500 the decree shall prescribe that the sale shall be advertised in a newspaper, published in the county in which the land is situated, stating the time, terms and place of sale together with a description of the property to be sold.

Void—Rights of Owner.—Where money from the sale of property has, by order of the court, been paid, and the decree ordering its payment was void, the party whose property was sold to raise the

purchase money in cash. By the express terms of this decree, the commissioner was fully authorized to receive the purchase money in Confederate States treasury notes. That the courts of this Commonwealth during the war had the authority to decree sales for Confederate money, and to make investments of funds under their control in Confederate securities is no longer an open question. It is definitively settled by legis-

lative enactment, by repeated decisions of this court recognizing *the validity of such decrees and investments, and by the Supreme Court of the United States. Transactions in Confederate currency during the war, and investments in Confederate securities (when properly made), must now be held to be as valid and binding as if made in times of peace in a sound currency. To hold such transactions null and void would unsettle half the titles to real estate throughout the Commonwealth, and would beget universal discord, confusion and chaos.

But it is insisted by the learned counsel for the appellees, that when the decree was entered the plaintiffs in this suit were infants, and that they now have the right to show cause against the decree of March 9th, 1863; and that they now have the right to show that this decree was not warranted, because it was not to the interest of the infants that the real estate should have been sold at the time the said decree was rendered.

The right of an infant to show cause against a decree which affects his interests, after he arrives at age, must be limited to this extent, to show cause existing at the rendition of the decree; and not such as arose afterwards.

The question always must be, can any cause be shown why the decree, at the time it was rendered, was not a legal and binding decree? In this case it is proposed to show by the infants, after they arrive at age, that it was not to their interest to sell the real estate in the decree mentioned, and that, therefore, the court was not warranted in decreeing the sale. And it is urged that it did not promote the interests of the infants, because the land sold was a reversion expectant on the expiration of their mother's dower estate; that such sale was to the widow's benefit, but not the infants'; that it secured to her a larger income than the rental value, but was a sacrifice of their reversionary interest, and a total loss to them of real estate worth \$10,000 and upwards in gold.

It is to be observed, that the jurisdiction of the court *and the regularity of the proceedings are not questioned; nor is it pretended that there is any error upon the face of the record, or that the case made by the record did not warrant the decree.

But the stress of the argument is, that the interest of the infants was not promoted by the sale, because the sale was made for Confederate currency, and because the proceeds of sale were invested by the court for

the infants in Confederate securities. This argument is not based upon the evidence before the court at the time the decree was entered for a sale of the property; is not made in the light of the facts then existing and proved before the court, but upon facts existing subsequent to the decree, and in the light of events that happened afterwards. It is easy to show now, after the close of the war, after Confederate currency and Confederate securities have perished, that, as subsequent events have transpired, the interests of the infants have not been promoted by a sale of their real estate. And if such considerations could govern the adjudications of this court, then every sale of real estate in which infants were interested, made under decrees of courts during the war, must be vacated and annulled: for in every case, as events have happened, their interests cannot be said to have been promoted by a sale of their real estate.

This very state of things strongly illustrates the necessity and wisdom of the rule, that the privilege accorded to the infant to show cause against a decree disposing of his real estate, is limited to a cause existing at the time the decree was pronounced. He may show cause within six months after attaining full age, against a decree in a suit, to which he was a party as an infant. But what cause can be shown to entitle him to vacate the decree? Can he show that in the light of subsequent events it has turned out that his interests have not been promoted by a sale of his real estate?

Can he, upon arriving at age, *introduce evidence to contradict the evidence upon which the court acted in deciding that his interests would be promoted by a sale? Will he be permitted, years after the decree has been pronounced by a court of competent jurisdiction, under regular proceedings, upon satisfactory evidence, and when the property has for years been in the hands of a bona fide purchaser, to show, not that the case made by the record did not warrant the decree, but that upon evidence taken long afterwards, and in the light of facts, not as they existed at the time of the decree complained of, but in the light of subsequent events the decree was not warranted? And especially when these subsequent events were the results of civil and political revolutions, over which the parties and the courts of chancery had no control, and could not possibly foresee?

Certainly the infant, upon arriving at age, can show no such cause as this, to entitle him to vacate a decree made against him while an infant. He may show error upon the face of the record; or he may show that the court had no jurisdiction to enter the decree; or if it had jurisdiction, that the proceedings were irregular and not binding upon the parties; or he may show that the case made by the record did not warrant the decree. But whatever cause he may properly show, he certainly cannot reopen the case, and introduce evidence to contradict that already given and acted upon by the court that entered the decree.

If the court which pronounced the decree had jurisdiction of the subject and the parties; if its proceedings were regular and in accordance with the requirements of law; and the decree is sustained and justified by the evidence then introduced, the infant will not be allowed, as against a bona fide purchaser, to go out of the record to show that, upon facts and events arising subsequent to the rendition of the decree, his interests were not promoted by a sale of his real estate.

To establish a contrary doctrine would in effect defeat *the very object of the law, and effectually prevent the sale of any real estate belonging to infants.

For who would purchase, at a judicial sale, real estate belonging to infants, if their title could be destroyed years afterwards by the introduction of evidence to contradict that upon which the decree was based? How could a purchaser ever know when a decree was valid and binding; for it would be simply impossible for him to conjecture what evidence might be hunted up to contradict the evidence upon which the decree was founded.

In the case before us the record of the proceedings have been destroyed, except the decrees before referred to. But in the decree directing the sale, the cause came on to be heard upon the bill, answers, replications, exhibits and examination of witnesses. We are not informed what was the testimony before the Circuit court of the city of Richmond, to show that the interests of the infants would be promoted by a sale of the real estate in the proceedings mentioned; but we are bound to presume that the evidence was of such a character as to satisfy the intelligent, careful and experienced judge who entered the decree for sale, that the interest of the infants would be promoted by that sale. It is worthy of remark, too, that the mother of these infants was a party to the suit in which the decree was entered, that the infants were represented by a guardian ad litem, and all of the parties represented by counsel distinguished for his professional and personal integrity, who was the commissioner that made the sale, and invested the proceeds under the order of the court. It is to be presumed, then, that the interests of the infants were well considered, and that under the circumstances which then surrounded the transaction, and in the light of the events then transpiring, the court was satisfied upon the evidence then before it, "that the interest of the infant defendants would be promoted" by a sale of the real estate. It is true, that

subsequent events caused the sacrifice of *the property, and total loss of the investment made for their benefit; but these were events beyond all mortal prescience, and could not be anticipated. If the Confederacy had been a success, then, in point of fact the sale and investment would have "promoted the interests of the infant defendants;" for they would have found themselves in possession of property of double the value of that which was sold.

It was their misfortune that their property was sold and the proceeds invested in what has proved utterly worthless. But the sale was decreed, and the investment made by a court of competent jurisdiction, upon lawful and regular proceedings, and the real estate has passed and the title vested in bona fide purchasers who were only bound to see that all the parties necessary to convey the title were before the court, and that the sale was in accordance with the decree. Their title cannot now be divested by showing, that by events subsequent to that decree, it has turned out that the interests of the infants were not promoted by the sale.

I proceed now to notice briefly another ground upon which the decree of the court below is sought to be maintained. It was not taken in the bill or in the pleadings in the cause, but was relied upon with much confidence by the learned counsel for the appellee in their argument before this court. It is now insisted, for the first time, that the fee simple in the real estate referred to, was not decreed to be sold by the decree of March 9th, 1863, but only the life estate of Mrs. Louisa Carrington. The decree directs Geo. W. Randolph, esq., who was appointed a commissioner for the purpose, "to expose to sale at public auction, on the premises, to the highest bidder, the dower estate of Mrs. Louisa Carrington in the bill mentioned." It will be remembered that the bill in the suit of Carrington v. Carrington has been destroyed. If it were in existence, it could certainly be looked to to ascertain the

effect and meaning of the decree; but it is manifest *from the papers in said suit, which have been preserved, that the words "the dower estate of Mrs. Louisa Carrington," must be taken as a description of the property which had been assigned to Mrs. Carrington as her dower.

In the first place, the bill was filed by the guardian of Mary E. and Emily C. Carrington, infants over the age of fourteen years, against the said infants and their mother, Louisa Carrington, George M. Carrington, George W. Jones, and Louisa, his wife, who were all of the heirs of the late Richard A. Carrington. We can only gather the objects of the bill from the proceedings; and it is obvious that that object was to have the interest of the infant defendants, Mary E. and Emily C. Carrington, in real estate sold. It could not have been to sell the dower interest of the defendant, Louisa Carrington, for with that the plaintiff, who was the guardian of the infants, had nothing whatever to do, nor was it necessary to invoke the aid of a court of Chancery to sell her dower interest.

On the 22d of May 1863, the cause came on again to be heard upon the report of Commissioner Randolph, with the account of sales, the two statements of John A. Lancaster & Co., the report of the surveyor, and the bond of \$19,000. When the court decreed that the sale of the real estate (not of the dower interest therein), reported by said commissioner, and the investments made by him, be confirmed, and directed a convey-

crees; error, to decree a sale of lands for cash; error, to direct payment of money to creditor and conveyance of land to the purchaser, before the sale is reported and confirmed. *Brien v. Pittman*, 12 Leigh 379.

A decree requiring lands descended to heirs to be sold *for cash*, to satisfy a debt due from ancestor, was *reversed*, and sale directed to be made upon a credit of six, twelve, and eighteen months. *Haffey v. Birchetts*, 11 Leigh 83; *Brien v. Pittman*, 12 Leigh 380.

Reasonable Credit.—As a general rule the decree, to enforce the lien of the vendor for unpaid purchase money, should be upon a reasonable credit. *Kyles v. Tait*, 6 Gratt. 44.

Delinquent Lands—Purchased from the Commonwealth—Cash Sale.—Acts 1895-96, p. 219, ch. 179, amending Code, sec. 666, as amended by Acts 1893-94, p. 737, ch. 685, providing for the sale of real estate purchased by the commonwealth at delinquent tax sales, not stipulating any time at which said land shall be paid for, it will be presumed that cash sales are contemplated, and the cash must accompany the application of purchase, such being the settled policy of the state. *Brooke v. Turner*, 95 Va. 696, 30 S. E. Rep. 55.

Installments of Debt.—It is error to decree the sale of land on terms, which makes the payments fall due more rapidly than their installments of the debt, for which it is sold, become payable. *Gates v. Cragg*, 11 W. Va. 300.

Confederate Money—Standard of Value.—In 1863 a decree was made appointing commissioners to sell lands on the terms of cash for cost of suit and expenses of sale, and a balance of the credit of six, twelve, and eighteen months. On the day of sale, it is proposed to the commissioners to sell for Confederate money; but they decline to do it, and say they will sell according to the decree. Four of the heirs, representing six shares out of twelve entered into a written declaration that they will take Confederate money for their shares, and this is read to the assembly by the crier, who at the same time expresses the opinion that all the heirs will take the money. The cash is paid in Confederate money, the bonds given and the sale is reported to the court and confirmed; and the receiver of the court is directed to withdraw the bonds, and collect the money as it falls due. He receives Confederate money in payment of the first bond, upon the purchaser undertaking to take it back if the persons entitled will not receive it. *Held*, the sale was a sale with reference to Confederate notes as a standard of value. *Poague v. Greenlee*, 22 Gratt. 724.

XII. REDEMPTION.

Day to Redeem.—It is error to decree the sale of land to enforce a lien retained for the payment of the purchase money without giving a day to the purchaser to redeem the land by paying what is due. *Gross v. Percy*, 2 Pat. & Heath 483; *Kyles v. Tait*, 6 Gratt. 44; *Pecks v. Chambers*, 8 W. Va. 210; *Wiley v. Mahood*, 10 W. Va. 206; *Rohrer v. Travers*, 11 W. Va. 146.

Trust Deeds.—It is error to decree the sale of land under a trust deed without giving the debtor a day to redeem. *Rohrer v. Travers*, 11 W. Va. 146.

Immediate Sale—Error.—The court erred in decreeing immediate sale of defendant's property. It should, as has been directed by the frequent ruling of this court, have decreed a time, within which the defendant should pay the judgment, and upon his

failure so to do, then sale to be made. For that error the decree must be reversed. *Spedel v. Schlosser*, 13 W. Va. 702.

Reasonable Time—Discretion of Court.—It is error to decree a sale of land for debt without giving a reasonable time for payment before sale. The length of time is within the sound discretion of the court. *King v. Burdett*, 44 W. Va. 561, 29 S. E. Rep. 1010.

Mortgages—Discretion of Court.—When a foreclosure is decreed, the court is to exercise a sound discretion in relation to the period of redemption, and fix it according to the circumstances of the case. The usual time is six months; but less may be allowed.

Though the time allowed for redemption be only thirty days, an appellate court will nevertheless presume that the discretion of the court below has been properly exercised, if no application appears to have been made to that court for an extension of time. *Harkins v. Forsyth*, 11 Leigh 294.

Failure to Allow Time—Postponement.—It is error to decree a sale of real estate without giving the defendant a day to redeem the property by paying the amount charged therein; and it is not giving a day to redeem to postpone the time in the decree for the property to be advertised and sold. *Rose v. Brown*, 11 W. Va. 122.

Decree—Failure to Allow Time to Redeem—When Not Material.—It is not *per se* error to decree a sale of land to enforce judgment liens without giving the debtor time to redeem, as in the foreclosure of mortgages, though such a practice ought in general to be pursued, but if the debtor does not show he has sustained any damage by the failure to do it, it is not ground for setting aside the sale. *Crawford v. Weller*, 23 Gratt. 836.

Heirs and devisees—Lien Debts—Fiduciary Debts.—The cases in which the heirs and devisees should have a day to pay the amount decreed against the testator's estate before a decree of sale is made of the real estate, are cases where the property is covered by a lien, such as a mortgage or a deed of trust, or other security for a debt. *McDearman v. Robertson*, Va. Law J. 1879, p. 175; *Long v. Weller*, 29 Gratt. 347; *Hart v. Hart*, 31 W. Va. 688, 8 S. E. Rep. 562. But where there is no lien of any kind but the suit of the decedent to the payment of a fiduciary debt, the personal estate being exhausted, it was not necessary to give the heirs and devisees a day to pay in the decree. *McDearman v. Robertson*, Va. Law J. 1879, p. 175.

Redemption—Waiver.—While it is the general rule, that when the court directs the sale of land, it shall first ascertain the amounts of the lien debts, and their respective priorities and give a day for payment in the decree, still this rule is not so fundamental in its requirements as to prevent the parties to the suit who are interested in its enforcement from dispensing therewith by consent. *Parsons v. Thornburg*, 17 W. Va. 356.

Failure to Pay Purchase Money.—Where land is resold for the failure of the purchaser to pay the purchase money, it is error to decree such resale without giving the purchaser a day to redeem. *Long v. Weller*, 29 Gratt. 347, and *note*; *Whitehead v. Bradley*, 87 Va. 676, 13 S. E. Rep. 195.

XIV. WHO MAY SELL.

The Virginia statute regulating sales of real estate for the payment of debts provides, in general, that the court making the decree for such sale may

appoint a special commissioner to make such sale, and where no special commissioner is appointed for the purpose a decree or order of any court for the sale of property shall be executed by the sheriff or sergeant who attends such, unless the place of sale be out of his county or corporation, in which case the sale shall be by the sheriff of the county wherein the place of sale is, or, if the place be in a corporation, by the sergeant thereof, or the sheriff of the county, including such corporation as the court may direct. Code of Va. §§ 3397, 3403; Code of W. Va. ch. 132, §§ 1, 2.

Where a decree for specific execution of a contract against a purchaser provides that if the purchase money, or a part of it, is not paid by a day certain, the property shall be sold, it is not error to appoint the counsel of the plaintiffs, there being no objection to the person, the commissioner to make the sale; nor is it error to refuse to associate with him, one of the counsel of the purchaser. *Goddin v. Vaughn*, 14 Gratt. 103.

But the owner of half of the judgment, to satisfy which the suit is brought to sell the land is incompetent to act as commissioner to sell the land. *Etter v. Scott*, 90 Va. 762, 19 S. E. Rep. 776.

XV. BOND OF COMMISSIONER.

A. NECESSITY FOR.

Bond of Commissioner—Necessity for.—No special commissioner appointed by a decree or order of court, or of a judge in vacation to sell or rent any property, shall advertise property for sale or renting, or sell or rent the same until he shall have given bond before the court or judge, or the clerk of the court in his office, in a penalty, to be prescribed by the court or judge, sufficient to cover at least the probable amount of the purchase money or rent, and shall have obtained from the said clerk a certificate that the bond required by law or by the decree or order has been given, which certificate or a copy thereof shall be appended to the advertisement. Va. Code, sec. 3398.

Commissioner—Bond Necessary.—The statute requires a bond of the commissioner to make the sale, and it must be given before he receives any money under the decree, whether it be therein directed or not. *McAllister v. Bodkin*, 76 Va. 809; *Donahue v. Fackler*, 21 W. Va. 124; *Flesher v. Hassler*, 29 W. Va. 404, 1 S. E. Rep. 581; *Cooper v. Daugherty*, 85 Va. 343, 7 S. E. Rep. 387; *Hess v. Rader*, 26 Gratt. 747; *Blair v. Core*, 30 W. Va. 265; *Lloyd v. Erwin*, 29 Gratt. 598; *Davis v. Snead*, 33 Gratt. 705; *Tyler v. Toms*, 75 Va. 116; *Clarke v. Shanklin*, 24 W. Va. 30. But see *Dixon v. McCue*, 21 Gratt. 377.

Where three commissioners were decreed to sell the debtor's real estate and the decree provided that those giving bond might sell alone, the sale by two commissioners, one of whom had given bond, was held to be valid, it appearing that the third had died before the sale was advertised. *Strayer v. Long*, 89 Va. 471, 16 S. E. Rep. 357.

Commissioner—Failure to Give Bond—Effect.—The commissioner who upon the sale of land received purchase money without having given the proper bond required of a commissioner, is liable to the purchaser for the amount so received; and he may be proceeded against by rule to show cause why a decree should not be rendered against him for the amount aforesaid. *Tyler v. Toms*, 75 Va. 116.

The Code, § 1, ch. 132, provides: "A court in a suit properly therein may make a decree or order for the sale of property in any part of the state, and

may direct the sale to be for cash, or on such credit and terms as it may deem best; and it may appoint a special commissioner to make such sale. No special commissioner appointed by a court shall receive money under a decree or order, until he give bond before the said court or its clerk." Chapter 142, § 1, Acts of 1882, amending this section, provides among other things, that "No sale shall be made by such commissioner until such bond and security has been given and approved by the clerk; and every notice of such sale shall have appended to it the certificate of such clerk that the bond and security have been given by the commissioner as required by law." The law, it will be seen, is much more stringent now than under the Code. The sale in this case was made under the provision of the Code. We cannot say that the failure to give bond in this case before the sale vitiated it. The provision of the Code does not authorize us to say the sale for this reason was void. *Sommerville v. Sommerville*, 26 W. Va. 483.

Failure to Give Bond—Effect.—Where purchaser, at sale made under decree of court, pays the purchase money to sale commissioner who has not given the bond required by law, such payment is invalid, unless certificate of clerk that such bond has been given was published with advertisement of sale. Code 1887, §§ 3397, 3398; *Lloyd v. Erwin*, 29 Gratt. 598. See, for very similar cases, *Woods v. Ellis*, 85 Va. 471, 7 S. E. Rep. 852; *Lee v. Swepson*, 76 Va. 178; *Tyler v. Toms*, 75 Va. 125. See also, *Brown v. Taylor*, 32 Gratt. 135.

Bond of Commissioner—Failure to Give—Effect.—Where commissioners, who are also counsel in the cause, are appointed to make sale of land under a decree of court, requiring them to give bond before proceeding to act, make the sale and before such sale is confirmed, collect the purchase money, and fail to pay it over to the distributees, it was held that the said persons appointed commissioners had no authority to receive said purchase money either as commissioners or as counsel for the parties, such commissioners not having given bond, and the purchaser is bound to pay it again. And such commissioners are liable to the purchasers for the amount received by them. *Donahue v. Fackler*, 21 W. Va. 124.

Failure to Give Bond—Waiver.—The bond with the security required of the commissioner is for the benefit of those entitled to the proceeds. If he collects without giving bond, and they ratify his act and look to him for payment, no one else can complain or claim that any equity is raised in their favor. *Lee v. Swepson*, 76 Va. 178.

Failure to Require Bond.—It is error to decree the sale of the land for cash, and not to require the special commissioner to give bond with security, conditioned according to law, before making the sale. *Baker v. Oil Tract Co.*, 7 W. Va. 462; *Donahue v. Fackler*, 21 W. Va. 124; *McClaskey v. O'Brien*, 16 W. Va. 791.

Sale of Land—Failure to Require Bond in the Decree.—The statute, Acts 1883-4, p. 218, says: "The commissioner shall give bond and personal security, to be approved by the clerk of the court." *Held*, a failure to provide that the commissioner of sale shall give bond and security is not error for which the decree should be reversed. *Cooper v. Daugherty*, 85 Va. 343, 7 S. E. Rep. 387; *McAllister v. Bodkin*, 76 Va. 809.

Commissioner—Sale of Land—Bond—Waiver.—A plaintiff in a suit to enforce the vendor's lien cannot waive the bond required by the statute of the com-

missioner appointed to make the sale. The decree should require the bond should be given. The statute is mandatory and no waiver is contemplated by it. *Neeley v. Ruleys*, 26 W. Va. 686.

B. VALIDITY.

Bond of Commissioner—Validity—Approval by the Clerk.—A bond of a special commissioner to make a sale in a chancery cause is delivered by the commissioner to the clerk of the court, which on its face is complete and perfect. The bond was executed by the sureties upon the condition that it would not be delivered to the clerk until it was also executed by another person as surety, and when the clerk received the bond he was not informed of such condition. *Held*, this was a valid bond; and the sureties cannot set up as a defense this condition when the bond is sued upon. It is not necessary to the validity of such a bond, that it should be either acknowledged or proven before the court. Such a bond, however, must, as to the sufficiency of the sureties, be approved by the clerk, but in order to make the bond valid, he need not endorse his approval upon it. *Lytle v. Cozad*, 21 W. Va. 184.

Sufficiency of Security.—Where two commissioners are appointed to sell land and they are required before proceeding to act to execute a bond with security conditioned according to law, and each executes a separate bond with the other as his surety, it was held that this was not a compliance with the decree, and that, though the bonds were given in court. *Tyler v. Toms*, 75 Va. 116.

Before Whom Given.—It is plain from the provision of § 3398 of the Va. Code that a decree which directed such commissioner to give bond before any other person or tribunal than those named in the said statute, would be erroneous. By the terms of that section, the bond is *required to be given before the court or before the judge of the court, or before the clerk of the court in his office* and the clerk of that court is required to certify that this has been done. It is also error to direct the clerk of any other court to take the bond, but if the decree directing the bond to be taken by some other court is appealed from, this court will correct the error, if the decree is simply interlocutory. *South West, etc., Co. v. Chase*, 95 Va. 50, 27 S. E. Rep. 826.

C. LIABILITY.

Sale by Sheriff or Sergeant—Bond—Liability of Surety on Official Bond.—Where the sheriff or sergeant makes a sale under a decree of a court of equity, the sureties on his bond are responsible for the due administration of the money. Code of Va. § 3403; Code of W. Va. ch. 132, § 2.

XVI. DEED OF COMMISSIONER.

Deed—Void Ab initio.—Where a special commissioner sold lands on terms other than those prescribed in the decree of sale, and without reporting his proceedings and obtaining confirmation, conveyed the land to a purchaser, though six months later the court did confirm the sale and deed, it was held that a bill would lie to cancel the deed as void *ab initio*. *Miller v. Smoot*, 86 Va. 1050, 11 S. E. Rep. 983.

Confirmation of Deed.—Although a deed made by commissioners of a court is not in exact accordance with the directions of the court, yet it is immaterial where it appears that they reported their action and it confirmed the deed. *Harman v. Stearnes*, 8 Va. Law Reg. 454.

Correction of Deed by Commissioner.—Where a party is appointed a special commissioner in a

chancery cause, and empowered and directed to execute and deliver a deed to a party to a suit for a tract of land therein designated, and such special commissioner, in endeavoring to obey the directions of said decree, conveys the property by a misdescription, such commissioner, when the mistake is discerned, may correct the same by a subsequent deed. *Guinn v. Bowers*, 44 W. Va. 507, 29 S. E. Rep. 1027.

Title That Passes by Deed.—The prayer of the bill being for a sale of the land, and the decree and sale being of the land, and the deed conveying it, the title of all the parties to the suit passed by the deed. *Zollman v. Moore*, 21 Gratt. 313.

XVII. OBJECTIONS WAIVED UNLESS TAKEN IN LOWER COURT.

A. IN GENERAL—SALE BEFORE PARTITION.

—Land sold before partition was held not to be erroneous, where no objection was offered when the decree was entered, or sale made, and nothing appears to indicate that the defendant was injured by it. *Thomas v. Nat. Bank*, 86 Va. 291, 9 S. E. Rep. 1123.

Partition.—In a suit for partition, the court has no authority to order a sale of the land, unless it is made to appear by an inquiry before a commissioner, or otherwise, that partition cannot be made in some of the modes provided by the second and third sections of ch. 128, of the Code. But when it did not so appear, and no such inquiry was asked in the court below, a party who promoted the suit and at whose instance the decree was made, will not be allowed to raise the objection for the first time in the appellate court. *Hewery v. Helms*, 20 Gratt. 1.

Order of Publication.—If there is no objection made in the court below as to the manner in which the order of publication was issued, or executed, so as to bring the matter before the lower court and have the sufficiency of the order of publication passed upon by that court, and the decree recites that the order of publication was "duly executed," the objection that it was not so executed cannot first be raised in the appellate court. *Scott v. Ludington*, 14 W. Va. 387.

Mistake as to Name of Purchaser.—If by mistake the name of the purchaser is not mentioned in a decree confirming a judicial sale, but by mistake the name of some other person is mentioned as the purchaser, such mistake is not ground for reversing the decree in the appellate court, if no motion to correct the same has been made in the lower court. *McMullen v. Eagan*, 21 W. Va. 233.

Judgment Creditors Not Parties to Suit.—The appellate court will not reverse a decree ordering the sale of lands of the debtor merely because the record disclosed that some of the judgment creditors had not been made formal defendants, who ought to have been made so, unless it appears that the objection was made to the rendering of such decree in this account in the court below, before such decree was entered. *Neely v. Jones*, 16 W. Va. 625; *Jackson v. Hull*, 21 W. Va. 601; *Norris v. Bean*, 17 W. Va. 655; *Grove v. Judy*, 24 W. Va. 294.

B. COMMISSIONER'S REPORT (See Commissioners in Chancery).—Where an exception is not taken to a commissioner's report, on a question which might be affected by extrinsic evidence, and the question is not made in the court below, the appellate court will not consider it. *Peters v. Neville*, 26 Gratt. 549; *Myers v. Nelson*, 26 Gratt. 729; *Keck v. Allender*, 37 W. Va. 201, 16 S. E. Rep. 530; *Hildreth*

v. Turner, 89 Va. 858, 17 S. E. Rep. 471; Wilson v. Wilson, 98 Va. 546, 25 S. E. Rep. 506. See monographic note on "Commissioners in Chancery" appended to Whitehead v. Whitehead, 28 Gratt. 376.

Where the sales-commissioner's report shows that the sale was made as the decree prescribed, no objection will be allowed in the appellate court, where none was made below. Smith v. Henkel, 81 Va. 524.

C. TO CONFIRMATION.—A debtor cannot have a decree reversed confirming a sale of real estate for an error in the decree ordering the sale, when he has not taken the proper steps in the court below before the confirmation to review said decree of sale. Hughes v. Hamilton, 19 W. Va. 306.

Where no objection was made in the lower court to the decree of sale before an account of liens was taken, it cannot be taken advantage of in the appellate court. Where a sale is confirmed without objection it is presumable that the property brought its full value. Karn v. Rorer Iron Co., 86 Va. 754, 11 S. E. Rep. 431; Redd v. Dyer, 83 Va. 331, 2 S. E. Rep. 283.

Irregularities.—Objections to the confirmation of a sale of land founded upon errors and irregularities in the proceedings, should be made in the lower court, since such irregularities, on timely notice might have been remedied. Thomas v. Davidson, 76 Va. 338. See Hansucker v. Walker, 76 Va. 753, holding that where no day for redemption was allowed, the exception came too late for the first term in the appellate court.

Exception.—Where a decree for the sale of real estate had been confirmed, it will not be reversed at the instance of the debtor, when he took no steps in the court below before the confirmation to review said decree, except perhaps in some case where the purchaser is party to the suit. Beard v. Arbuckle, 19 W. Va. 185; Dick v. Robinson, 19 W. Va. 150; Charleston, etc., Co. v. Brockmyer, 18 W. Va. 586.

XVIII. EXPENSES.

Costs—Fees of Counsel.—When property is sold under decree of court to satisfy liens thereon, out of the proceeds must be paid the taxed costs, but not more than the legal fee to the plaintiff's counsel. If an allowance beyond the usual fee, for counsel representing the creditors, be proper, and it be paid out of the proceeds, it should be credited ratably on the liens, so as not to tax the debtor with it. Citizens' National Bank v. Manoni, 76 Va. 802.

When the circuit court, on confirmation of a commissioner's report, fixes an attorney's fee at \$25, this court will not disturb such finding, unless plainly contrary to the evidence in support of such fee. Shahan v. Shahan (W. Va.), 37 S. E. Rep. 552.

Compensation of Auctioneer.—It was proper to allow compensation for the services of an auctioneer in making the sale ordered by the court and also the expenses of a former advertisement of the sale of the property by the trustee, which had been enjoined by the debtor, and the injunction dissolved. Hogan v. Duke, 30 Gratt. 244.

Extra Allowance.—Extra allowances to trustees and receivers should not be made in the absence of evidence of extraordinary services rendering such allowances just and reasonable. Weigand v. Alliance Supply Co., 44 W. Va. 133, 28 S. E. Rep. 803.

Report of Commissioner—Oath—Fees.—Where a report of a commissioner, under an order or decree of reference is returned, it is the duty of the court, when called to its attention, to see that the certifi-

cate under oath, of the fees and time employed of the commissioner, as required by section 5, ch. 187, is annexed thereto, and that no fees be allowed or paid thereon until such certificate is made. Weigand v. Alliance Supply Co., 44 W. Va. 133, 28 S. E. Rep. 803.

Proceeds—Insufficiency—Personal Decree.—If the proceeds are insufficient to pay the plaintiff's claim, the expenses of the sale and the costs of the suit, then for any deficiency of course there should be upon the confirmation of the sale, a personal decree rendered against the defendant-debtors for such deficiency after deducting from the proceeds of the sale the expenses of the sale; and if there has not been enough produced by the sale to pay the plaintiff's claim, the expense of the sale and the costs, whatever remains of the costs, should be decreed against all the defendants including the fraudulent grantors. Hinton v. Ellis, 27 W. Va. 427.

Employment of Stenographers.—Neither the circuit courts nor the judges thereof are authorized, under the statute providing for employment of shorthand reporters in said courts, to employ or authorize the employment of said reporters before commissioners in executing the orders or decrees of reference of such courts. Weigand v. Alliance Supply Co., 44 W. Va. 133, 28 S. E. Rep. 803.

Compensation of Commissioner—Res Judicata.—When the report of a sale which contains a statement of the commissions charged by the commissioner has been confirmed by the trial court, and that decree has been confirmed by the appellate court, without objection to the charge made by the commissioner, the question becomes *res judicata*, and the amount of the commission is beyond the reach of a judicial inquiry. Roller v. Pitman, 98 Va. 613, 36 S. E. Rep. 987.

XIX. PROCEEDS OF SALE.

A. DISPOSITION.—The proper rule in such sales is, to direct in the decree ordering the sale that the cash payment shall be retained by the commissioners making the sale, or be paid into bank to the credit of the suit, subject to the future order of the court. The purchase money being thus under the control of the court, will, upon the confirmation of the report or upon setting aside the sale, be disposed of in the way that shall then seem proper. Arnold v. Casner, 23 W. Va. 461; Cox v. Price (Va.), 22 S. E. Rep. 512.

A judicial sale is the act of the court and not of the commissioner who offers the property and receives the bids. The sale is not complete until a report of the bidding has been made and confirmed by the court. And, therefore, it would be irregular, though not sufficient ground, perhaps, to reverse the decree, for the court, by its decree ordering the sale, to direct the disbursement of the cash payment before the confirmation of the sale. Arnold v. Casner, 22 W. Va. 461; Anderson v. Davies, 6 Munf. 486.

Acceptance by Owner of Proceeds—Affirmation of Sale.—Where a party interested in the land, with a full knowledge of all facts, elects to affirm the sale, he will be concluded by it, and in this case the acceptance, without objection, of his share of the proceeds of sale in Confederate money (for which the sale was made), was held to be such an affirmation. Howerly v. Helms, 20 Gratt. 1.

Investment of Proceeds.—That the courts of this commonwealth, during the war had the authority to decree sales for Confederate money, and to make investments of funds under their control in Confed-

erate securities, is no longer an open question. Transactions in Confederate currency during the war, and investments in Confederate securities (when properly made), must now be held to be as valid and binding as if made in time of peace in a sound currency. *Walker v. Page*, 21 Gratt. 636.

B. RIGHT OF COMMISSIONER TO COLLECT PROCEEDS OF SALE.—A commissioner who is directed to file the bonds with his report has no authority to collect them. *Omohundro v. Omohundro*, 27 Gratt. 824.

A special commissioner appointed by a decree of the court of equity is simply the creature of such court, who has no powers except such as are conferred upon him by the order of his appointment and the course of practice of the court. Such special commissioner who makes the sale and takes bonds payable to himself as such commissioner, when said sale is reported to the court and confirmed, has no authority to collect said sale bonds unless the decree conferring the appointment or some subsequent decree or order of the court gives him authority to do so. And when he sues to enforce the payment of bonds executed to him as commissioner, must aver in his bill his appointment and authority to collect said bonds, or the bill will be held insufficient on demurrer. *Blair v. Core*, 20 W. Va. 265; *Clarke v. Shanklin*, 24 W. Va. 80.

Authority to Collect Implied.—A friendly suit was instituted for the sale of land in which a number of persons were interested, and there was a decree for a sale on a credit of six months, with the privilege of the purchasers to pay cash, and the commissioners were directed to give bond of \$40,000. There was a sale and the purchasers gave their bonds for the purchase price, and afterwards paid part of the purchase money to the commissioners who paid to several of the parties entitled their share of it, or part of it. It was held that under the terms of the decree in the case, and the condition of things at the time and looking to the amount in which the commissioners were required to give security before acting, their authority to receive the purchase money may be implied. *Finney v. Edwards*, 75 Va. 44.

XX. BIDDERS.

A. WHO MAY BID.—A sale commissioner may decline to cry the bid of a person who has refused to comply with the terms of a former sale, and who gives no satisfactory assurance of ability to comply with the terms of the second sale. *Hildreth v. Turner*, 89 Va. 858, 17 S. E. Rep. 471.

The auctioneer cannot himself bid for the property nor can he receive sham bids. *Hilleary v. Thompson*, 11 W. Va. 118; *Brock v. Rice*, 27 Gratt. 812, and *note*.

Where two commissioners unite in advertising, and both are present at a sale, and one of them declines to join in the report, but makes a separate report, asking that a former sale be confirmed to a bidder who refused to comply with the terms, and that such bidder (though a non-resident) be required to show cause why said former sale should not be confirmed; it was held that the validity of the second sale was not affected by the said facts, and that the court had no jurisdiction over such bidder. *Hildreth v. Turner*, 89 Va. 858, 17 S. E. Rep. 471.

(1) Rights and Liabilities.—Bidders acquire no rights until their bid is accepted and the sale is confirmed. *Terry v. Coles*, 80 Va. 695.

The bid made by the purchaser at the sale must be considered as his offer to the court through its com-

missioners; and in making it he agrees to be bound thereby, when it is accepted and approved by the court. *Marling v. Robrecht*, 13 W. Va. 440.

(2) Sale by Bidder at Advanced Price.—Bidders at a judicial sale have no right to sell their bids at an advanced price before the sale is confirmed, unless such advance inures to the benefit of the parties to the suit. *Camp v. Bruce*, 96 Va. 521, 31 S. E. Rep. 901.

(3) Limitation of Time upon Bidders.—The court will discourage the limitation of time upon bidders, which would prevent a fair sale of the property, yet when the property has been cried for a considerable time and the only effect was to quicken the bidders, the court will confirm the sale. *Fairfax v. Muse*, 4 Munf. 124.

B. COMBINATIONS AMONG BIDDERS.

(1) When Illegal.—Where property is to be sold at auction, and especially at a judicial sale or at a sale in the course of governmental administration, a secret combination and agreement amongst persons interested in bidding to refrain from bidding in order to prevent competition and to lower the selling price of the property, is illegal. *Barnes v. Morrison*, 97 Va. 372, 34 S. E. Rep. 93, 5 Va. Law Reg. 373.

If the purchaser combined with others to purchase the property at the attachment sale, at a sacrifice; and if, in pursuance of such combination, they so acted as to prevent competition at said sale, or to prevent the said property realizing a fair value, then such combination and action was fraudulent; and the deed of the sheriff passed no title to the purchaser. *Underwood v. McVeigh*, 23 Gratt. 409.

Where an insolvent debtor, whose lands are about to be sold by commissioners of sale to pay liens upon them makes an arrangement with a third party whereby he agrees to use his best efforts at the sale to depreciate the price, which a certain lot may bring, so that this lot may be bought by such third party at a grossly inadequate price, and in consideration thereof this third party agrees to convey to the insolvent debtor a portion of the said lot for the excess which may be paid for this lot over one thousand dollars, or to convey to the debtor for nothing, if it be purchased for less than one thousand dollars; such contract was held fraudulent, and the parties to it are *in pari delicto*, and the court will not enforce such contract at the instance of the debtor. *Horn v. Star Foundry Co.*, 23 W. Va. 522.

(2) When Not Illegal.—Since nothing appeared in the record to show that the property sold at a judicial sale brought less than its value when purchased by the owner, on account of the arrangement between him and the defendant, or that the creditors of the owner did not receive the benefit of the proceeds of the sale, it cannot be objected that it was such a fraudulent arrangement by the owner to cover up his property in fraud to his creditors, who do not appear to be injured and are not heard to complain, as will prevent his enforcing the agreement. *Fluharty v. Beatty*, 4 W. Va. 514.

See *Tucker v. Tucker*, 86 Va. 679, 10 S. E. Rep. 980, where the purchase was allowed to stand even though another purchaser was bought off. The court saying in this case the land sold at a price above the assessed value, and the motion to set aside for inadequacy of price was not sustained.

Where two or more persons desire to acquire different parts of a tract of land which is offered for sale at public auction by commissioners under a decree of a court, with respect to the convenience of

the several parcels to their own land respectively. It is not unlawful or improper for them to bid for the whole tract when it is offered to the highest bidder with the understanding that they will divide it between themselves, and how they will divide, if they should become the purchasers, and that each one shall be bound to comply with the terms of purchase as to his own part as agreed between them. *Roudabush v. Miller*, 82 Gratt. 454; *Barnes v. Morrison*, 97 Va. 372, 84 S. E. Rep. 93.

Land is sold under a decree, but before the sale is confirmed it is agreed, at the instance of the purchaser, between him and a creditor under the decree entitled to a part of the proceeds of sale, that if the latter will agree to the setting aside of the sale, he, the purchaser, will save the creditor harmless from all loss which he may sustain by reason of setting the sale aside and having the property again offered. *Held*, such contract is not *per se* a fraud upon the due administration of justice, and, unless such fact is made to appear, it is binding upon and enforceable against the purchaser. *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. Rep. 587.

Where a purchaser at a judicial sale resold at a greater price to a substituted purchaser, the fact that the latter required a bond of indemnity is not sufficient evidence of collusion to defraud the heirs by procuring sale at an inadequate price. *Lawson v. Moorman*, 85 Va. 880, 9 S. E. Rep. 150.

C. PUFFERS.—If the owner of an estate put up for sale at auction, employ one or more puffers to bid for him, it is a fraud on the real bidders, and the highest bidder cannot be compelled to complete the contract, unless it is publicly announced at the time of the sale, that there will be such puffer or by-bidder, who will bid at the auction. *Peck v. List*, 23 W. Va. 338.

XXI. OPENING BIDDINGS.

A. PROCEDURE.—For the mode of proceeding on application, to open the biddings and on what advance it will be done, *MONCURE, P.*, in his opinion quotes the following from *Sugden*: "Where a person is desirous of opening the biddings, he must, at his own expense, apply to the court by motion for that purpose, stating the advance offered. Notice of the motion must be given to the person reported the purchaser, and to the parties in the cause. If the court approve of the sum offered the application will be granted. * * The court will stipulate for the price and will not let the biddings be opened upon a small advance. * * Biddings are in general not to be opened after confirmation of the report, increase of price alone is not sufficient, however large." *Effinger v. Ralston*, 21 Gratt. 430.

B. DISCRETION OF COURT.—Whether the court will reopen the bids after a judicial sale, is a question addressed to the sound discretion of the court, subject to review by the appellate court, and the propriety of its exercise depends upon the circumstances of the particular case, and can only be exercised when it can be done with a due regard to the rights and interests of all concerned—the purchaser as well as all others. *Roudabush v. Miller*, 82 Gratt. 454; *Berlin v. Melhorn*, 75 Va. 639; *Hansucker v. Walker*, 76 Va. 753; *Todd v. Gallego, etc., Co.*, 84 Va. 586, 5 S. E. Rep. 676; *Moore v. Triplett*, 96 Va. 600, 32 S. E. Rep. 50; *Hudgins v. Lanier*, 23 Gratt. 494; *Brock v. Rice*, 27 Gratt. 812; *Carr v. Carr*, 88 Va. 739, 14 S. E. Rep. 308; *Kable v. Mitchell*, 9 W. Va. 492; *Coles v. Coles*, 83 Va. 525, 5 S. E. Rep. 673.

Fraud—Misrepresentation.—In a judicial sale, if it should be made to appear either before or after the sale has been ratified, that there has been any injurious mistake, misrepresentation or fraud, the biddings will be opened, the reported sale rejected, or the order of ratification rescinded, and the property again sent into market and sold. *Merchants' Bank v. Campbell*, 75 Va. 455; *Berlin v. Melhorn*, 75 Va. 639.

C. UPSET BIDS.

(1) **In General.**—Ordinarily a sale will be set aside and the biddings reopened at any time before confirmation upon the offer of a substantial upset bid. *Coles v. Coles*, 83 Va. 525, 5 S. E. Rep. 673; *Nat. Bank v. Jarvis*, 28 W. Va. 805.

But no fixed rule can be laid down as to the amount of an upset bid which will set aside a sale, but confirmation must depend upon the facts of each case. But the sale being for a price reported by the commissioners of sale and by the commissioner of accounts, and certified by three adjacent land owners, as much below the actual value of the land, and there being a well secured upset bid of ten per cent. the sale ought to have been set aside for inadequacy of price and a resale ordered. *Hansucker v. Walker*, 76 Va. 753; *Todd v. Gallego, etc., Co.*, 84 Va. 586, 5 S. E. Rep. 676; *Kable v. Mitchell*, 9 W. Va. 492; *Hughes v. Hamilton*, 19 W. Va. 366.

A substantial upset bid, well secured, put in before the confirmation of a reputed sale, is as much a valid bid as if made at the auction, and cannot be disregarded by the court. *Ewald v. Crockett*, 85 Va. 299, 7 S. E. Rep. 386; *Todd v. Gallego, etc., Co.*, 84 Va. 586, 5 S. E. Rep. 676.

A commissioner was empowered to sell property for one-fourth cash, and balance in one, two and three years, and the sale was made and reputed at \$1,000, receiving cash \$56.50 and purchaser's notes for the balance payable in three equal annual installments, and that he had found it impossible to sell to any advantage on the terms of the decree. On hearing the sale was confirmed. During the same term an upset bid of 10 per cent. was offered, with no money or security tendered. There was no affidavit or suggestion that the price was inadequate, and without notice to the purchaser. A decree was entered rescinding confirmation, ordering the property to be set up on the terms ordered and started at \$1,100. It was held that the decree of rescission of confirmation was erroneous. *Langyher v. Patterson*, 77 Va. 470; *Yost v. Porter*, 80 Va. 855.

Where land has been sold under decree in a creditor's suit and reported on the same day as sold to the highest bidder for \$10,100, and thereupon a person asks to be allowed to put in an upset bid of 10 per cent. advance, the bid should be allowed and the biddings opened to all. In such case, a former bidder not having withdrawn his bid, and the court having been asked to act definitely in five days, and twenty days were allowed for perfecting the upset bid by depositing money and giving bonds, this was held not error. *Ewald v. Crockett*, 85 Va. 299, 7 S. E. Rep. 386.

Advance Price.—Where land was sold by a commissioner in a suit and the defendant showed an offer of an advance bid of \$5.00 per acre, the bidder offering to comply with such terms as the court might impose, it was the duty of the court to accept the bid, and if such terms were complied with to set aside the sale and order a resale of the property. *Stewart v. Stewart*, 27 W. Va. 167.

Reopening Biddings.—But the advance of \$100 on

the price paid for the property, is no such substantial and material advance upon the price obtained by the commissioner, as would justify the court in annulling the sale and ordering a new sale. *Hudgins v. Lanier*, 28 Gratt. 494.

(2) **Who May Put In.**—The court of equity exercises sound legal discretion as to whether or not it will accept an upset bid on land sold under its decree. A mere advance of 10 per cent. though well secured, is not always to be accepted with regard to the circumstances of the case. But a substantial and well secured upset bid should be accepted unless there be circumstances going to show that injustice will be done to the purchaser, or other persons.

Usually, however, one who was present at the sale, and bid on the property, or had the opportunity of bidding will not be allowed to put in an upset bid. *Moore v. Triplett*, 96 Va. 608, 32 S. E. Rep. 50.

(3) **Refusal to Accept.**—One who was not a party to the suit asked leave to file a petition, offering, for the land to be sold, \$800—\$125 in cash and the balance in one, two and three years, without interest; the master having reported it as worth \$900, and it having cost \$1,200, without improvements, such leave was refused. Upon which facts the appellate court held there was no error. *Cooper v. Daugherty*, 85 Va. 348, 7 S. E. Rep. 887.

(4) **Prejudice.**—When a sale has been fairly made, and for a fair price, it should never be set aside, when there is good reason to believe that the upset bid has been offered to gratify ill will towards the purchaser. *Roudabush v. Miller*, 32 Gratt. 454; *Coles v. Coles*, 83 Va. 525, 5 S. E. Rep. 673.

XXII. SETTING ASIDE SALE.

A. AFTER CONFIRMATION.

(1) **Fraud, etc.**—After confirmation a judicial sale will not be set aside, except for fraud, surprise or other cause for which equity would relieve in case of sale by parties, and the fraud must be distinctly charged, otherwise it is irrelevant. *Va. Fire, etc., Co. v. Cottrell*, 85 Va. 857, 9 S. E. Rep. 132; *Berlin v. Melhorn*, 75 Va. 639; *Bank v. Campbell*, 75 Va. 455; *Patterson v. Eakin*, 87 Va. 49, 12 S. E. Rep. 144; *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. Rep. 431; *Allison v. Allison*, 88 Va. 328, 13 S. E. Rep. 549; *Langyher v. Patterson*, 77 Va. 470; *Hickson v. Rucker*, 77 Va. 135; *Harman v. Copenhaver*, 89 Va. 836, 17 S. E. Rep. 482.

(2) **Procedure.**—Where a judicial sale has been confirmed by the court it cannot be set aside except upon petition or motion, after proper notice to all parties interested and for good cause shown. *Langyher v. Patterson*, 77 Va. 470; *Taylor v. Palmer*, Va. Law J. 1882, p. 441.

The proceedings to rescind a confirmed sale are by petition setting forth the grounds relied on. *Va. Fire, etc., Co. v. Cottrell*, 85 Va. 857, 9 S. E. Rep. 132.

If a decree directs the sale of real estate under circumstances which injured the sale, the parties injured should except to the report of the commissioner, and apply to the court to set aside the sale. A bill of review after a final decree is not the proper remedy. *Vanmeter v. Vanmeters*, 3 Gratt. 148.

The application of the purchasers, to have the sale set aside, should be by petition in the cause. And if they proceed by bill to enjoin the collection of the purchase money, and have the sale set aside, the bill should be treated as a petition in the cause, and be brought to a hearing with it. *Cralle v. Meem*, 8 Gratt. 496.

(3) **Laches.**—To set aside a sale for fraud and conspiracy, suit must be brought within a reasonable time after the discovery of such fraud.

One who delays three years after knowledge of all the facts attending a sale before bringing such suit is guilty of such laches as will debar him from relief. *Williams v. Maxwell*, 45 W. Va. 297, 31 S. E. Rep. 909.

(4) **Sale Six Months after Decree—Purchaser.**—A sale having been made more than six months after the decree for a sale, and having been confirmed, the sale cannot be set aside, as to the purchasers. *Dixon v. McCue*, 21 Gratt. 373, citing Code of 1860, ch. 178, § 8; *Quesenberry v. Barbour*, 31 Gratt. 491; *Cooper v. Hepburn*, 15 Gratt. 551.

Sale Made Six Months after Decree—How Computed.—Under the Code of Va. of 1878, ch. 174, § 11, forbidding a judicial sale to be set aside when such sale was made more than six months after the decree of sale, that period must be computed from the date of the decree becoming operative, where date of redemption is given. *Frazier v. Frazier*, 77 Va. 775.

(5) **Previous Authority of Commissioner.**—Nor will the objection made by the bill of review, after confirmation that the commissioner was not previously authorized, make the sale void, but merely relates to an irregularity which might have been taken advantage of before confirmation. It is certainly not such a defect in the sale by the court as would have warranted this court in reversing the decree of confirmation in the absence of any evidence that the party had been prejudiced by it. *Core v. Strickler*, 24 W. Va. 697; *Estill v. McClintic*, 11 W. Va. 400.

B. BEFORE CONFIRMATION.

Inadequacy of Price.—A sale may be set aside before confirmation for gross inadequacy of price, but, if it be attempted to establish this by parol evidence only, the proof must be very clear, especially if a great length of time elapsed between the sale and its confirmation, and during this time no advance bid has been made to the court. *Connell v. Wilhelm*, 86 W. Va. 598, 15 S. E. Rep. 245; *Tracey v. Shumate*, 22 W. Va. 474.

But if a judicial sale has been confirmed mere inadequacy of price is not sufficient to justify the setting aside of such sale. *Harman v. Copenhaver*, 89 Va. 836, 17 S. E. Rep. 482.

A greatly inadequate price is generally, when clearly shown, sufficient cause to set aside a judicial sale. *Hartley v. Roffe*, 13 W. Va. 401; *Kable v. Mitchell*, 9 W. Va. 492; *Hughes v. Hamilton*, 19 W. Va. 366; *Beaty v. Veon*, 18 W. Va. 291.

If inadequacy of price was ground for setting aside a decree of confirmation, a sale of land at \$4,000 which had at two prior sales within the period of two years sold for \$1,550 and \$3,650 respectively, could not be deemed inadequate. *Allison v. Allison*, 88 Va. 328, 13 S. E. Rep. 549.

A sale ought not to be set aside on the grounds of smallness of price, if it was occasioned by the acts of the complainant. *Forde v. Herron*, 4 Munf. 316.

Who May Show Cause.—The purchaser of the land being *bona fide* and his purchase being confirmed by the court, it is for the debtor or his assignee, if they would set the sale aside, to show that the price was inadequate, or that only a part of the land should have been sold to pay the plaintiff's debt and this they failed to do. *Barr v. White*, 30 Gratt. 531, and note.

When Considered.—The circuit court ought not to set aside a sale by a commissioner for inadequacy of price, when there have been two previous sales of the same land, and the last sale was not made until

after repeated adjournments by the commissioner of sale with the view to getting the highest price possible, merely because there was a slight preponderance in the weight of the affidavits filed indicating that the price obtained was not the full value of the property. *McMullen v. Eagan*, 21 W. Va. 233. See also, similar cases, *Tucker v. Tucker*, 86 Va. 679, 10 S. E. Rep. 980; *Hazelwood v. Forrer*, 94 Va. 703, 27 S. E. Rep. 507; *Moran v. Clark*, 80 W. Va. 358, 4 S. E. Rep. 303; *Curtis v. Thompson*, 29 Gratt. 474; *Trimble v. Herold*, 20 W. Va. 602; *Max Meadows, etc., Co. v. McGavock*, 4 Va. Law R. 382, 98 Va. 411, 36 S. E. Rep. 490.

Few Bidders—Question for the Court.—It is no just cause for vacating a judicial sale, that only a few bidders were present. The only inquiry for the court is, whether the terms of the decree have been pursued and the property sold at an adequate price. *Hudgins v. Lanier*, 23 Gratt. 494.

But a sale of a tract of a land made by a commissioner under a decree of the chancery court, on a day so inclement that persons intending to be present and bid for a part of the land are prevented from attending, and when there was only one bidder present, who lived at the place, such sale will be set aside, without weighing the evidence, which was conflicting, as to the sufficiency of the price at which it was sold. *Roberts v. Roberts*, 13 Gratt. 639.

Procedure.—If a party objects to a sale for inadequacy of price, he should move the court to open the biddings and offer an advance on the price bid; his objection to the confirmation of the sale, without more, is no ground for refusing to confirm it. *Effinger v. Ralston*, 21 Gratt. 430.

C. IN GENERAL.

(1) Sale Set Aside.

Uncertainty of Sale.—The decree directed the commissioner to sell the land in the bill and proceedings mentioned, or so much thereof as may be necessary to satisfy the purposes of the decree. The commissioner reported that he sold the tract of land in the bill mentioned, known as the "Home Tract." This tract was described in the bill as lying partly in Tazewell county and partly in Mercer county West Virginia; but how much in each was differently stated in the different bills, and it was doubtful whether the commissioner sold the whole or only that in Tazewell county. *Held*, the report leaving it in doubt how much or what they sold, the sale should be set aside. *Barger v. Buckland*, 28 Gratt. 850.

Objections—Valid.—A judicial sale was objected to, first, because the land was sacrificed; secondly, because one of the commissioners to sell was interested in the purchase of one-half of the land; thirdly, because a material advance was offered by a substantial bidder; and fourthly, because there was no memorandum. It was held that these were valid objections and the sale was properly set aside. *Teel v. Yancey*, 23 Gratt. 691.

Interlocutory Decree.—Where land is sold under an interlocutory decree, which has never been confirmed, and purchased at a sacrifice, such sale ought to be set aside on an appeal by the administrator although the heirs (who were infants) did not join in the appeal. *Cocke v. Gilpin*, 1 Rob. 20.

Sale Improper.—If the report of the sale and order of confirmation is excepted to, and the record discloses sufficient reasons to show that the sale was improper and ought not to have been made, the decree or order of confirmation will be reversed

and the sale set aside. *Capehart v. Dowery*, 10 W. Va. 130.

Where all of the parties are not before the court when suit is brought to sell the land the decree of sale will be set aside. *Sexton v. Crockett*, 23 Gratt. 857.

When Proper—Upset Bid.—Under a decree of court, a commissioner is directed to sell three tracts of land; on the day of the sale, land is bid off to the debtors, and he being unable to comply with the terms of the sale makes a parol agreement with D, by which it is agreed that he shall be reported as the purchaser instead of the debtor and the latter as an inducement to D to purchase, agrees to get his wife to release her contingent dower in the land which afterwards the wife refuses to do; the commissioner reports D as a purchaser and the court confirms the sale without objection; on a subsequent day of the same term, a creditor of the debtor, offers for one of the tracts of land an upset bid of twenty per cent. advance of the price of such tract; at a subsequent term D moves the court to confirm the sale to him of the said tract, and the debtor moves the court to have the same set aside and a resale ordered; the court set aside the sale and orders a resale on the basis the upset bid and the resale is made. The creditor becomes a purchaser at his upset bid; this sale is confirmed and D appeals to this court. *Held*, the court properly set aside the order confirming the first sale. *National Bank of Kingwood v. Jarvis*, 28 W. Va. 805.

Where a suit in equity is brought by a party to enforce his judgment lien against real estate which his debtor holds jointly with another, and both of the owners of said real estate are made parties to the suit, and served with process, although no allegation is made or lien asserted against the party holding said real estate, jointly with such judgment debtor, and the cause being referred to a commissioner to ascertain the liens existing against said real estate, and their priorities, who reports a judgment lien existing against the real estate belonging to said party who is not the judgment debtor mentioned in the bill, it is error to decree a sale of the entire property, and such decree may be set aside by bill of review filed in proper time. *Calvert v. Ash* (W. Va.), 35 S. E. Rep. 887.

(2) Sale Not Set Aside.—The fact that the parties owned another tract of land in another county, and that it did not appear that partition in kind of the two tracts could not be made, is not ground for setting aside the sale; the parties not wishing to sell this other tract. *Frazier v. Frazier*, 26 Gratt. 500.

Increase of Value.—Increase of value is not ground for rescinding sale. *Va. Fire, etc., Co. v. Cottrell*, 85 Va. 857, 9 S. E. Rep. 132.

Sale Not on Premises—Regular in Other Respects.—If a tract of land, being advertised to be sold *on the premises*, be sold, *not immediately on the premises*, but within eighty yards of the dwelling house, within full view of it, and about fifteen or twenty yards of the boundary line; it being believed by some present that they were on the premises; such sale, being regular in other respects, and no fraud appearing, is not to be set aside. *Ferguson v. Franklins*, 6 Munf. 305.

Redemption.—Where the decree allowed ninety days for the redemption and the commissioners advertised before the expiration of that period, but one hundred and three days elapsed before the sale and neither the debtor nor his creditors could have been benefited by a further delay, it was held that

this was not sufficient ground for setting aside the sale. *Strayer v. Long*, 89 Va. 471, 16 S. E. Rep. 357.

Private Sales.—The owner of land, sold under a decree of court to pay his debts, having consented to a private sale to a certain person at a certain price and the commissioners having sold to another at a higher price he could not withdraw his consent to a private sale, so as to set aside the sale as made, as not made in pursuance of the decree. *Hudgins v. Lanier*, 23 Gratt. 494.

Lis Pendens—Estoppel.—A sale of land to satisfy a judgment was confirmed and half the purchase money was paid and the writ of possession awarded. Fifteen months after the sale, two sons of the former owner filed a bill claiming portions of the land under oral contracts with their father, accompanied by full payment and possession and conveyances made during the proceedings under which the sale was made. The complainant's own testimony, which was materially contradicted by written evidence was the only direct testimony proving the sale. They pretended to have paid a portion of the money to the assignee in bankruptcy of their father but neither the assignee nor the father's testimony was taken. One of the sons was a party defendant to the suits in which the sale was had, and present at the sale but he did not set up any claim to the land and the father admitted ownership in his answer, both complainants were in the vicinity pending these proceedings and must have known of them. *Held*, that this evidence was not sufficient to sustain the bill of the complainants. *McGee v. Johnson*, 85 Va. 161, 7 S. E. Rep. 374.

Sale—Defect—Waiver of Objection.—Though in this case there was a decree for the sale of the land, and a sale before an account of the debts was taken, the sale of the land will not be set aside upon the objection of some of the creditors who came in after the decree, made years after the sale, when it is obvious the land would not sell for as much as it had sold for before, and which was more than some of these creditors had expressed their willingness to take for it. *Wallace v. Treacle*, 27 Gratt. 479.

Purchaser—Necessary Parties—Bond of Plaintiff.—Where there are conflicting claims as to the purchase money of land sold under a decree the purchaser should be made a party by rule issued against him to show cause why the sale should not be set aside. But in no event is said sale to be set aside and a resale ordered, unless the plaintiffs or some one for them shall give bond with proper security before said court for a substantial advance upon the price for which the property heretofore sold. *McClintic v. Wise*, 25 Gratt. 448.

XXIII. PURCHASERS.

A. RIGHTS OF PURCHASERS.—When a void judicial sale is disaffirmed by the court, the purchaser should be placed in *statu quo*. In order to do this where improvements have been made, he must receive back his purchase money with interest, and be charged with reasonable rents and profits while he is in possession, less taxes paid by him and also has a right to charge the land with the amount of debt paid by him. *Charleston, etc., Co. v. Brockmeyer*, 23 W. Va. 635; *Haymond v. Camden*, 22 W. Va. 180; *Eminger v. Kenney*, 92 Va. 245, 23 S. E. Rep. 742; *Hull v. Hull*, 35 W. Va. 155, 13 S. E. Rep. 49; *Hudgin v. Hudgin*, 6 Gratt. 321.

A sale having been irregularly made, as the purchasers could not enforce their contracts, if resisted by the parties in the cause, they ought not to be

compelled to perfect them if they object. *Talley v. Starke*, 6 Gratt. 340.

Sale by Guardian.—Even if it is doubtful whether the guardian could maintain such a suit, yet it having been brought, and the sale having been so made and perfected, the purchaser will not be disturbed in his purchase at the suit of the infants. *Zirkle v. McCue*, 26 Gratt. 517.

Relief of Purchasers—Mistake—Fraud—Proof.—A purchaser is entitled to relief on the ground of after-discovered *mutual* mistake of material facts, or fraud, which must be clearly proved. *Redd v. Dyer*, 83 Va. 331, 2 S. E. Rep. 283; *Long v. Weller*, 29 Gratt. 347.

Encumbrances Subsequent to Decree of Sale.—Where land is sold, under the decree of the court having jurisdiction of the subject, to pay a deed of trust and a judgment debt and the judgment against the owner is obtained and docketed subsequent to the decree of sale and prior to the sale: the purchaser at such judicial sale takes the land free of the judgment lien. *Davis v. Landcraft*, 10 W. Va. 787.

Sales in Parcels.—Where land was sold in parcels, and one person became the purchaser of two or more parcels to be used together, and the purchase of one parcel was the inducement to purchase the other, and if, by reason of an upset bid, the purchaser loses one parcel, a court of equity ought not to compel him to take the other lot against his consent, and especially if the terms of the upset bid preclude a resale of the tract in the same manner as before. *Moore v. Triplett*, 96 Va. 603, 32 S. E. Rep. 50.

Public Policy.—Public policy requires that purchasers should be entitled to certainty and security in their rights under their purchase at judicial sales and that confirmation should not be refused simply because they have obtained a good bargain. *Langyher v. Patterson*, 77 Va. 470.

Disaffirmance of Sale—Subrogation.—Where a bill is filed against the executor of the testator to subject land to the payment of the debts of such testator and the heirs and devisees are not made parties, they are not bound by the sale and confirmation and the deed of the commissioner did not pass title. The will subjected the land to the payment of the testator's debts; and the purchaser who bought in good faith is entitled upon the disaffirmance of the sale, to be substituted to the rights of the creditor, and to charge the land to the amount of the debt paid by him. *Hudgin v. Hudgin*, 6 Gratt. 320. See also, *Hutson v. Sadler*, 31 W. Va. 358, 6 S. E. Rep. 930.

Where the purchaser pays a second time, he will be substituted to the creditor's rights under a decree requiring the commissioner to pay them. *Lee v. Swepson*, 76 Va. 173; *Tyler v. Toms*, 75 Va. 116.

Injunction.—The interest of a purchaser at a foreclosure sale will be protected by injunction, upon the confirmation of the sale, as against the execution sued out by the creditors of the mortgagor. *Crews v. Pendleton*, 1 Leigh 297.

Investigation of Truth Stated in Bill.—There had been a sale of the land of an infant under the decree of the proper court, in 1860, and a payment of the purchase money. In 1870, the infant by his next friend filed his petition in the cause to set aside the decree and sale, on various grounds. *Held*, although a purchaser at a judicial sale may be required to see the regularity of the proceedings upon which the jurisdiction of the court is founded, he is not bound to investigate the truth of the matters

stated in the bill and deposed to by the witnesses touching the estate owned by the infant. His title cannot be affected because the case made by the record happens not to be warranted by the facts. *Durrett v. Davis*, 24 Gratt. 302.

Sales by the Court—Sale in Pals.—Purchasers at judicial sales can presume that all things in the cause have been correctly concluded, but purchasers at private sales are negligent if they do not examine their titles. *Effinger v. Hall*, 81 Va. 94.

Irregularity of Proceedings—Effect.—The debtor having been served with process and having answered, he continued to be a party in the cause during all the subsequent proceedings. The petition for the sale of the land and the sale were proceedings in the cause, and he must be taken to be cognizant of these proceedings. And there not being any error on the face of the proceedings, the purchasers are not to be affected by any irregularities not apparent on their face. *Crawford v. Weller*, 23 Gratt. 836.

Previous Sale.—Purchasers at a judicial sale should not be compelled to complete their purchase if the land had before that time been sold in another suit and neither the sale nor the decree therefor has been set aside. *Etter v. Scott*, 90 Va. 762, 19 S. E. Rep. 776.

Inquiry as to Title of Parties.—The purchaser being *bona fide* is not bound, as against the parties to the suit, to enquire whether their title to the property was such as stated in the bill. *Zollman v. Moore*, 21 Gratt. 818.

Rights of Appeal.—In sales made by commissioners under decrees, and orders of a court of equity the purchasers, who have bid off the property and paid their deposits in good faith, are considered as having inchoate rights, which entitled them to a hearing upon the question, whether the sale shall be set aside. And if the court errs by setting aside the sale improperly, they have the right to carry the question by appeal to a higher tribunal. *Kable v. Mitchell*, 9 W. Va. 492; *Hughes v. Hamilton*, 19 W. Va. 366; *Connell v. Wilhelm*, 36 W. Va. 598, 15 S. E. Rep. 245.

Purchaser at a Void Sale in Possession—Statute of Limitation.—A court of equity without jurisdiction pronounces a decree for the sale of a certain parcel of land, and appoints commissioners, with direction to make the sale. They sell the land; the court confirms the sale, and appoints the commissioners to convey the land to the purchaser on payment of the purchase money. The purchase money is paid, and the commissioners make to the purchaser a deed purporting to convey the land in fee. Such deed being proved constitutes color of title.

Under such deed the purchaser and those claiming under him held the house and lot in question in actual, visible, and exclusive possession continuously for more than 10 years before the bringing of the suit, claiming it in fee as their own, subject only to the wife's contingent right of dower. *Held*, the remedy of the original owner and of those claiming under him is barred, and their right to the possession extinguished. *Mullan v. Carper*, 37 W. Va. 215, 16 S. E. Rep. 527.

Judgments—Lands in Another County.—The purchaser of land under a decree in the county in which the land lies, is not affected by constructive notice of a judgment obtained in another county which is not docketed in the former county until after the sale is confirmed and the purchase money is paid, though the title is retained. *Logan v. Pannill*, 90 Va. 11, 17 S. E. Rep. 744.

Notice of Confirmation—Papers Absent from Clerk's Office.—The sale of slaves having been made by a commissioner of the court but no report of the sale having been made and returned to the court until after a period of between four or five years, during which period the papers in the cause are absent from the clerk's office, precluding the purchaser from knowing what was done and the order directing the sale not authorizing the delivery of the slaves to the purchasers, it was error to make an order confirming said sale without notice to the purchasers. *Boner v. Boner*, 6 W. Va. 377.

Easements.—One of two adjoining lots owned by the same party is sold at public auction under decree of a court. At the time of the sale nothing is said of an easement running from the unsold lot through the one sold, for carrying the water from the former to a culvert in the street; and such easement was not to be seen on the lot sold, and was not known to the purchaser. The purchaser is entitled to have the lot free of the easement. *Scott v. Bentel*, 23 Gratt. 1.

Purchasers—Confederate Money.—It is no ground of complaint on the part of the debtor that the court decreed a sale of the land for confederate money. If the creditors were willing to receive such money in payment of debts due before the war, it was to the advantage of the debtor that it be so sold. And the creditors allowing the property to be sold for this money without objection, it is not for them afterwards to object to receive it in payment of their debts. *Crawford v. Weller*, 23 Gratt. 836.

In 1860 a commissioner under a decree of court sold land on a credit of one, two and three years. In 1861, on the application of the purchaser the court authorized him to deposit in a certain bank the amount of his first and second bonds, which he did. The commissioner afterwards collected the third bond and deposited it in the same bank, and reported it to the court; and his report was afterwards confirmed. The court must be presumed to have known when the reports were confirmed, that the deposits were made in confederate money and neither the purchaser nor the commissioner is liable to repay the money so deposited. *Mead v. Jones*, 24 Gratt. 847; *Dickinson v. Helms*, 29 Gratt. 462.

Objections.—By buying at a judicial sale the purchaser selects his forum and submits himself to the court as to all questions concerning the sale and his purchase. If there is any objection it should have been made in that court before confirmation. *Hickson v. Rucker*, 77 Va. 135.

Application to Have the Sale Set Aside—Procedure.—The application of the purchasers, to have the sale set aside, should be by petition in the cause. And if they proceed by bill to enjoin the collection of the purchase money, and have the sale set aside, the bill should be treated as a petition in the cause, and be brought to a hearing with it. *Cralle v. Meem*, 8 Gratt. 496.

Purchasers—Payment of Purchase Money.—The two commissioners directed to sell the decedent's land were required to give the usual bond. One gave it. The sale was made, and it was confirmed, and the commissioner ordered to collect and distribute the money. The commissioner who gave the bond died in 1860. The other commissioner was also administrator of the decedent and counsel for the heirs. He collected in 1861 a large amount of the purchase money and deposited it to his individual credit in a solvent bank, where it was lost during the war. A suit was brought to hold the purchaser and the

land liable for the money paid to a commissioner who had given no bond and also to hold the commissioner responsible for the moneys collected and lost. *Held*, purchaser paid money into hands legally entitled to receive it. On the face of the decree the commissioner is stated to be the counsel for the decedent and legally entitled to receive the money. Under the circumstances neither the purchaser nor the commissioner is responsible and the loss must fall on the heirs. *Thomson v. Brooke*, 76 Va. 160.

But where a purchaser at a judicial sale bought in all of the liens except one and was allowed credit therefor, and to prevent a resale, paid into bank, with approval of the court, the amount of the said lien, which was recognized as appropriated to the owners of the said lien, and which was later lost by the failure of the bank, the loss will fall wholly on the owners of the said lien. If there had remained more than one unsatisfied lien, the loss would then have fallen on the general fund and been borne by the lienors in the inverse order of the priority of their liens. *Gill v. Barbour*, 80 Va. 11.

The decree directed the commissioner to give security and to pay the money coming to the infants to their guardian; the purchaser paid the commissioner in pursuance of the decree, and was exonerated from liability for its proper disposition and cannot object to the decree on that ground. *Jones v. Tatum*, 19 Gratt. 720.

B. LIABILITY OF PURCHASERS.

1. PAYMENT.—The purchaser's liability is to pay in money and it can not be discharged in any other thing, so far as any party in interest is concerned, against his consent. *Frazier v. Hendren*, 80 Va. 265.

A check for the balance due upon a party who admitted his indebtedness to the drawer but did not pay it, of which the purchaser had notice, is not a valid payment and the purchaser must account for the balance. *Finney v. Edwards*, 75 Va. 44.

Bonds Payable in United States Currency.—In 1863 there was a decree for the sale of land, and in the same year the sale was made by the commissioners who announced publicly that the terms of the sale were on a credit of one, two and four years, and the purchase money to be paid in the currency which may be in use when the respective payments fall due; but with the privilege to the purchaser to pay one-half of the purchase money upon the confirmation of the sale by the court.

The sale was confirmed by the court and the purchaser paid one-half of the purchase money in Confederate money, and executed bonds for the other half which fell due in 1865 and 1867. *Held*, the purchaser must pay these bonds in United States currency, that being in use when the bonds fell due. *Teel v. Yancey*, 23 Gratt. 691.

Liability—Currency.—An ante-war creditor refused to receive from a purchaser of property sold for the payment of debts in 1863, Confederate currency in payment, and the purchaser obtained an order of the court to invest the money in Confederate bonds. *Held*, it was the purchaser's money which was invested and he must bear the loss. *Crockett v. Sexton*, 29 Gratt. 46.

Payments in Confederate Money.—The purchaser at a judicial sale in 1859 gave his bonds payable annually down to 1863. He paid all but the last bond and paid on that \$2,000 in Confederate money, and a few days afterwards offered to pay the balance to the commissioner in Confederate money, who refused to receive it.

The purchaser then filed his petition, stating that

he owed this balance and that the commissioner refused to receive it; that he was ready to pay it, and asked that he may be authorized to pay it, that a commissioner may be appointed to convey the land to him. The court decreed that the purchaser be authorized to pay the general receiver the balance due and upon its payment that the commissioner should convey the land to the purchaser. *Held*, the decree did not authorize the purchaser to pay in Confederate money and a payment to the receiver in that money was not a discharge of the debt. *Myers v. Nelson*, 26 Gratt. 729, and *note*.

2. APPLICATION OF PAYMENTS.—There was a judgment for the balance on a bond executed by the purchaser as principal and surety for the price of land purchased at a judicial sale. At a resale the property brought less than the amount of the judgment. The payments made by the purchaser on the bonds and the proceeds of a resale were applied to the purchase money under the court's supervision, with the assent of the purchaser. *Held*, in an action to enforce the judgment on the land owned by the surety at its date, purchasers from the surety with notice of the judgment could not claim that said payments and proceeds were misapplied. *Wells v. Hughes*, 89 Va. 548, 16 S. E. Rep. 689.

Purchasers—Attorney—Client—Application of Payments.—A purchaser at a judicial sale executed to the receiver of a court her bonds. To him, as her attorney, she also assigned certain claims to collect and pay on her bonds. Part of the collections he applied to the payment of the bonds; the balance he did not so apply. There was nothing to show that he had charged himself, as such receiver, with the balance. *Held*, as the receiver collected the money as attorney for the purchaser, she was not entitled to have it credited on her bonds until he had so applied it. *Paxton v. Steele*, 86 Va. 311, 10 S. E. Rep. 1.

Purchases—Off-Set—Creditor.—When a commissioner is ordered by a decree of the court in a creditor's suit to sell the land of a deceased debtor and the land is sold and the sale is confirmed, and the purchaser at such sale, who has executed his bonds, is a creditor, and the commissioner has been ordered to pay him the debt greater than the amount of the purchase money, the commissioner may offset *pro tanto* the indebtedness for the purchase money on the debt due to the purchaser from the estate of the deceased debtor. *Ellett v. Reid*, 26 W. Va. 550.

3. ABATEMENT OF PURCHASE PRICE.—If lands are sold under the direction of a court of equity by certain metes and bounds by a widow as guardian to her infant children who own the land subject to the widow's right of dower and she conveys their interest as well as her own designating the boundaries of the land and warranting the title, and she having shown to the purchaser before the sale the tract offered to be sold, and the purchaser is put into possession of the land so shown him, the title thereto being perfected, but it turns out, that the boundaries set out in the deed included land not shown to the purchaser, and never held by the vendor, the court may by a rule in the said cause properly require the purchaser to pay the whole of the purchase money without allowing him any abatement for the land, which was not shown him, but which is within the boundaries specified in his deed and to which his title is worthless. *Crislip v. Cain*, 19 W. Va. 438.

A purchaser at a judicial sale, with full knowledge of all the facts connected with the title, will not

after the sale has been confirmed, be entitled to any abatement of the purchase money, or any suspension of its collection on account of any flaw in the title to such land. *Boyce v. Strother*, 76 Va. 862.

Sale in Gross.—Though a tract of land was described as containing ninety acres, it was a sale in gross and not by the acre, and the purchaser is not entitled to an abatement of the purchase price. *Jores v. Tatum*, 19 Gratt. 720.

4. IN GENERAL—INVESTMENT.—It was held that, an investment in county bonds according to the decree by a commissioner who bought at his own sale, such investment was at the risk of the purchaser, and if the bonds were worthless it would be his loss. *Howery v. Helms*, 20 Gratt. 1.

Error in Decree—Confirmation of Report.—A court of equity will not interfere to give relief to a purchaser under a decree of a court having jurisdiction of the subject, or to his sureties, for errors in the decree, or the proceedings under it, where the report of the commissioners has been confirmed. *Worsham v. Hardaway*, 5 Gratt. 60.

Purchasers—Party to Suit by Purchase.—Where land is sold under decree of court, the purchaser becomes a party to the suit from the time of his purchase, and subjects himself to the orders of the court in all subsequent proceedings. *Haymond v. Camden*, 22 W. Va. 180.

Purchaser—Auctioneer—Agent.—An auctioneer selling real estate at auction, is the agent of both vendor and purchaser, and his writing, at the time, the name of the purchaser as such, to the written terms of sale binds the purchaser. *Walker v. Herring*, 21 Gratt. 678.

But he cannot bind the purchaser at auction of real estate, by subscribing his name to the terms of sale, after the sale is completed. *Walker v. Herring*, 21 Gratt. 678.

A purchaser at a judicial sale is conclusively held as having notice of all facts touching the rights of others in the property sold, disclosed by the record of the case. *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. Rep. 411.

Purchaser—Decree—Knowledge of Contents.—A purchaser under a decree is held to know its contents, and what property or estate he is to acquire. *First Nat. Bank v. Hyer*, 46 W. Va. 13, 32 S. E. Rep. 1000.

Interlocutory Decree—Deed.—It is not error in an interlocutory decree enforcing a specific execution of a contract against a purchaser, that it does not direct a deed to be made and tendered to him. *Godin v. Vaughn*, 14 Gratt. 103.

Encroachment of Street—Notice of.—A purchaser at a judicial sale of a city lot cannot, after his purchase, make the objection that a street encroaches on the lines of the lot where it appears that he had ample opportunity to find out that there was such encroachment. *Carneal v. Lynch*, 91 Va. 114, 20 S. E. Rep. 969.

Liability of Sureties.—A part of the land devised to the defendant was sold to the husband of such defendant to pay the testator's debts and the plaintiffs became sureties on the bonds for the purchase money. The husband defaulted, and a commissioner was appointed to ascertain the amount due on the purchase reported, the amount of the debts of the estate and that the husband was entitled to a balance in the right of his wife. A decree was entered confirming the report, and adjudging that the land be resold, unless the husband pay the debts within a definite time. The money was not paid, and the

land was resold with the knowledge of the plaintiffs, for enough to pay the debts of the estate. The defendant subsequently obtained an absolute divorce, and judgment was rendered against the plaintiffs for the sum with which the husband had been credited in right of his wife. *Held*, that the husband, as such, was entitled only to the profits of the balance, in right of his wife, since this sum was impressed with the character of realty, and that the decree was not an adjudication that the plaintiffs were only liable for the amount of the purchase money. *Cleek v. McGuffin*, 89 Va. 324, 15 S. E. Rep. 896.

Appeal—Sale after—Receivers.—Where, after an appeal is allowed, the commissioners sell the lands decreed to be sold, which sale was never confirmed and the decree was afterwards annulled, and the so-called purchasers take possession, appropriate the profits, claim to be treated as receivers and allowed the commissions paid in cash, and compensation for expenses and services in managing the land, it was held, that they were intruders who had no claim to compensation in any way, and were accountable for a fair rent. *Strayer v. Long*, 83 Va. 715, 3 S. E. Rep. 872.

Appeal—Costs.—The purchaser resisted the decree for a resale, and took an appeal from a former decree in the cause; he was properly subjected to pay the costs of the proceedings under the rule. *Jones v. Tatum*, 19 Gratt. 720.

Sale Not within Statute of Frauds.—A judicial sale made under a decree of a court of equity is not within the statute of frauds. It is binding on the bidder or purchaser without any written contract or memorandum signed by him or his agent. *Robertson v. Smith*, 94 Va. 260, 26 S. E. Rep. 579.

C. THE TITLE THAT PASSES TO THE PURCHASER.

1. COMMISSIONER'S DEED.—A court of equity, in a suit where it is proper to decree or order the execution of any deed or writing, may appoint a commissioner to execute the same; and the execution thereof shall be as valid to pass, release or extinguish the right, title, and interest of the party on whose behalf it is executed, as if such party had been at the time capable in law of executing the same, and had executed it. Va. Code 1887, sec. 3418; Code of W. Va. ch. 182, sec. 3.

A deed made by a commissioner to an assignee by deed of the purchaser, passes the whole title and interest in the realty, sold and conveyed, that was vested in the debtor from whence the same was sold by the proceedings in chancery, to such assignee. *Hall v. Hall*, 12 W. Va. 1.

It is well settled that, in an adversary proceeding in a court of equity for the sale of land, nothing but the title which is vested in the parties to the suit can be sold; and the deed made under the decree in such proceeding carries with it only the title of the parties to the suit. *Adams v. Alkire*, 20 W. Va. 480.

A bond conditioned to convey land of which the obligor had neither title nor possession, passes nothing. And a decree in a cause between the parties, for a conveyance of the land by a commissioner, and his conveyance, passes nothing; none of the parties ever having had either title or actual possession. *Cales v. Miller*, 8 Gratt. 6.

The prayer of the bill being for the sale of the land, and the decree and sale being of the land, and the deed conveying it, the title of all the parties to the suit passed by the deed, though the bill misstates the title, and a *bona fide* purchaser for value

without notice takes the legal title which is not subject to be defeated. *Zollman v. Moore*, 21 Gratt. 318.

2. IN GENERAL.—But where the sale is of such a character, and made under such circumstances, as fully and sufficiently to make known to the purchaser the exact nature of the title he is to expect; as where the sale is made avowedly by an executor under the provisions of the will, or by a sheriff or commissioner under an order of the court, he can of course only demand such title as was in contemplation of the parties when the sale was made. *Goddin v. Vaughn*, 14 Gratt. 102.

It is a general rule, that a court of equity ought not to decree a sale of an *equitable* title in land, but if a decree for the sale of land be proper, it should first direct the *legal* title to be perfected, and then decree a sale of that. *Goare v. Beuhring*, 6 Leigh 585.

Time to Perfect Title.—A court of equity has at least as large a discretion in giving time to perfect the title in cases of sales under its decree as in cases of purchasers under private contracts. *Daniel v. Leitch*, 18 Gratt. 195.

Objection to Title—Question of Law.—Where the facts are all before the court, and the objection to the title to land purchased is a question of law, it is unnecessary to refer the title to the commissioner. *Goddin v. Vaughn*, 14 Gratt. 103.

Reference.—It is not the universal rule in Virginia to refer to a commissioner to report on the title, though such reference may be proper where the title is doubtful or obscure or depending upon matters *in pais*. *Thomas v. Davidson*, 76 Va. 338.

Sale of Property Not Authorized to Be Sold—Title.—A sale, under a decree, of property which it does not authorize to be sold, or excepts from sale, passes no title to such property, and is void. *First Nat. Bank v. Hyer*, 46 W. Va. 13, 32 S. E. Rep. 1000.

Titles—Rule.—Upon the grounds of public policy the courts have established the rule that *bona fide* purchasers at judicial sales, upon proceedings regular upon the face of the record of a court of competent jurisdiction, will be protected against mere errors of the court, and secret vices in the proceedings, which can only be made to appear by outside testimony. *Marrow v. Brinkley*, 85 Va. 55, 6 S. E. Rep. 605.

Relief for Defects in Title by Resisting Confirmation.—A purchaser of land at a judicial sale, can only obtain relief for defects in the title, or incumbrances on the property, by resisting the confirmation of the sale by the court, upon the return of the commissioner's report. And it is not competent for a court of equity to enjoin a judgment obtained against him for the purchase money, on the ground of defect of title to the property at the time of the purchase. *Threlkelds v. Campbell*, 2 Gratt. 198.

After Confirmation—Title.—A purchaser of land under a decree of a court of chancery, after confirmation of the sale by the court, is the equitable owner of such land, subject to be compelled to comply with the contract by paying the purchase money. *Hurt v. Jones*, 75 Va. 341.

Cloud on Title.—Where one part of the land sold at a commissioner's sale under a decree of court, and the purchaser had paid all of the purchase money, he was entitled to a deed, but it had not been made. This was held not to be a cloud upon the title which would avoid the sale. *Hudgins v. Lanier*, 23 Gratt. 494.

Confirmation—Objections to Title.—The general rule in Virginia is, that objections made by the purchaser for defect of title should be made before the sale is

confirmed by the court, and such objections made afterwards come too late, except in cases of after-discovered mistake, fraud and the like. *Thomas v. Davidson*, 76 Va. 338; *Watson v. Hoy*, 28 Gratt. 603, and *note*; *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. Rep. 431; *Insurance Co. v. Cottrell*, 85 Va. 857, 9 S. E. Rep. 132; *Talley v. Starke*, 6 Gratt. 339; *Berlin v. Melhorn*, 75 Va. 639; *Hyman v. Smith*, 13 W. Va. 772. See *Long v. Weller*, 29 Gratt. 353; *Hickson v. Rucker*, 77 Va. 139; *Redd v. Dyer*, 83 Va. 331, 2 S. E. Rep. 283; *Williams v. Blakey*, 76 Va. 255.

Deed—Warranty.—A party purchases land from a special commissioner appointed by the court, and his purchase is confirmed before the deed is made to him. He executes a power of attorney to such special commissioner authorizing him to sell this land for him, and the special commissioner does so signing the written contract agreeing to convey the land to the purchaser upon the payment of the whole of the purchase money, signing as special commissioner and attorney in fact of the first purchaser. It was held the true meaning of such contract was that the sub-purchaser took a deed from the special commissioner with the assent of the first purchaser, and therefore he is in such case only entitled to a deed with special warranty of title. *Tavener v. Barrett*, 31 W. Va. 656.

Uncertainty of Title.—Purchasers under decree should not be required to take or pay for property where it had been sold three times without an account of liens having been taken and the title is uncertain. *Etter v. Scott*, 90 Va. 762, 19 S. E. Rep. 776.

Irregularities—Title.—The failure of a purchaser at a judicial sale to take a deed from the commissioner and to give deed of trust for deferred payments, is irregular but does not vitiate the title. *Whitlock v. Johnson*, 87 Va. 323, 12 S. E. Rep. 614.

Title Should Be Protected.—It is necessary that the title of a purchaser at a judicial sale should be protected, in order that the property may bring a fair price. *Capehart v. Dowery*, 10 W. Va. 130.

Time to Investigate Title.—The purchaser at a commissioner's sale to whom property is knocked down to is not entitled to any time to investigate the title before complying with the terms. *Hildreth v. Turner*, 89 Va. 858, 17 S. E. Rep. 471.

Title—Parties.—A decree for the sale of land where the owner is not a party to suit, is a nullity and passes no title to the purchaser. *Underwood v. McVeigh*, 23 Gratt. 409.

Estoppel—Acquiescence.—A person who causes his land to be sold for some purpose of his own, under a judicial proceeding which turns out to be void, and receives and retains the proceeds of sale, cannot afterwards be heard to question its validity. He has made his election. If such person afterwards stands by and sees the purchaser expend large sums in developing oil on the property, he may not afterwards set up such defect in the purchaser's title; he is estopped. *Williamson v. Jones*, 39 W. Va. 281, 19 S. E. Rep. 436.

3. EFFECT UPON REVERSAL OF DECREE.—If a sale of property be made under a decree or order of a court, after six months from the date thereof, and such sale be confirmed, though such decree or order be afterwards reversed or set aside, the title of the purchaser at such sale shall not be affected thereby; but there may be restitution of the proceeds of sale to those entitled. Va. Code of 1887, sec. 3425.

And by the Code of West Virginia, it is provided that "if a sale of property be made under a decree

or order of a court, and such sale be confirmed, though such decree or order be afterwards reversed or set aside, the title of the purchaser at such sale shall not be affected thereby; but there may be a restitution of the proceeds of sale to those entitled." Ch. 183, § 8.

In construing the above statute this court has determined, that, if before the confirmation of a sale the report of sale be excepted to, on the ground that the decree ordering the sale is erroneous, and it clearly appears to the court, that the sale of the land was materially affected thereby, and that it brought materially less than it otherwise would have brought by reason of this error in the decree of sale, the court should refuse to confirm the sale; and if it be confirmed, the appellate court will reverse the decree confirming the sale as well as the decree ordering the sale. *Tracey v. Shumate*, 22 W. Va. 500; *Trimble v. Herold*, 20 W. Va. 602.

The title of a purchaser of property under a decree or order will not fall with its reversal or setting aside; he not being a party, and all persons holding an interest in the land sold being parties. *Frederick v. Cox* (W. Va.), 34 S. E. Rep. 958.

A purchaser, under an execution issued on a judgment which is afterwards reversed, shall not have his title impeached; but the injured party shall be restored to the money arising from the sale. *Burnley v. Lambert*, 1 Wash. 308.

Reversal of Decree—Absence of Parties.—But a purchaser at a judicial sale is not protected upon reversal of the decree by section 8, ch. 183, of the Code, when the record shows that necessary parties interested in the land sold, having liens thereon, were not parties when the sale was ordered and confirmed. So when a trustee holding the legal title to the land is not a party. *Turk v. Skiles*, 38 W. Va. 404, 18 S. E. Rep. 561; *Peck v. Chambers*, 44 W. Va. 270, 28 S. E. Rep. 706; *Calvert v. Ash* (W. Va.), 35 S. E. Rep. 887; *Underwood v. Underwood*, 22 W. Va. 308; *Capehart v. Dowery*, 10 W. Va. 130; *Buchanan v. Clark*, 10 Gratt. 164. See also, where the court had no jurisdiction to decree a sale, *Hull v. Hull*, 26 W. Va. 1, 80.

4. CAVEAT EMPTOR.—*Caveat emptor* applies to a purchaser at a judicial sale. *Calvert v. Ash* (W. Va.), 35 S. E. Rep. 887; *Young v. McClung*, 9 Gratt. 359; *Redd v. Dyer*, 33 Va. 331, 2 S. E. Rep. 283; *Sexton v. Patterson*, Va. Law J. 1884, p. 72; *Smith v. Wortham*, 82 Va. 937, 1 S. E. Rep. 831; *Hickson v. Rucker*, 77 Va. 135; *Long v. Weller*, 29 Gratt. 347; *Boyce v. Strother*, 76 Va. 862.

The rule *caveat emptor* applies to a purchaser at a judicial sale, and even if, after confirmation of the sale by the court, he finds that the title he will procure will be worthless, he cannot be relieved from the payment of the purchase price. *Capehart v. Dowery*, 10 W. Va. 130.

D. RIGHT OF POSSESSION.—Where real estate has been sold under a decree in a cause, and the sale has been confirmed, the purchaser is entitled to the possession of the property, even though the decree confirming the sale does not direct possession to be delivered to him. *Hudgins v. Marchant*, 28 Gratt. 177; *Whitlock v. Johnson*, 87 Va. 329, 12 S. E. Rep. 614.

If an appeal in the cause has been obtained and perfected before the possession of the property is obtained by the purchaser, he is not entitled to have possession. But if possession is obtained before the appeal is perfected, the purchaser is entitled to retain it until the case is decided in the

appellate court. *Hudgins v. Marchant*, 28 Gratt. 177.

Where a sale of land under a decree was made and confirmed and the purchase money paid, but there was no deed, and the former owner's heirs remained in possession, it was held that the statute of limitations did not begin to run against the purchaser until the heirs made a distinct disavowal of his title and their assertion of adverse claim is brought home to him. *Whitlock v. Johnson*, 87 Va. 329, 12 S. E. Rep. 614; *Creekmur v. Creekmur*, 75 Va. 496.

The purchaser of property at a judicial sale, which before confirmation thereof has been set aside by a subsequent decree directing the property to be reoffered for sale, cannot appeal from such decree, before such resale has been confirmed.

A decree setting aside a judicial sale, which has not been confirmed, and directing the property to be reoffered for sale is not a decree, "which requires the title or possession of the property to be changed," within the meaning of the seventh clause of the first section of chapter 185 of the Code of W. Va., as amended by chapter 157 of Acts of the Legislature of 1882 (p. 535). *Childs v. Hurd*, 25 W. Va. 530.

E. DEPRECIATION OF PROPERTY BETWEEN SALE AND CONFIRMATION.—In *Heywood v. Covington*, 4 Leigh 373, *TUCKER, P.*, says: "If the mill and mill dam were materially injured by freshes, after the sale and before the report of sale was confirmed, I should think, upon the authorities, that the loss should not fall upon the vendee, provided there was no fault in him." See also, *Taylor v. Cooper*, 10 Leigh 317; *Cocke v. Gilpin*, 1 Rob. 20.

The court will not compel the purchaser to take land by confirming the sale, where by the acts of the parties to the suit, action on the report of a sale by the court in confirming the same has been delayed for such an unreasonable time, that confirmation of the sale would most probably cause him loss, if the purchaser is not in default, or guilty of *laches* or fraud or the like, and has not acquiesced in such delay, as where it appears that during the unreasonable time of delay the property has depreciated in value. *Hyman v. Smith*, 13 W. Va. 744.

F. PAYMENT TO UNBONDED COMMISSIONER.—Where a commissioner fails to give the bond required by the statute, he has no authority to receive the purchase money; and the purchaser is responsible to the party who is entitled to the proceeds of such sale. The statute, Code 1873, ch. 174, § 1, is imperative that a bond shall be given, and it is the duty of the purchaser at a judicial sale to see that the bond has been given before he pays the money to the commissioner, or he does it at his own risk. *Hess v. Rader*, 26 Gratt. 746; *Eggleton v. Whittle*, 84 Va. 163, 4 S. E. Rep. 222; *Eggleton v. Dinsmore*, 84 Va. 358, 6 S. E. Rep. 146; *Tyler v. Toms*, 75 Va. 116; *Lloyd v. Erwin*, 29 Gratt. 598, and *note*; *Donahue v. Fackler*, 21 W. Va. 124; *Lee v. Swepson*, 76 Va. 173; *Whitehead v. Bradley*, 87 Va. 676, 13 S. E. Rep. 196; *Woods v. Ellis*, 85 Va. 471, 7 S. E. Rep. 852; *McAllister v. Bodkin*, 76 Va. 815; *Boisseau v. Boisseau*, 79 Va. 79; *Lamar v. Hale*, 79 Va. 163.

The court is of opinion that although no bond was given by the commissioner, before he proceeded to collect the purchase money for the land, yet inasmuch as he was authorized by the decree to collect the money as it fell due and to pay it to the receiver of the court, in the event of the refusal of the parties to receive it; and the money having been paid by the purchasers, and the money having been paid into bank by the commissioner in consequence of

the refusal of the parties to receive it, and the said fund having been lost without default of the commissioner, the purchasers cannot be in any way prejudiced by his failure to execute the bond required by law. Per STAPLES, J., *Dixon v. McCue*, 21 Gratt. 373. See also, *Thomson v. Brooke*, 76 Va. 160.

Publication of Certificate of Clerk.—Defendants purchased land at a sale by special commissioners pursuant to an advertised notice, to which was appended a certificate of the clerk of court that they had given the proper bond. One of the commissioners was subsequently appointed receiver to collect the proceeds of sales, rents, etc., on giving a specified bond. Defendants, without notice of such appointment, paid the price to such receiver, who failed to account therefor, or to give the receiver's bond. *Held*, under Acts 1883-84, p. 213, providing that when any special commissioner authorized to sell land shall publish with the notice of sale a certificate of the clerk of court that he has given the bond required, a purchaser shall be relieved from all liability for the purchase money paid to such commissioner, unless another person has been appointed to receive the same, of which the purchaser has due notice, defendants were not affected by the receiver's failure, since they paid to him as a commissioner who made the sale. *Pulliam v. Tompkins* (Va.), 39 S. E. Rep. 221; Code of Va. 1887, §§ 3397, 3398; *Whitehead v. Bradley*, 87 Va. 676, 13 S. E. Rep. 196.

Right of Purchaser against.—Where a commissioner receives the purchase money without authority he is liable to the purchaser for the amount so paid. *Tyler v. Toms*, 75 Va. 116.

G. WHO MAY NOT PURCHASE—COMMISSIONERS.—The law is well settled in this state that the same person cannot occupy the antagonistic positions of seller and purchaser of the same subject. And if a person selling land as a commissioner of the court, becomes himself the purchaser, or has any understanding at the time of the sale that he is to have any interest in the purchase of the land sold by him, the sale will be held voidable and set aside at the election of any party interested in the land. *Ayers v. Blair*, 26 W. Va. 562; *Winans v. Winans*, 22 W. Va. 678; *Newcomb v. Brooks*, 16 W. Va. 32; *Howery v. Helms*, 20 Gratt. 1; *Bailey v. Robinsons*, 1 Gratt. 4; *Davies v. Hughes*, 86 Va. 909, 11 S. E. Rep. 488.

But, upon the failure of the purchaser to pay the purchase money there was a decree appointing a commissioner to resell and the commissioner by arrangement with the purchaser became the purchaser. This was reported to the court and it was approved and confirmed. It was held that the fact that the commissioner was appointed to sell the land did not avoid his purchase from the first purchaser, and the parties having all that they were entitled to claim cannot object. *Hurt v. Jones*, 75 Va. 341.

One who cries a sale cannot properly act for himself, or any other person in bidding for the property. *Hilleary v. Thompson*, 11 W. Va. 113.

Attorney.—An attorney, without his client's consent, cannot purchase for his own benefit any property of the defendant sold under execution, unless he gives for it an amount equal to the whole of the judgment; and without such consent he cannot purchase for his own benefit his client's property sold at a judicial sale. Nor can the fiduciary make a valid purchase of trust property though made at a public judicial sale under the decree made in an

adverse proceeding. Such purchase may be avoided at the option of any party to whom he holds such fiduciary relations. *Newcomb v. Brooks*, 16 W. Va. 32.

Executors.—Where a decree ordered a public sale, but it was made privately, and also ordered enough land sold to pay certain debts but more was sold than necessary, and where the executor, who brought the suit and by his own counsel managed it, was in fact the purchaser, though but a nominal bidder, it was held that he could have no protection in the purchase. *Peirce v. Graham*, 85 Va. 227, 7 S. E. Rep. 189; *Quarles v. Lacy*, 4 Munf. 251.

Frauds upon Rights of Owners.—The commissioner having become the purchaser under a judicial sale it was held that the non-resident co-parceners could set the sale aside, even though it had been confirmed, by an informal bill on the grounds of fraud upon their rights. *Howery v. Helms*, 20 Gratt. 1.

H. PURCHASERS BY ESTOPPEL.—A purchaser at a judicial sale becomes a *quasi* party to the suit. If the purchaser stands by and suffers the sale to himself to be confirmed and makes no objection, and also a sale to another and makes no complaint until the land has been conveyed to a third person, he will not be allowed to ask for the correction of a mistake, certainly as to such third party. *Shirley v. Rice*, 79 Va. 442; *Young v. McClung*, 9 Gratt. 336.

Where one acquiesces in proceedings treating him as purchaser he is estopped to deny that he is a purchaser at a judicial sale. *Robertson v. Tapscott*, 81 Va. 533.

XXIV. RESALE.

(1) Enforcement of Lien Retained for Purchase Price—Procedure.—Where a judicial sale is confirmed, and the court directs the commissioner to convey the land to the purchaser, retaining in the deed a lien for the purchase money, and such conveyance is made, and the purchaser sells the land and conveys it to a third party, and such third party sells and conveys to others, and the purchaser from the commissioner fails to pay the balance of the purchase money, the lien should be enforced by original bill, if the original cause is ended, or if still pending for any purpose, by supplemental bill filed in such cause. *Glenn v. Blackford*, 23 W. Va. 182.

Where land is resold because the commissioner was purchaser, the usual and proper course is to offer the property at an upset price, to be fixed by the decree, according to the cases of *Buckles v. Lafferty*, 2 Rob. 202, and *Bailey v. Robinsons*, 1 Gratt. 4. But this rule is intended for the protection of the parties who elect to avoid the first sale; and where the decree for resale directed a sale in general terms, without fixing an upset price, it cannot be assigned as error in the appellate court, either by the original purchaser, or by any party who has elected to affirm the first sale. *Howery v. Helms*, 20 Gratt. 1.

Land is sold under a decree of the court of equity and the title is retained, and bonds with personal security are taken, and, as additional security, collaterals are assigned by the purchaser to the commissioner. It is not error, in such case, for the court to decree a re-sale of the land within a certain time unless such purchase money shall be paid, without first exhausting the bonds and collateral; especially where the commissioner has reported that the collaterals cannot be made except by suit. *Mosby v. Withers*, 80 Va. 82.

(2) Rule to Show Cause.—A judicial sale of land is

partly on credit, and the purchaser pays the cash payment and executes his bonds with security for deferred payments, and the sale is confirmed by the court. When the bonds become due the purchaser fails to pay them. He may be proceeded against by rule made upon him to show cause why the land shall not be sold for the payment of the purchase money; and upon that proceeding a decree may be made for the sale of the land. *Clarkson v. Read*, 15 Gratt. 288; *Gross v. Percy*, 2 P. & H. 483; *Thornton v. Fairfax*, 29 Gratt. 669, and *note*; *Jones v. Tatum*, 19 Gratt. 720; *McClintic v. Wise*, 25 Gratt. 448; *Long v. Weller*, 29 Gratt. 347, and *note*; *Williams v. Blakey*, 76 Va. 254; *Hickson v. Rucker*, 77 Va. 135; *Hurt v. Jones*, 75 Va. 341; *Marling v. Robrecht*, 13 W. Va. 440.

If one becomes a purchaser at a judicial sale, and falls to complete his purchase as required by the decree, he is liable for the difference between the amount of his bid and the sum released at a second sale; but, to hold him liable, the sale must be reported and the rule awarded and served upon him to show cause why he should not complete his purchase, or, in default, the property be resold at his expense, and at the risk of liability for any difference between the sum for which he agreed to purchase and the sum realized on the resale. *Stout v. Philippi, etc., Co.*, 41 W. Va. 339, 23 S. E. Rep. 571; *Robertson v. Smith*, 94 Va. 250, 26 S. E. Rep. 579; *Hurt v. Jones*, 75 Va. 341.

Where a purchaser is in default, and a resale is ordered upon a rule to show cause why such resale should not be had, the case is not within section 3425 of the Code, for the property is sold as the property of the purchaser whose title is not affected by such resale. *Whitehead v. Bradley*, 87 Va. 676, 13 S. E. Rep. 195.

There was a decree approving guardian's account, and directing among other things that certain money be deposited in bank, which could be withdrawn only on the order of the court, and how costs up to date of sale should be paid. *Held*, not too late for rules against purchasers of infant's property, sold under decree and purchase money paid to unbonded commissioners, to show cause why said property should not be resold. *Whitehead v. Bradley*, 87 Va. 676, 13 S. E. Rep. 195.

Though no rule was served on the purchaser in this case, he had notice of the proceeding, and came forward to show cause in his own chosen way. There was no need, therefore, for a rule. *Thornton v. Fairfax*, 29 Gratt. 669.

Rule to Show Cause—Return.—Where the purchaser is in default in paying the purchase money, and a rule is issued requiring him to show cause why the land should not be resold, the objection that the rule is made returnable to the same term at which it is issued, is of no effect, provided there was given sufficient time to answer the rule. *Boyce v. Strother*, 76 Va. 862.

Day to Redeem.—Where a judicial sale of land is made upon a credit, and the title retained as a security, upon a rule against the purchaser to show cause why the land should not be resold for his failure to pay the purchase money, before making a decree for the sale, the court should ascertain how much of the purchase money is due, and should in the decree give him a day in which to pay it, and if not paid in that time the commissioner is to sell. Whether the whole or part is to be sold is left to the discretion of the court. *Long v. Weller*, 29 Gratt. 347, and *note*; *Whitehead v. Bradley*, 87 Va. 676, 13 S. E. Rep. 195.

(3) In General.

Account of Liens.—And it is error for the court to order a resale of the land, if the facts, then appearing in the cause, show the existence of liens, the amounts and priorities of which have not been ascertained and fixed. In such case the court should set aside the former decree of sale and refer the cause to a commissioner or otherwise determine the amounts and priorities of the liens before ordering a resale. *Payne v. Webb*, 23 W. Va. 558.

Terms.—Where a judgment debtor bought his own land at a sale under a decree in a creditor's suit against him, and failed to pay the purchase money, it was held not to be inequitable under sec. 3397 of the Code, to decree a resale on terms of one-fourth cash and balance in one, two, and three years. *Dickinson v. Clement*, 87 Va. 41, 12 S. E. Rep. 106.

But it is clearly erroneous, to decree a resale under such a rule where the purchaser has complied with the terms of the sale, and there is no necessity for a speedy collection of the purchase money, no proof of any default in the payment of the bonds, no suggestion or proof of the insolvency of the purchaser or his sureties. The proper course is to order the collection of the bonds by suit, if not paid without. *Gross v. Percy*, 2 P. & H. 483.

A resale of certain property was decreed for default in payment of the purchase price for which the surety of the purchaser was bound. The surety contracted with certain persons who had interest in the property to buy it, and form a joint stock company to manage it. To this company as the purchaser the sale was made, reported and confirmed, and a conveyance made; and the contract being before the court with the report of sale the surety was treated as agent of the company and was not personally liable. *Frazier v. Hendren*, 80 Va. 265.

Sale for purchase money will not be decreed where the property remains encumbered for purchase money due from plaintiff, without providing for discharge of such encumbrance. *Yost v. Porter*, 80 Va. 855.

Rights of Purchaser upon Resale.—The purchaser might have moved the court for leave to answer the petition of the owner; or he might have filed a supplemental bill, or an original bill in the nature of a supplemental bill, and put the matters in issue on which he relied. *Thornton v. Fairfax*, 29 Gratt. 669.

Deed Obtained by Fraud—Estoppel.—Where a commissioner is induced to execute the deed conveying the property to the purchaser, by purchaser's fraud or wilful misrepresentation, or by misrepresentation upon an honest mistake of fact as to the payment of purchase money, such purchaser cannot rely upon the deed as an estoppel, but may be proceeded against by rule to have the deed annulled and the property subjected to sale. *Williams v. Blakey*, 76 Va. 254; *Koon v. Snodgrass*, 18 W. Va. 320.

XXV. RIGHTS OF TENANTS—PROTECTION OF INTEREST.

The decree for the sale of land to satisfy a judgment without first enquiring into and protecting the interest of a tenant in possession under a release made prior to the judgment, is erroneous. *Moore v. Bruce*, 85 Va. 139, 7 S. E. Rep. 195. See *Crews v. Pendleton*, 1 Leigh 297.

XXVI. APPEAL.

A. WHO MAY APPEAL.

Non-Resident Party—Security—Failure to Except in Lower Court.—A non-resident party, against whom

a decree has been rendered upon order of publication, having appeared and filed his answer in the circuit court stating in his answer grounds of error, and praying that the court set aside the proceedings had against him which the court upon hearing refused to do, such party may appeal to this court from the decree so refusing to correct such error, without having first filed a formal petition for a rehearing of the cause, and giving the bond required by the statute. Since there was no objection made in the circuit court to his filing his answer or the want of such formal petition and security for cost, no objection will be allowed for the want of such petition for the first time in the appellate court. *Haymond v. Camden*, 22 W. Va. 180.

From refusal to confirm sale and order for resale, any party may appeal and to refuse suspension of the decree is error, but this court will not reverse the decree for such error when it is right on its merits. *Todd v. Gallego Mills, etc.*, 84 Va. 586, 5 S. E. Rep. 676.

B. WHO CANNOT APPEAL.—Where a person who bid at a judicial sale of land and refused to comply with the terms of sale, and at a resale, attempted to bid through an agent in disregard of the terms of sale, it was held that such person has no standing to appeal from a decree confirming the sale to another person. *Hildreth v. Turner*, 89 Va. 858, 17 S. E. Rep. 471.

One not a formal party cannot appeal, though affected as a *pendente lite* purchaser. *Stout v. Philippi, etc., Co.*, 41 W. Va. 339, 23 S. E. Rep. 571.

C. IN GENERAL.

Review.—Issues not determined by the circuit court will not be considered by this court on appeal. *Woods v. Campbell*, 45 W. Va. 203, 32 S. E. Rep. 208.

Circuit Court—Duty of Such Court.—Circuit courts are bound to obey the decrees of the appellate court in all cases. Where, on appeal, the appellate court prescribes the order in which property must be sold when a decree for sale was made, the circuit court, in its decree of sale, must conform to that order; otherwise its decree will be reversed for violation to comply with the order of the appellate court. *Strayer v. Long*, 83 Va. 715, 8 S. E. Rep. 372.

Appeal—Appointment of Receiver.—After a decree for the sale of real estate to satisfy creditors having liens thereon, and an appeal from that decree by the debtor, the court below in which the suit was pending, may appoint a receiver to take possession of the property and rent it out, and collect the rents, until the further order of the court, etc. *Moran v. Johnston*, 26 Gratt. 108.

What Considered on Appeal.—If the copies of the advertisement posted by the commissioner of the court to rent the property in such case are in no wise referred to in his report, or in the decree of sale subsequently made, they will not, though copied into the record, be considered as part thereof on appeal. *Mustain v. Pannill*, 86 Va. 33, 9 S. E. Rep. 419.

Jurisdiction of Appellate Court.—Where a purchaser at a judicial sale was compelled to pay a second time a part of the purchase money because the special commissioner failed to give a required bond, and his failure to pay over money collected, the jurisdiction of this court to hear the appeal of the purchaser depends upon the amount of the defalcation, and not on the amount of his official bonds. *Duffy v. Figgat*, 80 Va. 664.

XXVII. CONFIRMATION.

A. EFFECT.—It is well settled that a sale made by a commissioner under a decree in a court of equity is not an absolute sale, and does not become such, until it is confirmed by the court, and that until this has been done, the purchaser has no fixed interest in the subject of the sale. *Childs v. Hurd*, 25 W. Va. 583; *Hartley & Co. v. Roffe*, 12 W. Va. 401; *Cooke v. Gilpin*, 1 Rob. 39; *Crews v. Pendleton*, 1 Leigh 297; *Heywood v. Covington*, 4 Leigh 373; *Taylor v. Cooper*, 10 Leigh 317; *Hudgins v. Marchant & Co.*, 28 Gratt. 177; *Kable v. Mitchell*, 9 W. Va. 492; *Arnold v. Casner*, 22 W. Va. 446; *Anderson v. Davies*, 6 Munf. 486.

Where commissioners appointed by a court of equity to make a sale of lands execute a deed to the purchaser, although they were not directed to make a conveyance by the decree appointing them, and the deed is afterwards by a final decree of the court confirmed, the order of confirmation relates back to the time of this date so as to invest the purchaser therein with the legal title to the land. *Evans v. Spurgin*, 6 Gratt. 107; *Cale v. Shaw*, 33 W. Va. 299, 10 S. E. Rep. 637; *Taylor v. Cooper*, 10 Leigh 307; *Hyman v. Smith*, 13 W. Va. 744.

Irregularities Cured.—Subsequent confirmation is equivalent to previous authority, it cures departures from the terms prescribed, and supplies all defects in the execution of the decree, except those founded on lack of jurisdiction. It makes the sale the court's own act, and renders it no longer an executory contract, but executed. *Langyher v. Patterson*, 77 Va. 470; *Core v. Strickler*, 24 W. Va. 689; *Estill v. McClintic*, 11 W. Va. 400; *Daniels v. Leitch*, 13 Gratt. 196; *Cralle v. Meem*, 8 Gratt. 496; *Garland v. Loving*, 1 Rand. 396; *Robertson v. Smith*, 94 Va. 250, 26 S. E. Rep. 579.

Though there be error in the amount decreed to be due from principal and surety, for the non-payment of which the principal's land was ordered to be sold, still the appellate court will not, after confirmation of the sale, set aside such sale, or the decree ordering the sale, even though the sale was made immediately after the rendition of the decree of sale; but it would simply correct the error, by allowing to the principal and surety credit for the amount of the error on the balance due from them. *Camden v. Haymond*, 9 W. Va. 680.

A court of equity will not interfere to give relief to a purchaser under a decree of a court having jurisdiction of the subject, or to his sureties, for errors in the decree, or the proceedings under it, where the report of the commissioner has been confirmed. *Worsham v. Hardaway*, 5 Gratt. 60.

B. DISCRETION OF THE COURT.—Whether a court will confirm a sale made by commissioners under its decree, must, in a great measure, depend upon the circumstances of each case. It is difficult to lay down any rule applicable to all cases; nor is it possible to specify all the grounds which will justify the court in withholding its approval. If there is reason to believe there has been fraud or mistake has been committed to the detriment of the owner or the purchaser or that the officer conducting the sale has been guilty of any unfair dealing, the court will withhold a confirmation of the sale. And either party may object to the report of the commissioner. The court in acting upon a report of sale, does not exercise an arbitrary, but a sound legal discretion in the interests of fairness and prudence, and with a just regard to the in-

terests of all concerned. *Brock v. Rice*, 27 Gratt. 812, and *note*.

See following cases holding that it is within the sound discretion of the court in setting aside or confirming a sale. *Thomas v. Bank*, 86 Va. 292, 9 S. E. Rep. 1122; *Todd v. Gallego, etc.*, 84 Va. 590, 5 S. E. Rep. 676; *Coles v. Coles*, 83 Va. 527; *Terry v. Coles*, 80 Va. 695; *Emfinger v. Henry*, 79 Va. 551; *Hickson v. Rucker*, 77 Va. 138; *Langyher v. Patterson*, 77 Va. 470; *Hansucker v. Walker*, 76 Va. 753; *Berlin v. Melhorn*, 75 Va. 639; *Redd v. Jones*, 30 Gratt. 123; *Roudabush v. Miller*, 32 Gratt. 454; *Hartley v. Roffe*, 12 W. Va. 401; *Marling v. Robrecht*, 13 W. Va. 440; *Hilleary v. Thompson*, 11 W. Va. 113; *Beaty v. Veon*, 18 W. Va. 291; *Brock v. Rice*, 27 Gratt. 812; *Carr v. Carr*, 88 Va. 735, 14 S. E. Rep. 368; *Roberts v. Roberts*, 18 Gratt. 639; *Hyman v. Smith*, 13 W. Va. 744; *Moran v. Clark*, 30 W. Va. 358, 4 S. E. Rep. 303; *Hughes v. Hamilton*, 19 W. Va. 366.

Affidavits—Depositions—Reference to a Commissioner.—Upon the question of confirmation of a judicial sale either party may be allowed to read *ex parte* affidavits. But it is within the discretion of the trial court to require depositions to be taken, or refer the matter to one of its commissioners. *Robertson v. Smith*, 94 Va. 250, 26 S. E. Rep. 579.

C. WHO MAY OBJECT.—A decree of confirmation founded on a false report of sale made may be impeached by an interested party guiltless of culpable fraud or neglect. *Springston v. Morris* (W. Va.), 84 S. E. Rep. 766.

A joint principal in some of the debts for which the land is sold, though owning no part of the land, may object to the confirmation of the sale, when the proceeds are insufficient to pay all of the debts. *Thomas v. Nat. Bank*, 86 Va. 291, 9 S. E. Rep. 1122.

Until confirmation, a judicial sale is an incomplete bargain. Whether the court will confirm the sale must depend in a great measure upon the circumstances of each case. Either party may object; and the purchaser becomes a party to the suit and may have any mistake corrected by the court. *Carr v. Carr*, 88 Va. 735, 14 S. E. Rep. 368; *Brock v. Rice*, 27 Gratt. 812; *Hartley v. Roffe*, 12 W. Va. 410.

According to the Virginia practice upon objection to the sale of land made by the commissioner, it is not necessary to ask that the biddings be opened by the offer of a substantial advance upon the price reported. But the court will consider the objection to the sale, and confirm it or set it aside as the merits of the case require. *Roberts v. Roberts*, 18 Gratt. 639.

But if the sale be made and reported, a petition, filed by those who were not parties to the suit and setting up a vague and indefinite interest in the land and praying that the sale be not confirmed, should not be entertained, but the petitioners should be left to litigate their rights in some other proceeding. *Thomas v. Thomas*, 81 Va. 17.

Notice of Motion to Confirm.—Only two days' notice was given the owner, of land sold for the payment of his debts, that a motion would be made for confirmation of the sale. *Held*, these facts are not sufficient to justify the setting aside of the decree confirming the sale. *Allison v. Allison*, 88 Va. 328, 13 S. E. Rep. 549.

D. WHEN WITHHELD.—Where there is reason to believe that fraud or mistake has been committed to the detriment of the owner or purchaser, or that the officer conducting the sale has been guilty of any wrong or breach of duty to the injury of the parties interested the court will withhold a confir-

mation of the sale. *Brock v. Rice*, 27 Gratt. 812; *Hartley v. Roffe*, 12 W. Va. 401; *Hilleary v. Thompson*, 11 W. Va. 117.

A court of equity, will not, where the facts are known to it, confirm a sale where the bidder has sold his bid at an advance unless the advance inures to the benefit of the parties to the suit. If the commissioner who made the sale knows of a resale by the bidder at an advance price, it is his duty to report it to the court. He is the mere agent of the court, and should give it all information in his possession that can affect the confirmation of the sale. *Camp v. Bruce*, 4 Va. Law Reg. 743, 96 Va. 521, 31 S. E. Rep. 901.

Auctioneer.—An auctioneer or crier, making a sale cannot properly act for himself or any other person in bidding for the property, and the court will not confirm it, though the commissioner is blameless. *Brock v. Rice*, 27 Gratt. 812.

Inadequacy of Price.—While no test of inadequacy applies to all cases and the court is averse to refuse to confirm a sale on the mere grounds of inadequacy, yet it will always do so where the inadequacy is so gross as to amount to a sacrifice of the property. *Coles v. Coles*, 83 Va. 525, 5 S. E. Rep. 673.

Resale.—Where land is decreed to be sold to pay specific legacies, and the rest to go to four residuary legatees, and the land is bid in by one of those legatees, and the other legatees oppose the acceptance of the bid and the confirmation of the sale, and show by witnesses that though the sale was open and fair, yet the price bid was grossly inadequate, and that the land if divided and sold in parcels would, on the usual terms of payment in such cases, bring two or three times the price bid, there was no error in the court in rejecting the bid and refusing to confirm the sale and ordering a resale. *Terry v. Coles*, 80 Va. 695.

E. IN GENERAL.—A party enters into a verbal contract for the purchase of land from a commissioner of the court, who was authorized to make a private sale of the land subject to the confirmation of the court and such party enters upon the land and improves it, but the sale is not reported nor any part of the purchase money paid, and he then by a written contract, without warranty, sells his claim and improvements upon the land to a third person, stating therein that the title is outstanding, but makes no reference to his verbal purchase. More than ten years after the sale of his claim he buys the same land from the commissioner by a written contract, and thereafter the assignee of the person to whom he sold his claim purchases from the commissioner a part of the land with full notice of the written contract of purchase by said party and obtains from the commissioner a deed for such part, neither of the said sales having been confirmed by the court. *Held*, that the last purchase by said party is valid and he is entitled to the land as against said assignee of the person to whom he sold his claim, and his purchase should be confirmed by the court. *Kent v. Watson*, 22 W. Va. 561.

Proper in This Case.—A report of liens was returned and confirmed without exception and a sale was decreed. Then further account of liens was ordered.

The sale was afterwards made at an unusually high price, and, without exception from any creditor, it was confirmed but no distribution was ordered. It was not claimed by the judgment debtor that a higher price could be got at a second sale.

The amount of liens was greatly in excess of the price obtained. *Held*, the sale was properly confirmed though the further account of liens remained untaken. *Utterbach v. Mehler*, 86 Va. 62, 9 S. E. Rep. 479.

Lunatics' Lands.—Where the committee of a female lunatic institutes a suit under Code 1873, ch. 124, to sell her contingent estate in lands, and conducts it in the proper manner, and against the proper parties, and adduces the proper evidence, in every respect in accordance with the requirements of the statute, and in his bill he presents the bids of certain parties who already owned other contingent interests in the same lands, and the court, deeming that the interests of the lunatic will be promoted and the rights of no one will be violated by the sale of her said contingent estate, decrees that the proposed sales be confirmed at the said bids, and the said estate of the lunatic therein be conveyed to the said bidders. It was held that the sale is lawful. *Palmer v. Garland*, 81 Va. 444.

Sale—Immaterial Error.—The court has decided that, where land is purchased at a judicial sale by a stranger to the suit, the court will not refuse to confirm the sale because of an error in the decree ordering the sale, unless such error did have the effect of causing the lands to sell for materially less than they would have otherwise brought; but, that the court would set aside the sale for such error when the record clearly showed that the lands sold for materially less than they otherwise would, on account of such error. *Martin v. Smith*, 25 W. Va. 585; *Hughes v. Hamilton*, 19 W. Va. 368; *Trimble v. Herold*, 20 W. Va. 602.

Commissioner's Deed—Direction to Execute.—Where a commissioner of court is directed to sell a tract of land and on compliance with the terms of sale to convey the same to the purchaser, and he makes such sale and conveyance and reports the same to the court which confirms the right, this is a sufficient confirmation of the deed, though no deed or copy thereof is returned with the report. *Va., etc., C. & I. Co. v. Fields*, 3 Va. Law Reg. 665.

Confirmation—Special Term.—A decree was entered at a special term, confirming a report of sale filed before the commencement of the preceding regular term and which could have been acted on at that term. *Held*, this was not error. Code of 1887, sec. 3062; *Harman v. Copenhaver*, 89 Va. 836, 17 S. E. Rep. 482.

Sale—Report.—It is error to direct payment of the money and conveyance of the land to the purchaser before the sale is reported and confirmed. *Brien v. Pittman*, 12 Leigh 379.

Doubts are entertained, however, whether it was regular, in this case, to direct the proceeds of the sale of the mortgaged land to be paid over to the appellant, before the said sale was confirmed by the court. *Anderson v. Davies*, 6 Munf. 484.

Conveyance.—It is bad practice upon the confirmation of a sale of land to order the commissioner to convey the legal title to the purchaser; the title should be retained until the purchase money is all paid. *Glenn v. Blackford*, 23 W. Va. 183.

XXVIII. RIGHT OF DOWER.

The dower right of the widow must be settled before decreeing sale of real estate. *Wilson v. Branch*, 77 Va. 65.

Assignment—Election of Widow.—The dower of the widow should be ascertained and assigned before sale is ordered, unless the widow elects to take the

value of the dower from the proceeds of the sale. *Underwood v. Underwood*, 22 W. Va. 308; *Laidley v. Kline*, 8 W. Va. 229; *Kilbreth v. Roots*, 23 W. Va. 600, 11 S. E. Rep. 21; *Simmons v. Lyles*, 27 Gratt. 922; *Wilson v. Branch*, 77 Va. 65; *White v. White*, 16 Gratt. 264; *McKittrick v. McKittrick*, 43 W. Va. 117, 27 S. E. Rep. 808; *Harrison v. Payne*, 32 Gratt. 387.

Purchaser—Notice of Dower Right.—It would seem necessary before a sale is made, that the dower of the widow should be set out, so that a purchaser may know what part will pass at once into his possession, and what not until her death, or that a valid arrangement be first made dispensing with her right to have dower in kind in the land. *Tracey v. Shumate*, 22 W. Va. 500; *Coles v. McRae*, 6 Rand. 644; *Cralle v. Meem*, 8 Gratt. 496; *Buchanan v. Clark*, 10 Gratt. 164; *Iaeger v. Bossieux*, 15 Gratt. 83; *Howery v. Helms*, 20 Gratt. 1; *Lipscombe v. Rogers*, 20 Gratt. 658; *Trimble v. Herold*, 20 W. Va. 602.

Vendor's Lien.—One who is party to a suit for the sale of land under the direction of a court of competent jurisdiction cannot claim a dower right where it appears that the vendor's lien, for the satisfaction of which the sale is made, is ahead of the dower right. The decision of the court is conclusive in such case. *Robinson v. Shacklett*, 29 Gratt. 99; *Martin v. Smith*, 25 W. Va. 579; *Sinnet v. Cralle*, 4 W. Va. 600.

654 *Wilson v. Chesapeake & Ohio R. Co.

January Term, 1872, Richmond.

- 1. Railroad Companies—Liability of C. & O. for Negligence of Va. Central.**—The Chesapeake & Ohio R. Co. is the Virginia Central R. R. Co. under another name; and is liable upon any contract, or for the negligence, of the Virginia Central R. R. Co.
- 2. Same—Liability for Baggage.**—A railroad company is liable as a common carrier, for the baggage of a passenger, to the same extent, if the passenger is travelling with his baggage, as if it was carried without him.
- 3. Same—Same—Negligence of Connecting Line—Liability of Initial Carrier.***—Under the contract between the Va. Central R. R. Co. and Trotter & Bro., stage proprietors, for the carriage, by the latter, of passengers from the terminus of the railroad to the White Sulphur Springs, Trotter & Bro. are the agents of the railroad company, and the company is liable for the loss of the baggage of a passenger by Trotter & Bro.
- 4. Same—Same—Same—Same.**—Though the contract stipulates that each party shall be responsible for losses occurring on their part of the line, the railroad company is responsible for the loss of a passenger's baggage by the stage line.
- 5. Same—Same—Same—Same—Case at Bar.**—Through passengers from Richmond to the White Sulphur Springs are allowed to stay all night at the terminus of the road, and go on in the stages the next morning. Though a passenger takes her baggage with her to a hotel, where she stays, yet if she, the

***Railroad Companies—Baggage—Negligence of Connecting Line—Liability of Initial Carrier.**—In regard to the liability of receiving carriers for baggage checked through on through tickets, the principal case is cited as extreme in 3 Am. & Eng. Enc. L. 573.

next morning, brings it with her to the stage, and commits it to the agent of the line, and it is lost; the railroad company is liable for the loss.

6. **Same—Same—Same—Same.**—Though the through ticket given to a passenger at Richmond, specifies on its face, that each party to the contract is only liable for losses on their part of the line, the railroad company is liable for the loss on the stage line.

7. **Same—Same—How Restricted.***—To restrict the liability of a railroad company as a common carrier, for the loss of the baggage of a passenger, there must be proof of actual notice to the passenger of such restriction, before the cars are started; and an endorsement on the ticket given to the passenger, is not enough, unless it is shown that he knew its purport before the cars started.

655 *In June 1869, Ann M. Wilson instituted an action on the case against the Chesapeake and Ohio Railroad Company, to recover the value of a trunk lost on the route from Richmond to the White Sulphur Springs. The declaration contained two counts. The first count alleged that the plaintiff, on the 15th day of August 1869, delivered at Richmond, to the defendants, a certain trunk, containing goods of the plaintiff of the value of \$515, to be carried by the defendants from Richmond to the White Sulphur Springs, and there to be delivered to the plaintiff for certain reasonable reward; and it thereupon was the duty of the defendants to take due care of the said trunk and its contents, whilst they so had it in charge, and to take due care in and about the conveyance and delivery thereof as aforesaid. Yet the defendants, not regarding their duty, &c., did not take due care of said trunk and its contents, whilst they had the charge thereof for the purpose aforesaid, or in and about the conveyance thereof; but on the contrary, &c., on the 16th of August 1868, took so little care, &c., and so negligently conducted themselves in the premises, that said trunk and contents, &c., was lost to the plaintiff.

The second count alleged that the trunk was delivered to the defendants at Richmond, to be carried by them in certain carriages owned and used by them for the carriage of passengers, goods, &c., upon and along a certain railway from Richmond to Covington, in the county of Alleghany, of which said railway the Chesapeake & Ohio Railroad Company, then known as and

***Same—Same—Limitation of Liability—Notice.**—In the case of *The Majestic*, 116 U. S. 375, 17 Sup. Ct. Rep. 601, the court said: "In *Malone v. Railroad Co.*, 12 Gray 388, it was ruled that there was no presumption of law that a passenger on a railroad has read a notice limiting the liability of the railroad corporation for baggage, printed upon the back of a check delivered him, having on the face the words 'Look on the back,' and that the question of notice was properly submitted to the jury as a question of fact. And see *Brown v. Railroad*, 11 Cush. 97; *Transportation Co. v. Theilbar*, 86 Ill. 71; *Rawson v. Railroad Co.*, 48 N. Y. 212; *Wilson v. Railroad*, 21 Gratt. 654."

styled the Virginia Central Railroad Company, was the owner and proprietor; and from thence, to wit: from Covington to the White Sulphur Springs, &c., in and by certain stage coaches, and to be delivered at the White Sulphur Springs, for certain reward, &c.

The defendant demurred to the declaration, and each count thereof; but the demurrer was overruled, and they pleaded "not guilty;" on which issue was joined.

656 *Upon the trial of the cause it was proved, that on the 15th day of August 1868, the plaintiff bought at the ticket office of the Virginia Central Railroad Company, at Richmond, a through ticket, entitling her to go as a passenger from the city of Richmond to the White Sulphur Springs; that she on that day took passage in the cars of the company with two trunks, one of which contained her wearing apparel, and the other contained ladies' goods or merchandise; that the trunks were checked with checks which she took for through checks, as they were marked with the letters W. S. S. That before arriving at Covington, an agent of the company called for her ticket, and tore off a part of it, and returned the other part to her. She was not required at Covington to pay any additional fare for the stage part of the through line. That when she got to Covington she stopped at McElwee's Hotel, and her trunks were taken with her; and on the next morning the stage for the Sweet Springs called for her and took her up, and took her two trunks on the stage. That the stage drove to McCurdy's Hotel in Covington, where the other passengers, who had come up with her, had stopped, and she was transferred to the stage going to the White Sulphur Springs, and before starting she warned the agent, who handed her from the one stage to the other, that her trunks were on the stage she was leaving, and asked him to change them to the stage she was entering; and he replied they were changed from the one stage to the other on which she was. This agent was the same man who acted as agent on the cars, and took the plaintiff's ticket, and he was acting as agent for the stage line. On her arrival at the White Sulphur Springs, her trunk containing her wearing apparel was missing, and had not been recovered. It appeared further, that stages started from Covington for the White Sulphur Springs upon the arrival of the cars; but passengers had the privilege of staying all night at Covington if they chose to do so.

657 *The line of stages to the Sweet Springs and White Sulphur, belonged to the same firm of Trotter & Bro.

It appears that by a contract entered into on the 31st of August 1868, between the commissioners of Virginia and West Virginia, of the one part, and the Virginia Central Railroad Company of the other, made in pursuance of the 15th section of an act passed February 26th, 1867, as amended by an act passed February 6th, 1868, providing for

the completion of a line or lines of railroad from the waters of the Chesapeake to the Ohio river, the said company was authorized to construct said work; and was thereafter to be known as the Chesapeake & Ohio Railroad company.

It appears further, that by a written contract between the Virginia Central Railroad Company, and James A. Trotter & Bro., stage proprietors, dated the 1st day of May 1867, Trotter & Bro. bound themselves, on the 1st day of the next June, and from that time during the continuance of the contract, to run a line of stage coaches daily, or so often as passenger trains of the railroad company were run west of Staunton, from and to various points; and among others, from the terminus of the railroad to the White Sulphur, Sweet and Salt Sulphur Springs, making close connections with said passenger trains, and at a speed of no less than four miles an hour, not including the time spent at night stands, but including all other stoppages. That they should at all times during the continuance of the contract, furnish a sufficient number of substantial and suitable coaches to accommodate all travel which may be brought by the said company to the western terminus of their road, &c.

This contract was to last four years from the 1st of June 1867, but might be cancelled by the company upon thirty days' notice, if the contract was not complied with by Trotter & Bro. The contract set out a table of charges from Richmond to the different points, and the portion of through

charge which each party was to
658 *receive. And it was agreed that each should be solely and separately responsible for all casualties, accidents, losses and injuries which might occur on their respective portions of the aforesaid lines of travel; and if either of the parties should be held responsible for any loss, damage or injury accruing on any part of said lines of travel owned by the other, such responsibility to be discharged by the party on whose lines the loss, damage or injury occurred. And the tickets were to be so framed as clearly to express on their face this separate responsibility. And Trotter & Bro. were to give to the company a bond, with good security, in the penalty of \$20,000, for the faithful performance of the contract on their part.

The form of the through ticket issued was as follows:

Trotter Stage Line.

Issued by Virginia Central Railroad.

One first class seat.

(Subject to conditions stated below.)

Covington to White Sulphur Springs.

Not transferable.

On the following conditions and agreement:

Each passenger allowed 125 lbs. of baggage on cars, only 75 lbs. on stages. The stage company may charge for any excess as much for 200 lbs. as for one passenger. Responsibility for safety of person or baggage on each portion of the route con-

finied to the proprietors of that portion alone.

Forfeited if detached.

J. F. Netherland, Gen'l ticket agent.

Virginia Central Railroad.

Issued by Virginia Central Railroad.

One first class seat.

(Subject to conditions stated above.)

Richmond to Covington.

Forfeited if detached.

J. F. Netherland, Gen. ticket agent.

659 *And on the right margin of each branch of the ticket were the words, Richmond to White Sulphur Springs.

After the evidence had been introduced, the defendant moved the court to instruct the jury as follows:

If the jury believe from the evidence, that the contract offered in evidence by the plaintiff, was in fact made with the Virginia Central Railway Company, then the plaintiff is not entitled to recover in this action. To this instruction, the plaintiff objected; but the court overruled the objection, and gave it: and the plaintiff excepted. This was the third bill of exceptions.

The defendant then moved the court to give the following instruction: If the jury believe from the evidence that the contract with the railway company was to carry the plaintiff as a passenger, with her baggage, then the plaintiff is not entitled to recover under the pleadings in this action. To which instruction the plaintiff objected; but the court overruled the objection: and the plaintiff excepted. This was the fourth exception.

The jury found a verdict for the defendant; and the plaintiff moved the court for a new trial: but the court overruled the motion; and rendered a judgment upon the verdict; and the plaintiff again excepted. And upon her application a supersedeas was allowed.

Robert Howard and H. Wise, for the appellant.

Page & Maury and Young, for the appellee.

ANDERSON, J., delivered the opinion of the court.

This is an action of trespass on the case, by the plaintiff in error against the defendants, common carriers, to recover damages for the loss of a trunk and its contents, valued at \$515. There was a demurrer to the declaration, which we think was properly overruled; and a plea of not guilty. And upon the issue there was a verdict and judgment for the defendants.

660 Upon the trial, the plaintiff took several exceptions to *the rulings of the court. The questions which we will first consider, are raised by the third and fourth bills of exception. The third exception is to the instruction given by the court to the jury, which is in these words: "If the jury believe from the evidence, that the contract offered in evidence by the plaintiff, was in fact made with the Virginia Central Railway Company, then the

plaintiff is not entitled to recover in this action."

The record does not show upon what ground this instruction was given. The suit was brought against the Chesapeake and Ohio Railroad Company; but it by no means follows, that proof that the contract was made with the Virginia Central Railway Company should necessarily defeat the plaintiff's recovery. If the name of the Virginia Central Railway Company, with whom the contract was made, or to whom the trunk was delivered, as a common carrier, was afterwards changed to that of the Chesapeake and Ohio Railroad Company, suit could be brought against the company by the latter name, and by no other. If the instruction had been qualified by adding, "unless the jury believe from the evidence that the name of the Virginia Central Railway Company had been afterwards changed to that of the Chesapeake and Ohio Railroad Company," the objection to the instruction would have been removed. But as given, however clear and satisfactory to the jury the evidence might have been to show that the company sued was the same company by whom the grievance complained of had been committed, though under a different name, the jury might not have felt warranted in finding a verdict for the plaintiff. The court by this instruction, undertook to decide, either upon the evidence, that the Chesapeake and Ohio Company was not the same company that was known by the name of the Virginia Central Railway Company, or upon the law, that when a contract was made with a corporation having a certain

name, it must be sued in that name, 661 although its name *was afterwards changed; and upon either ground we think the instruction was erroneous. It is well settled, that if a corporation changes its name after contract made, it must be sued in its new name. If the instruction was given upon the other ground, it would seem to be an invasion of the province of the jury to decide upon the evidence before them, whether the Chesapeake and Ohio Railroad Company was a continuation of the Virginia Central Railway Company under a new name, which seems not to have been a pure question of law, but a mixed question of law and fact. But was the court right in its construction of the law?

On the 26th of February 1866, an act was passed by the General Assembly of Virginia, entitled, "An act to incorporate the Covington and Ohio Railroad Company." Sess. Acts of 1865-'6, chap. 200, p. 317. By the first section it is enacted, "that the persons upon whom the benefits of this charter may hereafter be conferred, and who may be organized as hereinafter provided, shall thereupon be constituted a corporation, under the name and style of the Covington and Ohio Railroad Company," &c. The second section provides, that "the said Covington and Ohio Railroad Company when fully constituted and certified, as hereinafter provided, shall have all the

rights, interests and privileges, of whatsoever kind, in and to the Covington and Ohio Railroad, and appurtenances thereto belonging, now the property of the State of Virginia," upon the condition and limitation therein expressed. By the 9th section, commissioners are appointed, who are authorized to act in conjunction with a like number of commissioners on behalf of West Virginia should they be appointed, "whose duty it shall be, to offer the benefits of this charter for the acceptance of capitalists, so as to secure the speediest and best construction, equipment and operation of said railroad." To this end the commissioners were

662 authorized to contract with any parties who shall *give the best terms, and most satisfactory assurances of capacity, and responsibility for the undertaking, &c. This act was not carried into effect. And at the next session, March the 1st, 1867, the Legislature passed "an act to provide for the completion of a line or lines of railroad, from the waters of the Chesapeake to the Ohio." Sess. Acts of 1866-'7, chap. 280, p. 705.

This act provides, or proposes, several plans or methods for the accomplishment of this purpose. One is contingent upon the organization of the Covington and Ohio Railroad Company, under the charter granted by the act of February 26th, 1866. And when that was done, to authorize it to consolidate with various other railroad companies, or one or more of them: in which event the consolidated company is to be known as the Chesapeake and Ohio Railroad Company, and invested "with all the rights, privileges, franchises and property, which may have been invested in either company prior to the act of consolidation." It also provides that if the Chesapeake and Ohio Railroad Company should refuse to consolidate with the Norfolk and Petersburg and Southside Railroad companies upon application, that those companies may consolidate, and be known as the Norfolk, Petersburg and Covington Railroad Company, and have the privilege of extending their road to Covington, &c. And it makes various provisions affecting the rights and privileges of that company, and in relation to its organization. These provisions of the act were not carried into effect. But the plan proposed by the 15th section was.

That section provides, "that the Virginia Central Railroad Company may contract with the Covington and Ohio railroad commissioners for the construction of the railroad from Covington to the Ohio river; and in the event such contract be made, the said Virginia Central Railroad Company shall be known as the Chesapeake and Ohio Railroad

663 Company, and shall be entitled to all the benefits of the charter of the Covington and Ohio Railroad, and to all the rights, interests and privileges, which by this act are conferred upon the Chesapeake and Ohio Railroad Company, when organized." And the record shows that, on the 31st of August 1868, the Covington and

Ohio railroad commissioners, on behalf of the State of Virginia and West Virginia, entered into a contract with the Virginia Central Railroad Company, by which that company undertook to construct the railroad from Covington to the Ohio river, and thereby, and by virtue of the said 15th section, took the name of the Chesapeake and Ohio Railroad Company, and became entitled to all the benefits of the charter of the Covington and Ohio railroad, and to all the rights, interests and privileges, of the Chesapeake and Ohio Railroad Company. We are of opinion, therefore, that the Chesapeake and Ohio Railroad Company is a continuation of the Virginia Central Railroad Company, with additional franchises, under a new corporate name; and consequently, that in every point of view the third instruction was erroneous.

The fourth instruction is, "If the jury believe from the evidence, that the contract with the railway company was to carry the plaintiff as a passenger with her baggage, then the plaintiff is not entitled to recover under the pleadings in this action." As has already been said, the plaintiff in this action, has not declared upon a contract, but upon the common law obligation of the public carrier. It was only necessary to allege the delivery of the goods to the carrier, to be carried by them from Richmond to the White Sulphur Springs, and that the same were received and accepted by the carrier, to show the common law obligation. The common law upon the facts alleged, imposes the duty, for the breach of which the carrier is liable to the shipper.

These facts are sufficiently set out; and they are sufficient to fix the liability of the carrier, if the proof corresponds.

664 *But the allegata and the probata must agree. The proof is that the trunk with its contents, was delivered to, and accepted by the carrier, to be carried to the White Sulphur Springs. But it shows in addition, that the plaintiff went herself as a passenger, and paid for a through ticket to the White Sulphur Springs; and that this trunk contained her wearing apparel, and was taken as a part of her baggage.

We are of opinion that the obligation of the public carrier to carry safely and deliver the trunk at the White Sulphur Springs was the same, whether the plaintiff was a passenger or not. It is an elementary principle of law that the carriers of passengers are liable for their ordinary baggage as common carriers. 2 Redf. on Carriers, p. 37, § 155. So that it was not material, in order to fix the liability upon the carrier, to allege that the plaintiff went as a passenger and that the trunk was taken as part of her baggage. There is no disagreement between the proof and the allegation. And we are of opinion, therefore, that this instruction was erroneous, and ought not to have been given to the jury.

But although these several instructions were upon points vital to the plaintiff's action, yet if upon the whole case it is evident that, upon other grounds, the plaintiff

could not maintain her action, the judgment ought not to be reversed. And such is the case, if it be true, as contended by defendant's counsel, that the continuity of the bailment was broken by the plaintiff removing her trunks from the custody of the company at Covington, and taking charge of them herself. Or if the other proposition be true, that the railroad company was only liable for losses sustained on their part of the line. These are interesting questions, and deserve a careful consideration.

In relation to the first position, the proof is, that through passengers to the White Sulphur Springs were allowed to remain all night at Covington, at pleasure, 665 *without forfeiting their passage, and were not obliged to stop at any particular hotel. If the through passenger was allowed to remain all night in Covington, at his option, without forfeiting his passage as incident to it, he was entitled to retain his baggage. And it being sent to his lodgings did not break the continuity of the bailment so as to release the carrier from his original undertaking to deliver it safely at the White Sulphur Springs, if the same was returned to the agent in proper time the next day, to be conveyed with the passenger to the place of its destination. If there had been a loss of the trunk, or any of its contents, while out of the agent's possession, and while in charge of the owner, or the hotel keeper, it is true the carrier would not be responsible. But that is not pretended. And the passenger, having the privilege of lying over for a night at Covington, without impairing the obligation of the carrier to carry him through the next day, he had an implied right to retain his baggage, and the obligation of the carriers, to carry it through the next day when delivered to them, was the same it was to carry the passenger. If the obligation had been to carry by rail to the White Sulphur Springs, and the passenger had the privilege to stop for a night by the way, and to take a train the next day, it is very clear that the responsibility of delivering the passenger and her baggage at the White Sulphur Springs would not be relieved by the passenger availing herself of the privilege of stopping for a night by the way. And the transportation being by rail to Covington, and thence by stage to the White Sulphur Springs, could make no difference as to the obligation of the company, if it was their undertaking to deliver the passenger and her baggage safely at the White Sulphur Springs. Was that their undertaking we will now proceed to enquire.

"It is quite clear, (says Mr. Justice Story,) that a carrier may contract to transport beyond his own line, and may make connecting lines his agents, and thus 666 *become responsible to the owner of merchandise for its loss, at any period, or at any place, while it is in transit." Story on Bailment, § 588, and cases cited, English and American. And Mr. Redfield says: "It has generally been considered, both in this country and in the English

courts, that receiving goods destined beyond the terminus of the particular railway, and accepting the carriage through, and giving a ticket or check through, does import an undertaking to carry through; and that this contract is binding upon the company. Whether such contract exists, is regarded as a matter to be determined from all the facts and attending circumstances of the case, and will more generally be an inference for the jury than the court. 2 Redf. on Railw. p. 109, 110, and cases cited. Now let us apply these principles.

At the time of the alleged grievances, the Virginia Central railway was an unfinished road. Its cars were running west only as far as Covington, some twenty-five miles short of the White Sulphur. But by an act passed the 19th of April 1867, they were authorized to lay down the superstructure, and to do all other work necessary for bringing into use the Covington and Ohio road between Covington and the Alleghany tunnel, near the White Sulphur Springs. And were to have possession and use of the same, and of all the works connected therewith, until required to surrender, if found desirable, to effect a contract for building the part of the road lying in West Virginia. And in that case their cost, in bringing the section of the road aforesaid into operation, was to be refunded. But as we have seen, by the contract of August 31st, 1868, some fifteen days after the plaintiff purchased from them a through ticket, from Richmond to the White Sulphur Springs, they acquired the right to the whole line of railroad from Covington, passing by the White Sulphur Springs, to the Ohio. It was undoubtedly of great importance to this company to provide temporarily the means of
667 transportation from *Covington to the White Sulphur Springs, the great point of attraction, until this unfinished part of their road was put in running order, and to furnish the best accommodations and facilities for reaching the other mineral springs, from different stations on their road, so as to invite and secure this important travel.

Accordingly we find that they entered into a written contract with James A. Trotter & Bro., stage proprietors, by which they held them bound, at all times to furnish a sufficient number of substantial and suitable coaches to accommodate all the travel which might be brought by the railway to the western terminus of their road, as well as to the other stations on the road named in the contract. They bound them to carry their passengers' baggage, free of charge within a prescribed limit, and for extra baggage limited them as to their charges. They limited them as to the number of passengers to be carried on each coach, and reserved to themselves the privilege of dissolving the contract, in effect, at pleasure, and of employing other agencies for this service. It was the evident intention of the parties, that all the railroad travel to the places designated, should be transported by the Trotter line of stages; and if necessary

to prevent and put down competition, the railway company was to defray two-thirds of the expense incurred. And the stage company was to have an agreed proportion of the receipts on all through travel. And with regard to casualties, losses, &c., it was stipulated as follows: "It is distinctly understood and agreed between the respective parties to this contract, that each shall be solely and separately responsible for all casualties (losses, &c.) which may occur on their respective portions of the aforesaid lines of travel, and if either of the parties should be held responsible for any loss, damage or injury occurring on any part of the aforesaid lines of travel, owned by the other, such responsibility shall be discharged by the party on whose lines
668 the loss, *damage or injury occurred."

And it is further provided, that a bond for \$20,000 dollars, with approved security, shall be given by James A. Trotter & Bro. to the Virginia Central Railroad Company, conditioned for the faithful performance of their agreement.

The railway company having thus provided for the transportation of passengers, with their baggage, from the terminus of their road to the White Sulphur Springs, on the 15th of August 1868, sold the plaintiff a through ticket from Richmond to the White Sulphur Springs; received pay from her for the through route; and gave checks for her baggage, indicating that it was to be carried through to the White Sulphur Springs. The plaintiff's trunks were carried safely as far as Covington, and were then put in charge of the stage agent, who received from the plaintiff her checks for them, before she left the railroad car. One of the trunks containing the plaintiff's wearing apparel, was never delivered to her at the White Sulphur Springs, and is lost to her. We think the undertaking was, by the railway company, to deliver safely the plaintiff and her baggage, at the White Sulphur Springs. The ticket issued to the plaintiff has counterparts on the same card, one headed "Trotter Stage Line," and just below, "Issued by Virginia Central Railroad." On the other part is headed, "Virginia Central railroad," and just below that, as below the heading on the other part, is, "Issued by Virginia Central Railroad." Both parts are signed by "J. F. Netherland, Gen'l Ticket Agent," who is proved to be the ticket agent of the railroad. Upon the margin of each part is printed, "Richmond to White Sulphur Springs." What does that import? It can import nothing else, than that the holder is entitled to transportation from Richmond to the White Sulphur Springs. By whom? By Trotter & Bro. Both parts import an entire undertaking from Richmond to the White Sulphur. That could hardly have been
669 undertaken by Trotter & *Bro. But in truth, they undertake nothing. The ticket in neither of its parts is issued by them. Both parts profess to be issued by the railway company. It is not signed by Trotter & Bro., or their agents. But both

parts are signed by the railway general ticket agent. There is nothing upon the ticket, which creates any obligation on the part of Trotter & Bro., to the holder. The words "Trotter Stage Line," at the top of the ticket, can only mean, that that agency is employed by the railway company, to fulfil their obligation to convey the passenger and her baggage on the stage part of the line, to the White Sulphur Springs.

The ticket, therefore, imports no contract between the plaintiff and Trotter & Bro. There is nothing upon it to bind them. But it evidences an undertaking on the part of the railway company alone, to convey the plaintiff with her baggage, to the White Sulphur Springs. And this conclusion is supported and confirmed by the checks which were given by the railway company, clearly indicating an undertaking to deliver the baggage at the White Sulphur Springs. It was argued by counsel, that checks cannot be relied on as evidence, for such a purpose. But we think that upon reason and authority both, they are evidence of the company's undertaking. In *Dill v. Railway Co.*, it was held that the check stands in the place of a bill of lading. 7 Rich. R., 158; 2 Redf. on Railway.

The stipulation in the contract of the railway company with the stage company, that each party should be liable for losses upon their respective lines, does not militate against the conclusions to be drawn from the foregoing evidence. It was a contract between themselves, and not binding upon the plaintiff, who was no party to it. And the railway company required of the stage company ample security against loss, if they were held responsible for losses occurring on the stage part of the line. When

we consider what was substantially, 670 *and in effect, the contract between these parties, we can but regard it as constituting Trotter & Bro., if not partners, agents of the railway company in this business; and thus viewed, it is strongly confirmatory of the inferences deducible from the other facts already commented on. We are of opinion, therefore, that the railway company, undertook, undoubtedly, to carry the plaintiff and her baggage to the White Sulphur Springs; and that they are responsible for the loss of it on any part of the route, unless relieved from the responsibility by the notice printed on the ticket.

If it was the undertaking of the railway company, as has been shown, to carry safely the plaintiff and her baggage to the White Sulphur Springs, does not the law attach responsibility for the failure to deliver the baggage at that place? The undertaking of a common carrier to transport the goods to a particular destination, necessarily includes the duty of delivering them in safety; and his obligation is to deliver safely at all events, except the goods be lost by the act of God, or the public enemy. Angell on Carriers, p. 287, § 282. Carriers of passengers are not held responsible to the same extent with common carriers, except

in regard to the baggage. 2 Greenl. on Evid. p. 194, § 221. The carrier is only answerable for an injury to the passenger, where there has been some want of care or skill, but he must answer for the loss of the goods, though it happened without his fault. Ib. note 5. Is not the attempt, then, of the railway company to shift the responsibility from their shoulders, and to lay it upon the stage company, repugnant to the obligation they assumed. Suppose the railway company had put a line of stages of their own between Covington and the White Sulphur Springs to convey their passengers with their baggage from the terminus of the railroad to the White Sulphur, and caused a notice to be printed on the ticket to this

effect: "Responsible for safety of 671 person and baggage only *upon the railroad part of the line;" such a notice, although brought home to the passenger, would be invalid unless he assented to it. And even if an express contract were proved, to release the carrier from responsibility on the stage part of the line, he would still be liable for negligence, such as is proved in this case with regard to the stage agent. For the trunk was lost by his gross negligence in not having it removed from the Sweet Springs stage to the White Sulphur stage, after his attention had been specially called to it by the plaintiff. But if such a notice would be unavailing to relieve the carriers from responsibility if their own stages were put upon the line, is that responsibility any the less because they have employed the agency of Trotter & Bro., with their coaches, to carry through the railway company's passengers and their baggage? Qui facit per alium, facit per se. Redfield goes farther. He says, "in the case of a common carrier of goods, he is liable for the act of all the servants of his sub-contractor." 2 Redf. on Railw. p. 116.

When the railway company undertook to carry passengers and their baggage through to the White Sulphur Springs, and received compensation for the whole route, can they limit their responsibility, and say to the passenger, although we have undertaken to carry you and your baggage safely to the White Sulphur Springs, yet if we fail in it, and your baggage is lost on the stage part of the line, you must look to our agent for redress, and not to us. Although we are bound to deliver you and your baggage safely at the White Sulphur Springs, if we fail to fulfil our obligation, and your baggage is lost on the stage part of the line, we will not be bound to make it good; but you must look to our agent. It would seem that such a qualification and limitation of their responsibility would be repugnant to, and incompatible with, their express obligation.

Although the railway company have 672 a contract with *Trotter & Bro., by which the latter are bound to the former to be responsible for, and to pay for all losses occurring upon the stage part of the line, the passenger has no such contract

with them. And is it competent for the railway company to release themselves from this responsibility resulting from this undertaking to carry the passenger through to the White Sulphur Springs, by a notice to the passenger that they will not be responsible for any loss sustained on the stage part of the route? It might with as much propriety be said, that a stage proprietor, or any public carrier, would be relieved from responsibility by a notice to the passenger that he would not be responsible for baggage. But it seems to be well settled by American decisions, that a stage coach proprietor, or other carrier, cannot be relieved from his common law responsibility by a general notice that "Baggage of passengers is at the risk of the owners." Angell's Law of Carriers, § 238, and seq. Suppose Trotter & Bro. had failed to furnish a stage coach at Covington to carry her through, and she had been detained there for want of a conveyance for several days, by which she had sustained heavy losses, who would have been responsible to her upon this contract? Trotter & Bro. or the railway company? Can the railway company, by a general notice, oblige the passenger to look to a party with whom she has no contract, and no connection of any sort, who is unknown to her, and who may be insolvent, for any non-compliance with the undertaking of the railway company, or for a loss of her baggage, which they had undertaken to convey to the White Sulphur Springs? We think not. Such a notice is repugnant to their express undertaking, from which they could not be released, except by the act of the party to whom the performance was due. The notice, therefore, being incompatible with the obligation of the company, is void, unless assented to by the passenger.

673 But if this conclusion was not warranted by the current *of English and American decisions, and by elementary principles, as we believe it to be, it seems to be well settled, that the notice, in order to be availing, must be actual. The knowledge of it must have been brought home to the plaintiff: and that is a question of fact for the jury. "The mere advertisement by the carrier of the terms and limitations of his responsibility, however public it may be, will have no effect, except upon those to whom knowledge of it is directly or constructively brought home." It will not be sufficient that the notice is publicly posted up in the carrier's office in writing or in print, unless the party who is to be affected by it is proved to have read it. The case of *Mary Brown v. The Eastern Railroad Company*, 11 Cush. R., 97, which was decided by the Supreme Court of Massachusetts, was very much like this case. The delivery of two trunks in that case, and the non-delivery of one of them at the place of destination, the one containing the wearing apparel of plaintiff, and a demand therefor and its value, were fully proved. The plaintiff wished to go from Boston to Freeport, in Maine. Her

trunks were delivered to the baggage master of the railroad company and checks demanded. He said he was out of checks, but marked the trunks "Freeport." She inquired at the ticket office of the defendants in Boston, for a ticket to Freeport, and was told that no tickets were sold to Freeport, but that she could buy a ticket to Brunswick, (a place beyond Freeport), and get out at Freeport; and that one dollar would be refunded to her. She paid \$3 for a ticket, which had printed on its face, "Not transferable. This ticket entitles to a passage," &c. And on its back the following words: "Notice—Passengers are not allowed to take, nor will these companies be responsible for, baggage if it exceed fifty dollars in value, unless freight on any addition thereto be paid in advance; and this notice forms part of all contracts for transportation of passengers and their

674 effects." *There was a break in the line of railroads, of about one mile in Portland, and it was the practice of the defendants to transport over that break the baggage of passengers for Brunswick, but not for Freeport. There was no evidence that the plaintiff's baggage was carried over this break at all; or that she had any notice or knowledge of this practice. Between Boston and Portland, the plaintiff called the attention of a companion to the words on the back of the ticket. On the trial in the court of Common Pleas, the judge ruled, that taking the ticket raised no legal presumption that the plaintiff read the printed matter; that it was a question of fact whether she knew the contents before she started on her journey; and that if she did not read it until she was on her way, her rights were not affected by it; and that if the contract was for a passage to Freeport, or to Brunswick with permission to get out at Freeport, the railroad was bound to transport her baggage across said break, unless notice was given that they should not do so. Upon an appeal to the Supreme court of the State, this ruling of the court of Common Pleas was affirmed. The court says in the opinion: "A mere passenger ticket in the form in general use, would not naturally induce to the reading of its contents. The party receiving it might well suppose that it was a mere check signifying that the party had paid his passage to the place indicated on his ticket."

Usually the ticket office is opened but a short time before the train leaves. And the ticket has to be exhibited to the baggage master before he will check for the baggage. So that the passenger has scarcely any time to read the ticket before the train leaves. In general he only asks for a through ticket to the place of his destination, and relies upon the agent to give him the proper ticket. And if the passenger had time to look at it for an instant in this case, she would have seen that it was a ticket issued by the railway from 675 Richmond to the White *Sulphur Springs. She would hand it to the porter, or a friend, to get checks for her

baggage, while she would look out for a seat. It is returned with the checks, upon which are the letters W. S. S. She feels assured that all is right; and the next moment the train is moving. If she reads what is on the ticket at all, it is because she has nothing else to do, or from mere curiosity. And she reads for the first time, "Responsibility for safety of person or baggage, on each portion of the route, confined to the proprietors of that portion alone." She would say to herself that was not my understanding when I asked for a through ticket, and when I paid for it to the railroad agent, and when they gave me a check for my baggage, which by the letters on it indicated, that they undertook to carry it through to the White Sulphur Springs. But the train has been bearing her away from Richmond with the speed of twenty miles an hour, and it is too late to turn back.

If the railway company could relieve themselves from the legal responsibilities of their undertaking by such a notice, they should bring home the notice to the passenger before he pays for his ticket; at all events, in time for him to have his baggage removed from the car before the train left. It would seem reasonable, if it were a question of the first impression, to require the notice to be given before the money is paid. Mr. Justice Story says, "it has been said, if coach proprietors wish honestly to limit their responsibility, they ought to announce their terms to every individual who applies at their office, and at the same time place in his hands a printed paper specifying the precise extent of their engagement." Story on Contracts, § 761, p. 230. The question is usually asked of the ticket agent, Can I get a through ticket to such a place? The answer is, Yes. What is the price? The agent answers so much. The money is handed him, and then he issues the ticket. He never lets the ticket go out of his hand until he gets the money:

676 and that *completes the contract. It would seem that it is too late for him then to impose limitations and restrictions upon his implied or express undertaking, of which no intimation was given before the contract was closed.

At all events it seems to be well settled, that a carrier cannot be released from the legal responsibilities of his undertaking, unless the knowledge of the notice is brought home to the passenger in time to leave the car, and have his baggage removed before the train leaves. The mere delivery of the ticket to the passenger, with the notice printed upon its back, or on its face, under the usually attending circumstances which have been detailed, and which are of public notoriety, is not sufficient to raise the legal presumption of actual notice to the passenger before the train leaves. "Such notices by printed cards, or inserted in newspapers, are not sufficient unless it be shown that knowledge of the contents of such notices came to the party; and this is always a question for the jury." 2 Redf.

on Railw. p. 83; Clayton v. Hunt, 3 Campb. R. 27; Rowley v. Horne, 3 Bing. R. 2. Whether the delivery of the ticket to the plaintiff, under the attending circumstances, brought to the knowledge of the plaintiff the notice printed on it before the train left, is a question of fact for the jury, and consequently it is not in the power of the court to say that upon this ground the plaintiff could not maintain her action. We deem it unnecessary to decide the questions raised by the other bills of exception, as they can hardly arise again. We think that the cause should go back to the Circuit court for a new trial to be had therein.

Judgment reversed.

Note.—Before this opinion was delivered, and before the opinion of the court 677 was known, the defendants in *error, by their counsel, asked leave to withdraw the point, which had been made in argument, that they were not liable for the acts of the Virginia Central Railroad, saying that they would prefer to lose the case than to have that point decided in their favor.

678

*Walker v. Herring.

January Term, 1872, Richmond.

[8 Am. Rep. 616.]

1. **Statute of Frauds—Application of.**—The statute of frauds and perjuries applies to a contract between a purchaser of real estate and a third person for an interest in the property.
2. **Auctioneers—Agent of Seller and Purchaser.**—An auctioneer selling real estate at auction, is the agent of both vendor and purchaser, and his writing, at the time, the name of the purchaser as such, to the written terms of sale binds the purchaser.
3. **Same—Signing after Completion of Sale—Quære.**—**QUÆRE:** If the auctioneer can bind the purchaser at auction of real estate, by subscribing his name to the terms of sale, after the sale is completed, and it seems he cannot.
4. **Same—Signing by Third Party—Case at Bar.**—An auctioneer conducting a sale of real estate, writes the name of W. as the purchaser. His partner, who was not present at the sale, without any communication with, or authority from H. on the day after the sale writes the name of H. as a joint purchaser with W. The partner had no authority to write the name of H. and H is not bound by it.

This was an action of trespass on the case in the Circuit court of the city of Richmond, brought by Isaac N. Walker against George I. Herring, to recover Herring's portion of the loss sustained upon the resale of a house and lot which the plaintiff alleged they had jointly purchased.

Upon the trial of the cause, it was proved that Messrs. Goddin and Crump, trustees in a deed of trust, offered for sale at auction, a house and lot in the city of Richmond, which was struck off to Isaac N. Walker, the plaintiff, at \$5,025; and his name was entered at the time upon the memorandum of sale, by the auctioneer. In fact, how-

ever, Walker was bidding for himself and *Herring. The contract was written out on the sales-book of the auctioneers, and the sale was there written as made to Walker; but the day after the sale, one of the firm, who had not been at the sale, nor had had any communication with Herring, added on the sales-book, Herring's name in pencil, to Walker's, as purchaser.

Walker paid one-half of the cash payment, and executed his notes for one-half of the deferred payments; but Herring paid nothing, nor did he execute notes, or in any way commit himself in writing as a purchaser.

Herring not doing anything to complete the purchase on his part, the trustees again offered the house and lot for sale at auction, when it was sold for \$4,750; there being a loss upon the resale, including expenses of sale, of \$512.55. This Walker paid; and then brought this suit to recover from Herring his share of it. It appears that the second purchaser making some objection to the title, the trustees, after the second sale, made a deed for the property to Walker, and he conveyed it with general warranty to the purchaser.

The defendant demurred to the evidence; and the court sustained the demurrer, and rendered a judgment in his favor. And thereupon Walker took the case to the District court of Appeals at Williamsburg; where the judgment was affirmed; and he then brought it by supersedeas to this court.

A. A. Smith, for the appellant.

Steger and Sands, for the appellee.

STAPLES, J. This is a writ of error to a judgment of the District court at Williamsburg, affirming a judgment of the Circuit court of the city of Richmond. The action was instituted to recover one-half the amount paid by the plaintiff in error, who was plaintiff in the court below, for the loss and expense arising from a resale of a house and lot in the city of Richmond.

680 The plaintiff *alleges an agreement between himself and the defendant, by which they were to become the joint and equal purchasers of this property; that in execution of this agreement he bid for and became the purchaser, and fully complied with all the terms and conditions of sale, so far as was incumbent upon him; but that the defendant refused to perform his part of the contract; in consequence of which it became necessary to resell the house and lot; that the loss and expense attending this resale amounted to a considerable sum, which the plaintiff had paid to the owners of the property; and for one moiety of which defendant was responsible to him.

That the contract as stated, is within the statute of frauds and perjuries is well settled, upon the authority of numerous cases. The decision of this court in *Henderson v. Hudson*, 1 Munf. 510, is directly in point. In that case Chancellor Wythe decided that

the statute applied to contracts, and actions upon them, between the buyers and sellers of land; and not to a contract between the purchaser and a third person, that such person shall be admitted as a partner in the purchase. This court, however, reversed the decision. Judge Fleming, with whom the other judges concurred, said that although the contract was not between the buyer and seller, yet it was within the mischief intended to be guarded against by the statute, which being a remedial one, and intended to prevent a growing evil, ought to be liberally construed. The cases of *Cooke v. Toombs*, 2 Anstruther's R. 429; *Henley v. Brown*, 1 Stewart (Alab.) R. 144; *Parker's heirs v. Bodley*, 4 Bibb's R. 102; affirm the same doctrines. It is true that in *Henderson v. Hudson*, the application was for a conveyance of land by a person claiming to be a purchaser, but it is clear that the same principles apply whether the vendor or vendee be the party complaining; whether the proceeding be by bill in equity or by action at law upon the contract.

681 The next and only question to be considered is, *whether the alleged contract is evidenced by a writing sufficient to take the case out of the operation of the statute of frauds and perjuries. It is now well established, that in sales of real estate, at public auction, the auctioneer conducting the sale is to be regarded as the agent of both vendor and purchaser; and a memorandum of the terms and conditions of sale signed by him, is a sufficient writing within the statute.

Does this case come within the operation of this principle. It appears that at the time of the sale, or immediately thereafter, a memorandum was made by Messrs. Goddin & Apperson, the auctioneers, in which Isaac W. Walker, the plaintiff, is stated to be the purchaser. Subsequently, the terms were written out upon the sales books of said auctioneers, and the name of the plaintiff again recorded as the purchaser. The day after the sale, the name of the defendant was added to the statement on the sales book, in pencil, as a purchaser also. This addition, however was not made by the auctioneers, but by a member of the firm who was not present at the sale, and who had no information of its terms, or the purchaser, except what was derived from others. It does not appear at whose instance he made the addition; certainly not that of the defendant himself; as it is in proof that the person making the entry never had any conversation with the defendant on the subject of the sale. It will thus be perceived that the memorandum, so far as it affects the defendant, was not made contemporaneously with the sale, nor was it made by the persons conducting it; but by one who was absent when it took place, and who was in no manner authorized by the defendant to attach his signature to any writing or contract whatsoever.

There is no express decision upon the point by a Virginia court; but in a careful

examination of authorities elsewhere I have found no case which holds that a memorandum drawn up and signed by the auctioneer, *long after the sale is completed and ended, is to be regarded as a writing within the meaning of the statute of frauds and perjuries so as to bind a purchaser at such sale. With regard to the seller the rule may be different. The auctioneer is his agent, selected and remunerated by him, acting in his interests, and in a measure subservient to his wishes. The agency may be justly regarded as continuing until the close of the whole transaction. The purchaser, on the other hand, has nothing to do with the selection or the employment of the auctioneer. The agency created by him commences with the bidding and terminates when the sale is concluded.

In *McComb v. Wright*, 4 John. Ch. R. 659, Chancellor Kent uses the following language: "It appears now to be settled by the English authorities, that the auctioneer is a competent agent to sign for the purchaser, whether a sale of lands or goods at auction, and the insertion of his name as the highest bidder in the memorandum by the auctioneer, immediately on receiving his bid and striking down the hammer, is a signing within the statute as to the purchaser." In support of this position he cites many cases, English and American, and in all of them the immediate signing of the memorandum of the terms, and of the name of the purchaser is prominently mentioned as one of the material elements of a valid contract.

In *Smith v. Arnold*, 5 Mason's C. C. R. 414, Mr. Justice Story says, "the memorandum of the auctioneer to bind the purchaser must be contemporaneous with the sale."

In *Gill v. Bicknell*, 2 Cush. R. 355, Judge Shaw says, "the name of the bidder must be entered by the auctioneer, or by his clerk under his direction, on the spot."

In the case of *Horton v. McCarty*, 53 Maine R. 394, Kent, J., says, "The law in allowing the auctioneer to act in the nearly unprecedented relation of agent for both parties, imposes a qualification not applied to the *usual cases of agency, and requires that the single act for which, almost from necessity, he is authorized to perform for the buyer, shall be done at the time of sale, and before the termination of the proceedings."

The case of *Mews v. Carr*, 1 Hurlst. & Norm., 1 Excheq. R. 484, presents a very striking illustration of this rule. There the plaintiff put up for sale by public auction, a quantity of lumber, several bills of which remained unsold. A few days afterwards the defendant called on the auctioneer, and selected from the catalogue two of the unsold lots, which he agreed to purchase; and thereupon the auctioneer, in the presence of the defendant, wrote his name on the lists opposite the lots so purchased. Pollock, Ch. B., said, "no doubt an auctioneer at the sale is agent for both seller and buyer, so as to bind them by his sig-

nature; but the moment the sale is over, the same principle does not apply. and the auctioneer is no longer the agent of both parties, but of the seller only." *Buckmaster v. Harrop*, 13 Vesey R. 456; *Entz v. Mills & Beach*, 1 McMul. R. 454, are to the same effect.

Tested by these principles, it is manifest that the contract here cannot be enforced. It does not appear that the auctioneers were even informed at the time of the sale, or during the day, that the defendant was a bidder, or in any manner interested in the purchase. The entry of the defendant's name was made by a member of the firm, who was not present at the sale, and who was neither expressly nor impliedly authorized by defendant to act as his agent, or bind him in any manner whatever.

The principle of all the cases is, that the auctioneer at the sale is the agent; that the purchaser by the act of bidding calls on him or his clerk to put down his name as the purchaser. The entry being made in his presence, is presumed to be made with his sanction, and to indicate his approval of the terms thus written down. In

684 *such case there is but little danger of mistake or fraud. But if a third person, not present, or even the auctioneers, may afterwards add the name of another purchaser, they may strike out the name already inserted, and substitute that of a new and different purchaser. They may defeat rights already vested. They may impose liabilities never contracted. The party to be charged may thus be held liable by a writing he never saw, signed by an agent of whom he never heard. For as the memorandum in these cases is the only evidence of the contract, no parol testimony can be received to show that the terms had not been truly and correctly stated. The rule applicable to auctioneers' sales was not established without strong opposition from able jurists. Every principle of justice and sound policy requires that the limitation thrown around them should be rigidly adhered to by the courts.

There are other questions presented by the record; but it is unnecessary to notice them. For the reasons stated, I am of opinion the judgment of the District court should be affirmed.

The other judges concurred in the opinion of Staples, J.

Judgment affirmed.

685 *Owners of Steamboat Wenonah v. Bragdon.

January Term, 1872, Richmond.

1. *Statutes—Construction of.*—The act Code, edition of 1860, ch. 95, entitled "of harbor masters and dock masters," as amended by the act of February 16, 1867, Sess. Acts 1866-'67, ch. 209, p. 648, is to be construed as one act; and § 17 of ch. 95 of the Code, applies to the whole act so amended.

2. *Same—Same.*—The words "bay or river craft, or other boat," in § 17, ch. 95, of the Code, edition of 1860, embraces steamboats of 500 tons burthen.

3. **Same—Same—What Embraced in "Craft."**—The word craft, as used in this § 17, includes all kinds of sailing vessels.

4. **Code of 1849—Rule of Construction.***—The established rule of construction of the Code of 1849 is, that an intention not to change the former law will be presumed, unless a contrary intention plainly appears.

This was an action of assumpsit in the Corporation court of Fredericksburg, brought in August 1870, by Charles E. Bragdon, harbor master of the port of Fredericksburg, against Robert A. Taylor and four others, owners of the steamer Wenonah, to recover the amount of fees which he claimed to be due to him from the owners of said steamer. The cause came on for trial on the 16th of February 1871, when there was a verdict and judgment for the plaintiff. And thereupon the defendants applied to this court for a supersedeas; which was allowed. The case is stated in the opinion of the court.

Montague and Little, for the appellants.

Sener and Wallace, for the appellee.

686 *MONCURE, P., delivered the opinion of the court.

This is a supersedeas to a judgment of the corporation court of Fredericksburg, obtained by the plaintiff in error, Bragdon, against the defendants in error, Taylor and others, owners of the steamboat Wenonah, for the amount of certain fees claimed to be due by the said owners to the said Bragdon, as harbor master of the port of Fredericksburg. The action in which the said judgment was obtained, was an action of assumpsit. The declaration contained only the common counts. In the first count, after setting out the considerations of work and labor done, goods sold and delivered, money lent and advanced, and money had and received, in the common form, a special consideration is set out thus: "And also in the further sum of \$444, due on the day and year aforesaid, to the said Bragdon, as harbor master's fees, from the said owners of the steamboat 'Wenonah,' as by statute and act of assembly made and provided, and enacted February 16th, 1867; said Bragdon being the legally appointed and qualified harbor master of the port of Fredericksburg, and performing all the duties of the same during the time for which said fees are charged, and said steamer being, during the time for which said fees are charged, a steamer plying regularly between the port of Fredericksburg, Va., and the port of Baltimore city, Md., and of 500 tons or more

*Code—Rule of Construction.—In construing the Code, the rule of construction is that the old law was not intended to be altered unless such intention plainly appears. *Parramore v. Taylor*, 11 Gratt. 220.

The principal case was cited as authority for this proposition in *Durrett v. Davis*, 24 Gratt. 315; *Thomas v. Lewis*, 89 Va. 66, 15 S. E. Rep. 389; *Harrison v. Wissler*, 98 Va. 601, 36 S. E. Rep. 982.

burden; on which accounts said defendants are liable to pay to the plaintiff the said sum of \$444." Such was the amount, and such the consideration of the claim, as specially stated in the declaration. The only plea to the action was the general issue of non-assumpsit, on which there were verdict and judgment for the amount of the claim, \$444, with interest thereon from the 31st day of August 1870, until paid and costs. During the progress of the trial, the court refused to give several instructions asked for by the defendants in the action; and after the verdict was rendered, the court overruled the motion of the defendants *to set it aside. To these rulings of the court a bill of exceptions was taken, in which the facts proved on the trial were certified. The purport of which certificate, so far as it is deemed material to state the same, is substantially as follows:

The plaintiff, to support the issue joined, proved that he was the harbor master, duly appointed by the corporation court for the town of Fredericksburg; that he had qualified under the acts of the Virginia Legislature, and had discharged the duties of that office for the period covered by his bill of particulars filed with his declaration, to wit: from the 16th day of March 1867, to the 20th day of March 1869, and from the 16th day of March 1870, to the 31st day of August 1870; that the steamer Wenonah, owned by the defendants, plied regularly, during that period, between the city of Baltimore in the State of Maryland, and the town of Fredericksburg in the State of Virginia, and was of more than 500 tons burden; that all the wharves at Fredericksburg, on the Rappahannock river, which is navigable at the port of said town, belong to individuals, and it has always been the universal custom, within the memory of the witnesses, for vessels to land at any wharf they might choose, paying the owner wharfage therefor; that prior to the purchase by the defendants of the wharf where the steamer Wenonah landed in 1865, this custom had prevailed at that wharf; that since the late war very few vessels have come to Fredericksburg, the trade having been done principally by two steamboats, one of which was the Wenonah; each of said boats arriving weekly at said port; that the plaintiff had always kept the approach to the wharf open, rendering it unnecessary to be called upon to do so; that he had demanded of one of the owners of said steamer his legal fees, soon after the passage of the act of the Legislature hereafter mentioned, and payment was refused; that the said steamer arrived at the port of Fredericksburg from Baltimore,

688 *the number of times set out in the bill of particulars; that the said steamer was a common carrier of freight and passengers to and from Baltimore and Fredericksburg; its owners owning several wharves on the river, for which, except the one at Fredericksburg, they charged wharfage, the wharfage of that one having gone

to the account of freight; that the plaintiff had petitioned the Legislature to pass the act of March 1867, because the trade with Virginia, which was, prior to the war, carried on by vessels, was now almost entirely carried on by steamers; that some time during the year 1867 he notified the master of the Wenonah that he would claim harbor master's fees, and at the same time sent by said master a letter to that effect to Robert A. Taylor, one of the owners of said steamer.

The defendants, to maintain the issue on their part, proved, that in 1865, they, in conjunction with one Mason Weems, purchased, and had conveyed to them by deed from A. K. Phillips, a wharf in the town of Fredericksburg, which they have continued to own from that date, and still owned at the trial of the cause, on which they have spent a large amount in improvements, including a building erected thereon; that during the entire period for which harbor master's fees are charged in this cause, said steamer Wenonah was moored and made fast to said wharf, and to no other, at the town of Fredericksburg; that during the same period, and their entire ownership of the same, they have exercised complete and exclusive control of said wharf; that no other steamboats, vessels or craft of any kind, could or did occupy said wharf without their special permission, and no charge was ever made, or anything received, for such occupation, and but one instance proven at the trial in which it was ever so occupied; that no charge was ever made, or amount received, as wharfage, on any goods at said wharf, landed from or shipped by said steamer Wenonah, or any other steamboat, vessel or otherwise,

689 *and that said owners claimed said wharf as their private property, over which they exercised exclusive ownership; that no demand was ever made by the plaintiff for the fees named in his bill of particulars upon the master of the Wenonah, nor upon any of the other agents of said defendants, nor upon the defendants, save upon one of them, Robert A. Taylor, in the year 1867, who refused to pay the same, on the ground that the plaintiff had no right to them under the law; that one Dawes had been captain and master of said steamer from the year 1865 to the date of the trial, and that neither he nor the agent of the said defendants at Fredericksburg, nor any other agent or owner of said steamer, had ever called on said plaintiff to render any service as harbor master; and that, within the knowledge of said defendants and their agents, no services had ever been rendered to them by said harbor master as such.

The foregoing being all the material facts proved, the defendants prayed the court to instruct the jury as follows:

1. If the jury believe that the wharf to which the steamer Wenonah went and was made fast, during the time at which harbor master's fees are charged by the plaintiff, was during that time a private wharf, the said steamer is not liable to pay said fees,

and the jury should find for the defendants.

2. All acts of a State Legislature, regulating commerce between the States, and authorizing harbor masters to charge a fee on a steamboat plying between the ports of one State and the ports of another State, passed without the consent of the United States Congress, except what may be absolutely necessary for executing the State's inspection laws, are contrary to the United States constitution, and are therefore illegal and void.

3. All duties and charges on the tonnage of steamboats, carrying on commerce between one State and another State, authorized by the act of a State Legislature, 690 *are in contravention of the United States constitution, and are therefore void.

4. The act of the Virginia Assembly of 1866-67, ch. 209, enacting that harbor masters should be entitled to demand and receive the sum of four dollars on any steamer of five hundred tons burden or more, plying regularly between any ports of this State (other than Norfolk and Portsmouth) and those of other States, whether called on to perform any service or not, is in contravention of the United States constitution, in that it is an attempt to regulate commerce between the States, and is also a duty on tonnage, which is unconstitutional and void.

But the court refused to give the said instructions, and in their stead gave two others, which are identical with the second and third asked for by the defendants, omitting these words in the second, viz: "and authorizing harbor masters to charge a fee on a steamboat plying between the ports of one State and the ports of another State."

And thereupon, the plaintiff prayed the court to instruct the jury as follows:

1. If the jury believe from the evidence that the steamer Wenonah (during the time mentioned in the bill of particulars filed with the declaration) was a steamer plying regularly between the port of Fredericksburg and the port of Baltimore, in the State of Maryland, and that said steamer was of five hundred tons burden, then the harbor master of Fredericksburg is entitled to a fee of four dollars for each arrival of said steamer at the port of Fredericksburg.

2. It is a question of fact for the jury, whether the wharf at which the steamer Wenonah landed is a private or a public wharf.

Which instructions the court accordingly gave. And a verdict having been found for the plaintiff, and a motion to set it aside and grant a new trial having been 691 *made by the defendants, and overruled by the court, a bill of exceptions was taken by the defendants as aforesaid. A bill of exceptions was also taken by the plaintiff to a ruling of the court on the trial, but it is not material to be stated.

The plaintiff in the court below (the defendant in error here), claims to be entitled to his demand in this case under section 12

of chapter 95, of the Code of 1860, entitled "of harbor masters and dock masters," as amended by the act passed February 16, 1867, entitled "an act to amend and re-enact the 1st, 2d, 3d, 4th, 5th, 6th, 12th, 13th, and 15th sections of chapter 95, of the Code of 1860, concerning harbor masters and dock masters," Acts of Assembly 1866-'67, chapter 209, p. 648. The said section 12, as amended, provides, among other things, "that for every vessel arriving at any port other than Norfolk or Portsmouth, the harbor master shall be entitled to the following fees," viz: "For steamers plying regularly between any other ports of this State (except those of Norfolk and Portsmouth), and those of other States, if under 300 tons, two dollars; if 300 tons and under 500 tons, three dollars; and if 500 tons or more, four dollars."

On the other hand, the defendants in the court below (the plaintiffs in error here) insist, first, that they are exempt from liability for the said demand, even under the State law; the 17th section of said chapter 95 of the Code, expressly providing that, "Nothing in this chapter shall prevent any bay or river craft or other boat, from going to and anchoring at any private wharf, without fee to any harbor master or superintendent." And if the State law would make them liable, they insist, secondly, that it would contravene those provisions of the Constitution of the United States, or some of them, which declare that Congress shall have power "to regulate commerce with foreign nations, and among the several States," &c., Article 1, section 692 8, clause 3; that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except," &c., Id. section 10, clause 2; and that "no State shall, without the consent of Congress, lay any duty of tonnage," &c., Id. clause 3; and, therefore, that the State law, to that extent, would be null and void.

There can be no doubt but that the plaintiff is entitled to his demand according to his claim, unless the defendants can maintain the exemption which they claim under the State law itself, or else that that law is unconstitutional and void as aforesaid. And now let us enquire in the first place, whether the defendants are exempt from liability for the said demand under the Code, chapter 95, § 17, p. 489.

The counsel for the defendants rightly argued in this court, that chapter 95 of the Code is now to be read in connection with the amendatory act of February 16, 1867, as if they were, as in effect they are, one and the same act, all the amendments of the latter being considered as engrafted on the former. The amendatory act amends and re-enacts nine of the twenty sections of chapter 95, of the Code; but it neither amends nor repeals the 17th section of that chapter, which, therefore, still remains in full force and effect. So that we find, at or near the end of the chapter as it now stands, a section which declares, that "nothing in

this chapter shall prevent any bay or river craft or other boat, from going to, and anchoring at, any private wharf, without fee to any harbor master or superintendent." The plaintiff's demand is for fees as harbor master, under the 12th section of the chapter as amended, charged on account of the said steamer of the defendants, which, whenever it went to Fredericksburg, during the periods for which the said fees were charged, always went to and anchored at, or was fastened to, their own private wharf. And it is very clear that the defendants are exempt from this demand, if the said steamer be a "bay or river 693 craft *or other boat," within the meaning of the said 17th section. The question, therefore, comes down to this: Does the said steamer come within the meaning of the said section?

It is argued that it does not; 1st, because the words, "bay or river craft or other boat," refer only to small vessels, and do not embrace a vessel of the size of the said steamer; and, 2dly, because the 17th section should be read in connection with the sections among which it is immediately located; to wit: the 14th, 15th, 16th, and 18th sections, which, with the 17th section, are all arranged in the chapter under the heading, "Who to superintend county dock in Norfolk," and should be considered as referring, like its associates, only to vessels entering the dock in the city of Norfolk, or the port of said city.

As to the first of these two grounds, that "bay or river craft or other boat" refers only to small vessels. "Craft," we are told by lexicographers, is "a name now sometimes applied to all kinds of sailing vessels," though "formerly restricted to the smaller vessels." Worcester's Dictionary, in which Johnson is cited as authority. We cannot suppose that the Legislature, in thus securing to the owners of wharves the use of their property, free from the burden of harbor master's fees, intended to limit the right to small vessels, by the use of terms so vague. If these terms mean small vessels, how is the size of the vessel to be ascertained? Where is the line to be drawn? We think it much more reasonable to suppose, that the Legislature used the word "craft" in this instance, in its larger sense as meaning "all kinds of sailing vessels." But the words, "or other boat," are also used in the section, which are sufficient of themselves, to embrace a steamer of the size of the Wenonah. At all events we think a steamer of that size is embraced in all the words used in the section, taken together, as descriptive of the vessels referred to.

694 *As to the other ground, that the section refers only to vessels entering the county dock in the city of Norfolk, or the port of said city. We do not think there is any sufficient reason for giving it so limited a meaning, contrary to the proper import of the words used. The words of the section are general words, used without any limitation whatever. "Nothing in this

chapter;" thus embracing all the sections of the chapter, and not those only under the heading, "who to superintend county dock in Norfolk;" "shall prevent any bay or river craft or other boat from going to and anchoring at any private wharf, without fee to any harbor master or superintendent." The headings of the sections constitute, of course, no part of the law, and were adopted for convenience by the revisors of the Code. The 17th section was no doubt placed in its present location, near the end of the chapter, to apply to all the preceding sections, including those in regard to the county dock in Norfolk, and the superintendent thereof. We find the same section, substantially, in all or nearly all the general laws on the subject, since it was first made a matter of legislation in the State. In the first act on the subject, passed the 25th of November 1785, entitled "An act for the appointment of harbor masters, and declaring their duty," there was a proviso to the fifth section, "that no master or commander of any river or bay craft shall be subject to the payment of any fee by this act imposed." In the next act, passed the 18th of January 1798, entitled "An act to amend the act entitled an act for the appointment of harbor masters, and declaring their duty," section six provided, that "this act shall not be so construed as to authorize any harbor master to prevent any bay or river craft from going to or anchoring at any private wharves." These two acts are copied literally in the Revised Codes of 1802 and 1814, and may be found on pages 14 and 381 of the former, and 21

and 537 of the latter. They are consolidated in one act in 2d Rev. Code of 1819, p. 128, ch. 217, entitled "An act to reduce into one act the several acts concerning the appointment of harbor masters, and declaring their duties." Section six of this act, is a literal copy of section six of the act of 1798 aforesaid. We find the same section, substantially, in chapter 95 of the Report of the Revisors, and of the Codes of 1849 and 1860; being section twelve of the former two, and section seventeen of the latter. This section has the same meaning wherever it occurs in any of the places aforesaid. There can be little or no doubt as to its meaning in the Codes of 1803, 1814 and 1819, and there can be no more as to its meaning in the Codes of 1849 and 1860. The established rule of construction of the latter Codes, or rather of the Code of 1849, is, that an intention not to change the former law will be presumed, unless a contrary intention plainly appear.

By a review of our legislation on the subject, we find that from its commencement, the Legislature has manifested a disposition to encourage the bay and river trade and to exempt it from unnecessary burdens. It seems to have been regarded as a domestic trade, though a large portion of the bay, and some of its tributary rivers, lie within the limits of our neighboring and sister State of Maryland. Therefore, in the very first act concerning harbor masters, to wit:

the act of 1785, the 5th section, which prescribes their fees, expressly provides "that no master or commander of any river or bay craft, shall be subject to the payment of any fee by this act imposed." Thus we see that this "craft" was by that act exempted from any fee, whether they anchored at a public or private wharf, or in the open dock or harbor. By the next act on the subject, to wit: the act of 1798, power was given to harbor masters "to regulate the anchoring of the river and bay crafts that shall come within their respective jurisdictions" (§ 1); and it was declared that they

696 "shall be entitled to receive from the master or *shipper of each bay or river craft that shall go within the county dock, or that shall anchor at, or be secured to the county wharf, twenty-five cents," &c. (§ 3). Having made these new provisions, and having repeated in effect the proviso annexed to the 5th section of the act of 1785 as aforesaid, by providing "that no master or shipper of any bay or river craft shall be subject to the payment of any fee by this act imposed, except those who shall go within any ferry dock, or shall anchor at, or make fast to the county wharfs" (§ 5); the act of 1798 then declares, that "this act shall not be so construed as to authorize any harbor master to prevent any bay or river craft, from going to or anchoring at any private wharves." (§ 6). This, as we have before seen, is the same provision, in effect, which has come down to us as section 17 of chapter 95 of the present Code; and we see here why it was that the exemption which it declares was confined to those vessels which go to or anchor "at any private wharves," and was not extended to those which "shall go within any ferry dock or shall anchor at or make fast to the county wharfs;" the latter vessels being, by the same act, burdened with a small fee to the harbor master. These provisions of the act of 1798, in regard to the "county dock" or "ferry dock," and "county wharfs," no doubt had special reference to the city of Norfolk, which was our great seaport, and where the terms were well known and understood. But the language of the earlier acts on the subject is general, not naming Norfolk or any other place, and applies to all places where there are docks or wharves, public or private. The exemption was not intended as a peculiar privilege to Norfolk over the other portions of the State, but was intended as a privilege to all who were engaged in the bay or river trade, to whatever port of the State it might be directed. In the subsequent legislation on the subject, we find special acts in regard to Norfolk and Portsmouth, which were enacted, not to

697 *give those ports advantages over any others in the State, but because, being our chief seaports, they seemed to require some special legislation not adapted to other portions of the State.

Our review of the course of legislation on this subject also informs us, why it was, that the words, "bay or river craft," came

to be first used and since continued, in the provision we have been considering. The word "craft" generally implies small vessels, though it is sometimes used to embrace vessels of all sizes. But it was not used in the said provision because it was intended to confine the privilege in question to small vessels. The privilege was intended to be given to the bay and river trade, and not to the vehicle in which that trade was conducted. The word "craft," may have been used because at that time the bay and river trade was exclusively conducted in small sail vessels, such as did not usually go outside of the capes; and, therefore, the whole trade was exempted by the exemption granted to "the bay and river craft." Steam had not then been used as a motive power to propel vessels. The introduction of that propelling power has wrought wonderful changes in navigation, and one of these changes is, that most of the bay and river trade is now, and for a long time past has been, carried on in steamboats instead of sail vessels. But there is the same reason for the exemption of the trade now as there ever was heretofore. That it is conducted in steamboats, instead of sail vessels, can make no difference. Nor that these steamboats are often of many more tons burden than the ordinary river and bay craft formerly were. Steamboats are embraced by the word "craft," as well as sail vessels; though that word might not have been as happily chosen to embrace a steamboat of 500 tons burden, and probably would not have been chosen, if steamboats, and especially steamboats of that size, had been in use when the word was first used in this connection. But the word, in one of

698 *its meanings, sufficiently embraces a boat of that size; and as such a boat has been brought to the service of trade and commerce since the provision aforesaid was first enacted, and plainly comes within the spirit and meaning of that provision, we must also hold it to be within the letter of the law. But if there were any doubt upon that question, the 17th section of chapter 95 of the Code, as if from abundant caution, adds to the words "any bay or river craft," the words "or other boat," which seems expressly to embrace all steamboats.

But why should the defendants be required to pay to the plaintiff four dollars every time their steamer comes to Fredericksburg, though it comes there once a week, and every time it comes, comes along a great public highway, and remains, while there, alongside the private wharf of the owners? The burden to which they are thus subjected is a very heavy burden, and ought not to be imposed without a corresponding benefit to be received by them from the person to whose use the burden is to enure. What consideration have these owners received from the plaintiff or any other person for the heavy charge now made against them? The proof certified is, that during the whole period for which the charge is made, neither they nor any of

their agents "had ever called on said plaintiff to render any service as harbor master," and "that, within the knowledge of said defendants and their agents, no services had ever been rendered to them by said harbor master as such." To be sure, it is further certified as proved by the plaintiff, "that he had always kept the approach to the wharf open, rendering it unnecessary to be called upon so to do." But how had he kept it open? It is not pretended that he kept the navigation open by cleaning out the river of sand or other obstructions lodged in the bottom. It is only pretended that he kept the approach to the wharf clear of other vessels. But his own proof shows "that since the late war very few vessels came to Fredericksburg, 699 *and that the trade was done principally by two steamboats, one of which was the Wenonah, each of said boats arriving weekly at said port." So that the keeping of the approach to the wharf open by seeing that no vessels were in the way must have been a very small job.

We are therefore of opinion, that the 17th section of chapter 95 of the Code exempts the defendants from any charge for fees to the plaintiff as harbor master at Fredericksburg, and that on that ground the judgment must be reversed, the verdict set aside, and the cause remanded for a new trial to be had therein. And this renders it unnecessary to decide, or consider, the other question, in regard to the constitutionality of the law, supposing it to impose the charge aforesaid, which we do not think it does. That question was ably argued by the counsel on both sides, and will deserve to be well considered when it is necessary to decide it. Being now unnecessary, we therefore think it would be improper to decide it.

Judgment reversed.

700

*Tyler v. Taylor.

January Term, 1872, Richmond.

1. Partnership—Case at Bar.—H and T, partners, failed, and obtained their discharge in bankruptcy. H had some separate property, which he had not surrendered, and G, one of the creditors of the firm, having taken steps to subject it to the payment of his debt, H and G entered into a covenant, under seal, by which H covenanted to pay G the sum of \$2,100, partly on time, in full of G's claim. G having sued H on the covenant, and thus received payment, H sued T to recover one half of what he had paid to G. To entitle H to recover, he must prove that T agreed with and promised H to pay him one moiety of the debt to G, if H paid the whole of it to G; and that such promise was an express and unequivocal promise; and that B afterwards, in pursuance of such agreement, paid the debt to G.

2. Appellate Practice—Two Trials—Rule of Decision Where First Verdict Set Aside.*—If a case is tried,

*Appellate Practice—Two Trials—Rule of Decision Where First Verdict Set Aside.—In Johnson v. McClung, 26 W. Va. 661, the proposition laid down in the

and a verdict for the plaintiff, and the court sets aside the verdict, and grants a new trial, and on the second trial there is a verdict and judgment for the defendant, from which there is an appeal, the appellate court will look to the proceedings on both trials, and if the court below erred in setting aside the verdict on the first trial, the appellate court, without considering the subsequent proceedings in the case, will reverse the judgment rendered for the defendant on the second trial, and enter final judgment upon the first verdict.

This was an action on the case in the Circuit court of the city of Richmond, brought in October 1859, by Hiram W. Tyler against Wm. Taylor. On the first trial of the cause there was a verdict for the plaintiff, which was set aside by the court. The cause came on again for trial in May 1869, when it was agreed by the parties to dispense with a jury, and submit the whole matter of law and fact to the determination and judgment of the court: and after hearing the evidence the court rendered a judgment for the defendant. And
701 *Tyler thereupon obtained a supersedeas to the judgment. The case is stated in the opinion of the court.

Page & Maury, for the appellant.

Sands, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

This is a supersedeas to a judgment of the Circuit court of the city of Richmond.

The record discloses the following facts:

Hiram W. Tyler and William H. Taylor were merchants and partners doing business in the city of Richmond, under the name and style of Tyler & Taylor. In the year 1843 they were adjudged bankrupts, and on the 24th day of May 1843, they obtained from the District court of the United States for the eastern district of Virginia, a discharge in bankruptcy. Among other creditors, they were indebted to one Fendall Griffin, who had endorsed their notes to a large amount. After the administration of their assets by the Bankrupt court, there was still due to Griffin from Tyler & Tay-

second headnote of the principal case is approved and followed, the court saying: "It is well settled, that, where a case is tried and a verdict is rendered, which is set aside by the court, and a new trial is granted, and on the second trial the verdict is for the other party, and judgment is rendered thereon, to which a writ of error is obtained, the appellate court will look to the proceedings on both trials, and if the court below erred in setting aside the first verdict, the appellate court without considering the subsequent proceedings in the case will reverse the judgment and enter final judgment on the first verdict. *Pleasants v. Clements*, 2 Leigh 474; *Knox v. Garland*, 2 Call 241; *Briscoe v. Clarke*, 1 Rand. 213; *Tyler v. Taylor*, 21 Gratt. 700."

For the above proposition, see the principal case cited and approved in the following cases: *Hudgins v. Simon*, 94 Va. 661, 27 S. E. Rep. 606; *Jones v. Old Dom. Cotton Mills*, 82 Va. 149.

lor, several thousand dollars. Tyler was owner of a vessel called the H. W. Tyler, which was lost at sea, and had been insured in several insurance companies in the city of New York, for the aggregate sum of \$10,000. This vessel had never been given in by Tyler with the schedule of his effects in the Bankrupt court. Upon hearing this, Griffin went to the city of New York, and there commenced legal proceedings for the purpose of preventing the insurance companies from paying over the insurance money due to Tyler, and to have the same appropriated to the payment of his debt against Tyler & Taylor. The matter was compromised between Griffin and Tyler, the result of which was, that Griffin and Tyler entered into a written contract under seal, by which Tyler acknowledged himself to be indebted to Griffin in the sum of \$2,100, for the payment of which
702 Griffin agreed to wait *until the insurance money upon said vessel was paid; provided the said Tyler should pay down the sum of \$500 in cash, and the residue in two years.

In April 1850, an action was instituted on said covenant by Griffin against Tyler, and a judgment recovered against Tyler for the sum of \$1,600, with interest from the 6th of January 1848. In October 1859, Hiram W. Tyler brought his suit in the Circuit court of the city of Richmond (an action on the case), against William Taylor, in which he seeks to recover of said Taylor one-half of the money which he had paid to Griffin; under an alleged agreement that Taylor promised to pay one-half of whatever amount Tyler might pay to Griffin. The defendant pleaded non-assumpsit and non-assumpsit within five years. Upon the trial of this suit, to wit: on the 19th of November 1860, the jury found for the plaintiff on the issues joined, and assessed his damages at \$800, and allowed interest on the same from the 6th of January 1848. This verdict, however, was set aside by the court, and a new trial awarded. At the second trial the parties agreed to waive a trial by jury, and submit the whole case upon the law and the facts to the decision of the court; and the said court was of opinion "that the plaintiff has not shown himself entitled to recover anything in this cause against the defendant;" and accordingly rendered judgment against the plaintiff for costs. It is from this judgment that a writ of error has been awarded to this court.

There having been two trials in the Circuit court, this court will look to the record of the proceedings in both trials, and if the said Circuit court erred in setting aside the verdict of the jury, that is an error for which this court, without considering the subsequent proceedings in the case, will reverse the judgment rendered for the defendant upon the second trial, and enter final judgment upon the verdict of the jury in favor of the plaintiff at the first trial.

Pleasants v. Clements, 2 Leigh 474;
703 **Briscoe v. Clarke*, 1 Rand. 213; *Knox v. Garland*, 2 Call 241.

Upon the first trial the plaintiff excepted to certain instructions given by the court, which were in the following words: 1. "That in order to entitle the plaintiff to recover in this cause, the jury must be satisfied from the evidence, that the defendant, Tyler, agreed with and promised H. W. Tyler to pay him the moiety of the debt due to Griffin, if he (Tyler) paid Griffin the whole of it; and that such promise was an express and unequivocal one; and they must be further satisfied, from the evidence, that the said Tyler afterwards, in pursuance of such agreement, paid the said debt to Griffin. 2. That even though the jury shall be satisfied from the evidence, that such payment was made as specified in the foregoing instruction, still to enable the plaintiff to recover on the second plea in the cause, they must be further satisfied that such payment was made within five years next before the institution of the suit." The second instruction was not objected to, but a bill of exceptions filed to the first only.

We are of opinion that the Circuit court did not err in giving the said first instruction; but that it very correctly and clearly expounded the law of the case as applied to the facts. It is unquestionably true, upon well settled legal principles, that Taylor could not be held responsible to Tyler, for a moiety of debt which he (Tyler) owed and had paid to Griffin, except upon a distinct and specific promise, and unequivocal agreement to pay one-half of the same, in pursuance of which agreement and promise Tyler had paid Griffin. It is shown from the certificate of facts signed by the judge, that the debt which Griffin had recovered against Tyler, was upon a covenant between Tyler and Griffin, to which Taylor was no party. Tyler and Taylor were both discharged bankrupts, and there was no legal obligation upon them to pay any part
704 of the balance due to Griffin *remaining after the administration of their assets by the court of bankruptcy.

The covenant between Tyler and Griffin was entered into by Tyler for the purpose of releasing from an attachment certain insurance money in the hands of insurance companies in New York, for the loss of a vessel which was the property of Tyler, and not the partnership property of Tyler and Taylor, and which vessel was not included in the schedule of Tyler. Taylor was in no manner interested in this fund, and it cannot be said that the debt growing out of that covenant was paid by Tyler, in pursuance of any understanding or agreement that Taylor would pay him one-half of the amount which he paid Griffin. So far from paying it in pursuance of any such agreement or promise, it was paid in pursuance of his own covenant with Griffin, which was enforced by a judgment of the court, and grew out of transactions to which Taylor was no party, and was in no wise concerned. It is true that Griffin says in his testimony, that Taylor had frequently said that though discharged as a bankrupt, he

felt in honor bound to pay the balance due to him from the firm of Tyler & Taylor; and that they had some negotiations on the subject, when Taylor proposed to execute his note to Griffin for one-half of the debt due from the firm, provided Tyler would execute his note for the other half. He also states that after he had obtained the covenant from Tyler under the circumstances referred to above, that Taylor frequently said to him, that he must sue Tyler upon the covenant, and that he would settle with Tyler; and that he often said he felt himself honorably bound for one-half of what the firm owed to Griffin. But there is nothing in the certificate of facts, to show that Taylor ever made any specific or express promise to Tyler, or for his benefit, to pay one-half of the debt which Tyler had
705 covenanted to pay Griffin, or that the said covenant *was entered into, or the money paid under it in pursuance of any such promise or agreement.

We are, therefore, of opinion, that the verdict of the jury was manifestly contrary to the evidence, as well as to the law of the case as expounded by the court in the said first instruction, and that the said Circuit court did not err in setting aside the verdict of the jury and awarding a new trial.

And the court is further of opinion, that the said Circuit court did not err upon the second trial (in which a jury was waived, and the matters of law and fact submitted to the court), in rendering a judgment for the defendant.

In this last trial both of the parties, Taylor and Tyler, testified in the case, and Griffin (the principal witness in the former trial) being dead, evidence was heard of his testimony previously given. In this trial we have no certificate of facts, but the whole of the evidence is spread upon the record. It is conflicting and contradictory, and presents the case certainly in no better light, for the plaintiff, than the former trials; but if it did, the evidence and not the facts being certified to this court, and that evidence being conflicting and contradictory, this court would not interfere with the judgment of the court below, which had the witnesses before it, heard them speak, and could better weigh the evidence and judge of the credibility of the witnesses. We are, therefore, of opinion that the judgment of the said Circuit court of the city of Richmond should be affirmed.

Judgment affirmed.

706 *Richardson v. Davis and Wife.

January Term, 1872, Richmond.

Insurance Policies—Conveyance by Deed of Trust—Case at Bar.—S makes an assignment of a policy of insurance on his life to R, for the benefit of the wife of S and her children. A few days after, he conveys the same policy to R in trust for his wife and her children by him; but if she died without children, the principal to be paid to S's children by his first wife. The widow of S and her infant son file

a bill against R, claiming the insurance money under the assignment. R answers, and says he has acted under the deed of trust, and insists that the children of S by his first wife, are necessary parties. There is a decree on the merits against R, and he appeals. **HELD:**

Same—Same—Necessary Parties—Appellate Practice.*—The children of S by his first wife are necessary parties; and the appellate court will reverse the decree for this error, without passing upon the merits.

This was a suit in equity in the Circuit court of the city of Richmond, brought in January 1869, by Thomas H. Davis and Sarah Jane, his wife, and Lewis James Smith, an infant by said Davis, as his next friend, against Wm. Holt Richardson, to recover the amount of a policy of insurance on the life of Wm. J. Smith, a former husband of Mrs. Davis. The plaintiffs claimed under an assignment of the policy made on the 23d of April 1858, to Richardson in trust for the benefit of Mrs. Smith and her children, of whom the plaintiff, Lewis James Smith, was the only one.

***Chancery Practice—Parties.**—In *Simon v. Ellison*, 90 Va. 158, 17 S. E. Rep. 436, the court said: "Upon plain principles he whose rights are to be affected by any proceedings should be before the court, and have an opportunity to be heard. Otherwise he is not bound by the decree. *Clark v. Long*, 4 Rand. 452; *Richardson v. Davis and Wife*, 21 Gratt. 709; *Armentrout's Ex'or v. Gibbons*, 25 Gratt. 375; *Barton's Ch. Pr. p. 219*, vol. 1, sec. 74; *Collins v. Loftus & Co.*, 10 Leigh 5; *Commonwealth v. Ricks*, 1 Gratt. 416; *McDaniel v. Baskerville*, 13 Gratt. 228; *Story's Eq. Pl. §§ 207, 210*; *Fitzgibbon v. Barry*, 78 Va. 765; *Stovall v. Border Grange Bank*, 78 Va. 188."

And in *Lynchburg Iron Co. v. Tayloe*, 79 Va. 675, the court said: "In this state it must be regarded as settled law, that in every case of a bill in equity asking relief for the plaintiff as assignee of the rights of another, the assignor must be made a party to the cause, and the assignment ought to be shown and proved, though the fact be not denied, nor proof of it called for in the answers. See the opinion of JUDGE SCOTT in the case of *Corbin v. Emmerson*, 10 Leigh 668; *Sheppard's Ex'or v. Starke*, 8 Munf. 29; *Armentrout v. Gibbons*, 25 Gratt. 375; *Richardson v. Davis*, 21 Gratt. 710; *McKinnie v. Rutherford*, 1 Dev. and Bat. 15; *Cathcart v. Lewis*, 1 Ves., Jr., *supra*; *Ray v. Fenwick*, 3 Brown's Ch. 26; *Tennent's Heirs v. Patton*, 6 Leigh 196."

In *Moorman v. Arthur*, 90 Va. 478, 18 S. E. Rep. 869, the court said: "I do not understand that the doctrine of representation applies in Virginia between trustees and *cestui que trust*, so as to hold the latter concluded by decrees in cases in which the trustee is a party, but the *cestui que trust* is not. (*Sand's Suit in Eq.*, page 197; *Richardson v. Davis and Wife* 21 Gratt. 706.)"

Same—Same—Appellate Court.—In *Baker v. Oil Tract Company*, 7 W. Va. 458, the court said: "The appellate court will reverse a decree for the want of necessary parties, though the objection was not taken in the court below. *Taylor's Adm'r v. Spindle*, 2 Gratt. 44; *Jameson's Adm'r v. Deshields*, 3 Gratt. 4; *Richardson v. Davis and Wife*, 21 Gratt. 706."

See principal case distinguished in *Fitzgibbon v. Barry*, 78 Va. 764.

The defendant in his answer says, that he acted in receiving the money under a deed of trust executed to him on the 6th of July 1858, in favor of Mrs. Smith and her children, by Wm. J. Smith, her then husband; and in the event of her children dying under age without children, the money should go to his children by a former marriage; and he sets out their names and residence, and insists they shall be made parties to the suit. He says he never acted under the assignment, and has no recollection of ever having seen the policy until after the execution of the deed of trust.

As the case went off on the question of parties, it is unnecessary to state the different questions made and decided in the cause. There was a decree against the defendant in favor of the plaintiffs, Davis and wife, for one-half of the amount of insurance, and in favor of the infant plaintiff for the other half. And thereupon Richardson applied to this court for an appeal, which was allowed. The acts are sufficiently stated in the opinion of the court.

Griswold, for the appellant.

Neeson, for the appellees.

ANDERSON, J., delivered the opinion of the court.

A bill in chancery was exhibited, in the Circuit court of Richmond city, by the appellees, and Lewis James Smith, an infant, who sued by his next friend, against the appellant, to recover a trust fund, which they allege is in his hands as trustee, and belongs to the female plaintiff, and the said Lewis James Smith, her child, in equal moieties. They claim \$2,229.58, the amount received by the appellant, on a life policy issued by the Mutual Benefit Life Insurance Company of Newark, New Jersey, insuring the life of William J. Smith, with interest thereon, by virtue of an assignment in the following words: "For value received, I do hereby assign, transfer and set over unto William Holt Richardson, trustee, the above named policy of insurance, and all sum or sums of money, interest, benefit and advantage whatsoever, now due or hereafter to arise, or to be had or made by virtue thereof; to have and to hold unto the said

William Holt Richardson, trustee, for the benefit of my wife, Sarah Jane Smith, and her children. In witness whereof, I have hereunto set my hand and seal, the 23d day of April, one thousand eight hundred and fifty-eight.

[Signed], Wm. J. Smith."

The appellant admits the receipt of the money, but denies that he received it under that assignment. If there was such an assignment he says he never accepted it, or acted under it. He alleges that he received said trust fund by virtue of a deed of trust executed to him by said Wm. J. Smith, and acknowledged by said Smith on the 21st of June 1858, and which was executed and acknowledged on his part on the

6th of July 1858; and which is in the following words: "Know all men by these presents that I, William J. Smith, of the city of Richmond, for and in consideration of the love and affection I have for my wife, Sarah Jane Smith, and her children by her intermarriage with me, now born, or hereafter to be born, do grant, assign, transfer and set over, unto William Holt Richardson, of the said city, the life policy (No. 5,858), granted by the Mutual Benefit Life Insurance Company of Newark, New Jersey, to the said William J. Smith, in which the said company do assure the life of said Smith, in the amount of twenty-five hundred dollars, upon the conditions in the said policy set forth. The said policy was assigned by the said Smith to the said Richardson, as trustee for the benefit aforesaid, by an assignment bearing date the 23d of April 1858, with the consent of the said company, bearing date the 26th of April 1858; this assignment is now made in aid of the first assignment, and out of abundant caution, and ostensibly for the purpose of being placed upon record, by which the said Smith conveys in trust to the said Richardson, as aforesaid, the above named policy of insurance, and all sum or sums of money, interest, benefit, and advantage whatsoever now due, or hereafter to arise, or to be had or made by virtue thereof; but it is the desire and intention of said Smith, by these assignments, that in the event of the death of his said wife and her children by him, the children dying under age and without children, that the said trustee is to convey the principal money recovered from the said company to the children of said Smith, by his first marriage, in equal portions." Signed and sealed by "Wm. J. Smith and Wm. Holt Richardson." He alleges that in all his acts as trustee, he acted under the authority of and in discharge of the trusts of this deed alone, which he construes to invest in the female complainant a life estate alone in the said fund, with the remainder to such of her children by said Smith as survived her, and in the event of the death of her child or children under age, and without children, to go to Wm. J. Smith's children by the first marriage in equal portions. He claims also to have invested the fund or a large portion of it in Confederate securities, in which he ought to be protected. And he insists that the children of William J. Smith, by his first marriage, should be made parties; and gives their names and residences. They were not made parties, and upon that ground, it is insisted that the decree is erroneous.

Were they necessary parties? They are interested contingently in the establishment of the deed of trust. Should that contingency happen—if this decree is not binding on them, not being parties, what is there to prevent the assertion of their claim under the deed of trust against the trustee? If this decree is not binding on them it could not be pleaded by the trustee in bar of their

demand or relied on for his protection. In *Clark v. Long*, 4 Rand. 452, J. Carr, in delivering the opinion in which the other judges concurred, says: "It is the constant object of courts of equity to do complete justice by deciding and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to all those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested ought to be parties, plaintiffs or defendants, however numerous they may be, that a complete decree may be made between them." If this decree is not binding upon the children of Smith by his first marriage, who have clearly a material interest under the deed of trust, which the trustee acknowledges, and under which he professes to have acted, can it be said to be, in the language of J. Carr, perfectly safe for the trustee who is compelled to obey it? Is it a complete decree between all the parties materially interested? It is, if it is binding upon the children by the first marriage; otherwise it is not.

In *Collins v. Lofftus & Co.*, 10 Leigh, 5, and of the *Commonwealth v. Ricks*, 1 Gratt. 416, decided by this court, it was held that cestuis que trust, not being parties, are not bound by the decree. In the first of these cases, a testator bequeathed property to trustees for the benefit of his daughter. In a suit by creditors of the testator against the trustees, the court decreed that the property should be subjected to the payment of the debt. It was held that the decree was not binding upon the daughter, she not having been a party to the suit. *Tucker, P.*, in delivering his opinion, in which the other judges concurred, says: "At law, indeed, the trustee is the proper party defendant; but in equity no decree can be rendered affecting the rights of the cestuis que trust unless he is a party; for it is a fundamental principle in the court that all parties, however remotely concerned in interest, must be before it or no decree can be made to bind them. This is particularly the case as to cestuis que trust, since the trustee is a mere nominal party, and the real beneficial interest is in the cestuis que trust." In the other, the case of the *Commonwealth v. Ricks*, supra, it was held that a decree against a trustee subjecting property which had been conveyed to him for the benefit of creditors of the grantor, was not binding upon them—the cestuis que trust—they not having been parties to the suit.

*In these cases, it will be observed, the trustees had no interest adverse to the cestuis que trust, whose interests they represented. We are aware that a different rule has prevailed in other states; as in New York, in the case of *Rogers, &c. v. Rogers, &c.*, 3 Paige R. 379; and see *Van Vechten, &c. v. Terry, &c.*, 2 Johns. Ch. R. 197. Yet it seems to have been adopted by this court, as stated in the cases above cited. We would not say there is no case in which the cestui que trust is not bound

by the decree where he was not a party; but in the case in hand the trustee in one important aspect of his defence, in which he claims to have invested the fund, occupies a position adverse to the cestuis que trust both under the deed and the assignment, and therein cannot be said to represent their interests. Without, therefore, prescribing any fixed rule upon this subject, we are of opinion that in this case, in order to a complete decree, which would prevent future litigation, and protect the rights of the trustee, the children of Wm. J. Smith by his first marriage should have been made parties. This court has been reluctant, when a cause has been proceeded in to a final decree, to undo all that has been done because of a failure to make certain persons defendants who, strictly speaking, ought to have been parties. Yet there are many cases where it has reversed the decree, and sent the cause back for want of proper parties. A recent important case decided by this court, the case of *White v. Humes*, not reported, is an example. In this case the objection was pointedly made in the lower court, and we are of opinion, for the reasons given, without deciding any questions raised upon the merits, which would be premature, that there is error in the decree in not requiring the plaintiff to amend his bill and make the children of Wm. J. Smith, by his first marriage, parties defendants, and that the same must upon that ground be reversed.

Decree reversed.

712 *Bird's Committee v. Bird.

January Term, 1872, Richmond.

1. **Committee of Lunatic—Who Must Sue.***—Where there is a committee of a lunatic, every suit respecting the person or estate of the lunatic, must be in the name of the committee.
2. **Same—Suit by Next Friend.**—But where no committee of a lunatic has been appointed, or where the committee appointed has been removed, or a committee has interests adverse to the lunatic, a suit may be brought in the name of the lunatic, by his next friend approved by the court.
3. **Same—Same—No Previous Sanction of Court.**—If a suit is brought in the name of a lunatic by her next friend without the sanction of the court, against her former committee, who has been removed, for an account, and he objects to the par-

*Committee of Lunatic—Who Must Sue.—The proposition laid down in the first headnote in the principal case, that where there is a committee of a lunatic, every suit respecting the person or estate of the lunatic must be in the name of the committee, is quoted with approval in *Hinton v. Bland*, 81 Va. 591, the court saying: "Under this statute (*i. e.* sec. 48, ch. 32 of the Code 1873), it was held in *Bird v. Bird*, 21 Gratt. 712, and in *Cole v. Cole*, 28 Gratt. 365, that a suit on behalf of a lunatic respecting his person or estate must be in the name of the committee, if there be one. And such, it would seem, is the general rule independently of statute." See also, the principal case cited in *Knight v. Watts*, 26 W. Va. 207 and 218.

ties, the court may make an order for the cause to proceed in the name of the lunatic by some fit person as her next friend, if the one named in the bill is not such a one; or the court may direct the appointment of a committee, and the amendment of the bill, by making such committee a co-plaintiff or defendant in the suit.

4. **Same—Same—Same—Objection in Lower Court.**†—

In such a case, if the defendant does not make the objection in the court below, and there is an account and decree against him, the appellate court will consider that he has waived the objection; and will not reverse the decree on that account.

5. **Same—Retention of Funds—Scaling.**—In 1836, the committee of a lunatic receives her estate, which consists principally of money, and he does not invest it but retains it in his own hands. During the war he pays her expenses in Confederate money. These payments are to be scaled as of the date of payment.

6. **Same—Commission—Interest.**—Where a committee of a lunatic is charged in his account with the annual interest on money of the lunatic in his hands, he is entitled to his commission upon such interest.

7. **Same—Interest Charged on Interest—Case at Bar.**—Whatever may be the correct general rule, under the circumstances of this case, interest should not be charged upon interest.

This was a suit in equity in the Circuit court of Hanover county, brought in February 1867 by Ariadne P. Bird, a lunatic, by her next friend, Thomas R. Bird, against Patrick H. Price, the late committee of the plaintiff, to surcharge and falsify the accounts of said committee settled by a commissioner of the County court of Hanover, by which he had been appointed, extending from May 31st, 1860, to March 31st, 1865.

Price answered the bill, and the accounts were referred to a commissioner, who made a report, by which he reported to be due to the plaintiff, from the defendant, on the 28th of August 1866, when the powers of the committee were revoked, the sum of nine hundred and eighty-nine dollars and forty cents. To this report the defendant filed five exceptions.

It appears that the accounts of the committee had been settled up to May 31st, 1860, when a balance was reported against him of \$589.79 of principal, and \$224.98 of interest; and there was no question as to the correctness of this report. The commissioner in his report charges the committee

†Committee of Lunatic—Suit by Next Friend—No Previous Sanction of the Court—Objection in Lower Court.

—The proposition, that if the defendant does not make an objection in the court below, to the suit brought in the name of the lunatic by her next friend, and there is an account and decree against him, the appellate court will consider that he has waived his objection, and will not reverse the decree on that account, is followed, in the case of *Cole v. Cole*, 28 Gratt. 371, the principal case being cited as authority.

See the principal case cited and distinguished in *Barton v. Bowen*, 27 Gratt. 850; *Taylor v. Lancaster*, 33 Gratt. 21. See also, *foot-note* in *Crigler v. Alexander*, 33 Gratt. 674.

with the whole as an interest-bearing fund. In the years 1862 and subsequently, he deducts the expenses of the year from the interest and profits; and the balance, being scaled at the end of the year, is charged to the committee as principal; and no commissions are allowed on the interest charged in the year. The failure to allow commissions on the interest charged, is the subject of the first exception.

On the 31st of May 1864, there is a balance of \$31.55 of interest and profits over expenses, and this is scaled as of that date at 16.66 for one of gold; and this reduced to United States currency, at one for 1.50, gave \$2.43; with which the committee is charged. This is the subject of the second exception; in which it is insisted the scaling should have been at 22.05 for gold. On the 1st of January 1865, the committee is credited with \$1,083.57 Confederate money, over the interest and profits of that year;

714 which is scaled by the commissioner *at 57.50 for one of gold, and this is reduced to United States currency at one for two; and the committee is credited with \$37.68. This is the subject of the third exception; and it is objected that by this mode of scaling, the committee is allowed but \$22.32 in gold for his expenditures from March 1863 to March 30, 1865, which included two years' board and clothing of the lunatic, which upon the evidence was worth \$150 a year in good money; and the commissions allowed is \$24, which reduced at the same rate is forty cents for his care, labor and responsibility for one year. The account is brought down to August 28th, 1866, when the powers of the committee were revoked, and the interest charged as principal. And this is the subject of the fourth exception; on the ground that the dealings of the committee had ceased March 31st, 1865. And the fifth exception is because the interest is aggregated with the principal, and interest is charged upon interest.

The cause came on to be heard on the 3d day of October 1868, when the court overruled the first, third and fifth exceptions, and sustained the second; and also being of opinion that after the 31st day of March 1866, interest should be no longer compounded against the committee, sustained the fourth exception to that extent; and fixing the amount due from the committee at \$963.96, with interest thereon from the 31st of March 1866, made a decree in favor of the plaintiff against Price, the committee, for that amount. Price thereupon applied to the District court of appeals at Fredericksburg for an appeal; which was allowed.

In January 1870, the cause came on to be heard in the District court, when that court reversed the decree, and directed the Circuit court to enter a modified decree, as follows: The transactions of the committee in his discharge of his duties shall be stated on the principle governing the accounts of guardian, and not otherwise. The receipts and disbursements made by the com-

715 mittee *shall be scaled as of the several dates when they were received or made, except that interest shall not be computed upon interest. From this decree Price applied to this court for an appeal; which was allowed.

Griswold, for the appellant.

Winn, for the appellee.

STAPLES, J. This is an appeal from a decree of the District court at Fredericksburg, reversing a decree of the Circuit court of Hanover. The bill was filed in the name of the appellee, a person of unsound mind, suing by her next friend, against the appellant, her former committee. The object of the suit was a settlement of the accounts of the latter, and a decree for such sum as might appear to be due.

The first ground of objection taken in the argument here, is that the suit was improperly instituted in the name of the appellee; inasmuch as a lunatic is incompetent to maintain an action, except through the intervention of a committee. The bill was filed in January 1867—a decree for an account rendered—the account taken—exceptions filed and considered—and in October 1868, a final decree rendered. During all these proceedings this objection was never suggested, nor was it mentioned in the petition for an appeal to the District court; and now, after the lapse of nearly four years, it is, for the first time, made in this court. Every rule of convenience requires that an objection for want of parties should be made at an early stage of the proceedings, that the expense and delay of a fruitless investigation and hearing may be avoided. It is true, that it may in some cases be taken for the first time in an appellate court; but only where it is palpable that a necessary party is wanting, in whose absence gross injustice may be done, or no final adjudication of the matters in controversy can be made. Had this objec-

716 tion been made *in the Circuit court, that court might have entered an order for the cause to proceed in the name of the appellee, by some fit and proper person as her next friend, if the one now named in the record was found, upon investigation, to be unqualified; or the court might have given direction for the appointment of a committee, and the amendment of the bill by making such committee a party to the suit as co-plaintiff or defendant. The rule relied on by the appellant, is for the security and protection of the lunatic against the voluntary and officious interference of persons unskilled in the conduct and management of suits, or unfit to be trusted with the funds which may be the subject of a recovery. It is also for the protection of the defendant, who might be held responsible a second time at the suit of the committee when appointed. So far as the appellee is concerned, her estate will be made perfectly secure by an order for the investment of the fund under the supervision of the court, or for the appointment of

a committee, to whom it can be paid. And as to the appellant, he had the right to waive a rule intended for his advantage, as in this case he will be held to have done, by his silence and acquiescence. But whether he has or not, there can be no question of his perfect security under the decree of the court against a demand from any quarter.

But if the objection had been taken in limine, it ought not to have been sustained. It is clear when there is a committee, that every suit respecting the person or estate of the lunatic must be instituted in his name. But suppose there is no committee, or, as in this case, the demand is asserted against a committee whose powers have been revoked, and who is charged with violating his trust and converting the estate to his own use. Is the lunatic without remedy? It is said that another committee should be appointed. It may be that no one can be

717 found willing to accept the office, or that the condition of the estate, *or

the conduct of the adverse party, requires the utmost promptness in the institution of legal proceedings. Prior to the revisal of 1819, the laws authorized the appointment of committees only for insane persons ordered to be confined in the asylum; and even then the powers of such committees extended only to suits for the collection of debts. It appears to have been the practice in some instances for the courts of chancery to appoint committees for persons non compos mentis, who were not inmates of the asylum; but the committees were regarded as mere commissioners of the court, removable at its pleasure, and were in no manner authorized to sue or be sued in respect to the lunatic or his estate. If the proposition now asserted be correct, persons of unsound mind not confined in an asylum were utterly without redress in the courts of Virginia. It was suggested, however, that in this class of cases an information might be filed in the name of the attorney general, with some responsible person named as relator. This practice has been sometimes pursued in England, because there the custody and the care of the persons and estates of lunatics devolve upon the lord chancellor in virtue of his general power as holding the great seal and keeper of the king's conscience. And the attorney general, as the law officer of the crown, is authorized to institute suits in their behalf in the form of informations. Here the custody, control and management of the estates of lunatics are regulated by statute, and devolves upon persons appointed by the county courts. It is clear, therefore, there is no analogy between the practice pursued here and that followed in the English courts. In *Bolling v. Turner*, 6 Rand. 584, the action was against a committee appointed by a chancellor having the management of the lunatic's estate as a commissioner and receiver of the court; and it was held the action could not be maintained. Judge Brooke said the error in bringing the action was in not distinguishing it from an ac-

718 tion against *the committee of a lunatic appointed under the statute, where the lunatic is sent to the asylum, and is treated by the statute as "civiliter mortuus," and the committee as executor, and responsible in like manner. According to this view, under former laws the legal incapacity of a lunatic to sue and be sued, was the result of the commission of lunacy and the confinement in an asylum. If under the present statutes every person who is adjudged a lunatic, and for whom a committee has been appointed, is to be regarded as "civiliter mortuus," it would not follow that a person whose committee has been removed from office and the commission superseded, is also to be regarded as "civiliter mortuus," and legally incompetent to sue. In all such cases, or wherever the interests of the committee clash with those of the lunatic, or when no committee has ever been appointed, the lunatic should be permitted to institute a suit in his or her own name, with some responsible person named as next friend and approved by the court. This rule is a just and beneficent one, and has the sanction of a respectable and imposing weight of authority. *Noreom v. Rogers*, 1 C. E. Green, New J. R. 484; 1 Dan. Ch. Prac. last Ed. page 83; *Shelford on Lunacy*.

It is also insisted, that the Circuit court erred in applying the scale of depreciation to the disbursements made by the appellant in Confederate currency, for the support of the appellee. The appellant upon his qualification in 1836, received the estate of the appellee, consisting principally of money. What disposition he made of it does not appear. There is not the slightest pretext for saying that he invested it. The presumption is, that he appropriated, and thus became the borrower of, the fund. In January 1865, he expended for the appellee five hundred dollars, and on the 30th day of March thereafter he expended eight hundred dollars in Confederate money. He now gravely

719 insists, that in his settlement he is justly entitled to a credit for the *nominal amount of what was so expended.

He declares that he had no alternative but to call in the money of the appellee, or let her starve and go naked. This pretension is not sustained by the record. It was his own money that was expended, and not that of the appellee. The proposition that the appellant should now be permitted to claim this disbursement as a valid payment to its nominal amount, of a debt contracted in United States coin or its equivalent, is abhorrent to all ideas of justice, and cannot for a moment be entertained. He is entitled to the value of what was so advanced, and he is entitled to nothing more. The act of March 3d, 1866, relied on by his counsel, has no application to the case. The provision in question applies to payments in full, or in part, of an amount payable under a contract, and accepted by a creditor competent to understand his rights and obligations.

It was insisted also, that the commuted

value of the Confederate currency paid out by the appellant furnishes a very inadequate compensation for the support and maintenance of the appellee during the war. It is to be observed, however, that the appellant does not claim that he supplied the appellee with food and lodging in his own family. Neither in his answer, nor by his testimony, does he assert any such pretension. Before the war he paid others for performing that duty, and the presumption is he continued so to do, until his powers were revoked. He can therefore only claim to be reimbursed the amount and value of his expenditures in Confederate treasury notes. However small it may be when reduced to United States currency, it must constitute the measure of his remuneration and his recovery.

The appellant also excepted in the court below, to the refusal of the commissioner to allow him commission upon the sums annually charged to him for interest accruing upon the balances in his hands. This exception was well taken, and ought 720 to have been sustained. *If the appellant is to be held responsible, as though he had invested the fund, he is entitled to the commission he would have received had he actually made such investment. In this respect there can be no substantial difference between the fund accounted for as principal and that accounted for as interest. The appellant, in his petition to this court for an appeal, makes no complaint of the decree of the District court upon this point. Under a fair and just construction of that decree, he would be entitled to, and no doubt would have been allowed, his commission upon the interest with which he is chargeable.

The appellant also claimed in the Circuit court, that his accounts as committee should be stated upon the principles applicable to executorial accounts, rather than those of guardians. By the decree of the District court, it is directed "that the transactions of the committee shall be settled and stated upon the principles governing the accounts of guardians, and not otherwise; that the receipts and disbursements made by him shall be scaled as of the several dates when they were received or made, except that interest shall not be computed upon interest." Without undertaking now to decide whether, as a general principle, the rules governing in the settlement of guardians' accounts shall be applied to the transactions of committees for insane persons, it is sufficient to say that, under all the circumstances of this case, it is proper that the appellant should be exempt from the payment of compound interest. As under the decree of the District court the appellant is exempt from this liability, he has no just cause of complaint in this particular. The claim for compound interest being disallowed, there can be no valid objection that the account in other respects is adjusted and stated upon the principles governing the accounts of guardians, as directed by the decree of this court in the case of *Cunningham v. Cunningham*, 4 Gratt. 43.

721 *On these grounds, I am of opinion there is no error in the decree of the District court, and that the same should be affirmed.

The other judges concurred in the opinion of Staples, J.

Decree of the District court affirmed.

722 *Walker, Per. Rep. v. Pierce.

January Term, 1872, Richmond.

Absent. CHRISTIAN, J.*

1. **Contracts—Payment of Money—Kind of Currency—Presumption.**†—Upon contracts for the payment of money entered into between the 1st of January 1862, and the 10th day of April 1865, there is, under the operation of the act of 1867 in relation to the scaling of debts, no presumption of law as to the kind of currency in which they were to be paid.
2. **Same—Same—Same—Same.**‡—In the absence of proof to the contrary, contracts made during the war, subsequent to the date of the act of October 20th, 1863, would by the force of that act be presumed to be paid in currency such as designated in it.
3. **Bonds—Bearing Interest from a Day Anterior to its Date—Presumption.**—Where a bond is given which bears interest from a day anterior to its date, it is a fair inference that the bond was executed for a debt existing at the date from which it bears interest; and as that date is January 1st, 1861, though the bond bears date in 1864, the presumption that it was a Confederate debt to be paid in Confederate currency, is repelled by the face of the bond itself.

*He had decided the case in the Circuit court.

†**Bonds—Kind of Currency—Presumption.**—In *Eminger v. Kenney*, 24 Gratt. 121, the court said: "The court is also of opinion that the third instruction, if not erroneous in terms, is expressed in language calculated to mislead the jury; and probably did mislead them. It implies that the bond upon its face imports a contract to pay in specie, according to the common-law presumption, which it was held in *Walker, Per. Rep. v. Pierce*, 21 Gratt. 722, was designed to be altered by statute, in relation to contracts of that period. In that case it was said: 'The obvious design of the act of 1867 [1866], (meaning the adjustment act), is to ascertain and enforce the actual contract between the parties; to do which, it in effect annuls the presumption of law as to the kind of currency in which the contract is to be solved, whether common law or statutory.' This instruction might be understood to exclude, contrary to the terms of said act of assembly, and the repeated decisions of this court, an implication that the contract was made with reference to Confederate currency as a standard of value, or was solvable in that kind of currency, from the character of the currency which prevailed at the date of the contract, and the price paid for the land, which was the consideration of the bond, and other facts proved in the cause. The presumption was one of fact, and was a question for the jury."

‡**Same—Same—Same.**—In *Calbreath v. Va., etc., Co.*, 22 Gratt. 703, the court said: "By the act of 14th of October 1863, fairly construed, all contracts made on or after the 20th of October of that year, were presumed to be made with reference to Confederate currency as a standard of value, and solvable in the

4. Same—Evidence—Declarations of Obligor.—The acts, admissions and declarations of the principal obligor in a bond, done and made at the time of its delivery, are evidence against his sureties on the bond, though he is dead, and therefore not a party to the suit.

5. Same—Kind of Currency—Intention—Liability of Sureties.—If it appears that the bond sued on was given for a bond due before the war, and was intended both by the obligee and the principal obligor, to be paid in legal money, and was in fact taken for the accommodation of the principal obligor, the sureties will be bound to pay it in legal money, though they may not have known what was the consideration of it.

This was an action of debt in the Circuit court of New Kent county, instituted 723 in August 1866, by John L. *Walker, personal representative of Robert C. Harrison, deceased, against Bartholomew D. Christian and John P. Pierce, surviving obligors of John D. Christian and themselves, to recover the amount of a bond for fourteen hundred and twenty dollars and sixty-three cents. The cause came on to be tried on the 9th day of March 1868, when the parties dispensed with a jury, and submitted the case to the court.

The bond on which the action was founded is as follows:

\$1,420.63. On demand we John D. Christian, principal, and Bat. D. Christian and John P. Pierce, securities, bind ourselves to pay to John L. Walker, personal representative of Robert C. Harrison, deceased, or to his assigns, the sum of fourteen hundred and twenty dollars and sixty-three cents, with interest from the 28th day of January 1861. Witness our hands and seals this — day of January 1864.

John D. Christian, [Seal.]
Bat. Christian, [Seal.]
John P. Pierce. [Seal.]

Upon the trial the defendant, Pierce, moved the court to scale the debt, on the ground that the contract evidenced by the bond was entered into with reference to Confederate States treasury notes; and thereupon the plaintiff, for the purpose of ascertaining what was the true consideration of the contract, offered to introduce in evidence a letter written and signed by John D. Christian, the principal obligor in the bond, together with a statement accompanying the same, also in the handwriting of the said Christian, and a deed of trust executed by said Christian. The letter was dated New Kent Courthouse, January 22d, 1864, and directed to Colonel James M. Wilcox. The contents of the letter are suffi-

same kind of currency, unless a contrary intentment was expressed. It was a conclusive presumption of law. But now since the adjustment act of March 3d, 1866, as expounded by this court in Walker, Per. Rep. v. Pierce, 21 Gratt. 722, the presumption is not conclusive, but only *prima facie*."

See also, the principal case cited on this point in Hilb v. Peyton, 22 Gratt. 554.

The Confederacy—The De Facto Government.—See foot-note to Walker v. Christian, 21 Gratt. 291, where the principal case is cited.

ciently stated by Judge Anderson in 724 his opinion. *The statement sent with the letter is of a bond for \$2,500, due October 1st, 1857, with the payments made upon it, showing due on the 28th of January 1861, \$1,420.63; and the deed is a deed of trust signed by John D. Christian and George Walker, trustee, dated the 1st of January 1864, and conveys a tract of land called the "Mullens," containing four hundred and twenty acres, in trust to secure the payment of a bond of Christian, with personal security, of even date with the deed, payable to John L. Walker, adm'r, &c., of Ro. C. Harrison, for \$1,420.63, with interest from the 28th day of January 1861. The defendants objected to the introduction of this evidence; but the court overruled the objection; and he excepted.

The court rendered a judgment in favor of the plaintiff for \$1,420.63, the amount of the bond, with interest from the 28th of January 1861 till paid. And thereupon the defendant Pierce moved the court to grant him a new trial: which motion the court overruled; and the defendant excepted; and the court certified the facts proved upon the trial.

It appears that John D. Christian, the principal obligor in the bond sued upon, was the owner of a tract of land known as the courthouse tract, upon which there existed a lien executed in 1851, by George W. Bassett, the former owner of the land, to secure the payment of the sum of \$2,500, which lien was ample security for the said sum of money, to the intestate of the plaintiff; and said Christian being desirous of selling said courthouse tract of land, proposed to the plaintiff to release the said lien, and to take in lieu thereof a bond with personal security and a deed of trust on a tract of land of the said Christian, called "Mullins," supposed to contain four hundred and twenty acres, to secure the balance of the said sum of \$2,500, then due and unpaid, which was \$1,420.63, with interest 725 from the 28th of January 1861; to which proposal the plaintiff acceded, *and accepted from the said Christian the bond on which this suit was brought, and a deed of trust on the land called "Mullins," in lieu of his lien on the courthouse tract; and thereupon released the lien upon the courthouse tract of land. It was not proved that the defendant Pierce was cognizant of the aforesaid arrangement, or knew what was the consideration of the said bond.

Pierce obtained a writ of error to the District court of Appeals at Williamsburg; where the judgment was reversed, and a judgment entered for \$79.28, in full of the bond. And thereupon Walker applied to this court for a writ of error, which was awarded.

Cannon and Courtney, for the appellant.

Ould and Carrington, for the appellees.

ANDERSON, J. This is an action of debt brought in the Circuit court of New Kent county, by the plaintiff in error,

against the defendant in error and another, surviving obligors, on a bond executed by them as securities, and Jno. D. Christian, as principal, to the plaintiff, for the sum of \$1,420.63, with interest from the 28th day of January 1861. The bond bears date the day of January 1864. The Circuit court gave judgment for the whole amount of the bond, with interest as aforesaid and costs: which judgment was reversed by the District court, and judgment rendered for the plaintiff for \$79.28, the scaled value of the note as of its date; and for the defendant, for his costs in both courts. And the cause comes to us upon a supersedeas to the judgment of the District court. The main question is, was it a contract for Confederate money?

By the act of Assembly, passed February 28th, 1867, either party is authorized, if the contract was entered into between the 1st of January 1862, and the 10th of April 1865, to show by parol or other relevant
726 evidence, *what the true understanding and agreement, either express or implied, was as to the kind of currency with which it was to be performed, or with reference to what kind of currency, as a standard of value, the contract was made and entered into.

The defendant offered no evidence to show that it was Confederate currency. But the fact of the great depreciation of that currency, at the date of said obligation, and that it filled the channels of commerce, and was the only medium of exchange in circulation in this State, is a fact of public history, and may be judicially known, from which the inference may be drawn that it was the understanding of the parties that payment should be made in that currency. The defendant also relied upon the act of Assembly, passed October 20th, 1863, which declares in effect that all contracts for the payment of money, made subsequent to that date, shall be deemed to be for the payment in such currency as shall be receivable in payments to this State at the time the contract is payable, "unless this intendment is expressly excluded."

The plaintiff contends that this act has no force or validity as a law. I do not concur in that opinion. It was the act of a Legislature of the State, which had the power to enforce all its enactments. It had the force and effect of a law of the State, and was as obligatory on the citizens of the State as is any law passed by subsequent legislatures. But it was subject to alteration, amendment or repeal.

This act was evidently designed to change the common law presumption, that a contract to pay dollars is a contract to pay specie. In the then abnormal state of the country and condition of the currency, this presumption of the common law was well known to be contrary to the fact; and the Legislature designed to reverse the presumption of law, and make it conform to the presumption of fact. But they
727 gave to their declaration *only a prospective operation. It does not affect

the past. But the act of 1867 does. It is retrospective in its operation; and not unconstitutional on that ground. A law is not unconstitutional because it is retroactive.

It was perfectly competent for a subsequent Legislature to repeal the act of 1863. And when the provisions of a subsequent act of the Legislature are in conflict with a previous act, so far as that conflict exists the subsequent act prevails, and the provisions of the previous act in conflict, are by implication annulled. The act of 1867 declares, section 1, "that in any action or suit or other proceeding, for the enforcement of any contract, express or implied, made or entered into between the 1st day of January 1862, and the 10th day of April 1865, it shall be lawful for either party to show by parol, or other relevant testimony, what was the true understanding and agreement of the parties thereto, either express or to be implied, in respect to the kind of currency in which the same was to be fulfilled or performed," &c. This enactment, it seems to me, does in effect forbid any presumption of law, either of common law or statute, as to the kind of currency in which any contract which was made within the period designated, is to be performed or fulfilled; and that any presumption that may be made, must depend upon the proofs in the cause, including all implications of fact, and is only a presumption of fact. And the statute authorizes proofs to be given by parol, or any relevant testimony, by either party. The obvious design and operation of the act of 1867, is to ascertain and enforce the actual contract between the parties; to do which it in effect annuls the presumption of law as to the kind of currency in which the contract is to be solved, whether common law or statutory. This being so, the act of 1863, if construed to prescribe a presumption of law, is, to that extent, virtually repealed by the act of 1867, and evidence is admissible to repel the presumption of the statute. But only to
728 that extent is it in conflict *with the act of 1867. In the absence of proof

to the contrary, contracts made during the war, and subsequent to the date of said act of 1863, and by force of said act would be construed in accordance with the presumption of the statute. Nor can the act of 1867, as thus construed, be regarded as coming within the prohibition of the constitution, State or Federal, in relation to laws which impair the obligation of contracts; inasmuch as in its evident design and operation, it provides for the ascertainment and enforcement of the real contract between the parties.

The act of 1867 must therefore govern this case. And whilst the presumption does arise from the fact that Confederate currency was the only circulating medium at the date of the bond in question, that it was payable in that currency, it is competent for the plaintiff to rebut that presumption by parol, or other relevant evidence, and to show that such was not the true un-

derstanding and agreement between the parties.

To repel the presumption that it was a Confederate contract, the plaintiff relies upon the bond itself, which shows upon its face that it was given for a pre-existing debt. It shows that it was a debt existing as far back as the 28th of January 1861; for the obligors bind themselves to pay interest from that date. A man may owe a debt which is not bearing interest; but he can hardly be held to pay interest on a debt which he does not owe. It is, therefore, a very plain inference from the face of the bond, that the debt for which it was given was an existing debt as far back as January 1861, before the war commenced, or a Confederate currency had any existence. The presumption that it was a Confederate debt, and to be paid in Confederate currency, is therefore repelled by the face of the bond itself.

But the plaintiff introduced other evidence, to wit: a letter from Jno. D. Christian, the principal obligor, bearing date

January 22nd, 1864, with its inclosures, *addressed to Col. James M.

729 Wilcox. This letter shows that said Christian had sold his courthouse property to Charles Palmer for \$20,000, and that he could not make Palmer a title to it unless the plaintiff would release a trust deed which he held on it, executed in 1857, to secure a debt which had been reduced to \$1,420.63, on the 28th of January 1861: which the plaintiff had agreed to do, if he (Christian) gave bond and security for the debt, and a deed of trust on other lands. The letter also shows, that it was well understood by the writer, that the plaintiff could not take Confederate money in payment of the debt; and his acceding to the proposed arrangement was regarded by Christian as an act of kindness to him. The design of the letter was to get his friend, Col. Wilcox, to have the proposed arrangement effected. He encloses him the bond, executed by himself and securities, for \$1,420.63, with interest from the 28th of January 1861, and a statement, signed by himself, showing that that was the balance due on that day of the debt, which had been owing from a date anterior to the 1st of October 1857, and the amount of interest which was then due, which he was desirous of paying in Confederate money, and sent him a check to pay it, if the plaintiff would receive it. If he would, to credit it on the bond. But instructed him, that although he greatly preferred to pay it, not to insist on it. And if it was not received, to destroy the check. He also enclosed a deed of trust, conveying other lands, to be delivered to the plaintiff, to secure this debt, the description of which, in the deed, corresponds with the bond on which this suit is founded, and shows that the day of the month, in the date of the bond, which is blank, was intended to be the first of January. He also inclosed to him the deed of release, which he desired him to get the plaintiff to execute. And he expresses the

hope that the plaintiff will accommodate *him, and asks his friends Wilcox and Mr. Geo. Walker to intercede for him.

This letter, and the papers accompanying it, show the declarations, admissions, and acts of the principal obligor, connected with the delivery of the bond upon which the suit is founded; which had been previously executed by him and his securities, and the delivery of the deed of trust, in consideration of which he received the plaintiff's release, not of the debt, but of the lien upon the courthouse lands. It was not a novation of the debt; but only a change of security. Even the interest accruing after the 28th of January 1861, is not incorporated with the principal, but the status of the debt is precisely the same, after this bond is given, that it was in January 1861, only that a new security is accepted, and the old one surrendered, for the accommodation and benefit of the principal obligor alone. Was his (the principal obligor's) obligation as to this debt changed by this transaction? If it was his obligation originally, to pay it in gold, has that obligation been changed by these transactions; so that he can discharge that obligation by paying a gold debt of \$1,420.63, with interest thereon from the 28th of January 1861, in a depreciated currency, including interest, of the value of only \$79.28? Is that a fulfilment of the obligation of John D. Christian? Was it the true understanding and agreement between him and the plaintiff, that the latter was to receive such a worthless paper in discharge of this gold debt? Was it the said Christian's understanding, when he knew and acknowledged that the plaintiff could not receive payment in Confederate money, and would not even insist upon the payment of the interest in Confederate money? Was it the understanding of the plaintiff, when he accepted that bond, that it was to be paid in Confederate money? When he was unwilling, and the presumption from the evidence is, refused, to receive the interest in Confederate

731 *money, that he accepted a bond which he understood to require him to receive both interest and principal in that worthless currency? It is only to ask the question to see the absurdity of such a pretension.

But can it be said that, though it was the obligation of the principal obligor to pay this debt in specie, the obligation of the securities was different. If we could regard these joint obligors, in this action at law, not as joint obligors, but only as securities for the principal obligor, what is their undertaking to the obligee? Is it not, that the principal obligor shall fulfil his obligation to the obligee, and that, if he does not, they will do it for him? If so, their obligation to the plaintiff cannot be less than that of the principal obligor; it is precisely the same. But suppose that they could be regarded as having a separate contract with the plaintiff, and in executing that bond could have come under a separate and dif-

ferent obligation from that of the principal obligor, they could not entitle themselves to discharge their obligation by paying the value of the bond in Confederate money, as of the date of the bond, by showing that they understood the debt was to be paid in that currency. They must show also, that such was the understanding of the plaintiff. The act of Assembly requires it to be shown that it was the true understanding, and agreement, of the parties to the contract. But it does not appear that they so understood it. It is very clear, as we have seen, that the plaintiff did not so understand it. And as we have also seen, there is enough on the face of the bond which they executed to repel the presumption that they so understood it.

But they cannot sever their responsibility in this action, from that of the principal obligor. They are jointly bound with him and jointly liable to the plaintiff. And the acts and admissions of one joint obligor are binding on all. The general doctrine is, as laid down by Greenleaf, that the declarations of a party to the record, or of

732 *one identified in interest with him, are as against such party, admissible in evidence. 1 Greenl. Evi., § 171. As to the admissions of persons who are not parties to the record, the law looks chiefly to the real parties in interest, and gives to their admissions the same weight as though they were parties to the record. Ibid § 180; also § 170; 1 Philips on Ev. p. 491, marg. 406, top.

I am of opinion, therefore, that the Circuit court rightly overruled the objections to the introduction of the evidence, which is the ground of the first bill of exceptions; and did not err in admitting the same as evidence. I am also of opinion that, upon the facts certified, the Circuit court did not err in overruling the motion for a new trial. I am further of opinion, that the District Court erred in reversing the judgment of the Circuit court, and in the judgment which it rendered. I am therefore, of opinion to reverse the judgment of the District court, and to affirm the judgment of the Circuit court.

STAPLES, J., concurred in the main with Anderson, J.

MONCURE, P., concurred in the opinion.

Judgment of the District court reversed.

733 *Myers' Ex'or v. Zetelle.

Pizzini's Committee v. Zetelle.

March Term, 1872, Richmond.

1. Agents—Investment of Funds in Confederate Bonds—Liability—Case at Bar.—Z, a foreigner, who had lived some years in Richmond, was the owner of a house and lot in the city, and some furniture, and he held debts due to him, and among them the bond of P. for \$5,000, bearing interest, and due in November 1865, secured upon a house and lot. Z having determined to leave the country with his family for an indefinite time, on the 9th of Sep-

tember 1861, executed a power of attorney to M and C, by which he conferred on them the most ample powers and the largest discretion for the management of his business and the disposition of his property. On the same day Z and his wife conveyed to M and C his house and lot, in trust to rent or sell it at their discretion, and pay him the proceeds. He then left the country, and M and C received no communication from him, and had no knowledge of his residence until 1865, when he returned to Richmond. In the meantime they received payment of the debts due Z, and also of the debt of F before it fell due, and they sold the house and lot; and in 1863 invested all the funds in their hands in Confederate bonds for Z. There was no question of the *bona fides* of M and C in all that they did. HELD:

Same—Same—Same.—They are not responsible to Z for the loss which occurred by the investment in Confederate bonds; nor is P liable to him for his debt.

2. Same—Acting in Good Faith—Liability.*—An agent or trustee acting within his power, and acting in good faith, in the exercise of a fair discretion, and in the same manner in which he would probably have acted if the subject had been his own, he ought not to be held responsible for any loss accruing in the management of the trust fund.

3. Same—What Required of.—Pre-eminent knowledge and uncommon foresight are not required in a trustee. Ordinary men are to be compared and judged by the standard of ordinary men. Common skill, common prudence, and common caution are all that courts have required.

4. Same—Same.—It would be unreasonable to 734 judge of the conduct of an agent or *trustee, from subsequent events. His conduct ought not to be condemned if it flowed from an honest though uninformed and mistaken judgment.

This is the sequel of the case of Zetelle v. Myers & al., reported in 19 Grattan, 62. When the cause went back to the Circuit court, the plaintiff, Zetelle, dismissed his action at law, and amended his bill, bringing into the cause the subject of the agency

*Agents—Acting in Good Faith—Liability.—For the proposition that an agent or trustee acting within his power, in good faith, in the exercise of a fair discretion and in the same manner in which he would probably have acted if the subject had been his own, he ought not to be held responsible for any loss accruing in the trust funds, the principal case is cited and followed in the following cases: Windon v. Stewart, 43 W. Va. 714, 28 S. E. Rep. 776; Jones v. Jones, 86 Va. 852, 11 S. E. Rep. 426; Elliott v. Howell, 78 Va. 307; Wayland v. Crank, 79 Va. 609; Cooper v. Cooper, 77 Va. 204; Hale v. Wall, 22 Gratt. 433; Crouch v. Davis, 23 Gratt. 99; Mills v. Mills, 28 Gratt. 479. See in accord, Elliott v. Carter, 9 Gratt. 541; Davis v. Harman, 21 Gratt. 194, and *foot-note*; Thomson v. Brooke, 76 Va. 160; Parsley v. Martin, 77 Va. 381; Pidgeon v. Williams, 21 Gratt. 251; Douglass v. Stephenson, 75 Va. 747; Dickinson v. Helms, 29 Gratt. 462. See the principal case cited and distinguished in the following cases: Hawthorne v. Beckwith, 89 Va. 790, 17 S. E. Rep. 241; Williams v. Skinker, 25 Gratt. 507; Key v. Hughes, 32 W. Va. 190, 9 S. E. Rep. 79; McClure v. Johnson, 14 W. Va. 447. See the principal case cited in Simmons v. Trumbo, 9 W. Va. 365, upon the question of judicial notice.

of Myers and Cridland under the power of attorney, as well as under the deed conveying to them the house and lot.

Myers answered the amended bill; evidence was introduced; and Myers having died, and the suit having been revived against his executor, the cause came on to be heard on the 10th of January 1870, when the court made a decree against Myers' executor and Cridland for nine thousand seven hundred and eighty-three dollars and fifty-three cents, with legal interest thereon from the 16th of January 1863, until paid; that being the amount that Myers had received by virtue of his agency, after deducting his disbursements amounting to \$732.78, and Pizzini's bond for \$5,000 which he had collected; and also made a decree against Pizzini for \$5,000, the amount of his bond to Zetelle, with interest from the 1st of November 1861, until paid. And thereupon Myers' executor and Pizzini's committee applied to this court for appeals from the decree; which were allowed. The case is sufficiently stated in the opinion of Christian, J.

The cases were heard together and were argued by C. Robinson, J. Alfred Jones, A. Johnston, Meredith and Evans, for the appellants; and Neeson and Hunter Marshall, for the appellee.

CHRISTIAN, J. This is an appeal from a decree of the Circuit court of the city of Richmond.

The case is for the second time before this court.

The novelty of the questions which it presents, the importance of the principles to be settled, the marked ability and learning which have characterized the arguments of counsel, who with equal confidence, have pressed the claims of their respective clients, have demanded and received from this court a careful and anxious consideration.

When the case was before this court in 1869, there was no expression of opinion, as to the merits of the controversy; but the plaintiff in the court below (Zetelle) having instituted his action at law, as well as his suit in equity, on account of the same transactions, this court sent the cause back to the Circuit court, with directions to that court, to make an "order requiring the said plaintiff to make his election within a specified time, whether he would amend his bill in this case so as to embrace therein the transactions under the power of attorney, as well as those under the deed of trust, and dismiss his action at law, or whether he would prosecute his action at law."

In accordance with this order, the plaintiff (Zetelle) dismissed his action at law, and at March rules, 1869, filed his amended bill, to which bill Gustavus A. Myers, Frederick J. Cridland and Andrew Pizzini were made defendants. Gustavus A. Myers having departed this life after the bill was filed, it was revived by scire facias against his executor, and on the 10th day of January

1870, the Circuit court of the city of Richmond, pronounced its decree, directing, "that the defendants, Frederick J. Cridland and William B. Myers, executor of Gustavus A. Myers, deceased, out of the assets of his testator's estate in his hands to be administered, do pay to the plaintiff, nine thousand seven hundred and eighty-three dollars and fifty-three cents, with legal interest thereon from the 16th day of January 1863, till paid; and that the defendant, Andrew Pizzini, do pay to the said plaintiff the sum of five thousand dollars, with legal interest thereon from the 1st day of November 1861, till *paid." From this decree Myers' executor and Pizzini have been allowed an appeal by this court; and the case is now before us to be considered on its merits.

The facts disclosed by the record are substantially as follows:

Spiro Zetelle, a resident of Richmond, of foreign birth, and who had not been naturalized, being about to go to Europe, for an indefinite time, on the 9th day of September 1861, executed a power of attorney by which he constituted Gustavus A. Myers and Frederick J. Cridland his agents and attorneys in fact, for the management and disposition of his property and business during his absence from the country. The powers conferred by this instrument were of the most ample character, and will be more particularly noticed presently.

At the time this power was executed, Zetelle was the owner of a house and lot in the city of Richmond (which was in the occupation of a tenant), together with some furniture and personal effects; and also had debts due to him, amounting to several thousand dollars, due at different times from November 1st, 1861, to November 1st, 1865. On the same day (September 9th, 1861,) on which the power of attorney was executed, Zetelle and wife executed a deed by which they conveyed the house and lot to Myers and Cridland, trustees, with power to lease, rent, or sell the same, "as to the said trustees shall seem most beneficial." This deed of trust, and power of attorney, executed at the same time, and for the purpose of effecting the same general object, to wit: the management and disposition of the plaintiff's property during his absence from the country, were duly executed and admitted to record in the clerk's office of the Hustings court for the city of Richmond on the 11th of September 1861. Shortly thereafter Zetelle, with his family, left the country for Europe, and did not return to Richmond until April 1865. No communication was received *by Myers and Cridland, or either of them, from Zetelle, during his absence.

In March 1862, Myers and Cridland made sale of the real estate and received the proceeds of sale. Among other evidences of debt received by them from Zetelle was a bond of Andrew Pizzini for five thousand dollars, payable on the 1st day of November 1865; and secured by a deed of trust on certain real estate in this city; also three

negotiable notes of C. Wendlinger for \$1,030 each, payable at six, twelve, and eighteen months from the 1st July 1861. These were also well secured upon real estate in the city of Richmond.

Pizzini's debt was paid on the 9th January 1863, and the notes of Wendlinger were paid, the first in January 1862, and the other two in July 1862. These debts, as well as the proceeds of sale of the real estate, were all paid in Confederate States treasury notes, these being the only currency in circulation at that time. These different amounts, together with collections made of rents, and sales of furniture, were deposited, as received, in the Farmers Bank of Virginia, to the credit of Myers and Cridland, attorneys and trustees of Zetelle; and all checks drawn upon the fund were signed by both Myers and Cridland. In January 1864, the balance remaining to their credit was invested in Confederate States eight percent. coupon bonds. These bonds, enclosed in an envelope, were deposited in the Farmers Bank, endorsed with the following words: "15 C. S. bonds representing \$14,500, with coupons attached to the bonds. The property of Spiridione Zetelle, an Ionian subject, and under the protection of Great Britain. Deposited in the Farmers Bank of Virginia by Gustavus A. Myers and Frederick J. Cridland, attorneys and trustees of said Zetelle. January 21, 1864." This endorsement is in the hand-writing of Cridland. It is evident that the agents had two objects in making this deposit and endorsement: first, to keep the fund
738 separate *and distinct from their own funds; and second, to protect the fund against the sequestration laws of the Confederate Congress; Zetelle being an alien.

After Zetelle returned to Richmond in April 1865, he called upon Myers (Cridland having removed to another State) for an account of the agency and trust. A full and specific account was rendered by Myers, showing the amounts which had been received, and paid out, and that the balance (except a small amount which remained in Confederate notes) had been invested in Confederate bonds. This settlement Zetelle indignantly rejected, and brought his suit charging his agents with a breach of trust, in receiving Confederate currency, in payment of debts due to him; in selling his real estate for that currency, and in making investments for him without authority in Confederate bonds; and in failing to collect and remit to him, money which he contends they had undertaken to do; and by the amended bill charging that Andrew Pizzini was an active participant for his own advantage, in the gross violation of duty and breach of trust, on the part of his agents; and that the payment of his debt to the said agents was in no wise a just or legal satisfaction of said debt.

This amended bill is answered by Myers and Pizzini; Cridland having been proceeded against as a non-resident.

Myers denies all the allegations of the

plaintiff's bill as to any agreement upon the part of himself and his co-agent, to remit the proceeds of the sales of property or other collections made by them to the plaintiff; and emphatically declares, that if any such suggestion had been made, at the time of the execution of the power of attorney, that he would be expected to remit funds to Europe during a time of war and blockade, "he would unhesitatingly have declined the agency, however pressed upon, him." He denies that he and Cridland acted without authority, in receiving Confederate currency, and in making investments in Confederate securities, and
739 points *to the power of attorney and the deed of trust, which he insists conferred upon them the most ample powers to act for the plaintiff in his absence, as they would for themselves, in the condition of affairs which should exist during his absence. He denies that he was guilty of any violation of duty or breach of trust; but that what he had done was done in the honest exercise of a discretion voluntarily conferred by the plaintiff, by an instrument that invested him with the most ample powers and the largest discretion.

The answer of Andrew Pizzini admits the payment to Gustavus A. Myers, attorney in fact for Spiro Zetelle, of the sum of \$5,657.50, the principal and interest of his bond due said Zetelle, and that the payment was made in Confederate States treasury notes. And he insists, that this was a valid payment, made to one authorized to receive it, and that he was in no manner bound to see to the application of the money which he paid to such agent.

So much for the answers. The evidence in the cause (other than documentary) consists in the main of the depositions of the parties to the suit, there being but three other witnesses, Wendlinger, Von Groning, and Joseph J. Cridland, who were examined. And these witnesses knew but little of the transactions between Zetelle and his agents material to the matter in controversy. We may expect, therefore, to find such testimony conflicting and contradictory, and in the absence of documentary evidence, if the case stood alone upon parol proof, it might be difficult (according equal honesty and truth to the parties), to reconcile conflicting statements so as to arrive at a just conclusion.

But this conflict of evidence, which arises out of the different views and understanding of the parties, as to the character and objects of the agency and trusts, must be settled by reference to the terms of the instruments creating that agency and
740 those trusts. If upon the face *of these instruments of writing, voluntarily executed by Zetelle, by fair and reasonable construction of the language used, the nature, object and scope of the powers conferred, and trusts imposed plainly appear, then the parol proof need not, and ought not, to be resorted to in leading us to our conclusion.

First, let us look to the power of attorney.

The powers conferred by this instrument were of the most ample character. In addition to the enumeration of many particular powers, there are general clauses giving the widest scope to the powers conferred. For example, "to do, transact, execute and perform all proper, legal, equitable, needful, and requisite acts, matters and things relative to any affairs, business, and concerns of all and every kind whatsoever, none excepted or reserved." * * "It being meant and intended by me, to authorize and empower my said attorneys, or either of them, to do every matter and thing for me, in any right and capacity whatever, which can possibly be devised or lawfully done, although the same be omitted to be herein particularly set forth." And again, "And, moreover, in and about the premises to do, transact, execute and perform such other acts, matters and things as shall be deemed needful and most beneficial, as fully and effectually to all intents and purposes, as I myself might or could do by being personally present." It is difficult to conceive how any form of words or use of language could confer more ample powers or larger discretion upon agents, than is conferred by this power of attorney.

In addition to these general powers above enumerated, these agents are authorized specially, "to recover and receive of and from all governments, bodies politic or corporate, as well as from all and every person and persons whatsoever, whom it may concern, and to give receipts and acquittances for all such sum or sums of money, goods, wares, merchandise, effects, interest, instalments, debts and demands whatsoever, as now is, or are,
741 *or shall or may be hereafter due, owing, belonging to, or payable unto me."

In order to authorize Myers and Cridland to effect a sale of his real estate, and convey the title to a purchaser in case of sale, Zetelle and wife (on the same day on which the power was signed) executed and delivered a deed whereby they conveyed a house and lot to the said Myers and Cridland, "upon trust to lease the same for such term and for such rent as they or either of them might think most advantageous," &c. * * * "And upon further trust at such time, and in such manner, and upon such terms as the said trustees or either of them should think most beneficial, to make sale of said property, and to collect all sums arising from such rents and sales."

The deed of trust and power of attorney were executed at the same time, and for the purpose of effecting the same general object, namely: the management and disposition of the plaintiff's property and business during his absence from the country. They constituted, in fact, but one general agency, the power of attorney embracing all the property, and the deed of trust embracing the real estate only, for the purpose of investing the agents with an authority which was not, and could not have been conferred by the power of attorney, namely: the au-

thority to pass the title and interest of Mrs. Zetelle in case a sale was made of said real estate.

Looking to the deed of trust and the power of attorney, as constituting the agency of Myers and Cridland, for the management and disposition of the plaintiff's property and business during his absence in Europe, and defining their powers, it must, at least, be conceded, without considering at all the parol proof in the cause, that Zetelle voluntarily conferred upon these agents power to receive and collect all moneys due to him, as well as to sell his property, both real and personal, and to receive and collect the proceeds of such sale. This much is

742 *beyond dispute. It must also be conceded, that the power to collect necessarily carried with it the power to collect in Confederate currency, because no other currency was in circulation during the existence of the agency. And this is the more apparent when in an instrument drawn with the utmost particularity, no reference is made to the kind of currency which the agents are required to receive and collect, although at the time of the execution of the power of attorney Confederate currency was coming into general circulation, and became soon afterwards the only currency of the country.

But it is insisted that the only object which Zetelle could have had in authorizing the collection of debts due to him, and the sale of his real estate, was, that the same might be remitted to him in Europe. It is urged, therefore, that if the currency was of such a character as not to be made available to him, or if during the war and existing blockade this could not be done, then there was no excuse or justification on the part of the agents in receiving debts not due for several years, well secured by mortgage on real estate, or in making sale of valuable real estate for a depreciated currency, when there was no necessity or propriety for the sale; and that their conduct in this respect was a gross violation of duty and breach of trust for which they ought to be held liable.

It is argued with great force, by the learned counsel for the appellee, that however ample the powers conferred by the power of attorney and deed of trust, yet they must be construed with reference to the objects and purposes for which the agency was created. And conceding (say they) that the agents had the unquestioned authority to collect the debts due their principal, and to sell all his property, real and personal, yet the only object in conferring such power to collect and to sell must have been made the funds available to him, by remitting to him in Europe.

Certainly this argument would carry
743 with it almost *irresistible force, if the fact upon which it was predicated be admitted, to wit: that Zetelle had determined permanently to change his residence; that he intended to leave the country never to return, and that this intention was communicated to his agents. Upon the theory

assumed in the argument, that Zetelle left the country with the view of making his permanent abode in a foreign land, and that his desire and purpose was to have his property converted into such funds as might be available to him in the country where he proposed to locate, and that this intention and this purpose was communicated to him through his agents, it would be indeed difficult if not impossible for his agents to excuse or justify their conduct. It becomes, therefore, an important enquiry, as to what were the purposes of Zetelle in this respect, and whether these purposes were communicated to his agents. For if it be shown that he proposed to be absent temporarily only; to remain abroad until the war then waging should be brought to a close, and then to return again to this city which for many years had been his residence, and where he had met with much prosperity in his business; if it was his purpose simply to escape with his family from the dangers and privations of war, and avoid the vicissitudes of a civil strife, in which he as an alien had no interest, with the purpose to return with returning peace, then indeed the conduct of his agents must be viewed in a very different light. Or whatever may have been his purposes in this respect, if it be shown that he did not make known his purpose to his agents, but left them in ignorance of his plans, and gave them no specific instructions as to remitting to him, or as to the kind of currency to be received by them, or investments to be made for him, these facts must materially explain the conduct and affect the liability of the agents.

In his original bill Zetelle says he was about to go back to Europe, "to remain for an uncertain period; it might be for life."

Many months after the bill is filed
744 *and the answers of the defendants are in the cause, when produced as a witness, in response to a leading question by his counsel, whether, when he left, it was his purpose to change his domicil and make his permanent residence in Europe, he answers "Yes." When this determination was first formed does not appear. Certain it is, it was not his purpose to change his domicil and make his permanent residence in Europe on the 17th July 1861, less than sixty days before the execution of the power of attorney; for on that day a deed was put upon record in the Hustings court, conveying to Zetelle the same house and lot conveyed to Myers and Cridland by the deed of trust of September 9th, 1861. It could hardly have been his determination then to go permanently abroad, or he would not have purchased real estate in the city of Richmond. In point of fact he did return to the United States in the latter part of the year 1862, or early in the year 1863.

But whatever might have been his purpose, whether his absence was to be permanent or only temporary, certain it is that there is no sufficient proof in the cause from which we can conclude that his agents had any knowledge of his purposes in this respect. While Zetelle says that he com-

municated his intentions to his agents, both Myers and Cridland deny that they had any knowledge of his purpose to leave the country permanently; but both declare that they understood his purpose was to remain in Europe temporarily, during the continuance of the war. They both emphatically deny that there was any understanding or agreement that they should be required to undertake the remission of funds to Zetelle in Europe.

Myers in his answer says—"This defendant emphatically denies that there was by him, or in his presence, or to his knowledge, anything to show a purpose or understanding that the proceeds were during the then existing war, to be paid over or re-
745 mitted to the plaintiff, beyond *the limits of Virginia. So far from its being true, that this defendant was informed by the plaintiff before he executed said papers, that his object was that the net proceeds should from time to time be remitted to him, this defendant says that if he had been so informed, he would unhesitatingly have declined to undertake the agency however pressed upon him. For while the coast was blockaded there was great difficulty in remitting to Europe; it was not only troublesome and objectionable in other respects, and with his other engagements there was no adequate motive to induce this defendant to undertake it."

Cridland, in his deposition, in answer to the following question, "Were any instructions, written or verbal, given to you, or as far as you know to Myers, by Zetelle, as to remittance to him by you or said Myers, or both of you while the said Zetelle should be absent from America?" Says, "No instructions were given to me, and, as far as I know, none were given to Mr. Myers, or if they were I never saw them." Again, he says: "I was not informed by Mr. Zetelle in regard to remitting him money after he left Richmond. I did not understand that the agency was created for any such purpose. My understanding of the agency was this: that it was created by Zetelle because he intended to leave Richmond, and to leave reliable agents there to attend to the collection of his debts due and to become due to him; that he wished us to superintend the collection of rents of the real estate he owned in Richmond, to sell the same, if deemed best by his agents, and in all things to do for himself (Zetelle) precisely as he would do, if he had been present. I was under the belief that he desired to give us full control of his affairs in Virginia as soon as he left. I have no recollection, whatever, of having promised to remit money in any way, shape or form to him while he remained abroad, nor did I
746 receive any *instruction to remit any coin or sterling money of Great Britain."

These positive and emphatic statements in the answer, and the depositions of the defendants, Myers and Cridland, are not overthrown by any sufficient evidence in the cause. But they are confirmed by the

pregnant fact, and one full of consequence, that in the power of attorney which created the agency and defined the duties and obligations of the agents, a paper drawn with the utmost particularity, and widest amplitude, there is not to be found one line or word indicating a purpose to impose on the agents the obligation to remit any moneys which might come to their hands, to their principal in Europe. It would violate every rule of evidence to permit the parol proof of such a character as we find in this record, to outweigh not only the answer and depositions of the defendants, but to vary and modify in a material respect the written instrument creating the agency, fixing duties, and imposing obligations not to be found in that instrument.

Some stress was laid in the argument of the appellee's counsel, upon a provision of the deed of trust conveying the real estate to Myers and Cridland, which requires them in the event of selling said estate, "to pay over" the proceeds to Zetelle. This is a very usual and ordinary provision of trust deeds, where the power to sell is conferred upon the trustees; but this provision cannot be construed to impose an obligation to "pay over" to the grantor in a foreign country, in time of war, and pending a blockade. Such a construction would be most unreasonable, particularly when the deed of trust and the power of attorney executed at the same time, and for a common object, must be taken together, as constituting the same agency, and effecting the same general object.

I am of opinion, therefore, that the fair and legitimate conclusion to be arrived
747 at from the whole evidence, *upon the point now under consideration, is—1. That Zetelle, at the time he executed the power of attorney and deed of trust to Myers and Cridland, did not communicate to them that his purpose was to leave the country permanently. It was evidently their impression that his absence was to be temporary—only during the war. But if he had any well defined plan on the subject, I am bound to conclude, from the evidence before us, that it was not communicated to his agents.

2. I am constrained to say that there is nothing in the cause to show, either from the documentary or parol proof, that there was any undertaking or agreement on the part of Myers and Cridland, or either of them, to remit to their principal, in a foreign country, whatever might come into their hands as the agents of Zetelle. The positive and emphatic denial of both Myers and Cridland, sustained and confirmed by the absence of any clause in the power of attorney imposing any such obligation, is further strongly confirmed by the circumstances then surrounding the parties. It is incredible, in the absence of any written obligation to that effect, or proof of the most positive character, that these agents, both acknowledged to be gentlemen of the highest intelligence, should have undertaken to bind themselves to remit funds to

Europe under the circumstances then existing. They were in the city of Richmond, at that time the capital of the Southern Confederacy, and the great center of that power which held in check for four years the greatest armies ever marshaled in modern times; and Richmond was the objective point of all these armies. It was liable to be surrounded and laid in seige any day. The great object of the Federal government was to cut off the communications of this city; and the Federal generals manoeuvred their armies at different points to effect this object. Add to this the fact that our coasts were blockaded, and that blockade

becoming more and more effectual
748 every *day, and then it is almost incredible that any man in his senses should have undertaken to do that which was then difficult, but which any day might become impossible. No men understood these difficulties better than these intelligent agents with whom Zetelle had entrusted his affairs; the one being a lawyer eminent in his profession, the other representing the British government as consul here, and both intelligent observers of the remarkable events then transpiring. And we are not surprised to find Myers declaring, that if any such obligation, as undertaking to remit funds to Europe under these circumstances had been hinted at, he would unhesitatingly have declined the agency, however pressed upon him; or that Cridland should deny that the agency was created for any such purpose; accompanied with the statement "that consuls residing in the Confederate States received dispatches from the British minister in Washington, in which they were particularly cautioned not to transmit anything by means of the existing carrier, or special messenger, or through a British ship of war, but dispatches for the officers of the British government, and letters to their families, written by themselves."

That there was no obligation on the part of the agents to remit funds to Zetelle, is further confirmed by the fact that they received no communication on the subject from him during his absence. It is shown conclusively that Zetelle was travelling from point to point in Europe until his return to the United States in 1863, and that his agents had no knowledge of his whereabouts. According to Zetelle's own statement, he went first to Liverpool, then to London, then to Paris, then to Marseilles, then to Nice, then to Constantinople, thence to Naples, thence back to Nice, and returned to the United States the winter of 1862-3, spending a part of his time in New York and part in Chicago. But it is certain he

knew where they were, and there were
749 three modes of *communication open to him, which had been pointed out to him by Cridland before he left. And yet no instructions came from Zetelle on the subject of the agency. It is incredible, upon the theory that Myers and Cridland had undertaken to convert his means here into available funds, and transmit them to

Europe; that Zetelle should not have communicated with them. It is true Zetelle attempts to explain his failure to do this, by the statement that he had visited the brother of Cridland, a London attorney, through whom he expected his funds were to be remitted, and requested him to write for him on the subject. But in this he is not supported, but rather contradicted, by Mr. Joseph J. Cridland, the London attorney, whose deposition is in the cause. He recollects no conversation between him and Zetelle in reference to a remission of the funds, and is confirmed by the statement of his brother, the agent here, who states that the letter (and he received only one) of Jos. J. Cridland simply referred to his having seen Mr. Zetelle, but contained no instructions whatever, or any reference to his affairs. If there had been any understanding and agreement between Zetelle and his agents that the funds coming into their hands should be remitted to him in Europe, Zetelle would certainly have put himself in communication with them, and would not have remained satisfied to have attempted (admitting his statement to be true) to make that communication through one source when others were open to him; for Cridland, before he left the city of Richmond, had informed him that there were three channels of communication open to him, one through his brother, Jos. J. Cridland of London, one through the British consul at Nice (which Zetelle says was the first place of his destination), and one through the British embassy at Washington. With these channels of communication open to him, he fails to write to his agents, and this failure is a powerful fact to confirm the statements of Myers and

750 *Cridland, that there was no agreement on their part to remit funds received by them to Europe.

A minute and careful examination of the whole case forces my mind to the conclusion, that there was no such agreement on the part of the agents. It is not found in the written instruments creating the agency. It is not proved by the parol evidence. It is not consistent with the circumstances surrounding the transactions; and it is not consistent with the conduct of the parties.

Having arrived at this conclusion, the discussion of the case is now brought to a much more narrow compass, and the legal questions to be applied to the case as made out, according to my conception, are simple and easy of solution; because they depend upon well defined principles of courts of Chancery, settled by a course of decisions in England and in this country, too firmly now to be shaken.

The case made by the record is then simply this: Zetelle, having determined to leave the country to escape the dangers and inconveniences of the war, then raging between the Northern and Southern States, constituted Myers and Cridland his agents and attorneys in fact, and conferred upon them the most ample powers and the largest

discretion for the management of his business and the disposition of his property; in the language of the power of attorney, to act for him "as fully and effectually to all intents and purposes as he himself might or could do by being personally present."

It is conceded that they had the unquestioned authority to collect the debts due to him, and to sell his estate, real and personal, if in their discretion they thought it best. They did collect his debts and sell his property. The question as to their obligation to remit the funds to Europe having been disposed of, the only question now to be determined is, whether in doing this, and receiving Confederate currency and making investments in Confederate bonds,

751 they have been guilty of such a breach of trust, and violation of duty, as will make them liable to Zetelle for the loss he has suffered. No fraud is charged upon the agents, no mala fides is imputed to them, and certainly none is proven. They were both gentlemen of the highest character, and their integrity has not been and cannot be assailed. But it is said that they have been guilty of a gross violation of their duty and a breach of trust in this, that they collected debts which were not due, and were well secured upon valuable real estate; that they sold the real estate of their principal for a depreciated currency, and invested the proceeds, as well as the other funds collected, in Confederate States securities; and that in this way, they, by their gross negligence of the interests of their principal, and injudicious management, instead of preserving the trust property committed to them, caused its utter loss and destruction.

When we sit in judgment upon the conduct of these agents, during a period of such remarkable political events as were then transpiring, it would be to the last degree unjust and inequitable to measure their conduct by subsequent events; to characterize as acts of folly, those things which in the light of the present, may so appear, because of the unfortunate result, and to condemn as criminally injudicious and reckless, conduct which, if events had been different, would have been wise and judicious, and commended of all men. In the light of the present it is easy to discourse wisely of the folly and infatuation of those times in which men recklessly imperilled their own fortunes and the fortunes of others under their control, in investments which depended upon the result of battles and the fate of war. But that folly and that infatuation was common to a whole people, and men as wise and judicious as any of the present day, embarked their all, and lost their all, by their confidence in a struggle which they felt sure must ultimately triumph. To pass judgment

752 rightly, now, upon their conduct, we must place ourselves in their position, and look out upon all the circumstances then surrounding them, not from our standpoint, but from the standpoint from which they viewed them, and judge accordingly.

Myers and Cridland having undertaken the management of Zetelle's affairs in his absence, (an agency not of their own seeking, but which was pressed upon them by Zetelle) found themselves in possession of certain notes and bonds amounting to seven or eight thousand dollars, and real estate for which Zetelle paid \$2,900 in July 1861.

It has been already seen that they had full authority from Zetelle to collect these bonds and notes and to sell this real estate, and it must be conceded they had the authority to collect in Confederate currency; for at the time of the creation of the agency, to wit: on the 9th September 1861, that currency was coming into general circulation, and was soon afterwards the only currency in circulation in this State.

In March 1862, Myers and Cridland finding that they could sell the real estate of their principal, at a large advance over what he had paid for it in 1861, and not having received any communication from Zetelle, and being in ignorance of his residence, and unable to communicate with him, determined after "anxious consultation," (in the language of one of them) to expose the property for sale at public auction, and accordingly sold it on the 31st day of March 1862, for the sum of \$4,725. It is insisted that this was an injudicious and reckless exercise of authority on the part of the agents, and especially, when the proceeds were invested by them in Confederate bonds, causing a total loss of the property to their principal. But was it injudicious even, in the light of the circumstances then surrounding the agents? It that time Confederate currency was but slightly depreciated, and they had a chance of selling the property of their principal at an advance of \$1,825 upon its costs six months before. At that time Confederate currency was received in payment of debts and in all the channels of trade without doubt or question, and Confederate securities were eagerly sought after, by corporations as well as individuals, as the safest and most profitable investments that could be made. Courts of Chancery having funds under their control, were daily directing such investments in every county in the Commonwealth, and fiduciaries, with and without the advice of the courts, were seeking such investments as the best that could be made for those they represented.

753 It that time there was universal confidence in the ultimate triumph of the Confederate cause. The armies of the South had won victory on almost every battle-field; and here in Virginia had commenced those brilliant triumphs in the Valley, which in a few months afterwards enabled Jackson to unite with Lee, and culminated in the great battles around Richmond, which forced the grand army of the Potomac, broken and disorganized, to take shelter under the gunboats at Harrison's landing. At that time, and long afterwards the most prosperous, the most prudent and judicious men in this city; men of large experience and large success in business; men marked

in the community as prudent and judicious men, were every day selling their real estate under the temptation of high prices and investing the proceeds in Confederate bonds. Myers himself sold his own real estate and that of his sisters for Confederate money, and invested the proceeds in Confederate bonds. Is he to be held to act with greater prudence and forecast for his principal than for himself and for those bound to him by the nearest ties of blood and affection? If he acted for his principal as he acted for himself, and in doing so followed the example of the most prudent and judicious men, shall the loss fall on him because of the unfortunate result which the wisest men could not foresee? He was

754 authorized to do what Zetelle "might or could do *if he were personally present." Suppose Zetelle had been present. Would it have been at all improbable that he, surrounded by the same circumstances and influenced by the same examples, would have done precisely the same thing? Is it improbable that he would have been influenced by the advice of his friend Cridland, who was like himself a foreigner, who was an officer of the British government, and through whose kind offices Zetelle was enabled to leave the country. If he had remained in Richmond does any one doubt, after reading this record, that Cridland would have advised him to sell his real estate, and that Zetelle would have followed that advice? Cridland, a foreigner, not influenced by the patriotic hopes and desires of Southern men—Cridland, an officer of the British government, an impartial and intelligent observer of passing events, thought at that time the war would be of short duration and result in the triumph of the Southern cause; Cridland thought it best to sell Zetelle's real estate when it could be sold at a handsome profit. Would Zetelle have thought otherwise if he had been present? Is it at all probable that he would have acted differently from his intimate and influential friend, the British consul, who, from his official position and connections, had far better opportunities of forming an intelligent opinion upon passing events. I think no impartial mind can give this case a candid examination without coming to the conclusion that all the probabilities are that Zetelle, if he had been himself personally present in Richmond, would have done precisely what his agents, Myers and Cridland, did, so far as the sale of his real estate was concerned.

But it is said that these agents were guilty of a gross violation of duty and breach of trust because they collected the notes of Wedlinger and the bond of Andrew Pizzini, all of which were well secured upon real estate in this city. So far as the notes of Wedlinger are concerned, 755 *it is sufficient to remark that they were negotiable notes, payable at one of the Richmond banks, and were collected by the bank in the usual course of business, and in the only currency then received and paid out by the banks. The collection of

the note of Andrew Pizzini, which was not payable until the 1st November 1865, requires more particular notice. The collection of this note was certainly not without authority, however injudicious we may say it was; for the power under which the agents were acting, voluntarily conferred upon them by Zetelle, authorized them to collect all his debts, whether due or not. So that they did not act without authority, if they did act without judgment and due discretion. Certainly, as events have transpired, it would have been most prudent, and they would have best consulted the interest of their principal, if they had refused to receive this debt. But having the authority to receive it, its collection was at most an error of judgment only. But was it such an error as constituted a violation of duty and breach of trust, for which they or Pizzini can be held responsible for the loss which Zetelle has unfortunately suffered? If it was simply an error of judgment, without any of the elements of mala fides, without any intention or motive to defraud their principal, and is not characterized by a reckless negligence and disregard of their principal's interests, so as to constitute a violation of duty and breach of trust, then no legal liability can attach to the agents.

To determine these questions we must again look to the circumstances which surrounded the agents from the standpoint which they occupied. This debt was paid in January 1863. Both Myers and Cridland say that it was the subject of anxious consideration and consultation between them, whether they should receive this money. They both gave the same reason why they thought it best under all the circumstances to collect it. At that time the Confederate

armies had met with serious reverses. 756 *The city of Richmond was threatened, if not actually invested, by powerful armies from different points. They had every reason to believe that the city would be bombarded, and burnt if taken. The security for the debt of Pizzini was the house which was mortgaged to secure the debt. If that was burned, it was doubtful if the debt could be made.

The evacuation of Richmond was an event that might be expected any day. They had no reason to believe that the evacuation of this city would be followed by the surrender of the southern armies, but that the war might still continue, and the southern cause yet be triumphant; and that the best security they could have would be the bonds of the Confederacy. With this belief, and under these circumstances, they received the debt of Pizzini. Looking back upon these events from our standpoint, we may say it was an act of folly upon the part of these agents to collect this debt, so well secured; but can we say that, under the circumstances which then existed, they acted with such reckless disregard of their obligations as to impose on them a legal liability for their conduct. All we can say is, that it would have been better, as events have transpired, if they had not received

this debt; but we cannot say that, under all the circumstances, they were guilty of a breach of trust and violation of duty. It is easy to conclude now, that a deed of trust upon a house and lot in the city of Richmond was better security for a debt of five thousand dollars than a bond of the Confederate States. But when that city is threatened by beleaguering armies with bombardment and fire, we may conclude that a man at least acted honestly and in good faith, who, having unwavering confidence in the triumph of the southern cause, preferred a bond of the Confederate States as better security than property thus threatened with destruction.

But again it is urged, that these 757 agents had no authority *to make investments of the funds they received in Confederate bonds. It seems to me to be a full answer to this argument to say, that the same investment was made of the funds of Zetelle, which Myers, one of his agents, made for himself. Myers invested for himself the sum of \$10,000, part of which was for proceeds of real estate sold about the time he and Cridland sold Zetelle's real estate. He invested for his sisters and cousins over \$25,000. Can there be mala fides charged against a man who made these large investments for himself and those nearest to him by the ties of blood?

But let it be remembered, that these agents were cut off from all communication with their principal, without any knowledge of his whereabouts, and without the power of communicating with him. They find themselves in possession of a large fund belonging to their principal. What are they to do with it? It is their duty certainly to invest it in an interest bearing fund. They find the most judicious and prudent men making investments in Confederate States bonds. One of them has invested for himself and those dependent upon him, the sum of \$35,000; and under these circumstances they conclude to make the same investment for their principal, who is in a foreign country, and who has given them no instructions, and with whom they cannot possibly communicate. How can it be said that in doing this they have been guilty of a breach of trust and a violation of duty, for which they shall be held responsible?

But let it be conceded that these agents did commit errors of judgment; that by a different course they might have saved a large portion of their principal's estate from the wreck and ruin of the war; that if they had not sold his real estate, that would have escaped the hazards of sequestration, as well as the fires which did at last consume a large portion of this city;

758 that the debt of Pizzini, if they had let it remain till due, would *have been also saved to their principal: admit all this, and yet, in the absence of any proof of fraud or mala fides, upon the well settled principles of courts of equity, they cannot be held liable for the loss their principal has suffered. That loss must fall on him, and not on them.

There has been great uniformity in the decisions of the English and American courts in the application of the equitable principles which fix the liability of trustees and other fiduciaries, with respect to the trust subject; and I believe no case can be found where a trustee guilty of no mala fides, has ever been held responsible for a loss occurring from a mere error of judgment, without any wilful default on his part when the act done was within the power under which he acted. In *Jackson v. Jackson*, 1 Atk. R. 513, Lord Hardwicke said: "To compel trustees to make up a deficiency not owing to their wilful default is the harshest demand that can be made in a court of Equity." In *Knight v. Lord Plymouth*, 3 Atk. R. 480; S. C. 1 Dick. R. 120, the same great judge uses the following language: "If there is no mala fides, nothing wrongful in the conduct of the trustee, the court will always favor him. For as a trust is an office necessary between man and man, and which if faithfully discharged is attended with no small degree of anxiety and trouble, it is an act of great kindness in any one to accept it. To add hazard or risk, to that trouble, and to subject a trustee to losses he could not foresee, would be a manifest hardship, and would be deterring every one from accepting so necessary an office." See, also, *Belchier v. Parsons*, 1 Amb. R. 218; *Rowth v. Howell*, 3 Ves. R. 565; *Adams v. Claxton*, 6 Id. 226. As late as 1843, the master of the rolls (Lord Langdale) would not charge fiduciaries "when they pursued that which was considered the most prudent and proper course, and a loss has unfortunately arisen." *Edmunds v. Peake*, 7 Beav. R. 239, 243, 29 Eng. Ch. R.

The courts of New York have repeatedly declared the same doctrines.

In *Thompson v. Brown*, 4 Johns. Ch. R. 619-628, Chancellor Kent, after expressing his concurrence in the views of Lord Hardwicke, above quoted, declares, that "where there is no just imputation of mala fides, and the fault is but, at most, an error of judgment, and a want of sharp-sighted vigilance, it would have the appearance of great rigor, and would be hardly reconcilable with the doctrines of a court of equity, to hold a trustee responsible." And in *Franklin v. Osgood*, 14 John. R. 527-560, Platt, J., says, "It is not necessary to show that the trustee acted with all the prudence and sagacity that might have been used."

In Pennsylvania the same doctrines have been repeatedly declared. In *Konigmacher v. Kimmel*, 1 Penr. & Watts R. 207-215, the court, speaking of the "standard by which trustees are to be held liable," say, "pre-eminent knowledge and uncommon foresight are not required. Ordinary men are to be compared and judged by the standard of ordinary men. Common skill, common prudence and common caution are all that courts have required or ought to require."

In *Zebach's lessee v. Smith*, 3 Binn. R. 69, 73, in a case in Pennsylvania growing out of a sale of land in 1779 for continental money, for an inadequate price, and when

there seemed to be no pressing necessity for the sale, Teates, J., said, "It would be unreasonable to judge of the conduct of W. from subsequent events. His conduct ought not to be condemned if it flowed from an honest though uninformed and mistaken judgment." See also, *Burr v. McElvine*, 1 Bald. R. 162; *Gray v. Lynch*, 8 Gill's R. 403, 430; *Hart v. Ten Eyck*, 2 John. Ch. R. 62; *Wilkinson v. Stafford*, 1 Ves. jr. R. 32.

In Virginia these same doctrines have become well settled by repeated and very recent decisions of this court. In *Carter v. Elliott*, 9 Gratt. 511, 559, Judge Lee, delivering the opinion of the court, after reviewing many of the leading English and

American cases, says: "The fair result of the views they present and the reasoning they adopt is, that where a trustee has acted in good faith, in the exercise of a fair discretion, and in the same manner in which he probably would have acted if the subject had been his own property and not held in trust, he ought not to be held responsible for any loss accruing in the management of the trust fund. * * * It is doubtful whether a wise policy should ever require more of a trustee than that he should act in good faith and with the same prudence and discretion that he is accustomed to exercise in the management of his own affairs."

The principles settled by the case of *Elliott v. Carter* were approved and reaffirmed in the case of *Davis, trustee, v. Harman*, decided at the last Wytheville term of this court, supra 194, and may now be regarded as the settled law of this State.

Applying these well settled principles of equity jurisprudence to the case under consideration, I am constrained to say, that the loss which has unfortunately occurred, ought not to fall on these agents and trustees. That they had the authority to collect the debts due Zetelle, and to sell the real estate, cannot be denied. That they acted with the utmost good faith, and with an honest though (as events have transpired) a mistaken judgment, must be conceded. The loss which Zetelle has unfortunately suffered was certainly not caused by the wilful or negligent conduct of his agents. They could have had no other motive in what they did, than an honest, if misguided, purpose to promote the interests of their principal. One of them was his intimate friend, who had shown himself ready under trying circumstances to do kind offices for him, and not a step was taken without his co-operation and advice. The other was a gentleman of such high character and unblemished reputation for integrity, that it is impossible to conceive

that he would act otherwise than with the utmost fidelity to such a trust.

And it is shown that he made the same disposition of his own property as that of his principal. The only motive suggested, inconsistent with an honest purpose to protect the interests of their principal, was that they sold his property and collected his debts, in order that they might

be the recipients of the paltry sum of five per cent. commission in Confederate money, to be divided between them. To such an unworthy motive all the circumstances of the case and the high character of the parties afford an incontestible refutation.

The serious loss which must fall upon the appellee (Zetelle) is the result, not of the wilful negligence or misconduct of his agents, but of a disastrous civil war, which has spread a flood of ruin and desolation over the land, engulfing the fortunes and wrecking the hopes of half the people of this Commonwealth. To make these trustees and agents liable now, would be to hold them responsible for an unerring discretion, for a judgment infallible, and a forecast beyond all mental prescience.

The result of these views is, that neither Pizzini nor Myers and Cridland can be made liable to Zetelle for the unfortunate loss he has suffered.

I am painfully impressed with the hardship of this decision upon the appellee. And it would be an equal hardship upon the appellants, if the decision were otherwise. The loss cannot be divided. It must fall upon the one side or the other. We must place it where the established adjudications of the courts and the firmly settled rules of equity have authoritatively fixed it.

I am of opinion that the decree of the Circuit court of the city of Richmond should be reversed, and that the bill of the appellee be dismissed.

The other judges concurred in the opinion of Christian, J.

Decree reversed.

762 *Meredith & als. v. Salmon.

March Term, 1872, Richmond.

Bonds—Case at Bar.—A tract of land worth before the war, not more than \$6,000, was, in June 1863, sold by F to S for \$30,000; of which \$5,000 was paid in cash in Confederate money, and for the remainder, five bonds of \$5,000 each were given, to be paid in one, two, three, four and five years, "in current funds," with interest payable semi-annually from their date; and a deed of trust on the land to secure them. The fourth bond was, in July 1863, sold by the agent of F to M, who purchased it as commissioner of the court for an investment. In a controversy in equity between S and M as to the amount to be paid upon this bond, HELD:

1. Same—Bona Fide Holder—Equitable Defences.—

Though M is a *bona fide* holder of the bond, S may make any defence to it in equity, that he could make in an action upon it by the obligee. M holds the bond subject to every infirmity of consideration—to all the equities attaching to it in the hands of the party to whom it was executed.

2. Same—Kind of Currency—Parol Evidence.*—

Though the bond provides on its face, that it "is

*Bonds—Kind of Currency—Parol Evidence.—See the principal case approved in *Hilb v. Peyton*, 22 Gratt. 562, 567. See also, *foot-note* to *Hilb v. Peyton*, 22 Gratt. 550.

to be paid in current funds," S may prove, by parol evidence, that by agreement with F at the time the bonds were executed, he had a right to pay them at any time before they were due in Confederate currency; and that he had so paid the other four bonds to the holders thereof, and in January 1865, offered to pay this bond.

3. Same—"To Be Paid in Current Funds"—Presumption.—

The words of the bond that it is "to be paid in current funds," does not necessarily raise the presumption, that it is to be paid in another and more valuable medium; but their proper interpretation depends upon the time when and the circumstances under which they are used.

4. "Current Funds"—Interpretation of.*—

The most just and reasonable interpretation of the words "current funds," is, that they are intended to guard against any contingency of an obligation to pay in coin.

5. Bond—How Discharged—Case at Bar.—

The bond constituting one-sixth of the price contracted to be given for the land, it is to be discharged by the payment of one-sixth of the value of the land in United States currency, at the time of the sale.

763 *This was a suit in equity in the Hustings court of the city of Richmond, by Wm. L. Salmon against John A. Meredith, Mary L. Meredith and her children, asking the court to fix the amount the plaintiff should pay in discharge of a bond of \$5,000, which was one of five given by him in June 1863, for the purchase money of a tract of land which he purchased of S. R. Fondren. The plaintiff insisted that the contract for the land was made with reference to Confederate currency as the standard of value; and that by agreement with Fondren at the time, he was entitled to pay off the bonds at any time before they fell due; and that he had in fact so paid off the other four bonds.

John A. Meredith answered the bill, and said he was induced to purchase the bond as commissioner of the court, as an investment, because of the length of time it had to run, and that it was to be paid in current funds; and at the time of the purchase, and indeed until January 1865, he had no information that Salmon had a right to pay off the bond before it was due; and if he had been so informed he would not have purchased it. Mrs. Meredith also answered, referring to the answer of John A. Meredith.

The facts as they appear in the record, are substantially as follows:

In June 1863, S. R. Fondren sold to William L. Salmon, a tract of ninety-three acres of land lying about a mile and a half from the city of Richmond. For this land, which before the war was worth about five thousand five hundred or six thousand dollars, Salmon was to pay thirty thousand dollars; of which he paid \$5,000 in cash, and executed his five bonds of \$5,000 each,

*Current Funds—Interpretation of.—See the principal case cited and approved in *Wrightsmen v. Bowyer*, 24 Gratt. 439; *Sexton v. Windell*, 23 Gratt. 538. See generally, monographic *note* on "Bonds."

for the balance, payable in one, two, three, four and five years from the date, with interest payable semi-annually. The bonds were alike except as to the time of payment, and were in the following form: \$5,000. One year after date I promise to pay to Samuel R. Fondren, his executors,
 764 *adm'rs or assigns, the sum of five thousand dollars, with legal interest thereon from the date thereof until paid, the said interest to be paid half yearly, on the first days of December and June, and to be paid in current funds, for value received. For the punctual payment whereof, I bind myself, my heirs, executors and administrators. Given under my hand and seal, at Richmond, this first day of June 1863.

The first three of these bonds were transferred to Fendall Griffin, from whom Salmon had purchased the land, and were paid to him or his assignee before their maturity; and the fifth was paid in the fall of 1863, to Fondren. The fourth, which is the subject of this suit, was transferred to John A. Meredith as commissioner of the court.

It appears that Mr. Meredith, who had, as commissioner of the court, in June 1863, sold certain real estate belonging to Mrs. Mary L. Meredith and her children, and was directed to invest the proceeds of the sale, applied to Wellington Goddin, who as auctioneer had sold the property, to purchase State stock for him. Failing to procure the stock, Mr. Meredith then enquired if he (Goddin) has any securities other than Confederate bonds in which the investment might be made; and Goddin offered to sell to Meredith the bond in controversy in this suit, and also the one payable in five years. Meredith, with the approval of one of the beneficiaries, purchased the first; and was induced to make the purchase because it was payable four years after date, in current funds, was endorsed by Fondren, who he believed to be responsible, and was secured by a deed of trust on real estate. When he purchased the bond he had no information that Salmon had a right to pay it before it became due.

Wellington Goddin was examined as a witness. He states that at the request of Fondren he wrote the bonds, and that they were written in exact accordance with the

765 *instructions of the parties given to him. In answer to a question, he says: "I do not know what were the views of these gentlemen as to the kind of currency in which these bonds were to be paid, but I will state my opinion after hearing an interview between them at the time. As I before stated, Confederate currency, at the time of the contract, was greatly depreciated, and as, in the event the Confederate government succeeded the currency would improve in value, that nearly all the citizens of the South had the greatest confidence that the South would gain her independence, in which event its currency would be greatly enhanced in value, therefore, persons selling real estate, were willing to sell it on a credit, in the hope that

by the maturity of the obligation, the success of the Confederacy would be established. In that event, if the Confederate money was the current circulation at the time of the maturity of the obligations, then the obligation was to be paid in such currency, but if gold was the only money in circulation, then the obligations were to be paid in gold."

Salmon, who testified in the case, states that there was an understanding between Fondren and himself, the amount of the bonds being so large, that he, Salmon, should have the privilege of taking up any or all of the bonds before maturity, that is, whenever he had the money to take them up with; and that this agreement was made before the bonds were executed. He says he paid the five years' bond to Fondren in the fall of 1863; and he took up the bonds assigned to Griffin before they were due. And they received the money because they knew of the understanding, and that he had a right to take them up; and in January 1865 he offered to pay to M. the bond in controversy. There are other witnesses who testify to having heard from Fondren that such was the agreement. Fondren himself was dead when the suit was brought.

The cause came on to be heard on
 766 the 22d of June *1868, when the court held that the bond in controversy was a contract entered into with reference to Confederate States treasury notes as a standard of value; and it appearing that on the 1st of June 1863, the date of the contract, seven dollars of said Confederate notes were equal to one of gold, it was decreed that the bond be commuted and reduced to \$714.29; and that upon Salmon's paying that amount, with interest from the 1st of June, up to which time the interest had been paid, into the First National Bank of Richmond to the credit of the cause, he should be discharged from all indebtedness by reason of the bond aforesaid. And upon the payment of the said sum and interest into the bank, Goddin, the trustee in the deed of trust to secure the bonds, was directed to release the trust. The Merediths thereupon applied to this court for an appeal from the decree; which was allowed.

Meredith, for the appellants.

Cannon & Courtney, for the appellees.

STAPLES, J. Although the bond in controversy is in the possession of a bona fide purchaser, the obligor may, notwithstanding, make any defence here he could have made in an action by the obligee. The purchaser holds the bond subject to every infirmity of consideration—to all the equities attaching to the instrument in the hands of the party to whom it was executed. The only question then to be considered is, what did the parties mean by the words "current funds," used in the several obligations executed by the vendee? Did they intend to provide for payment of the debt in the money current, whatever it might be,

at the maturity of these obligations, or were they contracting with reference to Confederate money, and its probable continuance as the circulating medium of the country. This question must be decided not alone by the language of the instrument,
767 *but by a careful consideration of all the facts and circumstances.

That an individual during the war, having urgent need for Confederate notes, and knowing they would be useful to him in the payment of specie debts, might have been willing to execute his obligations therefor, payable at a remote period, and incur all the risks of an appreciation of the currency may be readily imagined. But it is difficult to believe that a person possessed of ordinary intelligence would deliberately have encountered the hazard of being required to pay \$25,000, with its accumulated interests, in a sound currency, for a tract of land worth only \$6,000, whatever may have been his conviction of the result of the struggle. Certainly if the parties looked forward to some other and more valuable currency as a medium of payment, and measured their agreement by a more permanent standard, that very consideration must have had its influence on them in estimating the price to be paid for the property.

If we are permitted to speculate as to their views, we may reasonably suppose they entertained the opinions held by a great majority of the people. They probably anticipated an early triumph of the Confederate cause, and, as a necessary result, a marked appreciation of the Confederate money. Mr. Wellington Goddin, a witness, an extensive auctioneer and real estate agent during the war, in answer to a question asked him, says that he wrote the bonds in accordance with instructions given him by the parties; that he does not know what were their views as to the kind of currency in which the bonds were to be paid; but that he would state his opinion after hearing an interview between them at the time. He says: "Confederate notes at the time of the contract were greatly depreciated, and as nearly all the citizens of the South had the greatest confidence in the success of the cause, and as in that event the currency

would be greatly enhanced in value,
768 persons selling real estate *were willing to sell on credit, in the hope that by the maturity of the obligation, the success of the Confederacy would be established." If the parties consummated their sale and purchase with these views and expectations, they contracted on the basis of Confederate money as the medium of payment. A contract of this sort is substantially the same as a contract to pay in Confederate States notes. It is a contract, according to the real understanding of the parties, entered into with reference to such notes as the standard of value, and to be fulfilled in like medium.

The extended credit given would indicate, in such a case, not that the vendor expected payment in coin or lawful money of the United States, but that the Confederate cur-

rency would be less depreciated when the day of payment arrived. In this view the stipulation in relation to "current funds" may be readily explained as intended to exclude the idea of an agreement to pay in coin. These views are strongly confirmed by the conduct of the vendor subsequent to the sale. In October 1863, we find him receiving from the vendee payment in full of the bond maturing in June 1868. The bond falling due in June 1867, was placed by him in the hands of a broker and sold for Confederate money. The remaining three were assigned to Fendall Griffin, from whom he had purchased the land. It is not proved; it is not even suggested, that the vendor was impelled to this course by a pressing and urgent demand, or by the prospect or hope of a better investment. His sale of the bonds under the circumstances is utterly inconsistent with the theory that the vendor was unwilling to receive the Confederate notes, and intended to await the advent of a better circulating medium. The conduct of the holders of these bonds also repudiates such a pretension. As late as November 1864, all of them, except the appellant, readily accepted payment, not because their necessities re-

quired it, but, according to the evidence, because *they were apprised of the real agreement and understanding of the original parties. This understanding has been fully proved by the vendee, whose deposition has been taken and read without objection. According to his statement it was expressly agreed between him and the vendor he should have the privilege of discharging the whole amount of the purchase money at any time before its maturity, and in accordance with this privilege he had paid all the bonds except the one in controversy, which he also proposed to pay in January 1865. It is also proved by another witness, S. N. Davis, "that in a conversation held in 1863 with the vendor about the sale of the property, that the latter said he had made a sale to Salmon, the vendee, on long time, giving him the privilege to pay for the place whenever he got the money, which he was satisfied he would soon do." These statements are strongly corroborated by the conduct of the vendor before alluded to, and are not contradicted by any evidence in the record. If they are to be believed, it seems to me they are decisive of this case. They explain the motives and views of the parties in entering into the contract—that no special importance or meaning was attached by either to the use of the words "current funds," or to the extended credit given; that the vendor certainly did not intend thereby to provide for payment in some better currency, nor the vendee to subject himself to the hazard of being forced to pay four times the value of the property purchased, without the slightest probability of being a gainer by the arrangement.

It is insisted, however, that this evidence is plainly contradictory of the written agreement. Were this so, it would

still be legitimate, as the statute authorizes either party to show by parol or other relevant evidence, what was the true understanding, either expressed or to be implied, in respect to the kind of currency in which the contract was to be fulfilled. Such evidence, however, *does not modify or alter the written agreement. As was said in *Thorington v. Smith*, 8 Wall. U. S. R. 1, it simply explains an ambiguity which under the general rules of evidence may be removed by parol. It enables the court simply to interpret the written terms according to the real intent and agreement of the parties, and to understand what was meant by the words they have employed.

The case of *Taylor v. Turley*, 33 Maryland R. 500, very recently decided, in some of its features is very similar to this. The note in controversy there was executed the 7th February 1863, in the State of Tennessee, while the Confederate forces "were in the ascendancy in that State, for a loan of Confederate money, payable two years after date, "in current bankable funds." Four judges in a court of seven, held that the note was payable in United States currency. The other three were of opinion that the note according to its terms, when construed in the light of the facts and circumstances described by the evidence, was payable in Confederate currency. Judge Stewart, in delivering the opinion of the majority, relies mainly upon the fact, that no evidence had been adduced tending to show that the parties in employing the words, "current bankable funds," referred to Confederate money, and its probable continuance for the next two years as the prevailing currency of the State of Tennessee. On the contrary, the facts showed that they contracted in view of the fluctuating value of the circulating medium in that State, depending upon the fortunes of war, at one time Confederate notes constituting the currency, and at another United States treasury notes, accordingly as the contending forces alternately obtained the ascendancy; and these very fluctuations confirmed the conclusion that the parties contemplated the very possible occurrence of a different currency at

the maturity of the obligation from *the one then prevailing, and adopted the terms of the note to meet such a contingency.

In the State of Virginia the condition of things was entirely different. At the period of the execution of this instrument, certainly, there was no such struggle for ascendancy between contending forces, no such fluctuations and changes of currency, as in the State of Tennessee. The operations of the government and the transactions of the people were almost universally conducted through the medium of the Confederate treasury notes. It seems to me, therefore, the construction given to a Virginia contract of 1863 should be the very reverse of that applied to a Tennessee contract of the same period. It is certainly reversing the order of things to presume that parties, contracting with reference to

the prevailing currency, contemplated payment in some other unknown and more valuable medium. No such presumption results necessarily from the use of the words "current funds." There is no magic in these words. No legal import attached to them. Their proper interpretation depends upon the time when and the circumstances under which they are used. The Supreme court of the United States, without the aid of legislative enactments, finds no difficulty in divesting the word dollar of its long established legal signification in this class of cases, and of considering it in the light of all the circumstances surrounding the parties. We on the other hand, with the aid of a liberal statute, are continually embarrassed in our efforts properly to interpret the words "current funds," and phrases of a like character, when employed in the same connection. Most persons are willing to concede that an obligation executed in 1863 or 1864 for the payment of dollars, although at a remote period, is to be considered a Confederate contract when founded on a loan of Confederate notes, or a sale of property at Confederate prices. In such case they agreed that the parties meant the dollars in circulation *when the contract is made, and not when it matures. But if the words "current funds" and the like are inserted, something else was intended of a wholly different character. In that case it is a contract of hazard; a speculation upon the currency and the duration of the war was intended; and upon this arbitrary rule of interpretation, the unfortunate purchaser or borrower is overwhelmed with a debt never seriously contemplated by either of the parties. It seems to me, the most just and reasonable interpretation is, to consider these words as simply intended in such cases to guard against any contingency of an obligation to pay in coin.

The case of *Boulware v. Newton*, 18 Gratt. 708, has been cited as sustaining the pretension of the appellant. There the obligation was for the payment of the sum designated "in current funds." The counsel in that case, relying upon the authority of certain English cases, insisted that the parties were precluded by the reason, policy, and intendment of the law, from affixing to the words "current funds" any other meaning than that of funds current at the date of the contract. Judge Rives, in answering this view, said this would be to disregard the true reason of the authorities, and to deny to our citizens, at that time under all the circumstances of their condition, that absolute freedom of contracting in view of all possible eventualities, which the principles of the common law secure to all, in spite of the changes of government. It was held, not that the words in question of themselves excluded the supposition that Confederate currency was intended, but in the connection in which they were used, and under all the circumstances and provisions of the contract, they would not admit of that interpretation. It was said by Judge

Anderson, in *Miller & Franklin v. City of Lynchburg*, 20 Gratt. 330, 343, that he was indisposed to extend the principle of *Boulware v. Newton*, in its application to other cases, and would not apply it unless
773 required to do *so by clear and conclusive evidence; and in this remark all the judges concurred.

It is supposed that *Kraker v. Shields*, 20 Gratt. 377, is an authority for the appellant here. The cases will be found on examination to be wholly dissimilar. In *Kraker v. Shields* nothing is said in the notes or deeds of trust about the currency in which payment was to be made, but the money is described generally as so many dollars. There the land was sold in November 1862, at the price of fourteen thousand and five hundred dollars, of which \$5,000 were paid in cash in Confederate notes. The estimated value of the land in coin before the war and at the date of sale, was ten thousand dollars, and in November 1865 it would have sold for fifteen thousand dollars. Estimating the cash payment at its specie value, and supposing the remainder payable in United States currency, the price stipulated to be paid was about the fair value of the property. In point of fact, however, two instalments falling due in 1863 and 1864, were paid in Confederate money. It was proved that the vendor anticipating a better currency in a year or two, expressly refused to sell except upon the terms of receiving the deferred instalments in the money in circulation when the bonds matured, and that these terms were communicated to the purchaser and by him accepted, though with considerable reluctance and hesitation.

In the present case the real value of the land does not exceed six thousand dollars, while the agreed value was thirty thousand dollars. Does any one suppose that the purchaser would have entered into this contract, if the vendor here, as in *Kraker v. Shields*, had informed him it was his determination not to receive payment until the maturity of the respective bonds, and then to require it in gold if that should be the circulating medium. So far from it, the proof is, as I have before stated, that the vendee made the purchase and executed his
774 bonds in the form adopted, with the express reservation of a right to *pay them at his pleasure in Confederate currency. And in accordance with this privilege, he did pay all of them except the one in controversy, and not only asserted his right to pay that, but made a formal tender of the amount. If the vendor, instead of selling these bonds, had retained possession of them, refusing payment when tendered, and was now asserting a claim to a recovery of twenty thousand dollars, with interest thereon from June 1863, in United States currency, such a claim would meet with little favor in a court of equity. It would be justly regarded as an attempted fraud through the forms of a written agreement. No one of course attributes any impropriety to the distinguished and excellent

gentleman who purchased the bond in ignorance of the real contract of the parties; but according to well settled principles he can occupy no higher ground than his assignor.

As a general rule the construction of this class of contracts is matter of fact rather than law. In their interpretation, but little aid is to be derived from previous adjudications. Still I think we may study with profit and instruction the opinions of our predecessors in controversies arising at an early period of our history. After the close of the Revolutionary war a number of cases were before this court involving the adjustment of liabilities incurred during the existence of paper money. See *Watson & Harts-horne v. Alexander*, 1 Wash. 440; *Skipwith v. Clinch*, 2 Call, 213; *Smith, ex'or, v. Walker*, 1 Call, 39; *Bogle, Somerville & Co. v. Vowles*, 1 Call, 244; *Commonwealth v. Beaumarchais*, 3 Call, 122. In some of these cases the obligations were payable presently; in others at remote periods; in others the agreement was for the payment of a perpetual ground rent upon the conveyance of real estate in fee. Again, in others, leases had been made for long terms in consideration of annual rents. In some instances the contract provided for the payment of so many pounds without further description. In others, the stipu-
775 lation was to pay current *money or current funds of Virginia. In all these cases this court applied the scale of depreciation in some form, unless it appeared that a specie debt was intended.

It is true that these decisions were made under the act of 1781, which directed the application of a fixed scale to all the contracts and debts of that period, excepting debts and contracts made and entered into for gold and silver coin. But by the 5th section of the same act the court was authorized to award such judgment in such case as shall appear just and equitable. And in *Ambler v. Wyld*, 2 Wash. 54, the court said this section was not intended to let men loose from their contracts, but to allow a departure from the established scale in cases where it might be necessary to meet the real contract of the parties. It was the object then as now not to violate, but to execute the contract. And yet the court applied the scale to debts falling due after as before the close of the Revolutionary struggle, although in many instances the parties must have contemplated that the debts would be payable and the rents accrue long after the continental money had disappeared from the channels of circulation. This legislation and these decisions evince the strong disinclination of the distinguished men of that era to impose upon debtors the burden of discharging in a sound currency, the nominal amount of debts contracted in the depreciated currency of the Revolution. I think we may with safety immitate their example, applying to the contracts of our own time the same liberal rules of interpretation, and adjusting them upon the same humane and equitable

principles whenever it can be done consistently in any degree with legal rights and obligations. These I am disposed to respect in all cases; but where there is a doubt, any ambiguity in the terms of the contract, that doubt should be resolved in the interests of justice and equity, and according to the probable intent of the parties, rather than by the technical and rigid rules of the common law.

776 *In the present case there is nothing to prevent the application of these principles, nothing to preclude the court from declaring that this contract was entered into with reference to Confederate States treasury notes, and to be fulfilled in that medium according to the real understanding of the parties. As however these notes have ceased to circulate, the question arises as to the best mode of adjusting the rights of the parties. The court is authorized under the statute to award a just compensation for the value of the property sold, if under all the circumstances of the case it thinks the fair value of the property will be the most just measure of recovery. This mode of adjustment in cases founded upon sales of property has received the sanction of this court in several cases not yet reported. In the present case it accomplishes the ends of justice to all the parties. The vendor having received the entire amount of the bonds, has of course no interest in the question. The assignee can have no substantial ground of complaint, as his purchase was made with Confederate funds, and he will now receive a sum largely in excess of the value of his investment. The vendee having paid five-sixths of the amount agreed by him to be paid, and being in arrear for the remaining one-sixth, should in justice be required to pay its fair value. As however this court has not the materials before it for arriving at a correct conclusion upon this point, the cause should be remanded to the Circuit court, with directions to refer it to a commissioner to ascertain and report the fair value of the whole tract in United States currency at the date of the contract, and the vendee to be charged with one-sixth of such value, with interest thereon from the first day of June 1863.

The other judges concurred in the opinion of Staples, J.

Decree reversed.

777 *Cleck v. The Commonwealth.

June Term, 1871, Wytheville.

1. Criminal Practice—Verdict—Judgment at Next Term—Case at Bar.*—Upon an indictment in the County court against C the jury render a verdict of guilty, and that he be imprisoned in the county jail for ten months, and pay a fine of ten dollars. No judgment on the verdict is entered at that term, nor is the case continued; but at the next term of the court the judgment is rendered. Before the

*See the principal case cited and approved in *Harrison v. Com.*, 81 Va. 494.

ten months has expired C escapes from jail, and is afterwards retaken. **Held:**

1. Same—Same—Same.—The cause was pending in court, and it was proper to render the judgment on the verdict at the next term of the court.
2. Same—Escape—Effect upon Term of Imprisonment.—C is not entitled to be discharged at the end of the ten months; but is to be kept in prison beyond that period, for the length of time he was out when he escaped; and this though C has been indicted for his escape.

This was a writ of error to a judgment of the Circuit court of Bath county upon an application for a writ of habeas corpus, by William C. Cleek, complaining that he was illegally confined in the jail of that county. The facts are fully stated by Judge Moncure in his opinion.

Skeen, for the appellant.

The Attorney-General, for the Commonwealth.

MONCURE, P., delivered the opinion of the court. This is a writ of error to a judgment of the Circuit court of Bath county, rendered on a writ of habeas corpus, awarded on the petition of the plaintiff in error, William C. Cleek, complaining of imprisonment in the jail of said county without due process of law or the legal judgment of a court. The writ of 778 habeas corpus was *prayed for and awarded on the 13th day of May 1871. The jailor returned to the writ, that "the within named William C. Cleek is detained in my jail and custody under a judgment of the County court of Bath county, by which said William C. Cleek was sentenced to imprisonment in the said jail for the term of ten months, commencing on 13th July 1870, which term the said William C. Cleek has not served out by reason of the fact that on the 21st day of September 1870, he escaped from the said jail and was not apprehended or rearrested and returned to the said jail until the 14th day of January 1871." And the court, after hearing the matter both upon the return and other evidence, was of opinion that the petitioner was legally detained in prison, and overruled his petition and remanded him to jail. To the said judgment of the court a bill of exception was taken by the petitioner setting out the facts proved in the case. From which it appears that the petitioner, having been indicted for a felony alleged to have been committed by him in the said county of Bath by maliciously shooting, with intent to maim, disfigure, disable and kill one Samuel C. Burger, was tried for the said offence in the County court of said county, and on the 13th day of July 1870, a verdict was rendered against him in these words: "We, the jury, find the prisoner guilty of unlawful shooting with intent to maim, disfigure, disable and kill, and we do ascertain that he be imprisoned in the county jail for the term of ten months, and that he pay a fine of ten dollars."

No judgment was rendered on the verdict

at that term of the court. But at the next term, to wit: on the 25th day of August 1870, a judgment was rendered by the said court in the following words: "The said William C. Cleek was arraigned and tried at the last term of this court upon the indictment found by the grand jury at the term aforesaid, for feloniously and maliciously shooting a certain Samuel C. Burger with intent to maim, disfigure, disable and kill the said Samuel C. Burger, and the term of his confinement in the jail of this county was fixed by the jury at ten months, and a fine assessed against him by the said jury was fixed at ten dollars, and the judgment upon the verdict aforesaid was inadvertently omitted to be rendered up against him at the term aforesaid. The said William C. Cleek was again led to the bar, in custody of the jailor of this court; and, thereupon, it being demanded of him if anything for himself he had or knew to say why the court here should not now proceed to pronounce judgment against him according to law, and nothing being offered or alleged in delay of judgment, and the court proceeding to render judgment on said verdict nunc pro tunc—It is considered by the court that the Commonwealth recover against the said William C. Cleek ten dollars, the fine by the jurors aforesaid in their verdict assessed, and the costs of this prosecution; and that the said William C. Cleek be imprisoned in the jail of this county for the term of ten months, commencing on the 13th day of July 1870; and the said William C. Cleek is remanded to jail."

It was further proved by a witness, the former jailor of the county, introduced by the attorney for the Commonwealth, that the prisoner escaped from the jail of Bath county on the 21st September 1870, and remained at liberty until 14th January 1871, when prisoner was retaken by witness and committed to jail, where he has remained ever since. "These were all the facts proved," as the bill of exceptions recites: "and the court being of opinion that the county court had a right to make the order it did, at the August term, 1870, and that the jailor had a right to hold the prisoner in confinement for the length of time he was at liberty, and that the judgment for ten months' imprisonment will not expire until he has been imprisoned for the time which elapsed during his escape (although he is indicted for escaping), overruled the petitioner's petition, and remanded him to jail, there to be confined for the period of time elapsing from 21st September 1870 to 14th January 1871."

Two questions arise in this case: First, whether the County court of Bath, having adjourned at July term 1870, without then rendering any judgment on the verdict then found by the jury in this case, had any power to render such judgment at the succeeding August term of the court? And, secondly, if the court had such power, could the plaintiff in error be lawfully detained in prison after the expiration of ten months

next succeeding the verdict, and for a period equal to that which elapsed after his escape from jail, and while he was going at large during the said term of ten months?

As to the first question, it arises incidentally in the case. The legality of the judgment, and of the imprisonment under it until the expiration of ten months next succeeding the date of the verdict, would probably not have been questioned by the plaintiff in error, but for his escape and his having been detained after his arrest and after the expiration of the said period of ten months. His application for a writ of habeas corpus was not made until, but was made on the very day of, such expiration. But having thus questioned the legality of his detention after that period, it became material to enquire whether his imprisonment during that period, or any part of it, was lawful: and hence arose the first question above presented, which we will now proceed to consider.

The verdict did not finally dispose of the case, but was merely an interlocutory proceeding in it. Notwithstanding the verdict, the case was still pending, and stood over for judgment, which might have been rendered on the same day, or on a subsequent day of the same term, or might be rendered at a subsequent term. There could have been no doubt of this, if the case had been continued on the record for judgment,

either to another day of the same term, or to a subsequent term. But no such continuance was entered on the record; and the only question is, whether the omission of such an entry on the record worked a discontinuance of the case. Now, that very question is expressly answered by the statute, and no other answer is needed. The Code, p. 686, ch. 161, sec. 16, declares that "all causes upon the docket of any court, and all other matters ready for its decision, which shall not have been determined before the end of a term, whether regular or special, shall, without any order of continuance, stand continued to the next term." And again, at p. 834, ch. 207, sec. 26, in special reference to criminal cases, the Code declares that "there shall be no discontinuance of any criminal prosecution by reason of the failure of the court to award process or to enter a continuance on the record." It follows that the first question must be determined in the affirmative, and that the County court of Bath had power, at the August term of the court, to render judgment on the verdict found at the preceding July term of the court. And now we proceed to consider the

Second question: Could the plaintiff in error be lawfully detained in prison after the expiration of ten months next succeeding the verdict, and for a period equal to that which elapsed after his escape from jail, and while he was going at large during the said term of ten months?

The jury found the prisoner guilty, and ascertained "that he be imprisoned in the county jail for the term of ten months, and that he pay a fine of ten dollars." The

judgment of the court was for the fine and costs, and that he be imprisoned in the said jail for the term of ten months, commencing on the 13th day of July 1870. He had not been so imprisoned for the said term at the expiration of that period of time next after the verdict, having escaped from said jail on the 21st of September 1870, and remained

at liberty until the 14th of January 782 *1871, when he was retaken and committed. He will not have been so imprisoned for the said term until he shall have remained in jail after the expiration of the ten months from the date of the verdict (which ten months expired on the 13th day of May 1871) for a period equal to that which elapsed between the said 21st of September 1870 and the said 14th of January 1871; that is, a period of three months and twenty-three days. He has not yet been subjected to the entire judgment of the court. He has avoided it by his own voluntary act, and that, too, a criminal act. Surely a man cannot avoid the punishment of one crime by committing another: cannot get rid of an imprisonment to which he has lawfully been condemned by breaking jail and making his escape. Nothing would seem to be plainer than this. It may be said that the jailor must be governed by the term prescribed by the judgment, commencing at, and running continuously from, the date of the judgment; that when that term, so commencing and running is ended, he can no longer detain the prisoner under the judgment; and that it would be dangerous to give to a mere ministerial officer power to prolong the imprisonment for the purpose of obtaining compensation for so much of it as may have been avoided by an escape. But there would be no difficulty in ascertaining the measure of such compensation. The jailor would always know the precise period of the escape and of the recapture; and would act at his peril. If he erred, the party aggrieved would have a prompt and efficient remedy by habeas corpus, in which the facts on which the legality of the act of the jailor would depend, could be easily and clearly ascertained. He would also have a remedy by an action of false imprisonment. It may be further said that the escape itself is a criminal act, for which the party may be prosecuted and punished; that such punishment may embrace what remains due and unpaid for the original offence; that *that is the proper and only way of completing the punishment of the original offence; and that in this case a prosecution for the escape has actually been commenced, and is now pending against the plaintiff in error. The answer to this objection is, that the two offences are distinct, and each is subject to its appropriate punishment. Having been convicted of the original offence, and sentenced to punishment therefor, he must suffer that punishment, and cannot avoid it by the commission of another offence for which he may or may not be prosecuted and punished.

The offence of prison breaking was felony

at the common law, for whatever cause, civil or criminal, the party was lawfully imprisoned. But the severity of the common law is mitigated in England by the statute de frangentibus prisonam, 1 Ed. 2, stat. 2, which enacts that none from henceforth, that breaketh prison, shall have judgment for life or member for breaking of prison only; except the cause for which he was taken and imprisoned did require such a judgment if he had been convicted thereupon, according to the law and custom of the realm. After that statute prison breaking, where the party was confined for an inferior offence, was only a high misdemeanor, punishable by fine and imprisonment. 1 Russ. on Crimes, 427, marg. And now by our Code, p. 799, ch. 194, § 11, a person confined in jail on conviction of a criminal offence, who escapes thence by force or violence, shall be confined in the penitentiary one year, if previously sentenced to confinement therein, or be confined in jail six months, if previously sentenced to confinement in jail; the term of confinement under this section to commence from the expiration of the former sentence. § 12. If a person lawfully imprisoned in jail, and not sentenced on conviction of a criminal offence, escape from jail by force or violence, he shall be confined in jail not exceeding one year. This

784 offence of a violent escape from prison *can now be punished only under the above statutory provisions; it being provided by the Code, p. 812, ch. 199, § 3, that "a common law offence for which punishment is prescribed by statute, shall be punished only in the mode so prescribed." It does not appear whether the escape in this case was by force or violence; but conceding that it was, it is punishable only under the second branch of § 11, ch. 194 of the Code, supra, with six months' confinement in the county jail. Suppose that the prisoner in this case had made his escape the day after his conviction, and remained at large for ten months, then if he could not be imprisoned for ten months under the original judgment, he would by his own criminal act reduce his punishment from ten months to six months' imprisonment. In other words, would avoid punishment altogether for the original offence of which he had been convicted and be punishable only for a new and distinct offence. Whilst the statute limits the punishment of such an escape to six months' imprisonment, there are many statutes which prescribe a longer period of imprisonment for offences, and the common law offence of misdemeanor may be punished by any confinement in jail at the discretion of the court. In no such case could the punishment of prison breaking be considered as a punishment also of the offence for which the party was confined in jail when he made his escape. The words at the close of § 11, ch. 194, "the term of confinement under this section to commence from the expiration of the former sentence," can make no difference. The former sentence does not expire until the prisoner has

suffered the full amount of imprisonment adjudged against him. We are of opinion that there is no error in the judgment, and that it be affirmed.

Judgment of the Circuit court affirmed.

785 *Hirsh v. The Commonwealth.

November Term, 1871, Richmond.

1. **Statute—Interpretation of.**—Under the act of June 29, 1870, Sess. Acts 1869-'70, ch. 174, § 6, p. 232, a regular merchant paying the tax assessed upon him as such, must take out the license required by the act, to authorize him to deal in second-hand articles at his store.†

2. **Same—Constitutionality.**—The act is not in violation of § 4, Article X, of the Constitution of the State.

At the November term, 1870, of the Corporation court of Fredericksburg, Simon Hirsh was indicted for keeping a junk shop, and dealing in second-hand articles, junk, rags, old metals and like commodities, without having the license required by law. On the trial there was a verdict against him for a fine of fifty dollars; when he moved the court for a new trial on the ground that the verdict was contrary to the law and the evidence. But the court overruled the motion, and rendered a judgment on the verdict; and the defendant excepted.

It appears that in 1870 Hirsh was a merchant in Fredericksburg, doing business as such; and that he was taxed and paid his tax as such merchant; and that he did general business as a junk dealer, at his place of

***Statutes—Interpretation of—Constitutionality.**—The law as laid down in the syllabus of the principal case is quoted with approval in Morgan's Case, 98 Va. 814, 35 S. E. Rep. 448, the court saying: "Neither is it double taxation to require the accused to pay a license tax for the privilege of carrying on a business, and at the same time impose a tax upon the property used by him in carrying on that business. Attorneys at law, physicians and others pay license taxes for the privilege of practicing their professions and conducting their business, and taxes are imposed upon the property used by them in carrying on their professions and business. This has never been considered double taxation.

"Neither is the license tax in question in conflict with Article X, section 4, of the Constitution, which provides for a license tax on such business only as cannot be reached by the *ad valorem* system. Whether a business can or cannot be reached by the *ad valorem* system of taxation is primarily for the Legislature. Its determination of that question will never be held erroneous unless it is manifestly so. The business of fishing in the waters owned by the state is no more within the reach of the *ad valorem* system than that of an itinerant peddler, a commission merchant, sample merchant or junk dealer, upon whom it has been held license taxes can be imposed. Hirsh's Case, 21 Gratt. 785."

In Commonwealth v. Moore, 25 Gratt. 900, see the principal case cited and followed. See, in accord, foot-note to Lewellen v. Lockharts, 21 Gratt. 570.

†See the opinion for the act.

business in the town of Fredericksburg, without having taken out a license as junk dealer. That the commissioner of the revenue applied to him to assess him with the specific tax as junk dealer, when he wrote to the auditor of accounts, asking whether he was liable for such specific tax; and he received an answer from the first clerk in the office, saying it was the auditor's opinion, that if Hirsh was a regular merchant and exchanged his goods for wheat, corn, old iron, rags, &c., he was not required to take out a license as junk dealer.

After the receipt of this letter, the commissioner of the revenue told Hirsh he could go on and buy and sell rags, old iron and the like commodities; and informed the other merchants of the town, that they could do so without taking out a specific license as a junk dealer; which they accordingly did during the year.

Upon the petition of the defendant a writ of error was awarded.

Sener, for the appellant.

The Attorney-General, for the Commonwealth.

MONCURE, P., delivered the opinion of the court.

The only question presented for our decision in this case is, whether, as the law now stands, and has stood since the 29th day of June 1870, a person engaged in the general business of merchandise and paying the tax assessed by law therefor, can purchase, sell, barter or exchange any kind of second-hand articles, junk, rags, old metals, or other like commodities, and keep a shop for that purpose, without having a license therefor?

Undoubtedly he could, under the law which existed anterior to that day. By the act passed April 19, 1867, Acts of Assembly 1866-67, p. 832, chap. 57, § 9, it was enacted, that "no keeper of a shop, other than a merchant duly licensed, shall without a license authorized by law, purchase, sell, barter or exchange any kind of second-hand articles, junk, old metals or other like commodities. The places at which such business may be conducted, shall be kept open for the purchase or sale of any of the articles mentioned aforesaid; nor shall any purchase be made by the keeper or keepers of any such place of business, or by any person or persons for them,

787 *except between the hours of sunrise and sunset of each day; and said places of business shall be open at all times to the inspection of any revenue or police officer of the county or corporation wherein the license issued. Every person receiving such license shall place up over the principle entrance of his or her place of business, a sign designating that he or she is licensed in conformity with the provisions of this act. Any person violating the provisions of this act shall pay a fine of not less than fifty nor more than one hundred dollars for

each offence." We thus see that by that act "a merchant duly licensed" was expressly excepted from its operation.

But in the act approved June 29, 1870, Acts of Assembly 1869-70, p. 232, chap. 174, § 6, the words "other than a merchant duly licensed," which were in the former act, were omitted. In other respects the two acts are, substantially, and almost literally, the same. The effect of the omission of those words, however, plainly was, to require a person engaged in the general business of merchandise and paying the tax assessed by law therefor, as well as any person, to obtain a license to carry on the junk business, in order to be authorized to do so.

It is argued that the words "other than a merchant duly licensed," were omitted in the act of June 29, 1870, only because, since the adoption of the present constitution, a person engaged in the general business of merchandise has not been required to obtain a license, his business being taxed on the ad valorem principle; and therefore these words would have been inappropriate in that act. And it is insisted that there is the same reason now as there was before the adoption of the present constitution, for exempting a person engaged in the general business of merchandise from the necessity of obtaining a license in order to be authorized to carry on the junk business; that reason being, that as his general business of a merchant is taxed, he ought

788 not to be subjected *to a double tax in being required to obtain a license to carry on the junk business; which would be but a part of his general business as a merchant.

But we do not think that the act of June 29, 1870, will admit of such a construction. If the Legislature had intended to exempt a person engaged in the general business of merchandise from the necessity of obtaining a license in order to be authorized to carry on the junk business, they could very easily have said so, and no doubt would have said so; but they did not; and their language being plain, there is no rule of statutory construction which would authorize us to supply words, and thus give the act a different meaning from that which it expresses.

It appears that in this case, the auditor of public accounts was consulted by the plaintiff in error as to the necessity for his obtaining a license as a junk dealer, he being a regular merchant assessed with and paying tax as such on his capital stock and income according to law, and that the auditor, through his first clerk, informed the plaintiff in error, by a letter written to that effect, that he was not required to take out a license as a junk dealer; and that in consequence of that letter he was not required by the commissioner of the revenue for the corporation of Fredericksburg to obtain such a license.

The opinion of the auditor in the construction of the revenue laws with which he has so much to do, and with which, therefore, he is generally so familiar, is cer-

tainly entitled to great respect; and his instructions to the subordinate revenue officers of the State are generally pursued by them; and properly so. The high character and known intelligence of the gentleman who now fills that office, and who gave the opinion above referred to, deservedly increased the weight and influence of all his opinions on subjects which relate to his official duties. But while these considerations ought, certainly, to have great weight on an application to the court and attorney 789 *for the Commonwealth for a nolle prosequi in such case, or to the Legislature for a release of the fine which has been adjudged against the plaintiff in error, they cannot warrant us in reversing a judgment which we believe to be according to law.

In regard to the last assignment of error, "that so much of said act of June 29, 1870, as imposes a specific tax under section 6, on the sale of junk, &c., is in conflict with sect. 4 of article 10, of the State constitution, inasmuch as the junk business can be reached by the ad valorem system of taxation;" we are of opinion that no such conflict appears to exist. A great deal is necessarily left by the constitution, to the discretion of the Legislature, in determining what kind of business "cannot be reached by the ad valorem system," and may, therefore, be made the subject of a license tax. The only guide which the constitution affords us in this enquiry is, the enumeration of certain pursuits which are specified as subjects on which a license tax may be imposed. Following that guide, we cannot say that the junk business, as it is called, is any more within the reach of the ad valorem system than the business of selling ardent spirits, the business of an itinerant pedlar, of a commission merchant, or a sample merchant; all of which are embraced in the express enumeration. We are, therefore, of opinion that there is no error in the judgment, and that it be affirmed.

Judgment affirmed.

790 *Ruffin v. The Commonwealth.

November Term, 1871, Richmond.

1. **Convicts—What Court Has Jurisdiction.***—A penitentiary convict is hired to work on a railroad, and in Bath county, in attempting to escape, he kills the man put by the contractor to guard him. He may be tried for the offence before the Circuit court of the city of Richmond, and by a jury summoned from the city.
2. **Same—Bill of Rights—To Whom It Refers.**—The bill of rights, though made a part of the present constitution, has the same force and authority, and no more, than it has always had. And the principles which it declares have reference to free-men, and not to convicted felons.
3. **Same—Rights of.**—A convicted felon has only such rights as the statutes may give him.

*See principal case cited in Neal v. Utz, 75 Va. 488.

4. **Same—Hired Out—What Laws Govern.**—A person convicted of felony and sentenced to confinement in the penitentiary, is, until the time of his imprisonment has expired, or he has been pardoned, in contemplation of law, in the penitentiary, though he may have been hired out to work on a railroad, or the like, in a distant county; and the laws relating to convicts in the penitentiary apply to him.

At the November term for 1870 of the Circuit court of the city of Richmond, Woody Ruffin was indicted for the murder of Lewis F. Swats. The prisoner was tried by a jury taken from the city of Richmond; to which he objected; and he insisted that either he should be sent to the county of Bath for trial, where the offence was alleged to have been committed, or that a venire should be issued to that county, to bring a jury from thence for his trial. But the court overruled the objection.

Upon his trial it appeared that the prisoner had been convicted of a felony and sentenced to confinement in the penitentiary; that whilst he was such a convict in the penitentiary, he was, under the act of the General Assembly of April 23d, 1870, hired out to work upon the Chesapeake and Ohio railroad; that whilst so employed on the said railroad on the 10th of July 1870, in the county of Bath, where the offence was committed, the prisoner was not under any regular officer or guard of the penitentiary, nor any officer or employee of the Commonwealth; but was under the charge of contractors on the railroad, to whom he had been hired, and held in custody by a guard appointed and employed by said contractors; and that Swats, who was killed, was neither an officer or employee of the penitentiary or of the Commonwealth; but he was killed whilst guarding the prisoner, under his employment to do so by the contractor.

The jury found the prisoner guilty of murder in the first degree; and the court sentenced him to be hung: and he thereupon applied to this court for a writ of error; which was awarded.

The only questions made in the cause in this court was, that the prisoner should have been sent to the county of Bath for trial, or a jury should have been brought from that county; and this question was raised on the record in several modes.

Christian and Stiles, for the prisoner.

The Attorney General, for the Commonwealth.

CHRISTIAN, J., delivered the opinion of the court.

This is a writ of error to a judgment of the Circuit court of the city of Richmond. The record discloses the following state of facts:

Woody Ruffin, a convict in the penitentiary, was hired out, with other convicts, in accordance with the provisions of an act of Assembly approved April 23d, 1870, (Sess.

Acts 1869-'70, p. 72), to work on the *Chesapeake and Ohio Railroad. While thus engaged in the county of Bath, he killed, in an attempt to make his escape, one Louis F. Swats, who was acting as a guard of the convicts thus employed. For this offence he was tried in the Circuit court of the city of Richmond, by a jury selected from a venire from said city, and was found guilty of murder in the first degree, and was sentenced by said court to be hung on the 25th day of May 1871. To this judgment a writ of error was allowed by this court.

The only question presented for the consideration of this court now (other errors assigned in the petition not being insisted upon here), is, whether the court below was in error in putting the prisoner upon his trial before a jury selected from a venire summoned from the city of Richmond. It was earnestly insisted, in the able and eloquent arguments of the counsel for the prisoner, that the said Circuit court ought either to have sent the prisoner to the county of Bath, where the offence was committed, to be tried before the County court of that county, or should have sent to that county for a jury, before whom the prisoner should have been tried. This question raised indifferent forms, first by a demurrer to the indictment; secondly, by instructions asked for by the prisoner's counsel, and thirdly, by a motion in arrest of judgment, is the only one necessary to be considered.

The learned counsel for the prisoner, in support of their positions invoke the authority of the bill of rights which is now incorporated in, and made a part of the Constitution of the State; and which declares, among other declarations of personal and political rights, "that in all capital or criminal prosecutions, a man hath a right to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty." And it is insisted that those enactments of the statute law which confer upon the Circuit court of the city of Richmond jurisdiction to try offences committed by convicts in the penitentiary (except those committed within the territorial limits of that jurisdiction), are in contravention of the bill of rights and the constitution, and are therefore void.

The 3rd section of ch. 158, (Code 1860, page 666), which prescribes the jurisdiction of the Circuit court of the city of Richmond, declares that said court shall have jurisdiction of all criminal proceedings against convicts in the penitentiary.

The 1st section of chapter 215, "concerning proceedings in criminal cases against convicts," declares that all proceedings against convicts in the penitentiary shall be in the Circuit court of the city of Richmond; and provides the mode of summoning a grand jury and a venire, for the indictment and trial of such offenders.

The 3rd section of ch. 215, (Code, page 859), declares that a convict guilty of kill-

ing an officer or guard of the penitentiary, shall be punished with death.

An act of the General Assembly, approved April 23d, 1870, provides "that it shall be lawful for the governor of the Commonwealth to hire out, as in his judgment may be proper, such able-bodied convicts in the penitentiary, whose terms of service at the time of hiring do not exceed ten years, as can be spared from the workshops therein, to responsible persons, to work in stone quarries, or upon any railroad or canal in this State, or for any other suitable labor;" and makes it the duty of the governor in executing this act, to provide for the safe keeping and return to the penitentiary of convicts hired or employed under its provisions. The prisoner was one of a number of convicts hired under the provisions of this act, on the Chesapeake and Ohio railroad. Though at the time of the commission of the murder of which he was convicted, he was not within the walls of the penitentiary, but in a distant part of the State, he was yet, in the eye of the law, still a convict in the penitentiary; not, indeed, actually and bodily within its

794 walls, *imprisoned and physically restrained by its bars and bolts; but as certainly under the restraints of the laws, and as actually bound by the regulations of that institution, as if he had been locked within one of its cells. These laws and regulations attach to the person of the convict wherever he may be carried by authority of law, (or even when he makes his escape), as certainly and tenaciously as the ball and chain which he drags after him. And if when hired upon the public works, though hundreds of miles from the penitentiary, he kills a guard stationed over him by authority of law, he is as guilty of killing a guard of the penitentiary within the meaning of the statute, as if he had killed an officer or regular guard of that institution within its very walls.

The prisoner has thus been found guilty of an offence which the statute law punishes with death. It is not pretended that the verdict of the jury was contrary to the evidence, or that the evidence raises the slightest doubt of his guilt. But this case here rests solely upon the ground that he has not been tried by a jury of his vicinage; which right is secured to him by the bill of rights. The bill of rights though incorporated into and made a part of the present constitution, has the same force and authority which it has always had, neither more nor less, as containing the recognized and fundamental principles of a well regulated government. It is an authoritative affirmation of certain general principles, and a declaration of the political rights and privileges which it is the duty of the government to secure to the people.

And while these declarations of general principles must be recognized and followed, both in legislation and in the administration and execution of laws, we must give to each one of them a reasonable rather than a literal construction; certainly such a con-

struction as will make each consistent with the others, and carry out most effectually the object and design of the whole
795 *instrument. To give a literal interpretation to the cause relied upon by the counsel for the prisoner, to wit: "That in all capital or criminal prosecutions a man hath a right to demand a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty," would be to say that every criminal must be turned loose whenever an impartial jury of his vicinage could not be found to try him. Such an interpretation would be to declare that very statute in our criminal code which provides for a change of venue, for the removal of causes from one county or one circuit to another, or which authorizes a court to send, under certain circumstances, to any county in the State for a jury, is unconstitutional and void. It has been the common practice for many years, in all the courts of the Commonwealth, to try persons charged with felony before juries not of the vicinage, under the authority of the statutes referred to, and so far as we know the question has never been mooted in any court that these statutes were in violation of the bill of rights. The manifest necessity of the case, and the proper administration of justice, required such enactments.

We have said that a reasonable and not a literal construction must be given to the clause under consideration, and a construction that is consistent with the other declarations of general principles in the same instrument. One of these declarations is, "that government is instituted for the common benefit, protection and security of the people," &c. Now one of the most effectual means of promoting the common benefit and ensuring the protection and security of the people, is the certain punishment and prevention of crime. It is essential to the safety of society, that those who violate its criminal laws should suffer punishment.

A convicted felon, whom the law in its humanity punishes by confinement in the penitentiary instead of with death, is subject while undergoing that punishment, to all the laws which the Legislature
796 *in its wisdom may enact for the government of that institution and the control of its inmates. For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State. He is civiliter mortuus; and his estate, if he has any, is administered like that of a dead man.

The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. Such men have some rights it is true, such as the law in its benignity accords to them, but not the rights of freemen. They are the slaves of the

State undergoing punishment for heinous crimes committed against the laws of the land. While in this state of penal servitude, they must be subject to the regulations of the institution of which they are inmates, and the laws of the State to whom their service is due in expiation of their crimes.

When a convict in the penitentiary, while undergoing punishment for the crime of which he stands convicted, commits other offences, it is unquestionably in the power of the State, to which his penal servitude is due, to prescribe, through its Legislature, the mode of punishment as well as the manner of his trial. If he commits an offence not amounting to a felony, the superintendent is vested by law with authority, to punish him by stripes, or the iron mask, or the gag, or the dungeon. If he commits an offence which in law amounts to a felony, he has the privilege of a trial by jury, before a court of justice, to which special jurisdiction is given for that purpose. As a matter of convenience, as well as of manifest necessity, that special jurisdiction must be conferred upon a court within whose territorial jurisdiction the penitentiary is situated.

To remove him to a distant county for trial *for a second offence, while he is undergoing punishment in the penitentiary for the one of which he already stands convicted, would defeat the very object of the law which has placed him under the power and control of that institution, and from which he can never be released, except by serving out his term, or by pardon, or by a writ of habeas corpus; while to try him before the Circuit court of the city of Richmond, where the penitentiary is located, he would still be in the custody of that institution, and would still be undergoing his punishment for his first offence, while held for trial for his second. Suppose the prisoner in this case should be sent to the county of Bath for trial because he happened to kill his guard while in that county; in whose custody would he be? In that of the superintendent of the penitentiary, or of the jailor of Bath county? Who would be responsible for his escape? By what authority could the jailor of Bath county receive into his jail a convict in the penitentiary? Or by what authority could the superintendent of the penitentiary station his guard around the jail of that county? Suppose he should be detained, thus held for trial, for months, or it may be for years; is this time to be counted as a part of his term in the penitentiary or not? Or must he be carried back to serve out the same time which he has spent in the cells of the county jail? Again, the witnesses against a convict in a criminal prosecution are themselves convicts. Must they be turned loose from the penitentiary to attend as witnesses at the court of a distant county? It is thus made manifest that the statute conferring this special jurisdiction upon the Circuit court of the city of Richmond, is founded not only in convenience, but in the very necessity of the case. But it is in-

sisted by the counsel for the prisoner, that if it was not error in the court below to refuse to send the prisoner to the county of Bath for trial, it ought to have sent its officer to that county for a venire, because the prisoner was under the *bill of rights entitled to "a trial by a jury of his vicinage."

We have already intimated that the bill of rights is a declaration of general principles for the government of a society of freemen, and not of convicted felons. But where is the vicinage of a convict in the penitentiary? What county can be said to be his vicinage? Not in his case the county in which the offence is committed; because in the eye of the law he is always in the penitentiary. He may for a lawful purpose be carried under guard beyond its walls. But wherever he may be, until he has served out to the last moment, the term fixed by the sentence of the law, or has been pardoned, he is still a convict in the penitentiary. If he kills the guard which the law has stationed over him, whether the murder be committed within its walls, or on the capitol square, or in the county of Bath, he has still committed an offence while a convict in the penitentiary. If he can be said to have a vicinage at all, that vicinage as to him is within the walls of the penitentiary, which (if not literally and actually) yet in the eye of the law surround him wherever he may go, until he is lawfully discharged. If he has forfeited this right, which every freeman may claim, "a trial by a jury of his vicinage," that forfeiture is a consequence of his crime, and is one of the penalties which the law denounces against a convicted felon, as much one of the penalties attached to his crime, as the whipping post, the iron mask, the gag, or the dungeon, which is provided for offences other than felonies. He is for the time being a slave, in a condition of penal servitude to the State, and subject to such laws and regulations as the State may choose to prescribe.

We are therefore of opinion, that there was no error in the refusal of the Circuit court of Richmond either to remand the prisoner to the county of Bath for trial, or to send to said county for jury to try him. And we *are more ready to uphold the statutes under which the prisoner was tried, as not in any respect in contravention of the bill of rights and the constitution, because the prisoner could not have been prejudiced by the fact that he was tried in the mode prescribed by law. We are at a loss to perceive what possible injustice or hardship can result to the prisoner, from the fact that he was tried by a jury of the city of Richmond instead of the county of Bath. So far as the record shows, the prisoner never was in the county of Bath before in his life. He cannot claim that county as his vicinage, because he happened to be with his guard, whom he murdered, in the county of Bath, but at the same time a convict in the penitentiary, under the control and subject to the laws

which govern that institution and its inmates.

We are of opinion that the judgment of the Circuit court of the city of Richmond must be affirmed.

Judgment affirmed.

800 *Bird v. The Commonwealth.

November Term, 1871, Richmond.

1. **Bigamy—Foreign Marriage—Proof of.**—On a prosecution for bigamy, where a marriage is alleged to have taken place in a foreign country or State, proof must be made of a valid marriage according to the law of that country or State; but no particular kind of evidence is essential to establish the fact, except that it cannot be proved by reputation and cohabitation.

2. **Same—Same—Same.***—When a witness testifies to a marriage in a foreign State, solemnized in the manner usual and customary in such State, by a person duly authorized to celebrate the rites of marriage, and the parties afterwards lived together as man and wife, this is as satisfactory evidence of a valid marriage as can be expected or desired; and in such case it is not necessary to prove the laws of such State, or to offer further evidence of a compliance with its provisions.

3. **Evidence—Experts—Who Are.†**—All persons who practice a business or profession which requires them to possess a certain knowledge of the matter

***Bigamy—Proof of Marriage.**—In *State of W. Va. v. Goodrich*, 14 W. Va. 839, the court said: "The evidence, on which the jury in this case based their verdict of guilty, was sufficient to justify such verdict. It is true, the first marriage charged in the indictment was proved by the minister, who officiated at the marriage; and the second marriage charged in the indictment was only proved by the distinct admission of the prisoner; and that the authorities elsewhere are conflicting on the question, whether such proof is sufficient in an indictment for bigamy, or whether it is even admissible; but it is settled in Virginia, and in this State, that such evidence is admissible in such a case, and sufficient to justify a conviction. See *Warner v. Com.*, 2 Va. Cas. 95; *Oneale's Case*, 17 Gratt. 582; *Bird's Case*, 21 Gratt. 800."

Civil Suits—Proof of Marriage.—That admissions and reputation are sufficient proof of marriage in civil cases, see *Womack v. Tankersley*, 78 Va. 243, when the court said: "The admissions, however, must not be casual, but deliberate. Such admissions of a prior marriage in another State, are sufficient evidence of such marriage, without proving the marriage to have taken place agreeably to the laws of that State. Such admissions and acts are competent evidence not only of the fact of the marriage, but also of its validity, under the '*lex loci contractus*.' *Rex v. — of Brampton*, 10 East R. 282; *Hemmings v. Smith*, 4 Douglas R. 33; 3d *Waterman's Archbold*, 618; and *Bird's Case*, 21 Gratt. 800."

See in accord, *Purcell v. Purcell*, 4 H. & M. 507; *Hitchcox v. Hitchcox*, 2 W. Va. 435; *Lile's Notes to 1 Min. Inst.* 154 *et seq.*

†**Evidence—Experts—Who Are.**—In *McKelvey v. C. & O. Ry. Co.*, 35 W. Va. 502, 14 S. E. Rep. 262, the third head-note of the principal case is approved but distinguished upon the facts, the court saying: "Refer-

in hand, are experts, so far as expertness is required. 8 Man. Gran. & Scott. 812.

4. **Bigamy—Case at Bar.**—M proves that he is a Catholic priest and pastor of a church in Washington, D. C., and authorized to celebrate the rites of marriage; that by virtue of a license issued by the proper officer in the usual form, he married B and M, at his residence in said city, in the presence of two persons; and in accordance with the rules and customs of the Catholic Church and the laws of the District of Columbia. And it was proved that B and M afterwards lived together as husband and wife. On a prosecution of B for bigamy, this is sufficient evidence of the marriage of B and M.

5. **Act of Congress—Judicial Notice.**—The act of Congress continues the laws of Maryland in force in that part of the District of Columbia ceded by Maryland. The Maryland law thereby became the law of Congress in said District, and is to be taken notice of by State courts, without proof.

At the July term, 1871, of the Corporation court of the city of Alexandria, Thomas H. Bird was indicted for bigamy; for this, that on the 16th of January 1868, 801 *in the city of Washington, in the District of Columbia, he married Mary Broden; and afterwards, she being still living, on the 1st of March 1871, in the city of Alexandria, he married Henrietta Godwin. At the same term of the court he was tried and found guilty, and the jury fixed the term of his imprisonment in the penitentiary at three years; and the court sentenced him accordingly.

On the trial the prisoner's counsel asked for several instructions to the jury; which the court refused to give; and gave other instructions; and the prisoner excepted. The bill of exceptions sets out the facts proved, and the instructions asked and refused, and those given. From this bill of exceptions it appeared that it was proved by the Rev. P. F. McCarthy, that in the month of January 1868, the prisoner was married by him to Mary Broden, at his residence in the city of Washington, in the District of Columbia. That said McCarthy was a priest of the Roman Catholic Church, and had been for five years pastor of the church of the Immaculate Conception, in the city of Washington; and was duly authorized by the canons of his church and the laws of the District of Columbia, to perform the ceremony of marriage; that the prisoner carried to him the license issued by the clerk of the Supreme court of the District of Columbia, authorizing the mar-

ence is made to *Bird's Case*, 21 Gratt. 800, for the proposition that 'all persons who practice a business or profession which requires them to possess a certain knowledge of the matter in hand are experts, so far as expertness is required.' This is an acceptable statement, but this witness does not fall within it. He has no knowledge derived from study or experience in the construction or repair of locomotives."

See *Taylor v. B., etc., Co.*, 33 W. Va. 39, 10 S. E. Rep. 29.

Jurisdiction of Corporation Courts.—See the principal case cited in *foot-note* to *Boswell v. Com.*, 20 Gratt. 860.

riage of the prisoner to Mary Broden; that said license was issued by the proper officer, and was in the usual form of marriage licenses used in the District of Columbia at that time; and that under the authority conferred by that license, and in the presence of Mr. and Mrs. Cooke, two witnesses of full age, he, the said McCarthy, performed the ceremony of the marriage of the prisoner and Mary Broden; that said marriage was contracted in accordance with the rules and customs of the Catholic Church, and the laws of the District of Columbia.

The license was on file among
802 *the archives of his church, where by the rules of his church it was required to be kept.

On cross-examination the witness stated that he first saw Mary Broden a few days before the marriage; and that she first spoke to him concerning the marriage; and that he had a conversation with her in regard to it some days before it took place. The counsel for the prisoner then asked what that conversation was. To this question the attorney for the Commonwealth objected. The counsel for the prisoner then stated, that the object of the question was, by following it up by other questions, to show that Mary Broden was a common prostitute, and that the marriage between her and the prisoner was the result of a combination and conspiracy between herself and one Cooke and others, by which it was performed against the will of the prisoner, and under duress imposed upon him. But the court excluded the question; and the prisoner excepted.

It was proved that the prisoner and Mary Broden lived together for some years before their marriage; during which time she passed by the name of Mrs. Bird: and after the marriage they lived together as husband and wife. And it was further proved, that Mary Broden was still living, and that the prisoner was legally married to Henrietta Godwin, in the city of Alexandria, in March 1871: and this last marriage was admitted on the trial.

The evidence being closed, the prisoner moved the court to give the following instructions, viz:

1st. In order to convict the prisoner, the jury must believe, from the evidence, that two marriages have been contracted by him, according to all the forms of law of the places where they have been celebrated; and if either of them was performed outside the State of Virginia, in another State or country, then the law of such State or country must be shown to the satisfaction
803 *of the jury, and that all the requirements of that law have been complied with in such marriage.

2d. The jury are judges of the law as applicable to the case, in all matters, except wherein they are instructed by the court as to what the law may be.

3d. The law of the country or State where the first marriage is shown to have taken place, must be proved to the satisfaction of the jury, by competent testimony.

4th. The mere assertion of a minister of the gospel, that a marriage license was issued according to the law of the country where such marriage was celebrated, is not sufficient evidence of what the law may be.

The court, because the evidence of the legality of the marriage in the District of Columbia was not objected to when it was introduced; and because the acts of Congress of a public nature applicable to said District, are matters of judicial cognizance, and are not required to be proved as matters of fact to the jury, and for other reasons, refused to give these instructions; and instructed the jury as follows:

1st. If the jury believe from the evidence, beyond reasonable doubt, that the prisoner was married in the city of Washington, D. C., to Mary Broden, according to the law prevailing in said city at the time of said marriage; and that afterwards, and during the life of the said Mary Broden, and without having been lawfully divorced from the said Mary Broden, he was, in the city of Alexandria, State of Virginia, married to one Henrietta Godwin, according to the law of the State of Virginia, that then they will find the prisoner guilty.

2d. If the jury should not find the facts as stated in the foregoing instruction, they will find the prisoner not guilty.

The jury then retired to consult upon their verdict, and after a short time returned into court—the prisoner being present—and enquired of the court whether or not they could, upon the evidence adduced at
804 the trial, find *that the first marriage was celebrated according to the laws of the District of Columbia. The court informed them that they could. Whereupon, they again retired to their room, and in a short time returned into court with their verdict.

Upon the application of the prisoner, a writ of error to the judgment was awarded by a judge of this court.

There was no counsel for the prisoner.

The Attorney-General, for the Commonwealth.

STAPLES, J., delivered the opinion of the court.

This case comes before us upon a writ of error to the judgment of the Corporation court for the city of Alexandria. The prisoner was indicted in that court for bigamy. On the trial he offered to prove that his first wife was a common prostitute; that his marriage with her was the result of a conspiracy between herself and one Cooke and others, by which the ceremony was performed against his will and under duress imposed upon him. To the introduction of this evidence the attorney for the Commonwealth objected: the objection was sustained; and the prisoner excepted.

The evidence being closed, the prisoner asked for instructions, which the court refused; and in lieu thereof gave certain other instructions. It does not appear, however,

that any exception was taken to this ruling of the court. The jury found the prisoner guilty, and fixed the term of his imprisonment in the penitentiary at three years. He made no motion for a new trial; but the record states that the jury having returned into court with their verdict, the prisoner thereupon tendered his bill of exceptions, and prayed that the same might be signed, sealed and enrolled, which was accordingly done.

In his petition, the counsel for the prisoner does not suggest any error in the rejection of the evidence offered by him, and made the ground of the first bill of exceptions. *His assignment of errors relates exclusively to the instructions asked for by him and refused by the court; and to the competency of the evidence adduced by the Commonwealth to establish the fact and the validity of the first marriage. As the prisoner excepted neither to the instructions nor to the evidence, it is difficult to perceive how these objections, even if well founded, can avail him in this court. The last bill of exceptions may, however, be regarded as raising the question of the sufficiency of the evidence to warrant the finding of the jury; and in this view it may be proper, in tenderness to the prisoner, to consider the grounds suggested by him for reversing the judgment of the court below.

The second marriage was fully admitted on the trial; and no question arises in regard to that. The first marriage was alleged to have taken place in the city of Washington, in the District of Columbia. It was proved that in January 1868, the prisoner was married in that city to Mary Broden (his first wife), at the residence of the Rev. P. F. McCarthy, a Roman Catholic priest, duly authorized by the canons of his Church and the laws of the District of Columbia, to celebrate the rites of marriage; that the prisoner carried to the said McCarthy a license issued by the proper officer of said city, authorizing the marriage, which was in the usual form used in the District; that the said McCarthy, in the presence of two witnesses, performed the marriage ceremony; that said ceremony was conducted in accordance with the rules and customs of the Catholic Church and the laws of the District of Columbia; that the parties since that period have lived together as man and wife.

It is insisted that this evidence did not warrant a conviction; that it was incumbent upon the Commonwealth to prove the law in force in the District of Columbia regulating marriages; that the ceremony was performed in conformity with its provisions; and such proof of the law must have been derived from some person of competent *skill and knowledge, as an expert, or from duly authenticated documentary evidence.

It is true that in prosecutions for bigamy, where a marriage is alleged to have taken place in a foreign State or country, the courts always require proof of a valid mar-

riage according to the laws of that State or country. But they have never held that any particular kind of evidence was essential to establish this fact. The extent to which they have gone is, that in criminal prosecutions and certain civil actions, a valid marriage cannot be proved by reputation and cohabitation. In England it is the settled rule, that a foreign marriage may be proved by any competent witness present at the ceremony, with further proof of such circumstances as lead to the conclusion that the marriage is valid according to the laws of the country in which it is celebrated. In *Rex v. Inh. of Brampton*, 10 East's R. 282, it appeared that the marriage was contracted in St. Domingo. The parties being on that island and wishing to be married, went to a place of worship in that country and were married by a person professing to be a priest; and after such marriage they cohabited as man and wife for eleven years. This was all the evidence adduced. Lord Ellenborough said it was a good marriage by the law of England; but supposing the law of England not to have been carried to St. Domingo, every presumption must be made in favor of its validity according to the laws of the country where it was celebrated.

It is true that this was not a criminal prosecution; but the nature of the proceeding required proof of a valid marriage in fact, as distinguished from proof by reputation and cohabitation. In all such cases the rule is the same in respect to the evidence to be adduced, whether it be a criminal or civil proceeding. See also *Hemmings v. Smith*, 4 Doug. R. 33; 3 Waterman's Archbold 613.

In the United States there are numerous cases to the *same effect; but it is not necessary to refer to more than two or three of these. In the *State v. Kean*, 10 New Hamp. R. 347, it was decided that the testimony of a witness that he was present at the marriage of the accused in the State of Maine, and that the service was performed by the settled minister of the place, who was in the habit of officiating in such services in other instances, is sufficient evidence of a valid marriage, without further proof of the laws of the State of Maine, or that the person officiating was duly authorized to administer the rites of marriage. See also *State v. Rood*, 12 Verm. R. 396.

In Warner's case, 2 Va. Cas. 95, this precise question did not arise. But White, Judge, in the course of his very elaborate opinion, in which all the judges concurred, said that where the first marriage was established out of the State by a person who, from all the circumstances of the case, must reasonably be presumed to have filled a character authorizing him to do so, and who was recognized as the proper officer by the accused himself and the company present, and further proof, that after the ceremony, the parties lived together publicly as man and wife, such evidence, if not impugned by other testimony, is proper, com-

petent and sufficient to convict the accused.

In Oneale's case, 17 Gratt. 582, it was decided, that the prisoner's admissions, deliberately made, of a prior marriage in another State, are sufficient evidence of such marriage, without proving it to have been celebrated according to the law of such State. And yet, such admission involves not only the fact of the marriage, but its validity in point of law.

Although the testimony of a witness present at the marriage may not be as conclusive or satisfactory as the confession of the party, there is no solid reason for rejecting it as incompetent. There is no technical rule forbidding the reception of such evidence. When a witness testifies to

a marriage in a foreign State, solemnized in the manner usual and customary in such State, by a person duly authorized to celebrate the rites of marriage, and the parties afterwards lived together as man and wife, this is as satisfactory evidence of a valid marriage as could be expected or desired, and in such case it is not necessary to prove the laws of such State, or to offer further evidence of a compliance with its provisions.

This view renders it unnecessary to notice the second assignment of error, that a priest or minister is not competent to prove the law of another State or country upon the subject of marriage. It might be easily shown that he is competent for that purpose. And this upon the principle recognized in *Vander Donckt v. Thelluson*, 8 Man. Gran. and Scott 812, in which it was held, that all persons who practice a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts, so far as expertness is required. See also *Sussex Peerage Case*, 11 Clark and Fin. R. 55.

Thus far the laws of the District of Columbia have been treated as the laws of a sister State, or foreign country. Is it proper so to consider them? By the first section of the act of Congress of February 17th, 1801, it was provided that the laws of Maryland should continue in force in that part of the district ceded by it; and with them of course was continued the law in respect to marriage. By this enactment and recognition these laws became, to all intents and purposes, laws of the United States; of which the State courts will take judicial notice. The judge of the Corporation court was, therefore, right in holding that the acts of Congress of a public nature applicable to the District of Columbia are matters of judicial cognizance, and are not required to be proved as facts.

For these reasons the judgment of the Corporation court must be affirmed.

Judgment affirmed.

809 *Smith v. The Commonwealth.

November Term, 1871, Richmond.

i. Criminal Law—Murder—Counts.*—In an indictment

*Criminal Law—Counts.—That, in an indictment, the offence may be laid in several counts, as hav-

ing been occasioned in different and inconsistent modes, see the principal case cited and followed in the following cases, *Benton v. Com.*, 91 Va. 783, 21 S. E. Rep. 495; *Anthony v. Com.*, 88 Va. 850, 14 S. E. Rep. 834. See, in accord, *Dowdy v. Com.*, 9 Gratt. 727; *Amable v. Com.*, 24 Gratt. 563.

2. Same—Corpus Delicti—Proof of.—On a trial for murder, the death of the person charged to have been murdered, must be proved by the most cogent and irresistible evidence; either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead, or by proof of criminal violence adequate to produce death, and which accounts for the disappearance of the body.

3. Same—Same—Same.—The proof must show that a body found is the body of the person for whose murder the prisoner has been indicted and is tried

4. Same—Same—Same—Admissions.—Until there is clear proof of the death of the person for whose murder the prisoner has been indicted and tried, the admissions of the prisoner as to his having committed the act must be clear and explicit. If there may be doubt as to his meaning, he ought not to be convicted.

In January 1871, Newton Smith, a man of color, was indicted in the Corporation court of Alexandria, for the murder of an infant, the child of Harriet Ferguson. The indictment contained two counts. The first charged that the murder was committed by casting the child into a pond of water, whereby it was drowned; and the second count charged that the murder was committed by the putting of the child in a hole

ing been occasioned in different and inconsistent modes, see the principal case cited and followed in the following cases, *Benton v. Com.*, 91 Va. 783, 21 S. E. Rep. 495; *Anthony v. Com.*, 88 Va. 850, 14 S. E. Rep. 834. See, in accord, *Dowdy v. Com.*, 9 Gratt. 727; *Amable v. Com.*, 24 Gratt. 563.

†Same—Corpus Delicti—Proof of.—The proposition laid down in the principal case, as to the proof of the *corpus delicti*, on a trial for murder, i. e. that the death of the person charged to have been murdered, must be proved by the most cogent and irresistible evidence; either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead, or by proof of criminal violence adequate to produce death, and which accounts for the disappearance of the body, is approved in the following cases, citing the principal case, *Anderson v. Com.*, 83 Va. 329, 2 S. E. Rep. 231; *Nicholas v. Com.*, 91 Va. 730, 21 S. E. Rep. 364; *Johnson v. Com.*, 29 Gratt. 820.

In *Leath v. Com.*, 82 Gratt. 881, the court said: "Precedents are of little value in determining whether a verdict in a particular case is against the evidence or not, as the facts and circumstances are seldom, if ever, the same in any two cases; but the following decisions in criminal cases, prominent among those in which verdicts of juries have been set aside by this court and by the general court, because of the insufficiency of the evidence, may be referred to. *Grayson's Case*, 6 Gratt. 712; *Grayson's Case*, 7 Gratt. 613; *Smith's Case*, 21 Gratt. 809; *Pryor's Case*, 27 Gratt. 1009; *Johnson's Case*, 29 Gratt. 796. We do not think the insufficiency of the evidence was more palpable in *Johnson's Case* than in this."

The principal case is also cited in *Anderson v. Com.*, 83 Va. 329, 2 S. E. Rep. 231; also in both concurring and dissenting opinions in *Cluverius v. Com.*, 81 Va. 853, 878, 899.

in a bleak open place, and there leaving it; of which exposure it dies.

The prisoner demurred to the indictment; but the court overruled the demurrer: and he then pleaded not guilty.

On the trial, after all the evidence 810 had been introduced, *the prisoner moved the court to give several instructions to the jury; which motion the court overruled; and gave other instructions. To which ruling of the court, in refusing to give the instructions asked for, and in giving others, the prisoner excepted. It is only necessary to state the instruction asked, and that given, in relation to the confessions of the prisoner, which constituted a very important part of the testimony for the Commonwealth. The prisoner's first instruction was: That in weighing the evidence in regard to the confession of the prisoner, the whole confession must be taken as true, unless the part of such confession tending to his exculpation is rebutted by distinct and independent testimony. The sixth instruction given by the court was: That the whole of the conversation of the prisoner with Mr. Latham (the mayor of the city), as well the statements which may be favorable as those which may be unfavorable, are in evidence before you; and you will give to them such weight as upon a consideration of all the evidence in the case, and of all the probabilities or improbabilities of such statements, you may deem them entitled.

The jury found the prisoner guilty of murder in the first degree. And thereupon he moved the court for a new trial, on the ground of error in the rulings of the court in relation to the instructions; and also because the verdict was contrary to the law and the evidence. But the court overruled the motion, and sentenced the prisoner to be hung: and he applied to a judge of this court for a writ of error; which was awarded. The only question on the evidence was, whether the body of the child found was that of the child of Harriet Ferguson; and that depended upon what was said by the prisoner. This is stated by Judge Christian in the opinion delivered by him.

Stuart, for the prisoner.

The Attorney General, for the Commonwealth.

811 *CHRISTIAN, J., delivered the opinion of the court.

Newton Smith was indicted by a grand jury of the Corporation court of the city of Alexandria, on the 16th day of January 1871, for the murder of the infant child of one Harriet Ferguson. At the February term of said court he was found guilty of murder in the first degree, and was sentenced to be hung on the 21st day of April 1871. A writ of error to that judgment brings the case before this court. The first error assigned, in the petition for a writ of error, and insisted upon here, is that the

court overruled the prisoner's demurrer to the indictment. The indictment contained two counts.

The first count charges the prisoner with the murder of the said infant child by drowning in a pond of water. The second count charges him with the murder of the child by placing it in a hole, in a bleak, barren and open place, and leaving it there exposed to the inclemency of the weather, by means of which exposure the child died. These two causes of death are set out with technical precision in approved forms of counts, in an indictment for murder.

It is a well settled principle of criminal pleading and practice, that several modes of death, inconsistent with each other, may be set out in the same indictment. This grows out of the very necessity of the case. The indictment is but the charge or accusation made by the grand jury with as much certainty and precision as the evidence before them will warrant. In many cases the mode of death is uncertain, while the homicide is beyond question. Every cautious pleader, therefore, will insert as many counts as will be necessary to provide for every possible contingency in the evidence. If the mode of death is uncertain, he may and ought to state it in different counts, in every possible form to correspond with the evidence at the trial as to the mode of death. The reason for this is thus clearly stated by Chief Justice Shaw in Bennis'

Webster Case, 471: "To a person 812 *unskilled and unpracticed in legal proceedings, it may seem strange that several modes of death inconsistent with each other should be stated in the same document; but it is often necessary, and the reason for it when explained, will be obvious. A grand jury may well be satisfied that the homicide has been committed, and yet the evidence before them may leave it somewhat doubtful as to the mode of death; but in order to meet the evidence as it may finally appear, they are very properly allowed to set out the mode in different counts; and then if any one of them is proved, supposing it also to be legally formal, it is sufficient to support the indictment. Take the instance of a murder at sea: A man is struck down, lies sometime on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide by the blow or by the drowning, but leaves it uncertain which. That would be a fit case for several counts charging a death by a blow, and a death by drowning, and perhaps a third alleging a death by the joint results of both causes combined." See also 1 Wharton's Am. Criminal Law, and cases there cited, §§ 424, 425.

So in the case at bar, it being uncertain whether the homicide charged in the indictment was caused by exposure or drowning, it was certainly allowable to charge both modes of death in different counts, and proof of either would be sufficient. The court is, therefore, of opinion that the said Corporation court of the city of Alexandria was not

in error in overruling the demurrer to the indictment.

The court is further of opinion, that the said Corporation court did not err in refusing to give the instructions asked for by the prisoner's counsel. Some of these instructions contain propositions which are in contravention of well settled principles of criminal law; while in others, principles of law are stated in such a manner
813 as *is well calculated to mislead the jury. The court was therefore clearly right in rejecting them.

Nor was the said Corporation court in error, in giving the instructions which it gave in lieu of those asked for by the prisoner's counsel. These instructions comprehend in better form every one asked for by the prisoner's counsel, which ought to have been given, and very clearly and fairly lay down the principles of law governing such a case.

But the court is further of opinion, that the said Corporation court erred in refusing to set aside the verdict and grant to the prisoner a new trial.

The principles upon which courts are justified and required to set aside verdicts and grant new trials have been well settled by this court, and recently re-affirmed in the case of Blosser v. Harshbarger, decided at the last Staunton term.

A new trial ought to be granted—1st. Where the verdict is against law. This occurs where the issue involves both fact and law, and the verdict is against the law of the case on the facts proved. 2d. Where the verdict is contrary to the evidence. This occurs where the issue involves matters of fact only, and the facts proved require a different verdict from that found by the jury.

3d. When the verdict is without evidence to support it. This occurs where there has been no proof whatever of a material fact, or not sufficient evidence of the fact or facts in issue to warrant the finding of the jury. The material fact in every criminal prosecution is the corpus delicti. Proof of the charge, in criminal causes, involves the proof of two distinct propositions; first, that the act itself was done; and secondly, that it was done by the person charged. In murder the corpus delicti has two components—death as the result, and the criminal agency of another as the means. It is only where the first (that is, death by criminal violence), has been proved either
814 by the direct evidence of witnesses who *have seen and identified the body, or where proof of the death is so strong and intense as to produce the full assurance of moral certainty, that the other (the criminal agency) can be established by circumstantial evidence. In order to warrant a conviction of murder, there must be satisfactory proof either of the death, as by the finding and identification of the corpse, or of criminal violence adequate to produce death, and exerted in such a manner as to account for the disappearance of

the body. 3 Greenl. Ev. § 30, note, and cases there cited.

Let us apply these well settled and humane rules of criminal law to the case before us. Harriet Ferguson lived in the Mansion House, a hotel in the city of Alexandria, in the capacity of a chambermaid. The prisoner was a servant in the same hotel. This woman gave birth to a female mulatto child on Sunday, the 4th day of December 1870. The woman is a white woman, and the prisoner is a mulatto. The prisoner admitted that he was the father of the child. On Wednesday night, the 7th day of December following, this child was delivered to Newton Smith, the prisoner, by Martha Ferguson (the mother of Harriet Ferguson); she saying that the child's mother was not able to provide for it, and that her other daughters were not willing it should remain in the house; and the prisoner stating that he would have it raised by his mother, who lived some six or eight miles in the country. The child, when delivered to the prisoner, was alive and healthy, and had on at the time a flannel petticoat, a little slip, and a shirt or gown, and was wrapped up in a shawl.

About the 16th of December following, the body of a female mulatto child was found in a pond of water in the southeastern portion of the city, in the neighborhood of Gooding's ship yard, and near the bank of the Potomac river. This child was in the water, with nothing on it but a shirt and a band around its body. The physician
815 who made the post mortem examination, *expressed the opinion that the child so found was born alive, and came to its death by drowning. He also expressed the opinion that the child found was between one and six days old at the time of its death; but he expressed no opinion, nor was there any evidence in the case, as to how long the child so found had been dead. There was no evidence in the case, direct or circumstantial, independent of the admissions and conduct of the prisoner (which we shall notice presently), to prove that the child so found was the same child which was born of Harriet Ferguson, and delivered to the prisoner by Martha Ferguson. There is an entire absence of the most ordinary proof of identification by the clothing found upon the dead body. Whether that was preserved, and any effort made to identify it, does not appear in the record. Indeed, taking the facts proved (independent of the conduct and admissions of the prisoner), they rather tend to show that it was not the same child. The child delivered to the prisoner is described as a bright mulatto. It must have been at three days old almost white, the father being a mulatto and the mother white. So young a child, of such parents, would hardly be described as a mulatto. Yet this is the description given of the child found in the pond near the river—not a bright mulatto, as the child born of Harriet Ferguson was, and must have been, but simply a mulatto. The child delivered to the prisoner was dressed differ-

ently from the child found in the pond. If part of the clothing was taken off it, still there were two articles of clothing left upon the body. Martha Ferguson, who delivered the living child to the prisoner, described minutely every article of clothing it had on its person. Why was she not called by the Commonwealth to identify what was found on the body of the dead child? Again, no proof is offered to show how long the child had been dead which was found in the water. Might not that child have
816 been dead for *weeks before it was found? How long would a dead body of a child a few days old be kept in a perfect state of preservation in the month of December, in the open air, partly covered with water? Three days or three weeks? There is no medical testimony on this subject; and the record is silent as to the state of preservation of the body found. For aught the record shows, the child found might have been dead before the other was born. The Commonwealth might have shown, and ought to have shown, that the body found had been killed within such a recent period as to correspond with the time of the death of the child charged to have been murdered. But there was no such proof: and we are constrained to say, that independent of the admissions and conduct of the accused, there is not a particle of evidence tending to show that the body found was the body of the infant child alleged to have been murdered.

Let us now examine the facts certified in reference to the confessions of the accused. The bill of exceptions, setting forth the facts proved, concludes in these words: "He (the accused) admitted that the child found in the pond of water, in the southeastern portion of the city, was the child delivered to him by Mrs. Ferguson, only in the manner hereinbefore stated." Thus it is evident that the court below was unwilling to certify as a fact proved in the case, that the prisoner made a specific and unqualified admission, that the child found in the pond was the same child delivered to him by Mrs. Ferguson; but added the words only in the manner hereinbefore stated. We must therefore look to the evidence of Mr. Latham, the mayor of Alexandria, as to the confessions of the prisoner, and draw our own conclusions from it. The mayor states, that about the 21st December, Dr. French, who was a physician present and officiating at the delivery of the child born of Harriet Ferguson, called upon him, and told him of the delivery of the child, and gave him the name of the prisoner,
817 who had *admitted to him that he was the father of the child. Mr. Latham (the mayor) sent for the prisoner. He soon came into his office, and he, the mayor, then told him he knew all about Mrs. Ferguson having delivered to him the child of Harriet Ferguson, and asked him what had become of it. The prisoner said he had taken the child to his mother's, near Mount Vernon, and that a woman who lived with or near his mother was nursing it. The

mayor then told the prisoner to go down next morning on the steamer Arrow, and return on the same boat, and to produce the child or his mother or the nurse at the mayor's office the next evening; and then dismissed him. The next evening about 5 o'clock the prisoner walked into the mayor's office. He was taken into the mayor's private office, and the door locked. The mayor then asked him for the child. He said that he could not bring it—that he had not been to his mother's. The mayor then told him he was afraid the child found near Gooding's ship-yard was the one he had got from Mrs. Ferguson, and asked him what in the name of Heaven induced him to do such a thing. He replied he did not know why he did it; that he hardly knew what he was doing. The mayor, having heard from Mrs. Ferguson how the child was clad when she gave it to the prisoner, asked him what induced him to take the clothing off the child: to which he replied, Mr. Latham, do you think I would strip the poor little thing? The mayor then asked him where was the shawl with which the child was wrapped when delivered to him by Mrs. Ferguson. He replied that it was in the room of a servant, at the Mansion House, under the bed; and the mayor sent for it and got it, and it was identified as the same shawl which was wrapped around the child which was delivered to the prisoner.

Certainly these admissions must produce a strong suspicion against the accused; but we cannot say, as the court below, which
818 heard all the evidence, could not say, *that there was an admission on the part of the accused, that the child found was the child of Harriet Ferguson, charged in the indictment with having been murdered. In the absence of proof that the body of the infant found was the same as charged in the indictment, the confessions of the prisoner must be distinct and specific before we can say, that upon his confession, the corpus delicti is made out; or in other words, that the child found is the same which was born of Harriet Ferguson, charged in the indictment as murdered by the prisoner. His reply to the mayor's question, What in the name of Heaven induced him to do such a thing? that he did not know why he did it, that he hardly knew what he was doing, was not construed by the court below into an admission that he had murdered the child delivered to him, or that the child found was the same delivered to him. His reply may have had reference to his criminal intercourse with the mother of the child, who was a white woman (he being a negro servant), or to the fact that he had received the child and delivered it to the woman near the diagonal pump, with whom he said he left it for a few days before he was to carry it to his mother. His indignant denial to the mayor that he had stripped the clothing off the child, is inconsistent with the theory that his other declaration was intended as a confession that the child was the same. Certain it is, that there is doubt as to what he

meant by the expression, "he did not know why he did it, and hardly knew what he was doing." The court below evidently had grave doubts as to what he meant, as appears from the manner in which it certifies the facts proved. That court does not certify that the prisoner admitted that the body found was the body of the child charged in the indictment with having been murdered by the prisoner.

There being therefore no direct proof that the body found was the infant child of Harriet Ferguson, if his confession is to be relied upon as evidence to prove

819 that fact, it ought *to be certain that what he said was intended as an admission that the body found was the same child which was delivered to him. The court below has refused to certify that fact, and we cannot say, upon the evidence certified, that it was admitted by the prisoner. His failure to produce the child when the opportunity was offered him by the mayor, was certainly a strong circumstance against the prisoner; and if the corpus delicti had been established, it would have been overwhelming evidence of his guilt; but in the absence of proof of the corpus delicti, cannot be said to be conclusive. If the Commonwealth had summoned the mother of the prisoner to whom he said he had delivered the child, and she had failed to corroborate his statement, then the evidence would have been conclusive against the prisoner; especially if the death of the child of Harriet Ferguson had been proved. But in the absence of proof of the death of that child, and in the absence of proof of the identity of the body found (either direct or circumstantial), such a confession as the one referred to cannot be taken as conclusive against the prisoner. The corpus delicti, or the fact that a murder has been committed, is so essential to be satisfactorily proved, that, in the language of Mr. Greenleaf, "Without this proof a conviction would not be warranted, though there were evidence of conduct of the prisoner exhibiting satisfactory indications of guilt." 3 Greenl. Ev. § 131.

Whatever may be the circumstances of strong suspicion against the accused, it would be dangerous to the last degree, to convict a person of a capital offence unless the party charged with having been murdered is proved to be actually dead, either by the finding and identification of the body, or by proof of such criminal violence as would likely produce death, and exerted in such manner as to account for the disappearance of the body. 3 Greenl. § 30; *Ruloff v. The People*, 18 New York R. 179.

820 *The books furnish many deplorable cases of the conviction of innocent persons from the want of sufficiently certain proofs of the corpus delicti. A great English judge said: "I would never convict any man of murder or manslaughter unless the fact were proved to be done, or at least the

body be found dead." This sentiment of Lord Hale as to the importance of extreme care in ascertaining the truth of every criminal charge, especially where life is involved, may be regarded as a rule of law.

This is a general rule, subject to some qualification. We do not mean to say that in every case the body must be found, for the murderer may cast his victim into the sea, or consume the body by fire; but we mean to say that the fact of the death must be established by clear and unequivocal proof, either by direct testimony or by presumptive evidence of the most cogent and irresistible kind. The fact of the death is the fundamental and material fact to be established in every case of murder. It should be shown either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead, or by proof of criminal violence adequate to produce death, and which accounts for the disappearance of the body. Until this is shown the accused, under an indictment for murder, cannot be held guilty merely because he does not produce the person whom he is charged with having murdered.

In the case of *Reg v. Hopkins*, 8 Car. and Payne 591, a case very similar in many respects to the case before us, where upon an indictment against the prisoner for the murder of her bastard child, it appeared she was seen with the child in her arms, on the road from the place where she had been at service, to the place where her father lived, about six in the evening, and between eight and nine she arrived at her father's without the child, and the body of a child was found in a tide-water, near which she must have passed in her
821 *road to her father's, but the body could not be identified as that of the child of the prisoner; and the evidence rather tended to show that it was not the body of such child; it was held that she was entitled to be acquitted; and with respect to the child which was really her child, it was held that the prisoner could not by law be called upon, either to account for it, or say where it was, unless there were evidence to show that her child was actually dead. Many similar cases might be cited, but it is not necessary to cite authority to show that in every case of homicide, the fact of the death must be proved, before any party can be convicted of the killing. It is a rule adopted in the interest and for the protection of human life and liberty, and a principle that lies deep in the foundations of the criminal jurisprudence of every civilized country.

Tutius semper est errare in acquietando quam in puniendo; exparte miserecordiæ quam exparte justitiæ, is the wise and humane maxim of the criminal law.

We are of opinion that the judgment of the Corporation court ought to be reversed.

Judgment reversed.

822 *Chahoon v. The Commonwealth.

November Term, 1871, Richmond.

1. **Statutes—Court Equally Divided—Judgments—Finality of.**—A point in a cause in which the judges of the court of appeals are equally divided, stands affirmed by virtue of the act, Code, ch. 209, § 7, p. 841, Sess. Acts 1866-67, p. 987, as well where it is a ruling of the court below in the progress of the cause, as where it is the final judgment of the court in the case: and this decision is final and irreversible; and cannot be changed upon a second appeal in the cause.

2. **Constitution—Jurisdiction of Corporation Courts—Felony Cases.**†—§ 14, article 6 of the constitution, which provides that Corporation courts shall have similar jurisdiction which may be given by law to the Circuit courts of the State, was not intended to restrict, but to enlarge, the jurisdiction of these courts, and to elevate them to the grade and dignity of Circuit courts. And it was competent, therefore, for the Legislature to give to the Corporation courts jurisdiction to try cases of felony, though the jurisdiction in such cases was taken away from the Circuit courts.

3. **Statutes—Corporation Court of Richmond.**‡—Under the act of 1866-67, passed April 27, 1867, to revise and amend the criminal procedure, the Corporation court of Richmond was authorized to empanel a grand jury on the 2d of May 1870.

4. **Constitution—Corporation Court of Richmond—Term of.**§—§ 14, article 6 of the constitution, which

***Judgments—Finality of.**—For the rule laid down in the latter part of the first head-note of the principal case as to the finality of judgments, see the principal case cited in the following cases: Bank v. McVeigh, 84 Va. 48, 3 S. E. Rep. 885; Bank of Old Dom. v. McVeigh, 20 Gratt. 554, and *note*; Rosenbaum v. Seddon, 94 Va. 579, 27 S. E. Rep. 425; Holleran v. Meisel, 91 Va. 148, 21 S. E. Rep. 658. In addition to the above, see collection of authorities in *foot-note* to Campbell v. Campbell, 23 Gratt. 649.

†**Constitution—Jurisdiction of Corporation Courts—Felony Cases.**—In a *foot-note* to Watson v. Blackstone, 6 Va. Law Reg. 419, it is said: "The clause in section 14 of Article VI of the Virginia Constitution, declaring that corporation courts shall be vested with 'similar jurisdiction which may be given by law to the circuit courts,' was interpreted in a learned opinion by MONCURE, P., in Chahoon's Case, 21 Gratt. 822, as not requiring the jurisdiction of these two classes of courts to be identical, but as intended 'to elevate the corporation and hustings courts to the grade and dignity of circuit courts.'"

‡**Statutes—Corporation Court of Richmond.**—In Jordan v. Com., 25 Gratt. 949, the court said: "In Chahoon's Case, 21 Gratt. 822, this court held that the courts provided by the fourteenth section of the sixth article of the constitution (of which the Hustings court is one) are continuations and successions of the Corporation courts then in existence, invested with the same jurisdiction and powers, subject to such modifications and changes as were made by the constitution, or might be made by acts thereafter passed. One of these changes is that the Hustings court has been deprived of the greater part of its civil jurisdiction. Another is that it has been clothed with exclusive, original jurisdiction in criminal matters, within the city of Richmond, with exception of proceedings against convicts in the penitentiary."

§**Constitution—Corporation Court of Richmond—**

directs a Corporation court to be held as often and as many days in each month as may be prescribed, does not require that the whole term shall be held in the same calendar month, and under the act of April 7, 1870, Acts of 1869-70, p. 44, § 10, which fixes the terms of the Corporation court of Richmond to commence on the first Monday, and continue so long as the business before the court may require, the court may continue its session from the first Monday in one month until the first Monday in the next month. And a grand jury empaneled on the 2d day of May may find an indictment on the 4th of June, the term continuing until that day.

5. **Trial of Prisoner—Charge of Value—Discretion of Court.**—The court before which a prisoner is arraigned for trial, if qualified jurors not exempt from serving cannot be conveniently found in the county or corporation, may send to another county or corporation for such jurors. And in acting in such case the court must have a large discretion.

823 *6. Same—Conspiracy—Case at Bar.—J S, R S and

C are under a joint indictment for a conspiracy to defraud the estate of H. and each of them is under a separate indictment for forging or uttering the same forged note of H. They meet together to consult about their defence: L the counsel of R S, G, the counsel of J S, being with them. On the trial of C, R S is called by the Commonwealth as a witness, and testifies as to a question he put to C and C's answer to it. C then calls L as a witness, states what R S had said, and asks L what answer C made to the question. L says he considered all that passed at that meeting was under the seal of professional confidence, and declines to answer unless released by R S. C moves the court to require L to answer, but the court refuses. **HELD:**

1. **Same—Same—Privileged Communications.**—That L heard at that meeting in relation to the subject of consultation was privileged.

2. **Same—Same—Same.**—R S did not, by his giving evidence of what passed at the meeting, release L from his obligation to be silent as to what passed there.

3. **Same—Same—Same.**—The privilege extended to all three of the parties, and the consent of L was necessary to authorize L to give the evidence.

This was a continuation of the case of George Chahoon, reported 20 Gratt. 733. When the case went back to the Hustings

Term of.—For the proposition that the words in section 14, article 6 of the Constitution of Virginia, "as many days in each month as may be prescribed by law" do not refer to the calendar month in which the term may commence but to the judicial month, commencing from the day in one calendar month, and continuing to the day in the next calendar month fixed by law for the commencement of the monthly term of the court, see the principal case cited and followed in Cluverius v. Com., 81 Va. 790.

See 4th headnote in principal case reaffirmed in Sands' Case, 21 Gratt. 884.

[**Privileged Communications.**—For the proposition that communications of a client to his counsel are privileged, see principal case cited in State of West Virginia v. Douglass, 20 W. Va. 780. See also, Parker v. Carter, 4 Munf. 273.

court of Richmond, the prisoner was put on his trial at the March term 1871; and after a trial lasting from the 17th to the 24th of the month, the jury could not agree upon a verdict, and on the 28th, with the consent of the prisoner, they were discharged.

At the June term of the court the cause was again called for trial; and of the venire men summoned to try the prisoner, all of whom but one were present, none being found duly qualified, the prisoner moved the court to award a tales to the sergeant of the city for the summons of a sufficient number of jurors from the city to make up a jury for the trial of the cause. But it appearing to the satisfaction of the court, by evidence adduced and heard, that qualified jurors could not be conveniently found in the city, two writs of venire facias were issued to the sergeant, directing him to summon thirty jurors from the corporation of Fredericksburg, and

824 *twenty-five from the city of Lynchburg. To this action of the court the prisoner excepted. And thereupon the prisoner further moved the court, after his previous motion had been overruled, and after the decision of the court to send elsewhere for a jury had been made, for a change of venue, upon the proof heard upon the previous motion. But the court refused to change the venue: and the prisoner excepted. The evidence is sufficiently stated in the opinion of Judge Moncure.

In the progress of the trial the prisoner excepted to a ruling of the court refusing to require John Lyon, a witness introduced by the prisoner, to answer a question put to him. Lyon refused to answer the question, on the ground that it required of him a disclosure of a confidential communication. The facts are fully set out in the opinion of Judge Moncure.

The jury found the prisoner guilty of uttering the forged instrument, knowing it to be forged; and fixed the term of his imprisonment in the penitentiary at two years; and the court sentenced him accordingly. And the prisoner thereupon applied to this court for a writ of error; which was awarded.

Wells and Crump, for the prisoner.

The Attorney General and George D. Wise, for the Commonwealth.

MONCURE, P., delivered the opinion of the court.

The sixth and last assignment of error in this case is the first which will be disposed of, viz: "That the accused should have been sent to an examining magistrate before being placed on his trial."

This is the same question which was presented by the first bill of exceptions taken by the accused on his first trial in this case, and this court being equally divided in opinion upon it when the case was formerly before us, the judgment of the court of Hustings thereon was

825 *therefore affirmed. Chahoon's Case,

20 Gratt. 733, 788. That affirmance was in pursuance of the Code, p. 841, § 7, ch. 209, Acts of Assembly 1866-'67, p. 937, which requires an affirmance "in those cases where the voices on both sides are equal," and which applies as well to any ruling of the court below in the progress of the cause therein, as to the final judgment of the said court in the case. This question having thus already been decided by this court, the decision is final and irreversible, and could not be changed even if the court were now disposed to change it; as is not the case.

We will now proceed to consider the other assignments of error, in the order in which they are made. In regard to the first three, they present questions which properly ought to have been raised, if at all, before pleading to the indictment, but which are now raised for the first time in this court, on the present writ of error, unless they were embraced in the motion in arrest of judgment which was made in the court below. Without deciding whether or not it be now too late to raise these questions, and conceding, for the purposes of this case, that they are presented in due time, how ought they to be answered? And,

1st. That the Hustings court of the city of Richmond had no jurisdiction of the case.

This assignment of error is based upon section 14 of article 6 of the constitution, (Acts of Assembly 1869-'70, p. 622,) which declares that, "for each city or town in the State containing a population of five thousand, shall be elected, on the joint vote of the two houses of the General Assembly, one city judge, who shall hold a Corporation or Hustings court of said city or town, as often, and as many days in each month, as may be prescribed by law, with similar jurisdiction which may be given by law to Circuit courts of this State, and shall hold his office for a term of six years," &c.

826 It is argued that this is only the provision of the constitution *which prescribes the jurisdiction of a Corporation or Hustings court; that this requires it to be similar to that which may be given by law to the Circuit courts; that the constitution does not prescribe the jurisdiction of the Circuit courts, but declares that it "shall be regulated by law;" Art. 6, § 1; that the Circuit courts have not had, since the adoption of the constitution, any jurisdiction for the trial of felonies, except in the single case of election by the accused (which is not this case), and that, therefore, the Hustings court can have no such jurisdiction.

This is plausible, but we think not a sound, argument. It places too strict and literal a construction on the words, "with similar jurisdiction which may be given by law to the Circuit courts of this State." We think the constitution ought to be construed like other instruments; that is reasonably, and with a view to effectuate the manifest intention of the framers of the instrument. It would certainly be a most un-

reasonable and inconvenient construction of the constitution, to say that it gives to a Corporation or Hustings court similar, and only similar jurisdiction to that which may be given by law to the Circuit courts. According to that construction, such court was at once invested by the constitution, proprio vigore, with similar jurisdiction to that which the Circuit courts then exercised, and will have, ipso facto, and eo instanti, similar jurisdiction to that which may, at any time thereafter, be conferred by law upon the Circuit courts. Not the same jurisdiction, but similar jurisdiction; and as similis non est idem, we would have, according to this construction, in every case of jurisdiction exercised by a Corporation or Hustings court, to determine whether it was similar to jurisdiction given by law to the Circuit courts. It is unreasonable to suppose that the framers of the constitution intended so great an absurdity.

We think that the words under consideration: "with *similar jurisdiction which may be given by law to the Circuit courts," were intended to be an extension, and not a restriction of jurisdiction; to elevate the Corporation and the Hustings courts, to the grade and dignity of Circuit courts; and not to take away from them any jurisdiction which they then had, nor to render them incapable of being invested with any jurisdiction which the Legislature, in its wisdom, might see fit to give them. According to the judicial system which had existed under former constitutions, the judicial power of the State had been entrusted to three grades of courts; the Supreme Court of Appeals, the Superior or Circuit courts, and the County or Corporation courts; a modified right to appeal being given from the third to the second, and from the second to the first class of the courts, in that order of gradation. The framers of the present constitution intended to preserve and continue, in the main, the same judicial system, and the same order of gradation. But believing, no doubt, that the judges of the Corporation or Hustings courts would generally be as learned in the law as judges of the Circuit courts, they therefore raised the former to the level of the latter courts, by declaring that they should have similar jurisdiction. They thought it unnecessary to say anything about the continuance of the jurisdiction which the Corporation or Hustings courts then had, and which, of necessity, they must continue to have, as no other courts were provided to receive it. They intended that the Corporation or Hustings courts should continue to bear the same relation to the cities and towns as the County courts bore to the counties, and that, in addition to that, the Corporation or Hustings courts should have similar jurisdiction with the Circuit courts; in other words be of the same grade with the Circuit courts, so that an appeal would lie directly from the Corporation or Hustings courts to the Supreme Court of Appeals.

That this is the true construction of

828 the constitution *is also shown by the contemporaneous exposition of it by the Legislature which assembled immediately after its adoption, and organized the departments of government according to its provisions. The 7th section of the act approved April 2, 1870, entitled "An act to prescribe and define the jurisdiction of the county and corporation courts of the Commonwealth, and the times and places of holding the same," Acts of Assembly, 1869-70, p. 36, provides "that the several Corporation courts of this State shall, within their respective limits, have the same jurisdiction as the Circuit courts; and the same jurisdiction as County courts over all offences committed within their limits; and such other jurisdiction as may be conferred upon them by law: provided that the provisions of this section shall not apply to the courts of the city of Richmond." The 4th section of the act approved April 7, 1870, entitled "An act providing for courts for the city of Richmond, and defining the jurisdiction thereof," id. p. 43, provides that "the Hustings court of the city of Richmond shall (except as hereinafter provided) have exclusive original jurisdiction of all presentments, informations and indictments for offences committed within the jurisdiction aforesaid, including criminal causes now therein pending." And the 7th section of the same act provides, that "appeals, writs of error and writs of superseas from and to judgments, decrees and orders of the said Hustings court, and the said Chancery court of the city of Richmond, shall be taken and allowed as if they were from or to those of the Circuit court or a circuit judge." Thus, under the constitution and under these acts, the Corporation or Hustings courts in regard to crimes committed within their respective cities or towns, are invested with all the jurisdiction with which both the County and Circuit courts of the counties are invested, in regard to crimes committed in said counties respectively. In Boswell's case, 20 Gratt.

829 860, it was held that a prisoner indicted in a Corporation court for *murder, is not entitled to elect to be tried in the Circuit court; the act of April 27, 1867, Sess Acts, 1866-67, p. 931, being altered in this respect by the act of April 2, 1870, aforesaid. And that case and cases of Bird and Smith, decided at this term, all proceed upon the tacit admission of the existence of the jurisdiction, which is now for the first time questioned. If such jurisdiction do not exist, then there is none in any court for the trial of crimes committed in the cities and towns of the State.

We are therefore of opinion that the Hustings court of the city of Richmond had jurisdiction over the case.

2d. The next assignment of error is, "that if it had a general jurisdiction in cases of felony, it had no authority by law to impanel a grand jury at the time the supposed indictment was found against him."

Chapter 206 of the Code, entitled "Of

grand juries," provided for the summoning of grand juries in all the courts of criminal jurisdiction. That chapter, among others, was revised and amended by an act passed April 27, 1867, entitled "An act to revise and amend the criminal procedure." Acts of Assembly, 1866-67, p. 925. That act was in force when the present constitution was adopted, and when the act of April 7, 1870, was passed, providing for courts for the city of Richmond, and among others the Hustings court. Acts of Assembly, 1869-70, p. 42. The fourth section of that act having, as before stated, given to the said Hustings court exclusive original jurisdiction of all presentments, informations and indictments for offences committed within the jurisdiction aforesaid; and there being no other law then in existence providing for a grand jury but the act of April 27, 1867, aforesaid, it follows as matter of necessity, that that act should apply to the case. How else could the Hustings court exercise the jurisdiction expressly and exclusively given to it by the fourth section of the act of April 7, 1870, as aforesaid? Is it not a firmly settled canon of construction,

830 that whenever *a power is expressly given, all powers necessary to its execution are given by necessary implication? But here the act of April 27, 1867, never was repealed, and it applies in express terms to the Corporation court of Richmond, providing for a grand jury at the term of said court in May among other terms. The courts provided for by the fourteenth section of article 6 of the constitution, are continuations and successions of corporation courts then in existence, invested with the same jurisdiction and powers, subject to such modifications and changes as were made by the constitution, or might be made by any act thereafter passed. But if there were any doubt upon the subject, the first and fourth sections of the schedule to the constitution would continue the existence of the grand jury law until otherwise provided.

The only doubt, if any, existing in this case, arises from the act passed May 18, 1870, entitled "An act authorizing Hustings court, city of Richmond, to impanel a grand jury," &c. Acts of Assembly, 1869-70, p. 111. That act makes a change in the terms of the court to which a grand jury is required to be summoned, and was necessary for that purpose. But the most that can be said of it is, that it is a cumulative law, passed from abundant caution, and not at all in conflict with the continued existence of the act of April 27, 1867, except so far as it altered the same.

We are therefore of opinion, that the Hustings court of the city of Richmond had authority by law to impanel a grand jury at the time the indictment was found against the accused, to wit: on the 4th day of June 1870, and also at the time the grand jury which found the said indictment was sworn, to wit: on the 2d day of May 1870.

3d. The next assignment of error is, "that the said supposed indictment was found

on the 4th day of June 1870, at a period when the said court of Hustings had no authority to hold its sessions."

831 *The question presented by this assignment of error, depends upon the true construction of section 14 of article 6 aforesaid, which directs a Corporation or Hustings court to be held "as often, and as many days in each month, as may be prescribed by law." The act of April 7, 1870, aforesaid, Acts of Assembly 1869-70, p. 44, § 10, provides, that "there shall be a term of the Hustings court of the city of Richmond for each month in the year, commencing on the first Monday in the month, and continuing so long as the business before the court may require." The term at which the indictment in this case purports to have been found, commenced on the first Monday in May 1870, and the indictment was found on the 4th day of June 1870; which was, it seems, the Saturday next before the first Monday in that month. It is argued that the term commencing in May could not be continued into June, but only for as many days in May "as may be prescribed by law;" the words of the constitution being, "as often and as many days in each month as may be prescribed by law."

We do not think that this is a reasonable construction of the constitution. We think its framers contemplated that there should be at least one term of the Corporation or Hustings court in each month, and intended to authorize such court to be held oftener than once in a month, if deemed proper by the Legislature. Corporation courts, like County courts, had always been held once a month. The constitution expressly provides that County courts shall be held monthly, and there is no reason to believe that its framers intended that Corporation courts might be held less frequently than they and county courts had always been held before, and than county courts were expressly required to be held thereafter. It was probably supposed that the police business of the cities and towns, or some of them, might require that their corporation courts should sit oftener than once a month, and, therefore, the Legislature is au-

832 thorized so *to provide, if deemed proper. The words, "so many days in each month," seem to indicate an intention that there should be at least one term in each month. No doubt it was contemplated that, generally, if not in all cases, the law would provide thereafter as it had provided theretofore, for monthly sessions of those courts. Accordingly, the act of April 7, 1870, providing for courts for the city of Richmond, declares that there shall be a term of the Hustings court of said city for each month in the year. Acts of Assembly 1869-'70, p. 44, § 10. That act also declares that the said term shall commence on the first Monday in the month, and continue so long as the business before the court may require. So that, according to the literal terms and obvious meaning of that act, a term may continue from the day of its commencement,

on the first Monday in a month, until the first Monday in the next succeeding month, if the business before the court require it. There is nothing in the words, "for each month in the year," which requires a term commencing on the first Monday in May, to continue only during the same month of May. The term for the month of May, consistently with the words and obvious meaning of the act, may continue into June, and until the first Monday in that month, if the business before the court require it. Nor is this construction inconsistent with the 14th section of the 6th article of the constitution. The words, "as many days in each month as may be prescribed by law," in that section, do not refer to the calendar month in which a term may commence, but to the judicial month, commencing from the day in one calendar month, and continuing to the day in the next calendar month, fixed by law for the commencement of the monthly term of the court. Suppose the day fixed by law for the commencement of the monthly term of the Hustings court of the city of Richmond were the

833 last day of each month, instead of the first Monday in the month, is it *possible that the framers of the constitution could have intended that in such a case the court should sit but one day? Or can it be supposed they intended that all the Corporation courts of the State should commence early in each month, in order that there may be time enough, during that calendar month, to transact all the business before the court? We think not.

We are, therefore, of opinion that when the indictment was found, on the 4th day of June 1870, the said court of Hustings had authority to hold its sessions.

4th. The next assignment of error is, "that the court had no authority to send away, out of its jurisdiction, for a jury, the emergency contemplated by the statute not having arisen."

This assignment of error is founded on the first of the only two bills of exceptions taken in the court below, on the last trial of the case. The law under which the court acted, in the proceeding here complained of, is the 10th section of chapter 208 of the Code, as revised and amended in the act passed April 27, 1867, entitled "An act to revise and amend the criminal procedure," Acts of Assembly, 1866-67, p. 933, which provides that "in a criminal case, if qualified jurors not exempt from serving, cannot be conveniently found in the county or corporation in which the trial is to be, the court may cause so many as may be necessary of such jurors, to be summoned from any other county or corporation, by the sheriff or sergeant thereof, or by its own officer." In the exercise of the power conferred by this law, the court of trial must of necessity have a great deal of discretion, and the appellate court, in revising the judgment, ought not to reverse it for error in this respect, unless it be plain that such discretion has been improperly used. All the facts on which the proceeding here com-

plained of was founded are set out in the bill of exceptions, and without repeating or commenting specially upon them, it is sufficient to say that it does not appear 834 to us that the Hustings *court was not well warranted in that proceeding by the facts aforesaid. The sergeant of the city, N. M. Lee, testified, "that certainly a jury could not be gotten with convenience in Richmond, and he believed it was impossible;" and the deputy sergeant, Thomas U. Dudley, testified, "I have been sergeant and deputy sergeant of Richmond about ten years, and am accustomed to summoning jurors. It would be inconvenient to get a competent jury in this case; and I think it would be impossible." And both of them gave the reasons for the opinions they expressed. We are therefore of opinion that the Hustings court did not err in sending for a jury to the corporations of Fredericksburg and Lynchburg. Wormeley's case, 10 Gratt. 658, 672-3.

After the decision of the court to send elsewhere for a jury had been made, a motion was made by the accused for a change of venue; which motion was overruled by the court; and he excepted. This exception is embraced in the same bill of exceptions taken to the decision just referred to. The matter of it is not a subject of any of the assignments of error, and it is sufficient to say in regard to it, that we think there is no error in the judgment of the court below in that respect. See Wormeley's case, supra.

5th. The next and last assignment of error to be noticed is, "that the testimony of John Lyon, as rebutting evidence to the testimony of R. S. Sanxay, was improperly excluded."

This assignment of error is based on the second and only remaining bill of exceptions taken in the court below on the last trial of the case; and as it was the one chiefly relied on by the learned counsel of the accused, in their argument in this court; and is the only one about which we have had any doubt or difficulty; it seems to be proper to repeat, substantially, the facts as set out in the bill of exceptions, which is short, and contains no superfluous matter. "After the Commonwealth

835 *had introduced testimony tending to show that the paper alleged to have been forged, set out in the indictment, had been knowingly uttered and employed as true by the accused, and that the said paper had been sued upon in the County court by the accused, and that a bill in chancery had been filed by him in the Circuit court of Henrico upon the judgment obtained in the County court, to charge the real estate of Solomon Haunstein, and a decree obtained in that court for the sale of the said real estate, and the application of the proceeds thereof by the commissioner, R. D. Sanxay, to the payment of the said judgment; and after a receipt in the following words: 'Received of R. D. Sanxay, special commissioner, the sum of forty-nine hundred and ninety-six dollars and ninety-four

cents, in part satisfaction and discharge of the judgment obtained in Henrico County court, at March term 1867, in favor of Wm. Gleason, assignee of John W. Thompson, against Richard D. Sanxay, curator of the estate of Solomon Haunstein, dec'd. Geo. Chahoon, attorney for Wm. Gleason, assignee of Jno. W. Thompson; had been introduced in evidence by the Commonwealth, as the receipt given by the accused, as counsel, to said commissioner, the Commonwealth then called R. S. Sanxay, a son of said commissioner, who testified that the accused, in the office of J. H. Sands, where he and the witness and Sands (all of whom were then under a joint indictment for conspiracy to defraud the estate of Haunstein, and were also then under several indictments for the forging and uttering of said paper named in the indictment in this case) had met with their counsel for conference in said cases, except the counsel for the accused, who was absent; John M. Gregory, Esq., being present, representing Sands, and John Lyon, Esq., present, representing Sanxay; that in that conference, the accused had been asked by him (Sanxay) whether he intended to deny that

836 he had received the money receipted for in *the receipt given to said commissioner (hereinbefore set out), and that the accused replied that he had not, and would not deny it. Whereupon the accused introduced the said John Lyon, Esq., and informed him of the testimony of said Sanxay, and proposed to examine him touching the statements testified to by the said R. S. Sanxay for the Commonwealth, and asked said Lyon what response the accused gave to the question of said Sanxay, and whether he did not make a reply different from that testified to by said Sanxay. Whereupon the said Lyon, insisting that the knowledge and facts coming to him in said conference, and the reply to said question, came in the interview aforesaid, while he represented Sanxay as counsel, and that he considered all that passed there as passing under the seal of professional confidence, and that he claimed the privilege of counsel, and declined to answer the said question, unless released from his obligation by said Sanxay. Whereupon the accused asked that the court would require the said Lyon to answer said question." But the court refused to do so.

There is no rule of law better settled than "that a counsel, solicitor or attorney shall not be permitted to divulge any matter which has been communicated to him in professional confidence." In these words is the rule laid down in 2 Starkie on Evidence, page 395; and that excellent law writer further says: "This is the privilege of the client, and is founded on the policy of the law, which will not permit a person to betray a secret which the law has entrusted to him." "With respect to such communications, the mouth of the witness is forever sealed, and he cannot reveal them at any time, or in any proceeding, although the client be no party to it, however improb-

able it may be under the circumstances, that any injury can result to him from the disclosure, and although the relation of attorney and client has ceased by the dismissal of the attorney." To the same

837 *effect is the rule laid down in 1 Phillips on Evidence, 106 and seq., and 1 Greenleaf on Evidence, § 237 and seq. The decisions to be found on the subject, both in the English and American reports, are almost countless in number; though it is somewhat remarkable, that there has been scarcely a case in this court in which the subject has ever been referred to. But it does not at all follow, that the rule, thus firmly established elsewhere, has not also prevailed in this State. On the contrary, we believe it has been always accepted and acted on here. Learned judges in England, have differed as to the wisdom and policy of the rule, and also as to the apparent exceptions to it, but not at all as to its existence. Perhaps no judge has laid down the rule, and apparent exceptions to it, more fully or luminously than has Lord Brougham, in two cases, Bolton v. Corporation of Liverpool, 1 Mylne and Keen 88; and Greenough v. Gaskell, Id. 98, (6 Coud. Eng. Ch. R. pp. 511 and 516,) and especially the latter case, in which most of the main cases then existing, to wit: in 1833, were cited and commented upon. That case was argued by counsel of the greatest distinction, among whom was Sir Edward Sugden, Mr. Pepys, afterwards Lord Cottenham, and Mr. Spence, the great equity law writer. It was decided by a judge of distinguished ability, who, though perhaps not so learned a lawyer as some others who have graced the profession in England, yet, when he applied his great mind to any subject, as he did to the subject of that case, was sure to illustrate and adorn it. We are told, too, that in that decision he was assisted by consultation with Lord Lyndhurst, Tindal, C. J., and Parke, J., 4 Barn. & Ad. 876, than whom England can boast of no greater judges; and the case has been since referred to and relied on as settling the law on this subject. 2 Mees. & Welsh. 100; 15 Jur. 1117; 16 Jur. 30, 41-43, part 2d. We may therefore safely and fairly accept that case as a sound exposition of the rule, and the

838 reason of it. "To force from the party himself," says the lord chancellor in the case, "the production of communications made by him to professional men, seems inconsistent with the possibility of an ignorant man safely resorting to professional advice, and can only be justified, if the authority of decided cases warrants it. But no authority sanctions the much wilder violation of professional confidence, and in circumstances wholly different, which would be involved in compelling counsel, or attorneys, or solicitors, to disclose matters committed to them in their professional capacity, and which, but for their employment as professional men, they would not have become possessed of." "If, touching matters that come within the ordinary scope of professional employment,

they receive a communication in their professional capacity, either from a client or on his account, and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information, or produce the papers, in any court of law or equity, either as party or as witness." The foundation of the rule "is out of regard to the interests of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsel half his case." The learned chancellor then proceeds to state the apparent exceptions to the rule (none of which apply to this case), and thus continues:

839 "In all such cases, it is plain that the attorney is not called upon to disclose matters which he can be said to have learned by communication with this client or on his client's behalf, matters which were so committed to him in his capacity of attorney, and matters which, in that capacity alone, he had come to know." He then adverts to the cases which support the rule, and those which come under the apparent exceptions thereto; but it is unnecessary to notice them here, or to make any further extracts from his opinion, so much of which has already been set forth as showing more clearly than can be found elsewhere, the true exposition of the rule in question.

And now let us see whether and how far that rule applies to this case. When the communication sought to be introduced as evidence was made, Chahoon, Sands, and Sanxay were all under a joint indictment for conspiracy to defraud the estate of Haunstein, and also under several indictments for the forging and uttering of a paper named in the indictment in this case. Under such circumstances, it was natural and reasonable, if not necessary, that these parties, thus charged with the same crimes, should meet together in consultation with their counsel, communicate to the latter all that might be deemed proper for them to know, and to make all necessary arrangements for the defence. Accordingly, such a meeting and consultation were had in the office of Sands, one of the accused. There were present at that meeting all three of the accused, Chahoon, Sands and Sanxay; and John M. Gregory, counsel representing Sands, and John Lyon, counsel representing Sanxay. The counsel of Chahoon was absent. It does not appear that any other person was present on the occasion than those above named, and it may well be in-

ferred that there was not. Now nothing can be more certain than that, according to all the authorities on the subject, whatever either of the counsel present heard, or saw, on the said occasion, concerning 840 the matter of the said charge, was a privileged communication, within the meaning of the rule. Nothing can be more certain than that if John M. Gregory or John Lyon had been put upon the witness stand by the Commonwealth, and called on to testify as to any thing said or done at that consultation, in regard to the subject matter of the charge, he would not have been compelled, or even allowed by the court to give such testimony, at least without the consent of his client. This proposition will hardly, and certainly cannot successfully, be denied. Then, if Lyon had been put upon the stand by the Commonwealth instead of by Chahoon, and asked what reply Chahoon gave to a question put to him by Sanxay on the occasion aforesaid, and if Lyon had insisted, as he did, "that the knowledge and facts coming to him in said conference, and the reply to said question came in the interview aforesaid, while he represented Sanxay as counsel, and that he considered all that passed there as passing under the seal of professional confidence, and that he claimed the privilege of counsel, and declined to answer the said question, unless released from his obligation by said Sanxay," it is perfectly certain that he would not have been compelled, or even allowed, to make such disclosure, without such a release.

How does the case differ when Lyon is put upon the stand by Chahoon, instead of the Commonwealth, and asked, "what response the accused gave to the question of said Sanxay, and whether he did not make a reply different from that testified to by said Sanxay?"

The only ground for any such difference must consist in the view, that the privilege in question is that of the client not the counsel, and may therefore be released by the client; that Lyon was the counsel of Sanxay only in this matter; and that Sanxay released the privilege, by himself testifying that in the conference aforesaid, "that accused had been asked by him (Sanxay) whether he intended to deny 841 that he had received the money *received for in the receipt given to said commissioner, and the accused replied that he had not and would not deny it."

Undoubtedly the privilege in question is that of the client, and not the counsel, and the client may therefore release it. And the only question is, was the privilege released by the client in this case?

This question depends upon two others: First, could Sanxay be regarded as the only client of Lyon, within the meaning of the rule, and under the circumstances of this case; and, secondly, did Sanxay release the privilege by giving testimony as aforesaid?

And first, could Sanxay be regarded as the only client of Lyon, within the mean-

ing of the rule, and under the circumstances of the case?

A man may be the counsel of two or more parties, concerning the same subject matter, and in all such cases confidential communications made to him by one or all of such parties, jointly or severally, in reference to such matter, are privileged, and the privilege can only be released by consent of all the parties; the privilege being that of each and all of them. If all of the parties in this case, Chahoon, Sands and Sanxay, had employed Lyon as their counsel, there can be no doubt but that the privilege could not have been released by the consent of less than all. And can it make any difference in this case, that he was employed as counsel alone by Sanxay? The parties were jointly indicted for a conspiracy to commit a particular crime, and severally indicted for forging and uttering the same paper. They might have employed the same counsel, or they might have employed different counsel as they did. But whether they did the one thing or the other, the effect is the same, as to their right of communication to each and all of the counsel, and as to the privilege of such communication. They had the same defence to make, the act of

one in furtherance of the conspiracy, 842 being *the act of all, and the counsel of each was in effect the counsel of all, though, for purposes of convenience, he was employed and paid by his respective client. They had a right, all the accused and their counsel, to consult together about the case and the defence, and it follows as a necessary consequence, that all the information, derived by any of the counsel from such consultation, is privileged, and the privilege belongs to each and all of the clients, and cannot be released without the consent of all of them. Otherwise what would such right of consultation be worth?

Then Sanxay would have had no right to release the privilege, even if he had intended to do so, without the consent of Sands, and it is not pretended that Sands gave any such consent, and it is very certain that he did not.

But Sanxay, certainly, never, expressly, gave such consent, and did not intend to do so. On the contrary he, in effect, refused to do so. Lyon considered all that passed at the meeting, as passing under the seal of professional confidence, claimed the privilege of counsel, and declined to answer the question propounded to him by the accused, unless released from his obligation by said Sanxay. And Sanxay did not give such release.

Secondly. Did Sanxay release the privilege by giving testimony as aforesaid? If he did, the release was by implication only; and we would have a singular instance of an implication in the face of express evidence of a contrary intention. But his merely giving testimony as aforesaid, would not have operated as such a release by implication, even without any evidence of a contrary intention. It does not appear that

he was a voluntary witness; on the contrary it appears that he was called by the Commonwealth. It is, perhaps, not even yet a settled question, whether he had a right to refuse to give testimony, in such a case.

Admitting that he had; still he may not have been, and probably was not, 843 aware of *his right, but supposed that he was bound to give testimony. An intention to release the privilege ought to be expressed; or, if implied, the implication ought to be plain. The accused cannot complain that Sanxay was allowed to give testimony and Lyon not. Lyon found his way into that meeting, only under the seal of professional confidence. It was the interest of the accused, as well as that of his associates in the charge, that he, Lyon, should enter only in that way. As to giving testimony of what transpired there, he is to be considered as having been absent on the occasion. Suppose he had been absent, and no counsel of any of the parties had been present; would the accused have been any worse off than he now is? Could he have then complained that Sanxay was allowed to give testimony of what occurred when there was no person present to contradict him?

We see nothing in any of the cases referred to by the counsel of the plaintiff in error, which is at all in conflict with the views we have expressed, and we will not prolong this opinion by reviewing them. The rule stands unchallenged by any of them, that confidential communications from client to counsel, during the existence of this relationship, and about a professional matter, are privileged; and the most that any of those cases can show is, what Lord Brougham calls an apparent, not a real, exception to the rule; that is, that in that case, the relationship between counsel and client did not exist, or the communication was not confidential, or was not about a professional matter; none of which categories can be predicated of this case.

We are therefore of opinion that the testimony of John Lyon, as rebutting evidence to the testimony of R. S. Sanxay, was not improperly excluded.

But suppose the testimony of Lyon was admissible, was the accused prejudiced by its exclusion? We think not. If Lyon had testified that the accused answered 844 *Sanxay's question as Sanxay says he did, then the testimony would only have been confirmatory of Sanxay's, and of course would have done the accused no good. If, on the other hand, Lyon had testified that the accused answered the question differently, and denied that he had received the money according to the terms of his receipt to the commissioner, we can very well see how that answer might have prejudiced Sands and Sanxay, but we cannot see how it possibly could have benefited the accused. On the contrary, we think it would have prejudiced him also, by showing that the transaction was not real, as his receipt represented it to be, but fictitious

and false, and an imposition upon the court. The actual receipt of the money was not a necessary ingredient of the offence, and no more such an ingredient (if so much) than the feigned and fictitious receipt of it. Then, in that view, ought this court to reverse this judgment on that ground, and remand the case for a new trial, when there have already been three trials of it, and when the accused has been twice convicted by the verdict of a jury? If it appeared that an error was committed by the court below which may have prejudiced the accused, then he is entitled to a reversal of the judgment, however often he may have been tried, and whatever amount of trouble and expense his repeated trials may have occasioned. But if it be manifest that, even supposing the court below to have erred, yet the accused has not been prejudiced, we think the Commonwealth ought not to be further burdened and the public longer wearied by this prosecution, but that it ought now to be ended. We are told that the last jury which tried the case, though they found the accused guilty, yet fixed the term of his imprisonment in the penitentiary at the lowest period which the law authorized, and "recommended him to the mercy of the governor for executive clemency," in the exercise of the constitutional power of pardon. It will be for the governor to act upon that recommendation

845 *according to his sense of duty. It was not intended to have, and cannot have, any effect upon us. It is our duty to decide the case according to law, and we have endeavored to do so.

We are of opinion that there is no error in the judgment, and that it be affirmed.

STAPLES, J., thought that the witness Lyon should have been compelled to answer the question put to him. He concurred in the opinion of Moncure, P., on the other questions in the cause.

Judgment affirmed.

846 *Price v. The Commonwealth.

January Term, 1872, Richmond.

1. **Criminal Law—Receiving Stolen Goods—Indictment for Larceny—Statutes.**—If a person be indicted for the simple larceny of a thing, and the proof be that it was stolen by some other person, and received by the accused knowing it to have been stolen, the proof will sustain the charge; the act making the receiving of a thing stolen knowing it to be stolen, larceny. Code, edl. of 1860, p. 789, § 20.

2. **Same—Same—Same.***—P is indicted for receiving a horse which had been stolen, knowing that it

***Criminal Law—Receiving Stolen Goods—Indictment for Larceny.**—For the proposition that the indictment may charge specially the fact of receiving the goods, with the knowledge that they had been stolen, or it may charge the person with the larceny of the goods, see the principal case cited and followed in *Anable v. Com.*, 24 Gratt. 566. See also, the principal case cited in *foot-note* to *Shinn v. Com.*, 32 Gratt. 899. See generally, monographic *note* on "Indictment."

had been stolen. The indictment may charge specially the fact of receiving the horse, with the knowledge that it had been stolen, or it may charge P with the larceny of the horse; and the latter would seem to be the better practice.

3. **Same—Same—Election to Be Tried in Circuit Court.**

—P having been indicted in February 1871, for receiving a horse knowing it to have been stolen, and also for the larceny of the horse, elects to be tried in the Circuit court. In the Circuit court he, in September 1871, moves the court to send him back to the County court for trial, on the ground that the Circuit court has no jurisdiction to try him. The act of February 12, 1866, which provides that horse stealing may be punished with death, or confinement in the penitentiary, at the discretion of the jury, has not been repealed, and the Circuit court has jurisdiction to try the prisoner.

4. **Grand Jury—Special Term.**—The record of the indictment against P sent to the Circuit court, shows that it was found at the February term of the court by a grand jury of eight members; but it does not show that the February term was not one of the four regular terms of the said court, to which twenty-four citizens were required to be summoned to constitute a grand jury. In the absence of evidence to the contrary, it must be presumed that the indictment was found at a term when a grand jury might consist of only eight members.

5. **Same—Indictment—Failure to Endorse "True Bill"—Effect.**†—The record in the case does not show that the indictment was endorsed a "true bill" by the

†**Same—Indictment—Failure to Endorse "True Bill"—Effect.**—The proposition laid down in the principal case, that though the record in the case does not show that the indictment was endorsed "A true bill" by the grand jury and signed by the foreman, such endorsement being usual though not necessary, the record of the finding of the jury upon the order book of the court is the proper evidence of the fact, is followed and approved in the following cases, citing the principal case: *State v. Fitzpatrick*, 8 W. Va. 708; *Miller v. Com.* (Va.), 21 S. E. Rep. 499; *Crump v. Com.*, 98 Va. 833, 23 S. E. Rep. 760; *State of W. Va. v. Gilmore*, 9 W. Va. 645; *Simmons v. Com.*, 80 Va. 159, 15 S. E. Rep. 386; *Hodges v. Com.*, 80 Va. 203, 15 S. E. Rep. 513. In *State v. Cross*, 44 W. Va. 315, 20 S. E. Rep. 537, citing the principal case, the court said: "There is nothing of any substance in the *quære* on this point in *State v. Heaton*, 23 W. Va. 773 (this case also cites the principal case). If there were anything in the point it comes too late after plea. *Burgess' Case*, 2 Va. Cas. 483." In *Frisbie v. U. S.*, 157 U. S. 160, 15 Sup. Ct. Rep. 586, citing the principal case, the court held that, it is advisable, at least, that an indictment found be endorsed "A true bill," and signed by the foreman of the grand jury. An objection to an indictment that it has not the endorsement "A true bill," signed by the foreman of the grand jury, is waived unless made when defendant is called on to plead, as the defect does not go to the substance of the charge, but only to the form.

In *U. S. v. Levally*, 36 Fed. Rep. 687, distinguishing the principal case, the court said: "This case differs essentially from *State v. Freeman*, 13 N. H. 488; *Com. v. Smyth*, 11 Cush. 473; *Price's Case*, 21 Gratt. 846, and other cases cited and relied on by the district attorney. In this court the practice is, and

grand jury and signed by the foreman. Such endorsement, though usual, is not necessary, and the record of the finding of the jury, upon the order book of the court, is the proper evidence of that fact.

847 *6. *Venire Facias*—Effect of Statute Not in Operation When Prisoner Arrested.—The *venire facias* having been issued on the 18th of August 1871, properly conformed to the provisions of the act of March 29, 1871, Sess. Acts 1870-71, ch. 262, p. 357, which went into operation on 1st of July 1871; though this act was not in force at the time the prisoner was arrested, committed and indicted.

7. Criminal Law—Possession of Stolen Goods—Presumption.†—If property be stolen, and recently thereafter be found in the exclusive possession of the prisoner, then such possession of itself affords sufficient grounds for a presumption of fact that he was the thief; and in order to repel the presumption, makes it incumbent on him, on being called on for the purpose, to account for such possession consistently with his innocence. If he give a reasonable account of it, then it devolves on the Commonwealth to prove that such account is untrue. If he gives an unreasonable account of it, then it devolves on the prisoner to sustain such account by other evidence. What is such a recent possession as raises a presumption against a prisoner, in the meaning of the rule, is a question for the jury, and depends upon the nature of the property and other circumstances of the particular case.

8. Same—Same—Same—Case at Bar.—The facts certified in this case are insufficient to authorize a conviction.

At the February term 1871 of the County court of Cumberland county, the grand jury found an indictment against George W. Price for horse stealing. The indictment contained four counts. The first three counts charged that Price, on the 10th of February 1871, received the horse described, which had been lately before stolen, knowing it to have been feloniously stolen. The fourth charged him with having stolen the horse.

The prisoner was brought into court at the March term, when, being arraigned, he demanded to be tried in the Circuit court of

always has been, for the district attorney to prepare in advance the bills of indictment, and submit the same, with the evidence to support them, to the grand jury, whose action in each case, finding or ignoring the bill, is endorsed thereon, such indorsement being attested by the signature of the foreman thereunder."

†Criminal Law—Possession of Stolen Goods—Presumption.—For the proposition, that if property be stolen, and recently thereafter be found in the exclusive possession of the accused, such possession of itself affords sufficient ground for the presumption of the fact that he was the thief and in order to repel such presumption it is incumbent on him to account for such possession consistent with his innocence, see the principal case cited in Porterfield v. Com., 91 Va. 806, 22 S. E. Rep. 352; Walker v. Com., 28 Gratt. 976; Tallaferro v. Com., 77 Va. 413. But in all three of the last named cases it was said that mere possession of the goods is not even *prima facie* evidence of burglary or house-breaking.

the county. At the September term of the Circuit court, the prisoner demurred to the indictment; and stated two causes of demurrer: First, because the record certified by the clerk of the County court to the Circuit court, does not show whether the indictment was found at a regular or quarterly term of the County court, or not. Second, because the record does not show a sufficient finding of an indictment by the grand jury, in that there is no certificate to show 848 *that it was endorsed "a true bill," by the grand jury, and signed by the foreman.

The copy of the record of the County court certified by the clerk, says: Be it remembered, that at a County court held for Cumberland county, on Tuesday, the 28th of February 1871, came Thomas C. Brown, foreman, &c., naming seven other persons, a grand jury of inquest for the body of this county, sworn and adjourned until to-day, appeared in court according to their adjournment, withdrew, and after some time returned into court, and presented an indictment against George W. Price for horse stealing, "a true bill," which indictment is in the words and figures following, to wit: and then the indictment is set out at length. But it is not stated that the indictment was endorsed "a true bill," or that it was signed by the foreman.

The court overruled the demurrer; and the prisoner excepted. This is his second exception.

The prisoner then moved the court to remand the case to the County court for trial, on the ground that the Circuit court had no jurisdiction in the case of a larceny of a horse, the statute imposing the death penalty not being the law of the land. But the court overruled the motion; and the prisoner excepted. This is his third exception.

The prisoner then suggested a diminution of the record, in this, that the said record does not show that the foreman of the grand jury did endorse the said indictment "a true bill," and the name of the said foreman; and prayed the court to grant him a writ of certiorari to bring up the record. But the court refused to award the writ; and the prisoner again excepted. This is his fourth exception.

The prisoner then pleaded "not guilty" to the indictment; and moved the court to quash the *venire facias*, on the ground that it was not in accordance with the law of the land and the statute in force at 849 the time the *prisoner was arrested, committed and indicted. It appears that the *venire* was issued on the 18th of August 1871, directing the sheriff to summon jurors to the September court for the trial of the prisoner; and it seems to follow correctly the provisions of the act of March 29, 1871, Sess. Acts, 1870-71, p. 357, ch. 262. The court overruled the motion; and the prisoner again excepted. This is his fifth exception.

After the evidence was introduced, the prisoner moved the court to give five in-

structions to the jury; which were given. And the court further proceeded to instruct them as follows:

6th. If the jury shall believe from the evidence that the horse having been recently stolen, was found in the possession of the prisoner, they are justified in presuming his guilt, unless he shows that he came honestly by it; and his failure to do so, either by positive evidence of the manner in which he came by it, or of his own good character, to rebut that presumption of guilt, is a circumstance which the jury may consider in determining whether the prisoner stole the horse, or received him knowing him to be stolen. To this instruction the prisoner excepted. This is his sixth exception.

The jury found the prisoner guilty of receiving the stolen horse, as charged in the first count of the indictment, and ascertained the term of his imprisonment in the penitentiary to be ten years; and they found him not guilty on the other counts. And the prisoner moved the court for a new trial, on the ground that the verdict was contrary to the law and the evidence. But the court overruled the motion, and sentenced the prisoner in accordance with the verdict. The prisoner again excepted; and the court certified the facts proved upon the record. These are stated in the opinion of the court. Upon the application of the prisoner a writ of error was awarded.

Berkeley, for the prisoner.

The Attorney General, for the Commonwealth.

850 *MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the Circuit court of Cumberland county; whereby the plaintiff in error was convicted of receiving a stolen horse, knowing it to have been stolen. He was indicted for the offence in the County court of said county. The indictment contained four counts. The first three charged the offence specially, and in different forms, as receiving a stolen horse, knowing it to have been stolen. The fourth simply charged the larceny of a horse, in the common form. This last count would have been sufficient of itself, without the insertion of the others in the indictment. The law declares that "if any person buy or receive from another person, or aid in concealing, any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender be not convicted." Code, p. 789, § 20. If a person be indicted for the simple larceny of a thing, and the proof be that it was stolen by some other person, and received by the accused, knowing it to have been stolen, the proof will sustain the charge. Because, having received stolen property, knowing it to have been stolen, he is, by law, "deemed guilty of larceny thereof," and

may be prosecuted as if he had himself been the actual thief. Still the pleader may, if he choose, charge him specially as the receiver; and may insert several counts in the indictment charging the offence in both forms, as was done in this case. But as a count for simple larceny would be sustained by the proof whether it was that the accused actually stole the thing, or that he received it knowing it to have been stolen, and as simplicity and brevity in pleading, especially in criminal cases, is desirable, the better practice would seem to be to count in such cases as for simple larceny only.

The accused being arraigned for the 851 offence in the *county court on the 3d of March 1871, demanded to be tried therefor in the Circuit court of said county; which was ordered accordingly. On his arraignment in the Circuit court on the 10th of April 1871, he moved the court to be remanded to the County court for trial; which motion the court overruled. The same motion appears to have been again made afterwards, to wit: on the 14th day of September 1871, when it was again overruled. An exception was taken to the ruling of the court on this latter occasion, being the third exception taken; and the ground of it was that the Circuit court had no jurisdiction to try the offence. Whether it had or not, is the question we will now proceed to consider.

The act approved April 2, 1870, Acts of Assembly 1869-70, chap. 38, § 4, p. 36, declares that the County courts shall have exclusive original jurisdiction for the trial of all presentments, informations and indictments for offences committed within their respective counties; except that a person to be tried for arson, or any felony for which he may be punished with death, may, upon his arraignment in the County court, demand to be tried in the Circuit court having jurisdiction over the county for which said County court is held. The question whether the Circuit court had jurisdiction to try the offence in this case or not depends upon whether the offence may be punished with death or not. The act passed February 12, 1866, entitled "An act to provide more effectually for the punishment of horse stealing," Acts of Assembly 1865-6, p. 88-9, chap. 22, declares that the offence "shall be punished with death, or, in the discretion of the jury, by confinement in the penitentiary for a period of not less than five nor more than eighteen years." If that act was in force when the offence was committed in this case, then there can be no doubt about the question. It is argued that it was repealed by implication, by the act which next follows it, to

wit: the act passed February 20, 1866, 852 Id. p. 89, ch. 23, entitled "An act to amend and re-enact section 14 of chapter 192, of the Code of 1860." That section, as amended, reads thus: "§ 14. If any person steal from the person of another, money or other thing of the value of five dollars or more, he shall be guilty of grand larceny, and be confined in the penitentiary

for a period not less than five nor more than ten years. If any person commit simple larceny, not from the person of another, of goods and chattels, he shall, if they are of the value of twenty dollars or more, be deemed guilty of grand larceny, and be confined in the penitentiary not less than three nor more than ten years; and if they be of less value than five dollars in the first case, or twenty dollars in the last, he shall be deemed guilty of petit larceny, and be confined in jail not exceeding one year, and at the discretion of the court may be punished with stripes." That act was amended by an act passed March 4, 1867, Acts of Assembly 1866-7, p. 709, changing twenty to fifty dollars in defining the difference between grand and petit larceny. But that change is immaterial to the question we are now considering.

We think that chapter 22 was not repealed by chapter 23 of the acts of 1865-6 aforesaid; and that chapter 22 still remains in full force. Repeals by implication are not favored; and it cannot be supposed that the Legislature intended to repeal chapter 22 by the very next act which they passed, and which does not expressly, nor by necessary implication, repeal it. They were doubtless engaged in the enactment of the two laws at the same time. They were, emphatically, in *pari materia*, and must be construed together. They must be read as if they were one and the same act, and the subject of the larceny described in the first, had been expressly excepted in the latter act.

Again it is argued that while chapter 22 aforesaid makes a person "guilty of the larceny of a horse," &c., punishable with death, it does not make a person
853 "guilty *of receiving a stolen horse knowing it to be stolen," punishable with death; and therefore, as the accused was convicted of the latter offence, he was convicted of an offence which is not punishable with death, and so, not triable in the Circuit court.

But the Code, ch. 192, § 20, p. 789, as we have seen, declares that the receiver of stolen goods knowing them to be stolen, shall be deemed guilty of larceny thereof, and therefore the receiver of a stolen horse knowing it to be stolen, must be deemed guilty of the larceny thereof, within the meaning of chapter 22 of the Acts of 1865-66 aforesaid.

Again, it is argued, that the said chapter is in conflict with the provision of the constitution which declares, that "no law shall embrace more than one object, which shall be expressed in its title; nor shall any law be revived or amended by reference to its title; but the act revived, or the section amended, shall be re-enacted and published at length." Alexandria constitution (which was in force when the act in question was passed), Article IV, § 16; present constitution, Article V, § 15. Without considering the question, which seems to have been a vexed one, whether such a constitutional provision is anything more than directory, we do not think that any such conflict exists.

Certainly the act in question embraces only one object, which is expressed in its title; and it does not revive or amend any law by reference to its title. Can it be said to revive any act or amend any section, so as to require such act or section to be re-enacted and published at length, in the meaning of the provision aforesaid? It certainly does not revive any act at all. Nor does it amend any section, within the meaning of the said provision. It is an independent act providing "more effectually for the punishment of horsestealing." We have here, in chapters 22 and 23, standing side by side in the Acts of 1865-66, an example
854 of an act which does not, and one which does come *within the purview of the constitutional provision aforesaid. Chapter 23 comes within it. That chapter amends and re-enacts section 14, of chapter 192, of the Code, and, in strict pursuance of the constitutional direction, it publishes at length the section as amended.

We think, therefore, that the Circuit court had jurisdiction of the case, and properly overruled the motion to remove the cause to the County court for trial.

We will next consider the questions arising upon the demurrer to the indictment which was overruled; and which was the subject of the second bill of exceptions taken on the trial.

Two causes of demurrer are assigned in the bill of exceptions, which we will proceed to consider, in the order in which they are assigned; and,

First. "Because the record certified by the clerk of the County court to the Circuit court, does not show whether the indictment was found at a regular or quarterly term of the County court or not."

By the act approved November 5, 1870, entitled, "An act to amend and re-enact chapter 206, of the Code of Virginia. (edition of 1860,) as to grand juries," Acts of Assembly 1869-70, p. 550, chap. 397, it is enacted in § 4, that, "For four of the grand juries in each year, to be designated by such courts, there shall be summoned twenty-four citizens of this State, of the county or corporation in which the court is to be held, and in other respects qualified jurors," &c. "For grand juries ordered for any other term of such courts, there shall be summoned ten citizens of the State, with like qualifications, and subject to the exceptions hereinbefore stated; and the court may, by direction to its clerk, limit the number of persons to serve thereon, to not less than six. And in § 5, that "any sixteen or more of such persons summoned to the four regular terms, and any six or more of such persons summoned to any other term, shall be a competent grand jury," &c. And in § 9, that "at
855 *least twelve of the grand jury, at the four regular terms, and at least five of the grand jury at any other term must concur in finding or making an indictment or presentment," &c.

The indictment was found in this case at a term of the court held in February 1871,

and by a grand jury consisting of eight members. But it nowhere appears in the record, that February term was not one of the four regular terms of said court, to which twenty-four citizens were required to be summoned, to constitute a grand jury as aforesaid. On the contrary, it is said, "that a table of the terms of the several courts, in said Session Acts of 1869-70, p. 431, indicates February as a quarterly term" of said court. And it is contended, that it is incumbent on the commonwealth to show, that the indictment was found by a competent grand jury; and as it was found by a jury consisting of only eight members, that it was found at a term of the court when such a jury was lawful.

We think, according to the maxim, "all things are presumed to be rightly done," in the absence of evidence to the contrary, that it must be presumed that the indictment in this case was found at a term when a jury might lawfully consist of only eight members, and that it is incumbent on a party interested in denying that fact, to show the contrary. The court may, at any time, designate the four regular or quarterly terms; and though the February term of the County court of Cumberland, may have been one of those terms when the table aforesaid was published, it may not have been so, and probably was not, when the said indictment was found.

We will now consider the other cause of demurrer assigned in the bill of exceptions; which is,

Secondly. "Because the record does not show a sufficient finding of the indictment by the grand jury, in that there is no certificate to show that it was endorsed 856 *'a true bill' by the grand jury, and signed by the foreman."

It has been the general, if not the universal practice in this State, as it has been in most, if not all, of the other States of the Union, and in England, for a grand jury to endorse an indictment found by them, "a true bill," and for the foreman to sign his name to the endorsement. In England, the mode in which the grand jury formerly returned the result of their enquiries to the court, was by endorsing on the back of the bill, if thrown out, "ignoramus," and if found, "billa vera." But at the present day the endorsement is in English, if found, "a true bill," and if rejected, "not a true bill," or, which is the better way, "not found;" in which case the party is discharged without further answer. The endorsement, "a true bill," made upon the bill, becomes part of the indictment, and renders it a complete accusation against the prisoner. When the jury have made these endorsements on the bills, they bring them publicly into court: and the clerk of the peace at sessions, or clerk of assize on the circuit, calls all the jurymen by name, who severally answer to signify that they are present; and then the clerk of the peace, or assize, asks the jury whether they have agreed upon any bills, and bids them present them to the court; which they accord-

ingly do, &c. 1 Chit. Cr. Law, p. 324, marg. This mode of proceeding in England has been substantially pursued in most, if not all, of our American States. But while in England, the endorsement, "a true bill" (which, however, seems not to be required to be signed by the foreman of the grand jury), becomes part of the indictment, and renders it a complete accusation against the prisoner, and seems, therefore, to be necessary to constitute a good indictment in that country, the weight of authority in this country seems to be decidedly the other way. In 2 Leading Criminal Cases, 250, *The State v. Freeman*, 13 New Hamp. R. 488, decided in *1843, is given as the leading case on the subject; in which it was held that the omission of the words, "a true bill," does not vitiate an indictment. Most of the other American cases are referred to and commented on in the notes to that case. Two of them, Webster's case, 5 Greenl. R. 432, and Nomaque's case, Breese R. 109, sustain the English rule. But recently, in Massachusetts, the leading case aforesaid has been followed and approved, as a "decision placed upon grounds which are satisfactory and conclusive." *Commonwealth v. Smyth*, 11 Cush. R. 473. In that case the indictment was signed by the foreman of the grand jury, and countersigned by the attorney for the Commonwealth; but the words, "a true bill," were nowhere found upon it. This deficiency, the defendant insisted, was a material and fatal objection to it: first, because these words are an indispensable part of every indictment; and secondly, because they constitute the only recognized phraseology by which the action of a grand jury, in the due presentment of a criminal accusation, can be legally authenticated. Merrick, J., said: "This position seems to be well warranted by the English decisions; and if such an objection were made in those courts, it would undoubtedly be sustained. For there it is held that these words are not only indispensable to make a complete and valid legal accusation, but that, when endorsed upon a bill, they become incorporated with, and make a material part of its allegations. This necessarily results from the peculiar course of proceeding in the allowance and institution of prosecutions upon the presentment of a grand jury in that country. The words, 'a true bill,' obviously constitute no part of the description of the offence charged in the indictment. They are not indispensable to the legal authentication of the action of the grand jury. Their absence can subject the accused to no inconvenience or disadvantage. The reason upon which they are elsewhere held to be essential, does 858 not *exist in our practice and mode of procedure; and therefore this omission in an indictment is simply the omission of a form, which, if oftentimes found convenient and useful, is in reality immaterial and unimportant." In some of the United States these words are required by statute. *Gardner v. The People*, 3 Scam.

R. 83; *Spratt v. The State*, 8 Missouri R. 247; *McDonald v. The State*, Id. 283; *Commonwealth v. Walters*, 6 Dana's R. 290; *Bennett v. The State*, 8 Humph. R. 118; *Laurent v. The State*, 1 Kansas R. 313. But the statute, in some of them at least, has been held to be directory merely, and the omission of the words is no ground for arresting the judgment. *The State v. Merters*, 14 Missouri R. 94; *Morris (Iowa)* 332; 6 Iowa R. 511; 1 Texas R. 142. Whether or not indictments should be signed by the foreman, is also a question on which the authorities are conflicting. The English practice did not require them to be so signed. In *The State v. Squire*, 10 New Hamp. R. 558, such signing was held to be necessary. But contrary decisions have been made in South Carolina, North Carolina, Georgia and Kentucky. *The State v. Creighton*, 1 Nott & McC. R. 256; *The State v. Cox*, 6 Ired. R. 440; *The State v. Calhoun*, 1 Dev. & Bat. R. 374; *McGuffie v. The State*, 17 Georgia R. 498, 510; *Commonwealth v. Walters*, 6 Dana's R. 290.

In this state, the question as to the necessity either of the endorsement of the words "a true bill," or of the signature of the foreman of the grand jury, has never been decided. In the *Commonwealth v. Cawood*, 2 Va. Ca. 527, it was held that when a bill of indictment is found by the grand jury, and endorsed "a true bill" by the foreman, it should be brought into court, presented by the grand jury, and then the finding should be recorded; and that an omission to record the finding, cannot be supplied by a paper purporting to be an

indictment, with an endorsement, "a
859 true bill," and signed by the *person who was foreman of the grand jury at that term; nor by the recital in the record that he stands indicted, nor by his arraignment, nor by his plea of not guilty. It cannot be intended that he was indicted; it must be shown by the record of the finding. The record of the finding of the grand jury is as essential as the recording of the verdict of the jury. In that case, there was not only no record of the finding of the indictment against Cawood, but the record showed that at the term at which that indictment was alleged to have been found, various other indictments were found, and the grand jury having nothing further to present were discharged. That is a case of the highest authority. It was argued with great ability by very able counsel both for the Commonwealth and the accused, and was decided by very able judges; and it settled the question as to the necessity of a record of the finding of the indictment by the grand jury. But it does not touch the question as to the necessity of the endorsement or signature aforesaid. What is said in the opinion of the court about the endorsement of "a true bill" on the indictment, and the signing of it by the foreman of the grand jury, is obiter dictum, and no doubt was induced by regarding the English practice in that respect as ours, in the absence of any decision to the contrary, or of

any question being raised in the case on that subject. In fact, as we have seen, even the English practice does not require any signature to the endorsement. Certainly the question did not arise in that case, as there the endorsement was made on the indictment and signed by the foreman of the grand jury, which, with other circumstances occurring in the case, it was contended was equivalent to an entry of the finding on the record, or was sufficient of itself to put the accused upon his trial without such an entry. But the court decided to the contrary, and that the entry of the finding on the record was indispensably necessary. The finding being an-

860 nounced *in the presence of the whole jury, after being called by name in open court, and an entry being made of it on the record of the court, what reason or necessity can there be for requiring the words "a true bill," to be endorsed on the indictment? In *Burgess v. The Commonwealth*, 2 Va. Cas. 483, it was held, that where an indictment filled the whole of a sheet of paper, and then folded in another half sheet of the same size, on which half sheet the attorney endorsed, "*Commonwealth v. Joseph Burgess, Indictment*;" and immediately below, in the handwriting of the foreman of the grand jury, was endorsed "A true bill. Robert Hamilton, foreman;" although the said half sheet of paper was blank, except the endorsements, and although it was not otherwise attached to the indictment than being folded around it; yet the indictment enveloped by it must be considered as the indictment on which the grand jury passed, and on which the jury found their verdict. The general court, after a full conference, without any hesitation, overruled the application for a writ of error to a judgment by which the petitioner was sentenced to be hanged for murder; and the opinion of the court, which seems to have been unanimous, was delivered by Dade, J., one of the ablest jurists for his age (he died prematurely) whom this country has ever produced. "In this case," the court said, "it is not absolutely necessary to decide, whether the endorsement, 'a true bill,' be indispensably requisite to constitute an indictment. If it were necessary to decide this point, it might well deserve to be enquired, whether the law books in declaring this endorsement to be necessary to make the paper an indictment, have reference to any other than the mere inceptive stages while the subject is in the hands of the grand jury. A written charge preferred by the attorney to the grand jury, is not, when handed to them, an indictment, nor does it become so till sanctioned by them, which sanction is indicated by the above endorsement. So far, and in this
861 stage of the *proceedings, the endorsement does indeed stamp on the paper its character of an indictment. But when a still more solemn act has been done, when the grand jury has appeared in court, and there openly presented this charge as a true bill, of which a record has been forth-

with made by the court, this higher solemnity may well be supposed to take the place of any minor one, and it would scarcely seem necessary to look beyond this. But for reasons free of all difficulty, the exception cannot be sustained in this case." And the court then proceeded to state another ground on which it decided the case. It is manifest, however, from what was said in regard to the former question, that if it had been necessary to decide that question, the court would have held that, "when the grand jury has appeared in court, and there, openly, presented the charge as a true bill, of which a record has been forthwith made by the court," it is perfectly immaterial thereafter to enquire whether the words a "true bill," were endorsed on the indictment and signed by the foreman of the grand jury. The only useful purpose which could possibly be served by such an endorsement and signature after the finding is recorded, would be that it might help to identify the paper intended to be found as an indictment by the grand jury. What would be its value in this respect is illustrated by the statement made by the court in the case last cited, in regard to the ground on which it was decided. That statement thus concludes: "As to the consequences which it is supposed may ensue from the alleged laxity, they are all derived from an extreme hypothesis; the idea of the officers of the court, in the face of the court and of the public, being guilty of a fraud, which must be inevitably detected."

It appears from the copy of the record of this case in the County court, which was certified to the Circuit court and constitutes a part of the record of the case in the latter court, which is now before us, that on 862 the 28th *of February 1871, the grand jury returned into court, and presented an indictment against George W. Price for horse stealing, "a true bill;" which indictment is set out in the said copy in words and figures; and that three days thereafter, to wit: on the 3d day of March 1871, the prisoner was led to the bar in custody of the jailor, and being arraigned, demanded to be tried in the Circuit court of the county. It does not appear whether the words "a true bill," and the signature of the foreman, were endorsed on the indictment or not, except that they do not appear in the said copy as having been so endorsed. Probably they were in fact so endorsed, as the general if not the universal practice is to endorse them in such cases. It is much more probable that they were omitted to be copied, though endorsed, than that they were not in fact endorsed. The clerk of the County court probably considered them as forming no part of the indictment, and therefore omitted to copy them. But whether they were in fact endorsed on the indictment or not we consider to be an immaterial question, as the indictment was presented by the grand jury in open court as a true bill, and the finding was entered of record.

We are therefore of opinion that the Cir-

cuit court did not err in overruling the demurrer to the indictment.

The next question arises on the fourth bill of exceptions, which was taken to the refusal of the court to grant to the accused a writ of certiorari, on his suggestion of "a diminution of the record, in this, that the said record does not show that the foreman of the grand jury did endorse on the said indictment 'a true bill,' and the name of the said foreman." It follows, from what has been already said, that we think there is no error in this respect.

The next question arises on the fifth bill of exceptions, which is, to the action of the court in overruling the motion of the accused to quash the venire facias issued for the trial of this cause, "on the ground 863 that the said *venire facias is not in accordance with the law of the land, and the statute in such case made and provided at the time the prisoner was arrested, committed and indicted, and for other errors apparent on its face."

The venire facias in this case was issued on the 18th day of August 1871, and the trial was had on the 15th day of September 1871, after the act approved March 29, 1871, Acts of Assembly 1870-71, p. 357, chap. 262, under and in pursuance of which the said venire facias was issued, went into effect, which was from and after the first day of July 1871, and while the said act was in full force. That act, therefore, applies to the case, although it was not in force "at the time the prisoner was arrested, committed and indicted." Schedule to the constitution, sec. 4; Chahoon's case, 20 Gratt. 733, 790; Code of 1860, ch. 16, § 18, p. 116. No other errors are pointed out in the venire facias, and there are none apparent on its face. We therefore think the Circuit court did not err in overruling the motion to quash the venire facias.

The next question arises on the 6th bill of exceptions, which was taken to an instruction given by the court to the jury, being the 6th in the series of instructions given, the other five having been given on the motion of the defendant. The instruction excepted to is in these words:

"6th. If the jury shall believe from the evidence that the horse, having been recently stolen, was found in the possession of the prisoner, they are justified in presuming his guilt, unless he shows that he came honestly by it; and his failure to do so, either by positive evidence of the manner in which he came by it, or of his own good character to rebut that presumption of guilt, is a circumstance which the jury may consider in determining whether the prisoner stole the horse, or received him knowing him to be stolen."

It is not for us to decide in this 864 case, whether the first *five of the instructions given by the court to the jury correctly expound the law or not. They were asked for by the accused, and he cannot and does not complain of them. We have only to do with the 6th and last instruction, which he did not ask for, and of

which he does complain. It has just been set out in words, and deals, as we see, with the familiar question of the effect as evidence in a prosecution for larceny, of the possession by the accused of the goods mentioned in the indictment, and proved to have been recently before stolen. The bill of exceptions to this instruction sets out no evidence, and does not therefore enable us to determine, whether the question properly arose in the case, or whether or not it was a mere abstraction. The facts proven on the trial, however, are certified in the last bill of exceptions, and we will look to that certificate for them, in passing upon the question we are now considering. That certificate does not show that the horse charged to have been stolen was in the possession of the accused. It only shows, in regard to that question, that he claimed title to the horse, and said he had a bill of sale for it. There was then no sufficient foundation in the evidence for the instruction, supposing it to have been unexceptionable in other respects. It propounded an abstract point of law, and, therefore, ought not to have been given. Still, if it correctly expounded the law, the judgment ought not to be reversed on the ground that the point was a mere abstraction. We will, therefore, consider the question as if the point had properly arisen in the case, and enquire whether, in that view, the instruction was correct.

The law on this subject seems to be very well settled, and will be found in all the law books which treat of evidence in criminal cases. It is, perhaps, as well and briefly laid down in Starkie on Ev., 4th part, p. 840, as anywhere else. "As the caption and asportation," says that writer,

865 "can seldom be directly proved by an eye *witness, presumptive evidence must in general be resorted to. The most usual and cogent evidence of this nature consists in proof of the prisoner's possession of the stolen goods. The force of the presumption depends upon the consideration, that the prisoner, who can account for his possession of the goods, will, if that possession be an honest one, give a satisfactory account of it. The effect of this evidence is to throw upon the prisoner the burden of accounting for that possession, and in default, to raise a presumption that he took the goods. Evidence of this nature is by no means conclusive, and it is stronger or weaker as the possession is more or less recent, for the obvious reason that the difficulty of accounting for the possession is increased by the length of time which has elapsed during which the goods may have passed through many hands. The rule is, that recent possession raises a reasonable presumption against the prisoner." See also 2 Russell on Crimes, 123; Roscoe's Criminal Evidence, pp. 18-21; Best on Presumptions, p. 304, § 228; 47 Law Library, p. 179; and especially Wills on Circumstantial Evidence, pp. 47-50, 41st Law Library. In a prosecution for larceny, the fact that the stolen property is found

upon the person of the defendant, can always be given in evidence against him; but the strength of the presumption which it raises against the accused, depends upon all the circumstances surrounding the case. *Bennett v. The State*, 1 Swan R. 411. It is stronger or weaker in proportion to the length of time intervening between the stealing and the finding. *The State v. Williams*, 9 Ired. R., 140. The possession of stolen property, recently after the theft, is prima facie evidence that the person found in possession is the thief; but, like all other prima facie evidence, it is liable to be repelled by evidence to the contrary. It may even be repelled by the account given of such possession by the person with whom it is found, if that account be reasonable in itself and be not disproved by other evidence. What the person *found in possession of stolen property is called upon to do is, to account for how he came by it. In *Regina v. Crowhurst*, 1 C. and K. 370, 47 Eng. C. L. R., Alderson, B., said to the jury: "In cases of this nature you should take it as a general rule, that when a man in whose possession stolen property is found, gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to show that the account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on the prisoner." *Roscoe's Crim. Ev.* 19. If the possession of the prisoner be not proved to be recently after the theft, it is not sufficient to make it incumbent on him to account for such possession unless there be evidence of something more than the mere fact of possession. What is a recent possession within the meaning of this rule, is a vexed question, and depends in some measure on the nature of the property, as some articles pass from hand to hand more readily than others. But this is a question for the consideration of the jury. 2 Russell, 123. See the cases on this subject referred to by Russell and Roscoe, *supra*.

Let us now apply these principles to this case. The first part of the sixth instruction is in these words: "If the jury shall believe from the evidence that the horse, having been recently stolen, was found in the possession of the prisoner, they are justified in presuming his guilt, unless he shows that he came honestly by it." There seems to be no good ground for objection to this part of the instruction, which is laid down substantially in the terms in which the rule is expressed in some of the law books; as *Roscoe's Crim. Ev.*, p. 18; where it is said, that if it be "proved, or may be reasonably presumed, that the property in question is stolen property, the possessor is bound to show that he came by it honestly; and if he fail to do so, the presumption is 867 that he is the *thief." The only objection made to this part of the instruction is, that it treats the presumption

as one of law and not of fact. Certainly it is one of fact and not of law; and so we think the instruction, according to its true intent and meaning, treats it. The latter part of the instruction is in these words: "And his failure to do so," that is, to show that he came honestly by the possession, "either by positive evidence of the manner in which he came by it, or of his own good character, to rebut that presumption of guilt, is a circumstance which the jury may consider in determining whether the prisoner stole the horse or received him, knowing him to be stolen." The first objection made to this part of the instruction is, that it assumes the fact of the failure of the prisoner to explain his possession, instead of referring it to the decision of the jury to whom the question properly belonged. We do not think this is the true meaning of the instruction, but we think it ought to be construed as if it read, "and his failure to do so, if the jury believe that he did fail to do so," &c. The instruction was intended to be based upon that hypothesis. Still, we think it would have been better to have left no room for doubt upon the subject, while we think it cannot be predicated of the instruction that it is erroneous in this respect.

But there are grounds of objection to this part of the instruction which we think are well founded, and they exist in the means by which it is said the prisoner may rebut the presumption of his guilt, arising from his possession of the property recently after it was stolen; that is, "either by positive evidence of the manner in which he came by it, or of his own good character." The word "positive," here used, is objectionable. It is not incumbent on the prisoner to produce positive evidence to repel the presumption, but it is sufficient for him to produce any kind of legal evidence which

may satisfy the jury that he is not
868 guilty. Indeed, if they *be so satisfied, from the evidence on the part of the Commonwealth, that will be sufficient. If, on being called on to account for his possession of the stolen property, he give a reasonable account of it, showing he was not the thief, and which is not disproved by any other evidence in the case, that may be sufficient. But the reference made to the character of the prisoner is still more objectionable. The prisoner may, if he chooses, introduce evidence of his good character in his defence, but the Commonwealth cannot introduce evidence of his bad character to help to make out the charge against him; and, a fortiori, she cannot rely on any inference of his bad character from his failure to introduce evidence to prove his good character. If he introduce such evidence, the Commonwealth may then introduce countervailing evidence of character. In the absence of any evidence on the subject, the law gives him credit for a good character, or, rather, protects him from the imputation of a bad character. It requires the case to be decided according to the evidence, and without any reference at all to

the character of the prisoner. 2 Russell on Crimes, 784-786; 1 Wharton's American Criminal Law, § 637, and cases referred to in the notes; and especially, *The People v. White*, 24 Wend. R. 520, and *The same v. Bodine*, 1 Denio R. 281, cited by the counsel of the plaintiff in error. We also think the latter part of the instruction is obscure in its meaning, and was calculated to mislead the jury.

We are therefore of opinion that the Circuit court erred in giving the sixth instruction. If the evidence had been such as to make it proper for the court to give any instruction to the jury on the subject embraced in the said sixth instruction; that is, if there had been evidence before the jury that the horse in the indictment mentioned, after having been stolen, was found in possession of the prisoner; then the court should have laid down the rule on the subject to the following effect:

869 *"If property be stolen, and recently thereafter be found in the exclusive possession of the prisoner, then such possession of itself affords sufficient ground for a presumption of fact that he was the thief; and, in order to repel the presumption, makes it incumbent on him, on being called on for the purpose, to account for such possession consistently with his innocence. If he give a reasonable account of it, then it devolves on the Commonwealth to prove that such account is untrue. If he give an unreasonable account of it, then it devolves on the prisoner to sustain such account by other evidence. What is such a recent possession as raises a presumption against a prisoner, in the meaning of the rule, is a question for the jury, and depends upon the nature of the property and other circumstances of the particular case. Without undertaking to determine what length of time must elapse to prevent the application of the rule in such a case as this, where a horse is the subject of the supposed larceny, it may be safely said that two months (which appears to have been about the period that elapsed in this case after the property is supposed to have been stolen, and before it was found) is not too long to prevent such application."

The next and last question to be decided in this case arises on the seventh and last bill of exceptions, which was taken to the action of the Circuit court in overruling the motion of the prisoner to set aside the verdict, on the ground that it was contrary to law and to the evidence.

The facts proved on the trial are certified by the court, and, as certified, we think they are insufficient to sustain the verdict of the jury. They show that the horse in the indictment mentioned belonged to Mrs. Williams, and was stolen from her stable in Nelson county; that about two months thereafter the horse was found in Kennedy's stable, in the town of Farmville, he keeping a hotel in the said town; that Daniel Price, a brother of the prisoner,
870 *was seen at some time, but at what time is not stated, riding a horse,

which was no doubt the horse in question, into Farmville; and that the prisoner, upon being asked whether he claimed the horse in Kennedy's stable (being the horse in question), replied that he did; that it was his horse, and he had a bill of sale for it. This is all the evidence to connect the prisoner with the horse and with the larceny of it, and we think it insufficient to sustain the verdict. The certificate does not show when, by whom, and on what terms the horse was put in Kennedy's stable; how long it remained there, who exercised ownership over it, and in what way, while it was there, and whether the prisoner during that period exercised any, and, if any, what ownership over it; or had any, and, if any, what connection with it. That the prisoner claimed the horse, and said he had a bill of sale for it, is perfectly consistent with his innocence, in the absence of any evidence to the contrary. A horse is a thing easily sold, and often sold, and is apt to be sold by a thief; and though stolen, may be acquired bona fide by a purchaser, who possibly may not know his vendor nor where to find him. The certificate does not show whether the prisoner produced the alleged bill of sale or not, and if so who was the apparent vendor; whether he was known or not, and, if known, where was his residence, and why he was not produced and examined as a witness on the trial. On these, or some of these subjects, there might and ought to have been testimony on the trial.

We therefore think that the Circuit court erred in overruling the motion to set aside the verdict.

Upon the whole we are of opinion that the judgment is erroneous for the reasons and on the grounds aforesaid, and must be reversed, the verdict set aside, and the case remanded for a new trial to be had therein.

Judgment reversed.

871 *Sands v. The Commonwealth.

January Term, 1872, Richmond.

1. Criminal Proceedings—Venire Facias—Statutes—Return of Officer.*—The list given by the judge to the officer, from which the officer is to summon jurors for the trial of a prisoner for felony, contains but twenty-four names, and the officer returns the names of nineteen of them whom he has summoned, and of five as not found. Though it would be better for the judge to put more than

***Criminal Proceedings—Venire Facias—Statutes—Return of Officer.**—The proposition laid down in the first headnote of the principal case is approved and followed in *Drier v. Com.*, 89 Va. 581, 16 S. E. Rep. 672, the court saying: "This statute (Acts 1870-71, p. 357) was construed in *Sands' Case*, 21 Gratt. 871. In that case there was a motion to quash the writ and the return, on the ground that the list furnished by the judge contained the names of only twenty-four persons, it being insisted that it ought to have contained more than that number, so that the officer might have made a selection from the persons named in the list. But this court held that, while

twenty-four names on the list, it is not error to give but twenty-four, and the return of the officer that he has summoned less than the twenty-four, and the others were not found, is a valid return.

2. Same—Same—Change of Venue.—The court before which a prisoner is arraigned for trial, if qualified jurors not exempt from serving cannot be conveniently found in the county or corporation, may send to another county or corporation for such jurors.

3. Same—Same—Qualification of Jurors.—A person who is qualified to vote by the constitution of Virginia, is a competent juror, though he is disabled from holding office by the fourteenth amendment of the constitution of the United States. The provision in the State constitution, article 3, § 3, has reference to the disability to hold office under that constitution, that provision of which was stricken out by the vote of the people.

4. Same—Conspirators—Declarations of—When Admissible.†—Upon an indictment against a person for a conspiracy to commit a felony, or for the felony so actually committed, the acts and declarations of another of the conspirators, though not in the presence of the prisoner or afterwards reported to him, are evidence against him; and this though the acts and declarations were done or made before the prisoner became a party to the conspiracy, if done or said in furtherance of the common object.

5. Same—Same—Same—Same.—In order to the admissibility of such evidence, it must be shown, first, that the person whose acts or declarations are sought to be made evidence, was, at the time of making or doing them, himself a conspirator; and, also, that they were done or said in furtherance of the object of the conspiracy.

6. Same—Same—Guilty Knowledge of.—The guilty knowledge of the act done by the conspirators is a necessary element of their guilt, without proof of which there can be no conviction. But it is not necessary to prove that this guilty knowledge was imparted to all of them at one and the same time, and by one and the same means. It is only necessary to show that each of the conspirators had this guilty knowledge, no matter how, when or where he acquired it.

7. Constitution—Corporation Court of Richmond—Term of.—The fourth point in *Chahoon's case* reaffirmed.

This is the sequel of the case of *Sands v. The Commonwealth*, reported 20 Grattan, 800. When the cause went back, the prisoner was put upon his trial at the May term of the court for 1871, and that trial lasted

it would be better for the list to contain more than twenty-four names, and that the act no doubt contemplated it generally would contain more, yet that a list containing only that number did not invalidate the execution of the writ; and this ruling was reaffirmed in *Albert Mitchell's Case*, 33 Gratt. 845." The principal case is also cited and approved in *Mitchell v. Com.*, 33 Gratt. 851; *Honesty v. Com.*, 81 Va. 287; *Snodgrass v. Com.*, 89 Va. 688, 17 S. E. Rep. 238. See, in addition, *Polindexter v. Com.*, 33 Gratt. 766, and *note*; *Baccigalupo v. Com.*, 33 Gratt. 807, and *note*. See generally, monographic *note* on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 783.

†Same—Conspirators—Declarations of—When Admissible.—See principal case cited in *Bank v. Waddill*, 81 Gratt. 485, and *note*.

for twelve days; and the jury not agreeing upon a verdict, were discharged, and the case was continued. The prisoner was again put upon his trial at the September term of the court. He then moved the court to quash the writ of venire facias issued in the cause, and the return thereon, for errors upon the face thereof, and because the writ was not issued according to law. The writ commands the officer to summon twenty-four persons of the corporation to be taken from a list to be furnished him by the judge of said court, and are qualified in other respects to serve as jurors, &c. It was dated the 7th of August 1871, and returnable to the September term of the court. On this writ the officer returned the names of nineteen persons who had been summoned by him from the list furnished him by the judge; and he returned the names of five persons, on the list so furnished him, as not found. The court overruled the motion; and the prisoner excepted. This is his first exception.

Of the nineteen persons summoned, eighteen appeared and were found to be disqualified, for having formed and expressed opinions in reference to the case. The court thereupon expressed the opinion that it would be proper to send to some other county or corporation for a jury. To which the prisoner objected until further efforts were made to obtain a jury in this city. But the court refused to endeavor further to obtain a jury in the city, and ordered writs of venire facias to the towns of
873 *Staunton and Charlottesville; and the prisoner again excepted. The evidence is stated by Moncure, P., in his opinion. This is his second exception.

After the foregoing exception had been taken, and before the court had issued the said writs of venire facias to Staunton and Charlottesville, the prisoner moved the court to change the venue of this case to some other county or corporation, where a more impartial jury might be had than in this city; insisting that if the court was correct as to the state of public sentiment in the city, then it was not a fit and proper place for a jury to sit on the trial of the prisoner, even though the jurors should be brought from elsewhere. But the court being of opinion that a fair and impartial trial could be had in the city by a jury from a distance, overruled the motion; and the prisoner again excepted. This is his third exception.

After the officers had made return upon the writs of venire facias, and before the court had proceeded to call the jurors under these writs, the prisoner moved the court to quash both of said writs and the returns thereon for errors and irregularities apparent thereon, and because the same were issued without any constitutional or legal authority. But the court overruled the motion; and the prisoner again excepted. This is his fourth exception.

Upon the call of the jurors, J. B. Sherer, one of the jurors summoned on the venire facias to the town of Staunton, being called,

was examined on his voir dire, and in response to questions by the court, stated that he had formed and expressed no opinion as to the case, and was about to be accepted as juror, when he stated, voluntarily, that he did not consider himself a competent juror, upon the ground that he had held the office of justice of the peace of the town of Staunton in the years 1858 and 1859, and he had never applied for or had his disabilities under the fourteenth amendment of the constitution of the United States
874 removed. He stated further *that he had been duly registered as a voter of the town of Staunton under the present State constitution. The prisoner thereupon objected to said juror as not competent to serve in the case. But the court overruled the objection; and the prisoner excepted. This is his fifth exception.

In the progress of the trial, after a number of witnesses had been examined, whose testimony is set out at length, John W. Cole was introduced as a witness; and after some previous questions, and having had the paper alleged to have been forged shown to him, the attorney for the Commonwealth propounded to him the following question: Did you have any conversation with R. D. Sanxay concerning the bond for seven thousand dollars, which has just been shown to you, in the year 1866; if so, state the conversation?

To this question and any answer thereto, the prisoner objected, in the absence of any statement by the Commonwealth's attorney that he expected to follow the question up by proof either that the prisoner was present at the said conversation, or that, if absent, he was afterwards informed of the said conversation and its purport; and in this connection it was admitted that the said R. D. Sanxay died in the year 1868; and the attorney for the Commonwealth stated that he expected to introduce further evidence tending to prove that the said R. D. Sanxay, curator, and the accused, his counsel, afterwards conjointly uttered and employed the said forged bond as true, knowing it to be forged. The court overruled the objection; and the prisoner again excepted. This is his sixth exception.

The witness then proceeded to state two conversations which he had with Sanxay; and afterwards a number of other witnesses were examined for the Commonwealth, and among them Charles H. Page, who testified as to a conversation he heard between the prisoner, George Chahoon and Thomas R. Bowden.

875 *When the evidence for the Commonwealth was concluded, the prisoner moved the court to exclude from the jury, and to direct them to disregard so much of the evidence of Cole as purports to detail two conversations between Richard D. Sanxay and the said Cole concerning the note, bond or claim against Haunstein's estate, upon the ground particularly that the same was not held in the presence of the prisoner, and that it does not appear that he was ever informed of the fact that the

conversations had taken place, or of their purport; and that the same are not competent for any purpose in this prosecution. And the prisoner also moved the court to exclude from the jury, and direct them to disregard so much of the testimony of Charles H. Page as relates to the conversation between the prisoner, George Chahoon and Thomas R. Bowden, upon the ground that it does not sufficiently appear that the said conversation had any relation to the bond of Solomon Haunstein, specified in the indictment, or to the charges against the prisoner as contained in the second and fourth counts of the indictment, upon which alone he is now on trial. But the court overruled both of said motions; and the prisoner again excepted. This is his seventh exception. The evidence in relation to the sixth and seventh exceptions is sufficiently stated in the opinion of Moncure, P.

After the foregoing proceedings, the prisoner introduced several witnesses, whose testimony is set out, and among others Alexander R. Holladay, a lawyer practising in the city, who was examined as to the character of the prisoner, and as to the propriety of the action of counsel in certain circumstances; and upon his cross-examination, the attorney for the Commonwealth propounded to him the following question, viz:

Suppose you were counsel for the defence in a case where judgment had been allowed to go by default, and had afterwards assisted the plaintiff's counsel in getting a decree on that judgment for the sale
876 of your client's *property, and the property had been sold, and you had gotten possession of a part of it, and you had then known that the counsel for the plaintiff was paying fees to an officer of the State to stop his proceedings to escheat the property; would you have remained silent about it?

To this question, and to any answer to it, the prisoner objected. But the court overruled the objection, and allowed the question to be put to the witness: the witness having been asked on his examination in chief, without objection, numerous questions as to what he would or would not have done, and what he would and would not have considered proper, as a lawyer, in certain supposed cases, mostly based upon the action of the accused, as shown by the testimony in the case against the prisoner, which is set out in the bills of exception taken in the cause: the witness having said in answer to the question, that in the case supposed by the question, he would have exposed and denounced the whole proceeding, and all concerned with it. The prisoner again excepted. This is his eighth exception. See the opinion as to the evidence.

The ninth exception of the prisoner need not be stated.

The jury found the prisoner guilty on the second and fourth counts of the indictment, and fixed the term of his imprisonment in the penitentiary at two years. And there-

upon the prisoner moved the court for a new trial, on the ground that the juror Sherer was not a competent juror to try the cause; and tendered an additional affidavit of Sherer as to his disabilities under the fourteenth amendment of the constitution. But the court overruled the motion; and the prisoner again excepted. This is his tenth exception.

And lastly, the prisoner moved the court to arrest the judgment, upon the ground that the court, as organized and held by the present judge thereof, at the time
877 the *grand jury was empanelled and sworn, which found the indictment against him, had no lawful authority to empanel and swear the said grand jury, and upon other grounds appearing on the record. But the court overruled the motion, and sentenced the prisoner in accordance with the verdict: and the prisoner again excepted. This is his eleventh exception.

Upon the application of the prisoner, a writ of error was allowed him by this court.

Young and H. A. Wise, for the prisoner.

The Attorney General and G. Wise, for the Commonwealth.

MONCURE, P. The plaintiff in error has been three times tried, and twice convicted, in the Hustings court of the city of Richmond, in a prosecution there impending against him for felony. On the first trial he was convicted and sentenced to five years' confinement in the penitentiary. On the second trial there was a hung jury. On the third trial he was again convicted, and sentenced to two years' confinement in the penitentiary, the shortest term prescribed by law for the offence. The case has been twice before this court, on a writ of error to the judgment of the court below. In the petition for the first writ of error, which was to the first judgment of conviction, thirteen errors were assigned in the judgment, arising upon the bills of exceptions which had been taken in the court below, and which were twenty-one in number. This court upon that writ of error reversed the said judgment, but only upon one of the said assignments of error; though there were, in the opinion of the court, some other errors in the record. And as the questions presented by the other assignments of error had been fully argued before this court, and as many of them might again arise in a future trial of the case in

the court below, this court therefore
878 considered them, *and expressed an opinion upon such of them as were likely again so to arise. Sands' case, 20 Gratt. 800. The hope of the court, by this means, to prevent the necessity of bringing up the case again to this court has not been realized. It has been brought up on a writ of error to the second judgment of conviction, in the petition for which writ of error there are nine assignments of error, founded on the bills of exception taken in the court below on the third and last trial, which are eleven in number. The questions arising

on these last assignments of error and bills of exception are the questions we now have to decide, and I will proceed to consider them in the order in which the said bills of exception were taken.

I. The first of these assignments of error arising on the first of these bills of exceptions is, that the court erred in overruling the motion of the accused to quash the writ of venire facias which had been issued for his trial and the return thereon, which are set out in the said first bill of exceptions.

The said venire facias bears date the 7th day of August 1871, is governed by, and seems to be in conformity with, the act approved March 29, 1871, which went into operation from and after the first day of July 1871, entitled "An act to amend and re-enact sections 1, 4, 5, 9, 14, 25 and 26 of chapter 208 of the Code of Virginia, as to juries in criminal cases and change of venue." Acts of Assembly 1870-71, ch. 262, p. 357. That act seems also to be in conformity with the constitution. The venire facias therefore is free from any good ground of objection. Was it executed in a legal manner? Or were the proceedings under it, or any of them, illegal?

It is objected that the list furnished the officer by the judge of the Hustings court contained only the names of twenty-four persons; and as the writ commanded the officer to summon twenty-four persons to be taken from the list, he was therefore
879 required to summon all on the *list.

Whereas the list should have contained the names of more than twenty-four persons, so that the officer might have made a selection from the persons named in the list. It is argued that if the list need contain the names of only twenty-four persons, the judge may thus, in effect, select the jury, which would be palpably improper.

It would be better, no doubt, for the judge to include the names of more than twenty-four persons in the list required to be furnished by section four of the said act. Because twenty-four persons named in the list are required to be summoned by the officer, it might very well happen that some of the persons named in the list would be absent from the county, or could not be found, and therefore the officer would be unable to comply with the mandate of the writ.

But it is not perceived that the execution of the writ would be void, though the names of only twenty-four persons were included in the list, and though some of the persons therein named could not be found, and therefore could not be summoned; at least, if as many as sixteen of those persons were found and summoned. Under the old law, which required the officer to summon under a venire facias twenty-four qualified persons from the body of his county or corporation at large, for the trial of a case of felony, there could have been no reason for making a return of not found, and therefore no such return was ever made. But under the present law, there may often be reason for such a return, unless the number

of persons named in the list be large, and it would be very unreasonable to invalidate the proceeding, at least if as many as sixteen persons were summoned. And, indeed, if as many as sixteen persons were not summoned on the first venire facias, where is the difficulty in having other qualified jurors summoned in the manner aforesaid, until a panel of sixteen jurors free from exception should be completed? To

880 be sure, *the ninth section of the act aforesaid does not literally embrace such a case, but it does in spirit and effect. What the accused is entitled to have is, a panel of sixteen jurors, free from exception, from which a jury for the trial of his case may be selected. The law has provided certain means whereby to secure to him this right, and the use of those means may be continued until that right is attained. Suppose twenty-four persons be summoned by the officer, and all of them attend, and all of them be free from exception, how are sixteen of them to be chosen to constitute the panel? The accused cannot make the choice. He has no right to be tried by any sixteen of them he pleases. The officer can call any sixteen of them he pleases, and put them upon the panel, and then the accused may peremptorily challenge any four of them he pleases, and the remaining twelve will constitute the jury for the trial of the case. Suppose that sixteen only of twenty-four persons named in a list are summoned by the officer, the others not being found; and that all of these sixteen persons are free from exception; why may they not constitute the panel? Why should any more be summoned, when the officer may at last put those same sixteen on the panel? Why, when more than sixteen have been summoned, and the others named in the list are returned "not found," may not the court proceed to ascertain whether, of those summoned and in attendance, there be as many as sixteen free from exception, and if so, to constitute a jury out of that number, or if not, to make up and complete the panel in the manner aforesaid?

Nor is it perceived that there is any force in the objection that the judge, by naming only twenty-four persons in the list, in effect selects the jury. He certainly does not select the jury: at most he only selects the twenty-four. from sixteen of whom, free from exception, if so many there be, a jury may be constituted for the trial of the case. But what reasonable objection

881 can *there be to that? Is he not as competent to make such a selection as a ministerial officer of the court? Is he under any constitutional or legal disability to make such a selection? Does not the law expressly empower him to make such a selection in requiring him to furnish the officer with a list of the persons to be summoned, without prescribing the number of persons whose names are to be included in the list? But it is said that the law contemplated that more than twenty-four should be named in the list, as it directs twenty-four to be taken therefrom, which implies

that some would be left behind. No doubt it did contemplate that more would generally be included in the list, and it would be better, as I have already said, to include more. But I do not think the law requires that more should, of necessity, be included. If more, how many more? Would one, two, or twenty more be sufficient?

I think, therefore, that although twenty-four persons only were named in the list, and only nineteen of them were summoned, and of the nineteen summoned only eighteen were in attendance, the court did not err in overruling the motion to quash the said writ or the return thereof, and directing the clerk to proceed to call the jurors summoned under the said writ.

But even if there had been any error in this respect, I do not think the accused would have been prejudiced thereby, and it would have been cured by the subsequent proceedings in the case, and especially the proceeding by which a jury was constituted for the trial of the case, supposing that proceeding to be itself free from error, a question which will be presently considered.

II. The next assignment of error, arising on the second bill of exceptions is, that the court erred in overruling the motion of the accused to endeavor further to obtain a jury from the city of Richmond, instead of sending for jurors to any other county or corporation.

On the second trial of the case, after 882 an abortive effort *to obtain a jury from the said city, only two jurors having been obtained from the persons summoned under the venire facias which had been issued for the purpose of that trial, the court said that in its judgment it would be proper then to issue a writ of venire facias for other persons, to make up the said jury, to some other county or corporation than the said city; to which course the accused, by counsel, expressed objection, and a desire that another writ should be issued to summon persons from the city for a jury, before sending elsewhere. And thereupon, at the instance of the attorney for the Commonwealth, sundry witnesses were examined, after hearing whom, the court being of opinion that it would be very inconvenient, if not impossible, to get a jury in this case in the city of Richmond, sent to the city of Alexandria for persons to complete the jury. To which action of the court the accused excepted, and this matter constituted the second bill of exceptions taken on the second trial.

On the third and last trial of the case, after the proceedings had taken place which are set out in the first bill of exceptions taken on that trial, the court proceeded with the call of the persons who had been summoned under the writ of venire facias referred to in said first bill, of whom eighteen were present, being all who were summoned under said writ except one, and being severally examined on their voir dire as to whether they had formed and expressed opinions in reference to this case, they were all found to have formed and expressed such

opinions as disqualified them from serving as jurors upon the trial of the accused. The court thereupon said that in its judgment it would be proper then to pursue the same course that was adopted on the second trial of the case, and send for persons to form a jury to some other county or corporation than this city. To which course the accused, by counsel, pursuing the same course as before, objected, until further efforts were made to *obtain a jury from this city. Thereupon it was agreed by the Commonwealth's attorney and the accused, by counsel, and assented to by the court, that the testimony heard upon this point at the second trial should be considered as heard and received as testimony on the same point on the third trial. And the said testimony, as contained in the said second bill of exceptions taken on the second trial, was made a part of the second bill of exceptions taken on the third trial, as if repeated at large therein. And it further appeared by the registration list of voters in this city that there were at least 11,000 of such voters; that the number of colored voters was at least 5,000, and that no colored voter had ever been summoned as a venireman upon any of the trials of this case, or of the case of George Chahoon. And the sergeant of the city and his deputy (who had been examined on the same subject on the second trial), having been again examined, stated that it was still their opinion that it would be inconvenient, is not impossible, to get an intelligent and impartial jury in this case in the city of Richmond. Thereupon the accused renewed his motion, that further effort should be made to obtain qualified jurors from this city for his trial, before sending elsewhere for that purpose, and insisted that the vicinage had not been exhausted, and that the court, under the present constitution and laws, and under the facts now appearing, had no power to send elsewhere for jurors, certainly not at this stage of the case; and the court being of the opinion that it would be inconvenient, if not impossible, to obtain an intelligent and impartial jury in the city of Richmond, the cases of Chahoon and Sands having been the subject of almost universal discussion and commentary among all classes and conditions of people here, refused to endeavor further to obtain a jury from the city of Richmond, and ordered writs of venire facias to the towns of Staunton and Charlottesville. To which opinion and decision of the court the 884 accused excepted; *and this matter constitutes the subject of the second bill of exceptions taken on the third trial.

That the court below did not err in this opinion and decision is sufficiently shown by what was said in Chahoon's case, recently decided by this court, and not yet reported, unless the act concerning juries in criminal cases, approved March 29, 1871, as aforesaid, alters the case. That act, by its terms, went into operation from and after the first day of July 1871, and it carried into effect, in regard to criminal cases,

the third section of the third article of the constitution, which provides that "all persons entitled to vote and hold office, and none others, shall be eligible to sit as jurors." Independently of the effect of that act, there was greater reason for sending abroad for a jury for the last trial of the accused than for the last trial of Chahoon, which took place previously to that of the accused.

But, as by the operation of that act, which went into effect after the last trial of Chahoon, and before the last trial of the accused, a large addition was made to the class of persons in the city of Richmond "eligible to sit as jurors," the question is whether that fact altered the case and made it improper to send abroad for persons to constitute a jury for the last trial of the accused.

If these additional persons, who were thus made eligible to sit as jurors, had been brought from abroad and settled down in Richmond at the time the act aforesaid went into effect, it would have been proper to have resorted to this new source before sending abroad for a jury.

But these additional persons had been residents of Richmond during the progress of all the trial which had taken place in these cases, and their minds were as much made up on the subject as the minds of those of the same locality who had been previously eligible to sit as jurors. It is not strange, therefore, that the sergeant and deputy sergeant, upon their re-
885 examination after *this new element of jury material had been added to the stock, stated "that it was still their opinion that it would be inconvenient, if not impossible, to get an intelligent and impartial jury in this case in the city of Richmond," and that the court below should have been of the same opinion, and should accordingly have sent abroad for a jury. Certainly I cannot say that the said court erred in that respect.

III. The next assignment of error, arising on the third bill of exceptions, is, that the court erred in overruling the motion of the accused for a change of venue, made after the court had determined to send abroad for persons to constitute a jury as aforesaid, and before any writs of venire facias had been issued under that determination.

I am of opinion that there is no error in the judgment in this respect, and that on this branch of the case it is sufficient to refer to what is said on the same subject in the recent case of Chahoon, before referred to.

IV. The next assignment of error, arising on the fifth bill of exceptions, is that the court erred in overruling the objection of the accused to the competency of J. B. Sherer as a juror, and directing him to be placed upon the panel for the trial of the accused.

The question intended to be presented by this assignment of error, and the bill of exceptions on which it is founded is, whether a person laboring under the disa-

bility created by the 14th amendment of the constitution of the United States, can be eligible to sit as a juror under the 3d section of the 3d article of the constitution of the State, which provides that "all persons entitled to vote and hold office, and none others, shall be eligible to sit as jurors." Conceding, what is by no means certain, that it sufficiently appears from the said bill of exceptions, that the juror, J. B. Sherer, was in fact laboring under the said disability, does the aforesaid provision

of the constitution of the State apply
886 to *the case? I think not. I think

that provision applies only to "persons entitled to vote and hold office" under the State constitution, and not to persons so entitled under the constitution of the United States. The words of the provision were used in reference to other portions of the State constitution, as it was adopted by its framers. It then contained the provisions therein designated as clause 4th, section 1, article 3, and section 7, article 3, which were afterwards stricken out by the popular vote taken on the question as to the adoption of the constitution with or without the said provisions. By these provisions, similar disabilities to those created by the 14th amendment of the constitution of the United States, were adopted and engrafted on the State constitution, and were applied equally to voting and holding office, so that those and only those who were entitled to vote were entitled to hold office; and then the 3d section of article 3 declared that "all persons entitled to vote and hold office, and none others, shall be eligible to sit as jurors." That is, "all persons entitled to vote and hold office under this constitution," &c. These disabilities under the State constitution were entirely independent of the disabilities under the 14th amendment, and the 3d section aforesaid had reference to the former and not to the latter. The provisions aforesaid pointed out the mode whereby the disabilities thereby created might have been removed; that is, by a separate vote in each case, of three-fifths of both houses of the Legislature. The 14th amendment aforesaid points out a mode whereby the disabilities thereby created may be removed; that is, by a vote of two-thirds of each house of Congress. The removal of the disabilities in the one case would not have operated a removal of the disabilities in the other. When, therefore, the provisions aforesaid were stricken out of the State constitution, the said 3d section was not thereby made to refer to
the disabilities created by the said
887 14th amendment, *but continued afterwards to refer, as it had before referred, only to the State constitution.

I am therefore of opinion that there is no error in the judgment of the court below in regard to the competency of J. B. Sherer as a juror.

V. The next assignment of error, arising on the sixth and seventh bills of exceptions is, that the court erred in overruling the objection of the accused to a question pro-

pounded by the attorney for the Commonwealth to the witness John W. Cole, and to any answer thereto, and in allowing the said question to be asked, and the witness to answer it, as stated in the said sixth bill of exceptions; and also in overruling the motion of the accused to exclude from the jury, and to direct them to disregard so much of the evidence of said Cole as was in answer to the question propounded to him as aforesaid, as stated in the said seventh bill of exceptions.

The question here referred to was: "Did you have any conversation with R. D. Sanxay concerning the bond for seven thousand dollars, which has just been shown you, in the year 1866; if so, state the conversation?" To which question, and any answer thereto, the prisoner by his counsel objected, in the absence of any statement by the Commonwealth's attorney, that he expected to follow the question up by proof, either that the prisoner was present at the said conversation, or that, if absent, he was afterwards informed of the said conversation and its purport; and in this connection, it was admitted that the said R. D. Sanxay died in the year 1868: and the attorney for the Commonwealth stating that he expected to introduce further evidence tending to prove that the said R. D. Sanxay, curator, and the accused his counsel, afterwards conjointly uttered and employed the said forged bond as true, knowing it to be forged; the court overruled the said objection of the prisoner and allowed the said question to be put and the witness to
888 answer it; to which opinion of *the court the prisoner excepted: and this was the subject of the said sixth bill of exceptions.

The witness Cole then said, in answer to the said question, that "there was a conversation in the latter part of 1866 between him and Sanxay about the bond. Witness had collected rents for Sanxay from this property (Haunstein's real estate). Sanxay had had some difficulty with his tenants, and requested witness at the end of the quarter to call for the bills again. Witness met Sanxay on the street about the end of the quarter, and asked him if he had his bills ready. He told witness he did not; that he did not know whether he would give him any more bills to collect; that there had been an account or note, witness forgets which, brought against the estate, and that it was a damned forgery, and that he did not intend to pay it. Witness thinks he must have said 'note,' as he said it was a damned forgery. He told witness, however, he would see him again about it, and witness saw him afterwards, and he told him he would not want him to collect any more rents; that he had made enquiries about this note, and found it was all correct, and that he would have no more to do with the estate as curator:" "his meaning being, as witness understood, that the payment of the note would consume the whole estate." This last remark was made by witness on his cross-examination; in the

course of which he also said that it was about the 1st of October 1866 that he met Sanxay in the street, when the latter pronounced the note a damned forgery as aforesaid, and witness thought it was during the same month, October, that he saw Sanxay again, and he said "he had enquired into it (the note), and found the note all correct, and that he would have no more to do with the estate as curator." After this answer was given by the witness, Cole, a great deal of other evidence was given by that and other witnesses, and then the prisoner moved the court to exclude from the
889 jury, and to direct them to *disregard, so much of the evidence of the said Cole "as purports to detail the two conversations between Richard D. Sanxay and said Cole concerning the note, bond or claim against the said Haunstein's estate, which conversations are detailed in the testimony of said Cole as aforesaid, upon the ground, particularly, that the same were not held in the presence of the prisoner, and that it does not appear that he was ever informed of the fact, that such conversations had taken place, or of their purport, and that the same are not competent for any purpose in this prosecution." But the court overruled the said motion, and permitted the said evidence to remain before the jury, and to be considered by them in the trial of the prisoner; to which decision of the court the prisoner excepted; and this was the subject in part of the said seventh bill of exceptions.

The evidence introduced in behalf of the Commonwealth, and set out in the said bills of exception, tended to show that Solomon Haunstein, a foreigner, died in the city of Richmond in the year 1861, intestate, and without heirs, having lived in the city several years before his death, and accumulated quite a large estate, consisting partly of money and other personal property, but chiefly of houses and lots, in or near the city; that Richard D. Sanxay was curator of the said Haunstein's estate, having been appointed and qualified as such shortly after and during the same year of Haunstein's death, and having thereafter had the care and management of his estate; that a writing purporting to be the writing obligatory of said Haunstein, for the sum of seven thousand dollars, payable on demand to John W. Thompson or order, and an endorsement thereon purporting to be the endorsement of said Thompson, being the writing and endorsement in the indictment mentioned, were forged; that sometime in the year 1866, or early in the year 1867, a conspiracy was formed by George Chahoon, the prisoner, Johnson H. Sands, the
890 said curator, R. D. *Sanxay, and his son Richard S. Sanxay, to convert the estate of said Haunstein to their own use; that the plan which they devised to effect that object, was to utter and employ as true the said forged bond, which they knew to be forged, and by proceedings at law and in equity to subject the said estate to the payment of the said forged bond;

and then to divide the fruits of the crime among themselves; that in pursuance of the said criminal purpose, Chahoon, who it seems had come to the city of Richmond to live in 1866, professing to act as attorney at law for William Gleason, the pretended assignee of said forged bond, instituted an action at law thereon in the County court of Henrico, on the 28th day of January 1867, and at the same time handed to the clerk of said court the declaration in the case and the said forged bond; that said Chahoon, when he went to the clerk's office to bring said action, handed to the clerk a letter of introduction to him from the prisoner Sands, and he, the said Chahoon, was not seen at the clerk's office nor at the courthouse of said county again until after judgment was obtained in said action; that judgment by default was entered in said action for the amount of said forged bond, with interest and costs, on the 11th day of March 1867, less than two months after the action was brought; that the curator Sanxay was at the clerk's office pending the action, examined the papers therein, and told the clerk to mark the name of the prisoner as his counsel in the action; that afterwards, and on the day on which the office judgment in the action was confirmed, but before such confirmation, and before the office judgment docket was called, there was a meeting in the clerk's office between the said curator and the prisoner, and a pretended consultation took place between them in the presence and hearing of the clerk, about putting in a defence to the said action, which there was then full time enough to do; that they had the papers in the action, to wit: the said declaration and bond in their hands, when

891 Sands told Sanxay the *only way he could defeat the suit was to put in the plea of non est factum, and advised and urged him to do so; that Sanxay, who had been looking at the said paper in his hand, said he could not swear that this was not the writing of Solomon Haunstein, that he could not swear that it was not Haunstein's signature, and therefore that he could not put in that plea; that Sands said to Sanxay that other pleas might be dilatory, but this was the only plea that could defeat the action, and that if he could not put in that plea, he had no further use for counsel, or he could do him no good; they then went out together, and no plea was put in, and the office judgment was confirmed; that shortly thereafter, to wit: on the 29th day of April 1867, a cause in chancery was docketed by consent in the Circuit court of Henrico county, in the name of William Gleason, assignee of John W. Thompson, plaintiff, against Richard D. Sanxay, curator of the estate of Solomon Haunstein, deceased, defendant, the plaintiff having on the same day filed his bill and the defendant his answer; the object of which cause was to obtain a decree for the sale of the real estate of Haunstein for the payment of the said forged bond. The bill is very brief, states the judgment obtained at law

as aforesaid, of which a copy is exhibited, and that the plaintiff was informed by said curator that there was no personal estate; charges that the rents of said estate (meaning the real estate) would nothing like pay, said debt in five years, that the whole property, &c., was not sufficient for that purpose, if sold, and that Haunstein died without leaving heirs; and prays that Sanxay, the curator, might be made defendant to the bill, that so much of said property as might be necessary should be sold to pay said debt, that all proper parties might be made defendants to the bill, that all proper accounts might be taken, and for general relief. It is signed, "Wm. Gleason, assignee of John W. Thompson, by George Chahoon, his counsel." The said

892 evidence further *tends to show that the said bill is principally in said Chahoon's handwriting, though there are several interlineations in Sands' handwriting, some or all of which appear to be material. The answer of the curator, after making some preliminary statements as to his qualification and proceedings as curator, and as to Haunstein's having died intestate and without heirs, further states, "that he paid all the debts which he thought were due by said estate, and knew not of this debt due the plaintiff till after the war, when he gave as a reason for not applying for it sooner, through his counsel, that it was because the condition of the country prevented him from doing so;" and then, after stating that he had settled his accounts as curator, and was ready to render a further account and pay the balance, if any, which might be found due by him, he further states "that the rents from said property (meaning the real estate) would not pay the plaintiff's debt in twenty years; that said estate, if sold, would hardly do so; that he cannot make any objection to the sale asked for by the plaintiff, as the estate is liable for his claim, and the longer it stands there will be less chance for liquidating the whole of it; that he is satisfied this is the only outstanding claim against said estate, and he thinks it would be better for all parties for the estate to be sold, without waiting for the stay law to be removed, and for this claim to be paid out of the proceeds." The said evidence further tends to show that this answer was signed by the defendant Sanxay, and was in the handwriting of Sands. On the same day on which this bill and answer were filed, and the cause was docketed by consent, to wit: on the 29th day of April 1867, the cause came on to be heard by like consent, when the court decreed that the said Richard D. Sanxay, who was appointed a special commissioner for the purpose, should, after paying, on account of said alleged debt due by the said judgment, whatever might be due from him as curator aforesaid, sell

893 all or so much of the *said real estate as might be necessary to settle the balance of the said debt, at public auction on the premises, after advertising the time, place, and terms of sale in one of the news-

papers published in the city of Richmond for ten days, upon the following terms: one-third cash, one-third on a credit of three months, and the balance on a credit of six months, taking for said deferred payments negotiable notes with good endorsers, including interest, and retaining the title until the further order of the court, unless the purchaser or purchasers prefer to pay all cash; in which case the said special commissioner was authorized to receive the same and make such purchaser a deed at once for the property so purchased, and the said special commissioner was authorized and directed to apply said notes and cash arising from said sales in payment of said debt to said William Gleason, assignee of John W. Thompson, or to George Chahoon, his attorney, in full of the same, and take his receipt therefor, and file it with the papers in the case, and report all his proceedings therein to the court. The said Sanxay is then required to give bond as special commissioner, and to settle a further account as curator before a commissioner of the court.

On the 29th of October 1867, the cause came on again to be heard, by consent of parties, by their attorneys, upon the reports of commissioner Evans and commissioner Sanxay, under the former decree, which reports were on that day filed; on consideration whereof, the court approved and confirmed said reports; and it appearing that nothing further remained to be done in the cause, it was ordered to be removed from the docket. The report of special commissioner Sanxay states, that he sold the said property on the 16th day of May 1867, in the manner and on the terms prescribed by the decree of the 29th of April 1867, after advertising the sale as therein directed, at which sale Mary J. Wilkinson

became the purchaser of one lot, at the price of \$800; *Richard S. Sanxay of another, at the price of \$1,060; Wm. D. Porter, of two others, at the price of \$1,275; and J. H. Sands of two others, at the price of \$1,200; which embraced all of the real estate; that all of the purchasers preferred to settle and get their deeds at once for the property so purchased, which was done accordingly; and that after paying the expenses of sale, &c., and the balance arising therefrom of \$4,079.38, as well as the sum of \$917.56, due by the curator, was paid over to George Chahoon, attorney for Wm. Gleason, his receipt for which was therewith returned. That receipt is in these words: "June 15th, 1867. Received of R. D. Sanxay, special commissioner, the sum of forty-nine hundred and ninety-six 94-100 dollars, in part satisfaction and discharge of the judgment obtained in Henrico County court at March term 1867, in favor of Wm. Gleason, assignee of John W. Thompson, against Richard D. Sanxay, curator of the estate of Samuel Haunstein, dec'd. (Signed,) Geo. Chahoon, att'y for Wm. Gleason, assignee of John W. Thompson." The said evidence further tended to show, that the body of the said receipt of Chahoon,

and both of the decrees rendered in the suit, were in the handwriting of Sands, and that "Chahoon never appeared in the case in any shape or form;" that R. S. Sanxay was, in fact, the purchaser of the lot which was cried out to Mary J. Wilkinson, who was his mother-in-law, and afterwards sold it to Sands; that R. D. Sanxay, the curator, made an arrangement to have Porter's two lots conveyed to his son, the said R. S. Sanxay; so that he, R. S. Sanxay, finally got three of the lots, and Sands the other three; and that Chahoon and R. S. Sanxay paid money towards feeing the escheator to stop his proceedings to have the said property escheated, but that Sands refused to pay anything towards that object.

There is a good deal of other evidence embodied in the bills of exceptions, which I have not stated in detail, 895 *having stated only so much as I thought might be material to the proper understanding of the question I am now considering. Perhaps I have stated more than was necessary; but the question is one which the learned counsel for the plaintiff in error seems to deem the most important in the case, and which he argued with great earnestness and ingenuity. That question, be it remembered, is as to the admissibility of the evidence of Cole in regard to the declarations of R. D. Sanxay, which the counsel contends are inadmissible for any purpose in this prosecution. Is that so?

The charge against the accused in this case is, that he uttered and attempted to employ as true, a forged instrument, knowing it to be forged; and that he accomplished the criminal act by means of a conspiracy between himself and others. In such a case it is well settled, that the conspiracy being proved, the acts and declarations of any of the conspirators, in furtherance of the object of the conspiracy, are admissible evidence against each and all of them, though such acts and declarations were not done and said in the presence of all. And they are admissible even against a conspirator who did not accede to the conspiracy until after they were done and said. Each conspirator is the criminal agent of every other, and when he accedes to the conspiracy he sanctions what may have been previously done or said by the others, or any of them, in furtherance of the common object. Such admissibility is not confined to a case in which the prosecution is for the conspiracy itself, but extends to a case like this, in which the prosecution is for the very crime committed in pursuance of the conspiracy. And it does not matter whether the prosecution be jointly against all, or severally against each, or one of the perpetrators.

Now, in order to the admissibility of such evidence on the ground just stated, two things are certainly necessary: 1st, that the persons whose acts or declarations 896 *are sought to be made evidence, was, at the time of doing or making them, himself a conspirator; and, 2dly, that they

were done or said in furtherance of the object of the conspiracy.

That R. D. Sanxay, the curator of Haunstein's estate, was, at some time or other, one of the conspirators, if any conspiracy there was, the evidence strongly tends to prove. Indeed, it is difficult, if not impossible, to conceive, supposing the evidence in the case to be true, how any judgment could have been recovered against him in the action at law upon the forged bond, without his concurrence, consent or connivance. The least degree of fidelity on his part to the trust reposed in him by law as curator of the estate he represented, would have ensured the defeat of that action. The plea of non est factum would certainly have defeated it. It was his duty to have put in that plea. He could easily have done so; and he must have known it. The scene at the clerk's office before referred to, must have been all a sham, gotten up for effect, and to give some color of excuse for his palpable and criminal neglect of duty in letting a judgment go by default against him for a pretended debt, large enough in amount to sweep the whole estate he represented. The same scene, it appears from the evidence of a witness introduced by the accused, was substantially repeated by the parties, immediately after leaving the clerk's office, and in the presence of the said witness, whom they met outside of the office. Why was this repetition? Of course I make these remarks on the assumption that the evidence, and what it tends to prove, is true.

Sanxay, the curator, then was, according to the evidence, one of the conspirators at least as early as the meeting aforesaid at the clerk's office, on the day on which the office judgment was confirmed. But was he not also, as early as the time of making

the declarations to the witness, Cole, 897 before referred to, or a least *on the second occasion? I think he certainly was; and that those declarations prove the fact; of course, supposing the testimony of Cole to be true. The two occasions on which these declarations were made, both occurred in the same month of October 1866; there being but a short interval between them. But they were widely different in their nature. The first was made very soon after the curator first heard of a claim against the estate of Haunstein on the forged bond, and then he naturally and indignantly denounced it as a forgery, in the strongest language he could use, and declared that he would not pay it. He told witness, however, he would see him again about it. And witness saw him afterwards, during the same month, when he told witness he would not want him to collect any more rents; "that he had made enquiries about this note, and found it was all correct, and that he would have no more to do with the estate as curator. His meaning being, as witness understood, that the payment of the note would consume the whole estate."

Now, when the first of these two declara-

tions was made, it is evident that the curator, Sanxay, had not entered into the supposed conspiracy, and certainly that declaration, standing by itself, was not in furtherance of the object of said conspiracy. That declaration, therefore, had nothing further been said by him, would not have been relevant or admissible evidence in this case. But something further was said by him. He told witness on that occasion that he would see him again about it; and witness saw him afterwards, when he told witness "he would not want him to collect any more rents; that he had made enquiries about this note, and found that it was all correct, and that he would have no more to do with the estate as curator." This last declaration is, I think, both relevant and admissible. It tends strongly to show, that in the short interval of time between the

two conversations with the witness, 898 Cole, an *extraordinary change had been wrought in the mind of the curator, Sanxay; that he had deserted his impregnable camp and gone over to that of the enemy, and joined them in the assault they were about to make upon that estate which it was his sworn duty to defend. In what way this mysterious change was brought about, by whose agency, and what were the terms of capitulation, we do not know and probably never will. We only know how the curator acted afterwards, and in concert with whom, and with what result of action, all of which tends strongly to show that between the two conversations with Cole, Sanxay became one of the conspirators to defraud the estate of Haunstein and convert it all to their own use. The last declaration to Cole is admissible evidence, both because it tends to prove the conspiracy, and also because it was an act in furtherance of the object of the conspiracy. It was an important act in aid of the conspiracy to induce a belief in the public mind that the forged bond was genuine, or at least believed to be so by the curator, and to afford a plausible pretext to the curator for not defending the estate he represented against the heavy claim asserted against it. Having pronounced the paper on which that claim was founded a "damned forgery," it was peculiarly necessary for him, in furtherance of the object of the conspiracy, to counteract the impression produced by that denunciation; and he therefore told the person in whose presence the denunciation was made, "that he had made enquiries about this note, and found it was all correct. "This last declaration, therefore, was clearly admissible evidence; and so also was the first, which was inseparably connected with the last. They were closely connected in point of time, subject and person, and were parts, and almost one and the same part, of the res gestae. Cole and Sanxay were conferring about a matter of business that Cole was doing for Sanxay in reference to the estate of Haunstein. Cole was collector of the rents of the estate, 899 and called *on Sanxay for the accounts of rent for the last quarter.

Then it was that the denunciation aforesaid was made by Sanxay. "He told witness, however, he would see him again about it;" and he did accordingly see him again, when the last declaration aforesaid was made. Now the last declaration is connected with the first in its very nature, and cannot be well understood without reference to the first. It matters not that they were made on different days. They might have been made on the same day, and after the interval of only a few moments, though in different interviews. But they would have been none the more parts and parcels of the same transaction. They did occur in the same month, which is all sufficient for the purpose of the connection. I think, therefore, that both declarations are relevant and admissible evidence.

But the first is admissible upon another ground. The Commonwealth's theory of this case is, that certain persons conspired to utter and employ as true a forged bond, knowing it to be forged; and that they effected the criminal object in view by means of such conspiracy. The guilty knowledge of the forgery by the conspirators was a necessary element of their guilt, without proof of which there could be no conviction. No one could be a conspirator without having such guilty knowledge. The conspiracy being proved, then the acts of the conspirators in furtherance of the conspiracy become evidence against each other, as before stated. But the conspiracy must be proved, either positively or circumstantially, and "guilty knowledge" is a necessary part of that proof. Now how is this guilty knowledge of the several conspirators to be proved? Certainly it is not necessary to prove that at one and the same time, and by one and the same means, the guilty knowledge was imparted to them all. If that were necessary, there could hardly ever be any conviction in such a case. But it is not necessary. It is only necessary to show that each of the conspirators

900 had such guilty knowledge, no matter how, where *or when he acquired it.

The proof of it may therefore, and generally does, apply to the parties severally, and not jointly, as if the prosecution were against him only to whom the proof refers. In proof of Sanxay's guilty knowledge in this case, then, it certainly was admissible to show that when the forged bond was first demanded of him, he emphatically denounced it as a forgery. This was not evidence against the other parties that the bond was a forgery, nor of their guilty knowledge. But it was evidence of the guilty knowledge of Sanxay, and so it was admissible in this case for the purpose of showing such guilty knowledge. If it was admissible for any purpose in the case, the court certainly did not err in refusing to exclude it. The motion to exclude it was, upon the ground that it was "not competent for any purpose in this prosecution." If the accused had moved for an instruction to the jury that this evidence was admissible only to prove the guilty knowledge of

Sanxay, the question might have been different. But no such motion was made.

I am therefore of opinion that the Circuit court did not err in overruling the objection made to the question propounded to the witness, Cole, nor in overruling the motion to exclude the answer to that question as evidence in this case, as mentioned in the sixth and seventh bills of exception.

VI. The next assignment of error is, that the court erred in overruling the motion of the prisoner to exclude from the jury and direct them to disregard so much of the testimony of Charles H. Page as details a conversation he says he heard between the prisoner, George Chahoon, and Thomas R. Bowden, upon the ground that it does not sufficiently appear that the said conversation had any reference to the subject of the charge against the prisoner, as mentioned in the seventh bill of exceptions.

This conversation, standing by itself, would seem to be very vague and insignificant, and to be entitled to *little or no weight against the prisoner, and was perhaps entitled to little weight, even in connection with the other circumstances of the case, as it was very vague and uncertain in its terms. Still, I cannot say that it was entitled to no weight in that connection, and that it was therefore not competent evidence to go before the jury. The conversation occurred in the latter part of 1866 or first part of 1867, about, or just before, the time the action at law was brought upon the alleged forged bond of Haunstein. It occurred between Chahoon, Sands and Bowden, and was about some money matters. During the conversation, the remark was made by Sands, "that there was seven or eight thousand dollars to be made out of the case. Bowden, who seemed to be leading in the conversation, seemed by his language to indicate that it was too difficult to undertake; that there would be trouble about it; and Sands seemed to be pressing the case, saying there would be no trouble." The prisoner introduced no evidence to show, and did not pretend, so far as appears from the record, that this conversation referred to any other case than the claim for which the said action was brought. Of course I assume the truth of the testimony of the witness in expressing an opinion as to its competency. Whether it was true or not, and what weight, if any, should be given to the conversation to which it refers, as evidence in this case, were questions for the jury.

I am therefore of opinion that there is no error in the judgment of the Circuit court in this respect.

VII. The next assignment of error arises on the eighth bill of exceptions, and is that the court erred in overruling the objection of the prisoner to a question propounded by the attorney for the Commonwealth to Alexander R. Holladay, a member of the bar of the city of Richmond, and a witness introduced by the prisoner, and to any answer to the said question, as set forth in the said bill of exceptions.

902 *The said witness, after testifying in regard to the character of the prisoner, said "that he sees no impropriety in counsel co-operating in getting the real estate sold under a judgment, where there is no personalty. No defence could have been made in the chancery suit; saw nothing on examination of the bill to excite suspicion; knows nothing about the Haunstein forgery; if he had been a lawyer, would have been certain to have been present in a case of magnitude when the office judgment was called; got information of a material character from a gentleman, which he cannot detail; would not have made a mere fictitious defence, if the client could have made no defence on the merit." And the witness being then under examination by the attorney for the Commonwealth, the said attorney propounded to him the following question, which, at the instance of the prisoner's counsel, was reduced to writing, to wit:

"Suppose you were counsel for the defence in a case where judgment had been allowed to go by default, and had afterwards assisted the plaintiff's counsel in getting a decree on that judgment for the sale of your client's property, and the property had been sold, and you had gotten possession of a part of it, and you had then known that the counsel for the plaintiff was paying fees to an officer of the State to stop his proceedings to escheat the property, would you have remained silent about it?"

To which question and to any answer to it the prisoner objected. But the court overruled the objection, and allowed the question to be put to the witness; assigning as a reason that the witness had "been asked, on his examination-in-chief, without objection, numerous questions as to what he would or would not have done, and what he would or would not have considered proper, as a lawyer, in certain supposed cases, mostly based upon the action of the accused, as shown by the testimony in the case against the accused;" which testimony is set forth in the bills of exceptions

903 taken in the *cause. The witness, in his reply, stated, "that in the case supposed by the question, he would have exposed and denounced the whole proceeding and all concerned in it."

The court, by the reason assigned for overruling the objection to this question, seems to admit, and rightly so, that the question, as an original one, would have been improper; but seems to suppose that it was admissible to countervail questions of the like kind and alike improper, propounded to the witness on his examination-in-chief, without objection.

To this it was answered by the counsel for the accused, in argument before this court: 1st, that the questions propounded to the witness in his examination-in-chief were not improper, being questions propounded to the witness as an expert; and, 2d, that even if they were improper, they were not objected to; and that the admission of improper evidence on the one side,

which is not objected to, is no sufficient reason for the admission of improper evidence on the other side, which is objected to.

In regard to the first of these two answers, I think that the questions propounded to the witness on his examination-in-chief, or some of them at least, were alike improper with the question propounded to him on his cross-examination. In regard to the second answer, it is true as a general proposition; as the authorities referred to by the learned counsel seem fully to show. They are *Wilkinson v. Jett*, 7 Leigh, 115; *Walkup v. Pratt*, 5 Har. & John. R. 51; and *Stringer, &c. v. Lessee of Young*, 3 Peters U. S. R. 320, 337. In the last case, Chief Justice Marshall, in delivering the opinion of the court, said: "The testimony offered by the defendant was unquestionably irrelevant." "But the plaintiffs in error insist that they had a right to introduce this testimony in order to rebut other equally irrelevant testimony which had been offered by the plaintiffs in

904 *ejectment. This testimony was undoubtedly irrelevant, and, had it been opposed, could not have been properly admitted. Had the defendant moved the court to instruct the jury that it must be utterly disregarded, that it must not be considered by them as testimony, and this instruction had been refused, the refusal to give it would have been error. The defendant, however, has not taken this course; but has chosen to repel the testimony by other evidence which was clearly inadmissible. Whether a case may exist in which improper testimony may be calculated to make such an impression on the jury that no instruction given by the judge can efface it, and whether, in such a case, testimony not otherwise admissible may be introduced, which is strictly and directly calculated to disprove it, are questions on which this court does not mean to indicate any opinion. It is unnecessary, because the testimony rejected by the court is not of this character."

Whether the questions thus referred to by the Chief Justice have ever been decided or not, I do not know. Nor will I express any opinion upon them in this case, or attempt to show that the question propounded to the witness, Holladay, in his cross-examination as aforesaid, would have been admissible on the ground suggested by the chief justice, if it had been propounded to him in his examination-in-chief. We know very well, that questions are admissible on a cross-examination, which would not be admissible on an examination-in-chief. And the able counsel for the plaintiff in error admitted in his argument, that the attorney for the Commonwealth might have fairly cross-examined the witness upon the points to which he testified in chief, though the said counsel contended that it was not admissible to put to the witness a question which called for his opinion as a man, upon a certain supposed state of facts. Now let us see how this is.

A witness, who was very truly stated
905 by the counsel *to have been "for many years a lawyer of distinction and high position," was introduced by the prisoner, and testified on his examination-in-chief "that he is very well acquainted with the prisoner; practiced with him. That so far as he knows, he (prisoner) was considered a gentleman of character. Never heard of anything against him before he was a candidate for the judgeship of Henrico County court. Never heard of anything against his character until then. That he sees no impropriety in counsel co-operating in getting the real estate sold under a judgment where there is no personality. No defence could have been made in the chancery suit; saw nothing on examination of the bill to excite suspicion," &c., &c.

Now here was an attempt made by the prisoner to throw the great weight of this distinguished lawyer's opinion in the scale of the defence, by proving by him that certain acts of the prisoner in co-operating in the proceedings to get the real estate of Haunstein sold, which acts had been proved and relied on by the Commonwealth as links in the chain of testimony against the prisoner, were in fact innocent acts, and perfectly consistent with the prisoner's innocence of the offence charged against him. And so indeed they might have been the acts of an innocent man; and if he had not conspired with others to utter and employ as true a forged paper, knowing it to be forged, against the said estate, we would readily have accepted this as the true view of his conduct. But when we view these acts in connection with the other links in the chain of the testimony against the prisoner, we are led to the conclusion that they were not induced by the innocent motive of affording assistance in doing a lawful thing, but were parts and parcels of means which were used for the perpetration of the crime charged against him. The object of the question propounded to the witness in his cross-examination, which has already been set out in full in this opinion, was to present the acts aforesaid in connection

906 *with one or two of the other links in the chain of the testimony against the prisoner, and thus to show that while those acts standing alone might be viewed as innocent acts, yet they might be viewed as criminal acts when taken in connection with those other links in the chain of the testimony, supposing them to be true. I am therefore of opinion that the question, being put in the cross-examination of the witness and for the purpose aforesaid, was admissible.

We have high authority for this opinion in the decision of the court of King's Bench, made in 1844, in the case of *Greville v. Chapman*, 5 Ad. & El. 731, N. S., 48 Eng. C. L. R. There, a libel consisted in imputing to the plaintiff, that he acted dishonorably in withdrawing a horse which had been entered for a race; and he proved by a witness that the rules of the jockey

club, of which he was a member, permitted owners to withdraw their horses before the race was run; it was held that the witness, on cross-examination, might be asked whether such conduct as he had described as lawful under these rules, would not be regarded by him as dishonorable. Lord Denman, chief justice, in delivering the opinion of the court, said of the question: "We think this perfectly free from objection, and necessary for arriving at the real meaning of the evidence given."

But even if I doubted the admissibility of the question, and inclined to think it inadmissible, I do not think it can be said that the prisoner was injured by admitting it, and I would be unwilling to reverse the judgment and remand the cause for a new trial on that ground. That irrelevant evidence is admitted on a trial of the case is not, necessarily, a ground for reversing the judgment rendered in the case. The party complaining must have been injured by the admission of the evidence. A court cannot be required to give an instruction upon an abstract question of law, even though the law be truly expounded in the instruction asked for; and if the court
907 refuse to *give it, such refusal will

not be error; though if the court give it, that will not be error for which the judgment can be reversed, because it is not error to the prejudice of the party against whom the instruction was given. In this case the witness, as might well have been expected, stated in reply to the question, that in the case thereby supposed, "he would have exposed and denounced the whole proceeding, and all concerned in it." And so undoubtedly he would. All honorable and right minded men would, doubtless, have given the same answer to the same question. It could not have had the remotest influence in inducing the jury to convict an innocent man. Suppose the witness had been asked: "Do you consider perjury a sin which will be punished hereafter?" or, "If you were on the jury, and the guilt of the prisoner were proved to your entire satisfaction, would you find him guilty?" certainly these would have been irrelevant and improper questions, and ought not to have been permitted to be asked or answered. But suppose they had been permitted to be asked and answered, could it be said that this was an error to the prejudice of the prisoner, for which the judgment against him ought to be reversed? I regard the reversal of a judgment in such a case as this, in which there have already been three trials and two convictions, and the case has once before been in this court, as a great public evil, unless justice requires it, and I would be unwilling to reverse the judgment in this case, unless it plainly appeared that there was error in it, and that such an error worked an injury to the prisoner. I do not think that either appears, in regard to the assignment of error I am now considering; and I am therefore of opinion that the Hustings court did not err, and certainly not to the injury of the prisoner, in overrul-

ing his objection to the question propounded to the witness, Holladay, and to any answer thereto as aforesaid.

VIII. The next assignment of error arises on the *tenth bill of exceptions, and presents in a different form the question presented by the fourth assignment of error, to wit: as to the competency of J. B. Sherer, one of the jury. Having already expressed my views fully upon that question, it follows from them that I think there is no error in the judgment in this respect.

IX. The next and last assignment of error arises on the eleventh bill of exceptions, and presents the question, whether the Hustings court had power to empanel the grand jury which found the bill of indictment against the prisoner. This question was fully considered and decided in Chahoon's case, recently decided by this court, in which it was held that the said Hustings court had such power; and the same must accordingly be held in this case.

Upon the whole, I am of opinion that the judgment ought to be affirmed.

CHRISTIAN and STAPLES, Js., were of opinion that the testimony of Cole, as to his conversations with Sanxay, and the question put to Holladay and his answer, were illegal. On the other questions in the cause, they concurred in the opinion of Moncure, P.

ANDERSON, J., concurred in the opinion of Moncure, P.

Judgment affirmed.

909 *Dock v. The Commonwealth.

January Term, 1872, Richmond.

1. **Criminal Proceedings—Murder—Character of Deceased.**—On a trial for murder, it is not competent for the Commonwealth to introduce evidence in chief as to the character of the person on whom the offence was committed.
2. **Same—Murder—Malice.***—If the prisoner, in the execution of a malicious purpose to do the deceased a serious personal injury or hurt by wounding and beating him, killed him, the offence is murder.
3. **Same—Manslaughter—Self-Defence—What Two Things Must Concur.**—Where death ensues on a sudden provocation or sudden quarrel, without malice prepense, the killing is manslaughter, and in order to reduce the offence to killing in self-

***Criminal Proceedings—Murder—Malice.**—For the proposition that, if the prisoner, in the execution of the malicious purpose to do the deceased a serious personal injury or hurt by wounding and beating him, kill him, the offence is murder, see the principal case cited and approved in *Honesty v. Com.*, 81 Va. 295.

†**Same—Manslaughter—Self-Defence—What Two Things Must Concur.**—In *State of West Virginia v. Cain*, 20 W. Va. 703, the court said: "We hold the law to be, that where there is a quarrel between two persons, both being in fault, and a combat as the result of such quarrel takes place, and death ensues, in order to reduce the offense to killing in self-de-

fence, the prisoner must prove two things: First, that before the mortal blow was given, he declined further combat, and retreated as far as he could with safety; and, secondly, he killed the deceased through the necessity of preserving his own life, or to save himself from great bodily harm.

At the August term 1871, of the County court of Rockbridge, George Dock was indicted for the murder of George Ackerly. Being in custody at the time, he was tried at the same term of the court, when the jury found him guilty of murder in the second degree, and fixed the term of his imprisonment in the penitentiary at five years; and the court sentenced him accordingly. He thereupon applied to the Circuit court of Rockbridge for a writ of error to the judgment, which was awarded; but when the case came on to be heard, the Circuit court affirmed the judgment; and the prisoner then brought the case to this court. The case is sufficiently stated in the opinion of the court.

Dorman & Taylor and Letcher & Maury, for the prisoner.

The Attorney General, for the Commonwealth.

910 *MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the Circuit court of Rockbridge county, affirming a judgment of the County court of said county, convicting the plaintiff in error of murder in the second degree, and sentencing him to five years' imprisonment in the penitentiary, the term by the jury in their verdict ascertained.

The errors assigned arise upon four bills of exceptions, which were taken to rulings of the County court in the case. We will consider the questions presented by these bills, in the order in which they were so taken.

I. Upon the trial of the cause, the Commonwealth offered to give in evidence to the jury, testimony in chief, to prove the general peaceable and good character of the deceased, whom the accused was indicted for murdering. To which testimony the prisoner objected, as irrelevant to the issue, and illegal. But the court overruled the objection, and allowed the testimony to be given to the jury, as part of the evidence in chief for the Commonwealth. To which opinion and action of the court the prisoner objected: And this is the subject of the first bill of exceptions.

The law on this subject is thus laid down in 3 Greenleaf on Evidence, § 27: "In regard to the character of the person on whom the offence was committed, no evidence is

fence, the prisoner must prove two things: First, that before the mortal blow was given, he declined further combat and retreated, as far as he could with safety; and secondly, that he necessarily killed the deceased in order to preserve his own life or to save himself from great bodily harm. Dock v. Com., 21 Gratt. 909."

in general admissible, the character being no part of the *res gestæ*." This is the general rule, even where the evidence is offered by the accused; though in that case there are some exceptions to the rule. "Hence," says Greenleaf in the same connection, "where evidence was offered to prove that the person killed was in the habit of drinking to excess, and that drinking made him exceedingly quarrelsome, savage and dangerous; and when intoxicated he frequently threatened the lives of his wife, and others whom the prisoner had more than once been called upon to protect against his fury; all which was matter of common notoriety; it was held

911 *rightly rejected, as having no connection with what took place at the time of the homicide." And for this the writer cites in a note, *The State v. Field*, 14 Maine R. 294; *York's case*, 7 Law R. 507-509; *The State v. Thawley*, 4 Harringt. 562; *Quesenberry v. The State*, 3 Stew. and Port. R. 308; and *The State v. Tilly*, 3 Ired. R. 424. And he then proceeds thus: "The only exception to this rule is in trials for rape, or for an assault with intent to commit that crime; where the bad character of the prosecutrix for chastity may, under the circumstances of particular cases, afford a just inference as to the probability of her having consented to that act for which the prisoner is indicted." See further as to this exception, 2 Russell on Crimes, 784, and the cases cited. Other exceptions to the general rule, where the evidence is offered by the accused, have been recognized in some cases, as may be seen by referring to Wharton's Am. Crim. Law, § 641, and cases cited in note (a). One of these cases is *Franklin v. The State*, 29 Alab. R. 14, in which the court said that "the character of the deceased, as a violent, turbulent, blood-thirsty man, when it qualifies, explains, and gives point and meaning to his conduct, and tends to produce in the mind of the slayer a reasonable belief of imminent danger, is admissible evidence for the defendant. And there are cases also in which it may be looked to in determining the amount of provocation, and thus fixing the degree of the homicide; but the evidence in this case," the court proceeded to say, "does not justify its admission on either of these grounds." In cases of this kind, supposing them to be exceptions to the general rule, as to which this court expresses no opinion, if the accused opens the door by introducing evidence of the character of the deceased, of course countervailing testimony in behalf of the Commonwealth would be admissible. As to the general rule, see also Wharton's Am. Crim. Law, § 641, and the cases cited in notes (o) and (q).

912 *But while there are, or may be, exceptions to the general rule, when the evidence is offered by the accused, the court has been referred to no case, and it is believed there is none to be found, in which the Commonwealth has been allowed to introduce original evidence in chief, in regard

to the character of the person on whom the offence was committed. See *Commonwealth v. Hilliard*, 2 Gray R. 294; *Commonwealth v. Mead*, 12 Gray R. 167. We must therefore consider the case as coming under the general rule laid down by Greenleaf as aforesaid; and so considering, we are of opinion that the County court erred in overruling the objection of the prisoner, and allowing the testimony to be given to the jury, as mentioned in the first bill of exceptions.

II. Upon the trial of the cause, the County court, on the motion of the attorney for the Commonwealth, gave several instructions to the jury, of which the fourth and fifth were as follows:

4th. If the jury believe, from the evidence, that the prisoner, in the execution of a malicious purpose, to do the deceased a serious personal injury or hurt, by wounding and beating him, the offence is murder.

5th. Where death ensues on a sudden provocation, or sudden quarrel, without malice prepense, the killing is manslaughter; and in order to reduce the offence to killing in self-defence, the prisoner must prove two things:

First, that before the mortal blow was given, he declined further combat, and had retreated as far as he could with safety; and,

Secondly, he killed the deceased through the necessity of preserving his own life, or to save himself from great bodily harm.

To which fourth and fifth instructions, the prisoner objected; but the court overruled the objection, and gave the said instructions to the jury. To which 913 opinion and *action of the court the prisoner excepted; and this is the subject of the second bill of exceptions.

It is necessary to supply two words, viz: the words "killed him" in the fourth instruction, to complete its sense. If they were omitted in the original, as they are in the printed copy of the record, and also in the manuscript copy on which the writ of error was awarded, the omission was merely accidental, and there could have been no misunderstanding of the instruction by the jury on that account. Supplying the omission, the instruction will read thus: "If the jury believe, from the evidence, that the prisoner, in the execution of a malicious purpose to do the deceased a serious personal injury or hurt, by wounding and beating him, killed him, the offence is murder." So reading or construing it, there can be no good ground of objection to the principle of law which it announces. It defines a clear case of murder.

The fifth instruction is also free from any substantial ground of objection. It correctly defines a case of manslaughter; unless the case be reduced by the prisoner to homicide in self-defence, by proving the two things mentioned in the instruction. The law in regard to manslaughter and homicide in self-defence, in its application to this case, seems here to be well defined.

We are therefore of opinion that the County court did not err in overruling the

prisoner's objection to the said fourth and fifth instructions.

III. Upon the trial of the cause, the Commonwealth offered to prove by a witness, Mrs. Reid, that the deceased, George Ackery, as he rose from breakfast on the 30th of June last (the morning on which the homicide was committed), said he would go to Mrs. Reid's house, to see if he could employ her husband or son that day to work, if the prisoner would not work that day, and left the house with this declared purpose; to which evidence of declarations by the deceased, in the absence of the prisoner, the latter objected. But the court overruled the objection, and allowed the evidence to be given to the jury. To which opinion and action of the court the prisoner excepted; and this is the subject of the third bill of exceptions.

This act of the deceased, in leaving his house on the morning of the 30th of June last, and the declarations made by him as to his purpose in doing so, were clearly parts of the *res gestæ*, and as such were admissible evidence.

We are therefore of opinion, that the County court did not err in overruling the prisoner's objection to the said evidence, and allowing it to be given to the jury.

IV. The jury having found the prisoner guilty of murder in the second degree, and ascertained the term of his imprisonment in the penitentiary to be five years, the prisoner moved the court to set aside the verdict, on the ground that it was contrary to law and evidence, and to grant him a new trial. But the court overruled the said motion, to which opinion and action of the court the prisoner excepted; and this is the subject of the fourth and last bill of exceptions.

The bill of exceptions sets out all the testimony, and does not certify only what the court considered to be facts proved in the cause. In form it appears to be, in part, a certificate of facts proved, and in part a mere statement of the testimony; but upon the whole it must have been intended merely

as a statement of the testimony. It is impossible that the jury, or the County court, could have believed the statement of the prisoner to be true, that the wound which caused the death of the deceased "was inflicted by accident, and unintentionally," by the prisoner, "in throwing up his hands to ward off a blow;" or could have believed the testimony of the prisoner's daughter to the same effect, to be true. Had the jury so believed, they would certainly have found a verdict of not guilty in the case. And had the County court so believed, it would certainly have set aside the verdict of guilty, and granted a new trial in the case. If that statement or that testimony had been true, the case would clearly have been one of excusable homicide by misadventure or chance-medley. We must therefore construe the bill of exceptions as containing a certificate of testimony merely, and not of facts proved on the trial; and so construing it, we cannot say that the County court erred in refusing to set aside the verdict and grant a new trial. If the jury disbelieved the said statement of the prisoner and the said testimony of his daughter, we cannot say that they were not warranted in finding him guilty of murder in the second degree. It was a question for the jury to decide upon the evidence and according to the law laid down by the court in the instructions aforesaid.

We are therefore of opinion that the County court did not err in overruling the motion of the prisoner to set aside the verdict and grant a new trial on the ground that the verdict was contrary to law and evidence.

But we are of opinion that for the error of the County court, in overruling the objection of the prisoner to the testimony mentioned in the first bill of exceptions, and allowing the said testimony to be given to the jury as aforesaid, the said judgments, both of the said Circuit and County courts, must be reversed, the said verdict set aside, and the cause remanded to the said County court for a new trial to be had therein.

Judgment reversed.

INDEX.

ACCORD AND SATISFACTION.

1. See *Estoppel*, No. 2, 3, and *Poague & al. v. Spriggs & als.*, 220

2. R, having the bond of C, executed before the war, well secured on real estate, which will fall due in about a month, refuses to receive payment in Confederate currency, but states in writing the debt and when due; that it can be paid in registered eight *per cent.* Confederate bonds, issued to run the longest period bought at par, specifying the number of bonds and amount of each, and the treasury notes with which they are to be bought. **HOLD:**

1. The memorandum of R is to be construed as consenting to receive the bonds in payment of his debt, only if delivered by the time the bond fell due, and not in any indefinite time in the future.

Campbell v. Ranson & als., 405

2. R had the right to require payment to be made in these bonds at the maturity of the debt, as the condition on which the privilege might be secured; and also to require that the bonds should be precisely of the description named in the memorandum. And the difficulty or impossibility of complying with the conditions by C does not entitle him to pay his debt at any other time, or in any or other bonds. *Idem.*, 405

3. If the condition precedent is not performed, the bond remains in full force and effect. *Idem.*, 405

4. C, not having received the memorandum written in December 1862, until the April following, if he might have paid upon its receipt, it was his duty to procure the bonds immediately, and deliver them; and having waited until August, when they had greatly depreciated, his procuring them then was no compliance with the terms prescribed by C. *Idem.*, 405

5. Though R might have accepted the bonds at any time, and might have done so by an agent, the evidence of the acceptance by the agent, and of his authority to accept, should be beyond all doubt. *Idem.*, 405

6. The amended bill charges that H was the agent of R, and that he accepted the bonds; the answer denies the agency of H, and the proofs do not sustain it; and therefore the acceptance of the bonds by H does not bind R to accept them as payment of his debt. *Idem.*, 405

3. What is neither tender nor accord and satisfaction. See *Confederate Contracts*, No. 17, and

Moses v. Trice, 556

4. See *Contracts*, No. 4, and *Michie v. Jeffries*, 334

ACCOUNTS.

See *Lunatics*, No. 5, 6, 7, and *Bird's committee v. Bird*, 712

ACTIONS.

1. When and when not an action at law can or cannot be maintained on a lost or destroyed negotiable note. See *Promissory Notes*, No. 2, 3, 4, 5, and *Moses v. Trice*, 556

ACTS OF CONGRESS.

1. The act of Congress continues the laws of Maryland in force in that part of the District of Columbia ceded by Maryland. The Maryland law thereby became the law of Congress in said District, and is to be taken notice of by State courts, without proof.

Bird's case, 800

ADMISSIONS.

1. See *Evidence*, No. 2, and *Taylor v. Peck*, 11
918 *2. See *Attachments*, No. 2, 3, and *Wright v. Rambo*, 158

3. When admission of one co-adm'r will not revive a debt due to the other. See *Limitations—Statute of*, No. 3, and *Seig, adm'r, v. Acord's ex'or*, 365

4. The acts, admissions and declarations of the principal obligor in a bond, done and made at the time of its delivery, are evidence against his sureties in the bond, though he is dead, and therefore not a party to the suit.

Walker Per. Rep. v. Pierce, 722

5. See *Murder*, No. 4, and *Smith's case*, 809

AGENTS.

See *Principal and Agent*.

ALIMONY.

1. For the principles on which the amount of alimony will be fixed, in cases of divorce *a mensa et thoro*, see opinion of the court.

Bailey v. Bailey, 43

2. Where a wife is compelled to seek a divorce from her husband, on account of his misconduct, in fixing the amount of alimony the earnings of the husband may be taken into the account, if necessary, as well as property. *Idem.*, 43

3. In such a case, in fixing the amount of alimony, the court will not seek to find how light the burden may possibly be made, but what, under all the circumstances, will be a fair and just allotment. *Idem.*, 43

APPEALS.

1. An appeal may be taken to the Court of Appeals from the judgment of a Circuit court imposing a fine upon a person for a contempt of the court, in aiding to obstruct the execution of a decree of the court.

Wells v. The Commonwealth, 500

2. N is assessed with a double tax for failing to take out a license as a commission merchant; and he proceeds under the act of

1870-71, § 176, p. 121, to be relieved from the tax, on the ground that he was not bound to take out such license. This is a civil proceeding; and if the amount of tax assessed against him is less than \$500, no appeal lies to the Court of Appeals from the judgment of the court below against him.

Neal and others v. The Commonwealth, 511

3. There cannot be an appeal to the Court of Appeals from the award of an arbitrator, unless it be made the judgment or decree of the court from which it is taken; and the copy of the award in the proceedings of the court, though they are signed by the judge, does not make it the judgment or decree of the court.

Crane's guardian v. Crane, 579

4. Where the parties in a cause stand upon distinct and unconnected grounds, where their rights are separate, and not equally affected by the same decree or judgment, then the appeal of one will not bring up for adjudication the rights or claims of the other.

Walker's ex'or & als. v. Page & als., 636

5. Where the parties appealing and the parties not appealing stand upon the same ground, and their rights are involved in the same question, and equally affected by the same decree or judgment, the Court of Appeals will consider the whole case, and settle the rights of the parties not appealing as well as those who bring their case up by appeal.

Idem, 636

APPELLATE COURT.

1. When appellate court will not disturb a verdict on the ground that it was contrary to the evidence.

See *New Trials* 1, and *Bell v. Alexander,* 1

2. When appellate court will dismiss an appeal as improvidently awarded.

See *Judgments*, No. 1, and *Goolsby & als. v. Strother, comm'r,* 107

3. There is a judgment in name of D for the benefit of J, and D files a bill in his own name to enforce the lien of the judgment upon land, without making J a party. There is no objection to this in the Circuit court, and the decree is in favor of D. This is not error; but for conformity it may be amended by the appellate court and affirmed.

Hale v. Horne & als., 112

4. Where a case is heard by a court without a jury, an appellate court will not reverse the judgment, though the court below may have erred in requiring the plaintiff to introduce his evidence first. It is a matter of perfect indifference in such case, in what order the evidence is heard.

Wright v. Rambo, 158

5. When the appellate court will dismiss an appeal as improvidently awarded, on the ground that notice of the motion to amend a decree by default is insufficient.

See *Practice in Chancery*, No. 8, and *Coffman v. Sangston & als.,* 263

6. When the appellate court will not reverse

a decree because the plaintiff's interest in the subject matter of the suit is not stated in the bill.

See *Practice in Chancery*, No. 9, and *Idem,* 263

7. Though the notice for taking depositions, and taking an account by a commissioner, is not filed, yet as the record says the depositions were taken pursuant to notice, and it appears that the appellant claimed commissions, it will be presumed, in the appellate court, in the absence of proof to the contrary, that notice was given.

Idem, 263

8. The report of a commissioner having been completed on the 10th of April 1869, and the decree by default made on the 22d of October following, in the absence of anything showing the contrary, it will be presumed by the appellate court that the report and account were returned and acted on according to the requirements of the statute.

Idem, 263

9. The appellate court will reverse a decree upon the merits, if the court below had no jurisdiction of the case, though no objection to the jurisdiction had been taken.

Green & Suttle v. Massie, 356

10. No exception being taken, and the evidence before the court not being shown upon the record, upon a motion to scale a debt, which is overruled, the appellate court cannot review the judgment.

Gunn & als. v. Turner's adm'r, 382

11. On a motion to reform a judgment by default, no motion having been made to reverse the judgment, on the ground that the process had not been served on one of the defendants, that question cannot be considered by the appellate court.

Idem, 382

12. Upon appeal from an order of a judge in vacation dissolving an injunction and dismissing the bill, the appellate court will amend the decree, so far as it dismisses the bill and affirm it; there being no other error in the record.

Muller & c. v. Bayly & al., 521

13. What the appellate court will decide upon appeal by one of several parties.

See *Appeals*, No. 3, 4, and *Walker's ex'or & als. v. Page & als.,* 636

14. If a case is tried and a verdict for the plaintiff, and the court sets aside the verdict and grants a new trial, and on the second trial there is a verdict and judgment for the defendant, from which there is an appeal, the appellate court will look to the proceedings on both trials, and if the court below erred in setting aside the verdict on the first trial, the appellate court, without considering the subsequent proceedings in the case, will reverse the judgment rendered for the defendant on the second trial, and enter final judgment upon the first verdict.

Tyler v. Taylor, 700

15. In a suit in equity, the defendant insists there are other persons who ought to be parties, but the court decrees against him on the merits. On appeal, the appellate court

will reverse the decree for the failure to make the necessary parties, without passing on the merits.

Richardson v. Davis & wife, 706

16. When objection to parties on the record will be considered as waived. See *Lunatics*, No. 4, and

Bird's committee v. Bird, 712

17. What judgment of the appellate court cannot be changed upon a second appeal in the same cause.

Chahoon's case, 822

ATTACHMENTS.

1. Upon a motion, by the defendant, to abate an attachment which had been sued out against his property by the plaintiff, the *onus* is on the plaintiff, to show that the attachment was issued on sufficient cause, and he may therefore be required to introduce his evidence first.

Wright v. Rambo, 158

2. Upon such a motion, the admissions and declarations of the wife of the defendant are not admissible in evidence for the plaintiff, to prove the intention of the defendant to move with his property from the State, unless they were part of the *res gestæ* of an act *which was evidence, and which they might reasonably tend to explain.

Idem, 158

3. Upon such a motion, the defendant's intention and declarations as to leaving the State after the date of the attachment, are not admissible as evidence. *Idem,* 158

ATTORNEYS AT LAW.

1. Attorneys at law are liable, as ordinary bailees, for money collected for their clients.

Pidgeon v. Williams' adm'rs, 251

2. An attorney receiving in February 1862, Confederate currency, which was then the only currency and very little depreciated, is not liable to his client for receiving such money, he not having forbade it.

Idem, 251

3. An attorney having received Confederate currency for a debt due to his client, deducts his fees from the amount and deposits the balance in a bank in good credit, not in his own name, but to "collection account," an account in which he deposits all moneys collected by him for his clients, and on the book of the bank, the name of the client is written opposite the sum deposited for him. The client not calling for his money until the end of the war, when the bank has failed, the attorney is not liable for it. *Idem,* 251

4. The client living in Maryland, but the place of his residence being unknown to the attorney, though the client comes to the town where the attorney lives, occasionally during the war, when the Federal forces have possession of it, but does not call upon the attorney or let him know he is there; the attorney is not liable for failing to give him notice that the money has been collected.

Idem, 251

5. See *Contempts*, No. 2, and *Wells v. The Commonwealth,* 500

6. The duty of an attorney to his client cannot conflict with his obligation to demean himself honestly in the practice of the law, or to be faithful to his country. But if he acts in good faith, and demeans himself honestly, he is not responsible for an error of judgment. *Idem,* 500

7. See *Privileged Communications* and *Chahoon's Case,* 822

AUCTIONEERS.

1. An auctioneer selling real estate at auction is the agent of both vendor and purchaser, and his writing, at the time, the name of the purchaser, as such, to the written terms of sale, binds the purchaser.

Walker v. Herring, 678

2. QUÆRE: If the auctioneer can bind the purchaser at auction of real estate, by subscribing his name to the terms of sale after the sale is completed, and it seems he cannot.

Idem, 678

3. An auctioneer conducting a sale of real estate, writes the name of W, as the purchaser. His partner, who was not present at the sale, without any communication with, or authority from, H, on the day after the sale writes the name of H, as a joint purchaser with W. The partner had no authority to write the name of H, and H is not bound by it.

Idem, 678

AWARDS.

There cannot be an appeal to the Court of Appeals, from the award of an arbitrator, unless it be made the judgment or decree of the court, from which it is taken; and the mere copy of the award in the proceedings of the court, though they be signed by the judge, does not make it the judgment or decree of the court.

Crane's guardian v. Crane, 579

BANKS.

1. Under the power reversed in the charter of a private corporation, to repeal, alter or modify the charter, the Legislature may repeal the charter, but cannot modify it without the consent of the corporation. But if the corporation refuses to consent to the modification it must discontinue its business as a corporate body.

Yeaton v. Bank of the Old Dominion, 593

2. The bank of D, located at Alexandria, within the Federal lines, has a branch at P, within the Confederate lines. The acts of March 29th, 1862, and May 16th, 1862, of the Richmond government, not having been assented to by the mother bank, though acted on by the branch at P, did not operate to *amend the charter of the bank of D. *Idem,* 593

3. Y, a debtor before the war of the bank of D, at Alexandria, cannot, after the war, pay his debt by notes issued under the acts of March 29 and May 16, 1862, by the branch bank at P. *Idem,* 593

4. The bank of D, after the war, took possession of the assets of the branch bank at P, they being much less than the indebtedness of the branch bank to the mother bank. The

bank of D did not thereby sanction and ratify the acts of the branch bank, done under the acts of March and May 1862. *Idem*, 593

BANK CHECKS.

1. B gives A a check on a bank, which A holds up for a year and then presents it, but the bank refuses to pay it, B having drawn out all his money. B is not relieved from the payment of the check by the delay of A to present it, and in any case he would only be relieved to the extent that he was injured by the delay.

Bell v. Alexander,

1

BIGAMY.

1. On a prosecution for bigamy, where a marriage is alleged to have taken place in a foreign country or state, proof must be made of a valid marriage according to the law of that country or state; but no particular kind of evidence is essential to establish the fact, except that it cannot be proved by reputation and cohabitation.

Bird's Case,

800

2. Where a witness testifies to a marriage in a foreign State, solemnized in the manner usual and customary in such State, by a person duly authorized to celebrate the rites of marriage, and the parties afterwards lived together as man and wife, this is as satisfactory evidence of a valid marriage as can be expected or desired; and in such a case it is not necessary to prove the laws of such State or to offer further evidence of a compliance with its provisions.

Idem, 800

3. All persons who practice a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts, so far as expertness is required. 5 Man. Gran. & Scott, 812. *Idem*, 800

4. M proves that he is a Catholic priest and pastor of a church in Washington, D. C., and authorized to celebrate the rites of a marriage; that by the virtue of the license issued by the proper officer in the usual form, he married B and M at his residence in said city, in the presence of two persons; and in accordance with the rules and customs of the Catholic church and the laws of the District of Columbia. And it was proved that B and M afterwards lived together as husband and wife. On the prosecution of B for bigamy, this is sufficient evidence of the marriage of B and M. *Idem*, 800

BILL OF RIGHTS.

The bill of rights, though made a part of the present constitution, has the same force and authority, and no more, that it has always had; and the principles which it declares have reference to free men, and not to convicted felons. *Ruffin's Case*, 790

BILLIARD SALOONS.

1. The keepers of a billiard saloon may be required to take out a license and pay a tax thereon.

Lewellen, Sergeant for, &c. v. Lockhart,

570

2. The fact that capital is invested in billiard tables and other necessary furniture of

a billiard saloon, which may be taxed as property under § 32 of the act of June 1870, does not exempt the pursuit from a license tax. *Idem*, 570

BONDS.

1. See *Contracts*, No. 3, 4, 5, and *Michie v. Jeffries*,

334

2. As to questions on the alteration of a bond apparent on its face, see *Practice at Common Law*, No. 9, 10, and

Ramsey's adm'rs v. McCue & als., 349

3. P executes his bond to H for \$5,000, dated June 9th, 1863, and payable two years after date, without interest, "in such funds as the banks receive and pay out." Parol evidence is not admissible under § 2, of the adjustment act of 1866, to prove the kind of currency in which the bond was to be paid, or with reference to which, as a standard of value, it was made and entered into.

Hilb, for &c. v. Peyton & als., 386

4. Such a bond creates a contract of hazard. *Idem*, 386

5. A bond executed between the 1st of January 1862, and the 10th of April 1865, payable at a future day, in a currency designated in the bond, is to be paid in the currency designated. *Idem*, 386

6. What will not be a discharge of a bond. See *Accord and Satisfaction*, No. 2, and *Campbell v. Ranson & als.*, 405

7. Where, in a bond for the payment of money, the words "on demand" are used, it is payable at once, unless there be some other provision in the bond that it shall not be so paid.

Omohundro's ex'or v. Omohundro, 626

8. In such case, the words "to be paid when called for," do not change the legal effect of the instrument. *Idem*, 626

9. If a bond be given for a commodity, though a special demand may be necessary to entitle the obligee to sue, the debtor may pay without such demand. *Idem*, 626

10. See *Confederate Contracts*, No. 19, and *Idem*, 626

11. Where a bond is given which bears interest from a day anterior to its date, it is a fair inference that the bond was executed for a debt existing at the date from which it bears interest, and as that date is January 1861, though the bond bears date in 1864, the presumption that it was a Confederate debt, to be paid in Confederate currency, is repelled by the face of the bond itself.

Walker Per. Rep. v. Pierce, 722

12. The acts, admissions and declarations of the principal obligor in a bond, done and made at the time of its delivery, are evidence against his sureties on the bond, though he is dead, and therefore not a party to the suit. *Idem*, 722

13. If it appears that the bond sued on was given for a bond due before the war, and was intended, both by the obligee and the principal obligor, to be paid in legal money, and was in fact taken by the accommodation of the obligor, the sureties will be bound to pay it

in legal money, though they may not have known what was the consideration of it.

Idem, 722

14. What defence may be made by plaintiff in equity to a bond in the hands of a *bona fide* holder. See *Confederate Contracts*, No. 26, and

Meredith & als. v. Salmon, 762

15. Debt cannot be maintained upon a bond payable in the currency of Virginia.

Dungan v. Henderlite, 149

CASE AGREED.

1. Upon the question of an alteration of the bond sued on, if the case agreed does not state the alteration was made after the execution of the bond, the court, in pronouncing the conclusion of the law upon the facts, cannot assume that such was the fact.

Ramsey's adm'rs v. McCue & als., 349

CIRCUIT COURTS.

1. P, having been indicted in February 1871, for receiving a horse knowing it to have been stolen, and also for the larceny of the horse, elects to be tried in the Circuit court. In the Circuit court he, in September 1871, moves the court to send him back to the County court for trial, on the ground that the Circuit court has no jurisdiction to try him. The act of February 12, 1866, which provides that horse stealing may be punished with death, or confinement in the penitentiary, at the discretion of the jury, has not been repealed, and the Circuit court has jurisdiction to try the prisoner. *Price's case*, 846

CO-DEFENDANTS.

1. When the equities between the defendants do not arise out of the pleadings and proofs between plaintiff and defendants, there can be no decree between co-defendants.

Glenn v. Clark & als., 35

2. See *Election*, No. 2, and

Idem, 35

COMMISSIONERS.

1. When not responsible for Confederate money perishing in his hands.

See *Trusts and Trustees*, No. 5, and

Davis, Comm'r v. Harman & als., 194

923

*COMMON CARRIERS.

1. See *Railroad Companies*, No. 4, 5, 6, 7, 8, 9, 10, and

Wilson v. Chesapeake & Ohio R. R. Co., 654

CONFEDERATE CONTRACTS.

B purchased cattle of M in 1861; M informed B that he wanted the money to pay a debt he owed A, due in 1858 by bond; whereupon B agreed with M, that he would pay the debt to A, and accordingly drew a check in favor of A upon the Exchange bank at Salem. The check bore date April 17th, 1862, and was for \$1,435, the amount of the debt due from M to A, and A accepted the check in payment of M's debt, and M's bond was surrendered to him. A held the check until April 1863, when he presented it at bank for payment, which was refused; the cashier

stating that all the funds of B had been drawn out a few days before. There was nothing said at the time the check was given, as to the kind of currency in which it was to be paid, and at that time Virginia bank notes, Virginia treasury notes and Confederate treasury notes were circulated as of equal value. In April 1863, when payment was demanded, only Confederate notes were paid out by the bank. On the 25th of August 1862, B drew all his funds out of the bank, and made no further deposit until April 6th, 1863, when he deposited \$1,914; but he drew this out on the 27th of the same month. HELD:

1. B is not relieved from the payment of the check by the delay of A to present it; and in any case he would only be relieved to the extent that he was injured by the delay.

Bell v. Alexander, 1

2. B having asked the court for an instruction that A was only entitled to recover the value of the check on the — day of April 1863, when it was presented for payment, it was proper for the court to add to it—"provided the jury shall believe it to be a Confederate contract." *Idem*, 1

3. B asked for another instruction, that if the jury should believe it was a Confederate contract, then they are to assess the plaintiff's damages at the value of Confederate notes on the day of the demand of payment. It was proper for the court to add to it—"scaling the same by such rule as to the jury may seem right under all the circumstances." *Idem*, 1

4. The statute, Sess. Acts 1866-'67, ch. 270, § 2, p. 695, prescribing no rule or scale of depreciation, it is for the jury to fix it in each case, upon the evidence before them.

Idem, 1

5. A verdict for the whole amount of the check, with interest from its date, will not be disturbed by the appellate court as being contrary to the evidence. *Idem*, 1

6. A contract made in August 1863, for the sale of land to be paid for in Confederate currency, is a valid contract.

Hale v. Wilkinson, 75

7. What is a specie debt, and not to be scaled. See *Promissory Notes*, No. 1, and

Barnett v. Cecil & c., 93

and *Bonds*, No. 11, 12, 13, and

Walker, Per. Rep. v. Pierce, 722

8. Bonds given by C for purchase money of land, which are of the same date with the agreement for the purchase, are payable in one, two and three years, with interest from date "in currency at its specie value." These words are not in the agreement. QUÆRE: Is C bound to pay the amount named, in currency at its specie value at the date of the bonds, or is he to pay the full amount named in currency, or its value in specie at the maturity of the debt?

Caldwell v. Craig, 132

9. See *Estoppel*, No. 1, 2, and

Poague & al. v. Spriggs & als., 220

10. On the 15th of November 1862, H executed his bond to S for \$600, payable on demand, it being for Confederate money borrowed, upon a condition inserted at the instance of H, that no interest will be required until the money is demanded, and then a reasonable time to be given to pay; interest to run from the demand. **Held:**

1. H had the right to pay the debt at any time, though G made no demand.

Stover, assignee, v. Hamilton & al., 273

924 *2. It was a debt payable in Confederate currency, and therefore not usurious. *Idem*, 273

3. It is payable by H at any time after its date; and therefore the date is the proper period at which to fix the scale of depreciation. *Idem*, 273

4. Though S had a secret intention not to make a demand for the money until there was a better currency, as H had the right to pay at any time, this secret intention of S cannot change the construction and effect of the bond. *Idem*, 273

11. By the act of March 3d, 1866, and that of February 28th, 1867, two modes of adjusting Confederate contracts are provided. 1st. By reducing the nominal amount contracted to be paid to its gold value. 2d. In cases of sales of property, or renting, or hiring, giving the value of the property sold, or the value of the rent or hire, at the time of such sale, renting or hiring. *Pharis v. Dice*, 303

12. These acts do not change the contracts of the parties, but provide a mode of ascertaining the value of the Confederate money contracted to be paid; and they are constitutional. *Idem*, 303

13. The proviso annexed to the 1st section of the act of March 3, 1866 as amended by the act of February 28, 1867, will be considered as annexed to § 2, of the first act, as amended by the second, so as to carry out the obvious intention of the General Assembly. *Idem*, 303

14. See *Judicial Sales*, No. 3, and *Dixon & als. v. McCue's adm'x & als.*, 373

15. See *Bonds*, No. 3, 4, 5, and *Hilb, for, &c. v. Peyton & als.*, 386

16. When payment is to be made in Confederate currency for land purchased, time is of the essence of the contract.

Boolen v. Scheffer, 474

17. M borrows of T, early in 1864, Confederate money, and executes his negotiable note, endorsed by D, for the amount, payable in ninety days at the bank of Virginia. This note is renewed from time to time until the 4th of January 1865; M then proposes to pay off the note to T, but at the request of T renews the note again upon the promise of T that he will deposit the note in bank for collection; and before the note falls due, M deposits more than the amount of the note in the bank, where it remains until the bank fails. A few days before the note is due, the bank is

burned out, the note not having been deposited in bank. **Held:**

1. M's offer to pay, he consenting to renew the note, and his depositing the money in bank, was neither a tender, or accord and satisfaction; and he is liable to pay the amount due upon the note.

Moses v. Trice, 556

2. The note being a renewal of a former note, and all the notes having been given for the same loan of money, T might have sued on the original note, or for money loaned, and, therefore, he is entitled to recover, though at the time the note sued on fell due Confederate currency was worthless. *Idem*, 556

3. It is for the jury to fix the time when the scale of depreciation shall be applied to the debt; and it was error in the court to instruct them that the plaintiff was entitled to recover the value of Confederate currency at the date of the original transaction. *Idem*, 556

18. In October 1862, R sold and conveyed to C land, and took his bonds, payable in one, two, three and four years, secured by deed of trust on the land. It was a Confederate contract, and in October 1863, C paid R \$1,000 upon the first bond, and he paid no more. In 1867, the trustee advertised the land for sale, and C enjoined the sale, and asked that his bonds should be paid on such terms as to the court might seem proper. **Held:** C may have his election to give up the land, and receive back the value of the \$1,000 of Confederate notes he paid, as at the time of payment, and account for rents and profits; or retain the land and pay a reasonable price therefor, to be ascertained by a commissioner, subject to a credit of the proportion which the amount he has paid bears to the amount he agreed to pay, with interest on the balance from the date of the contract.

Carter v. Ragland, 574

19. S borrowed of R, his brother, Confederate money, and gave a bond 925 *for it as follows: On demand, I promise to pay to R, the sum of \$12,800, value received, borrowed money this date, to be paid when called for, in Confederate money, or whatever money may be current of the State, or our banks pay out to depositors. Witness my hand and seal. The bond bears date May 22d, 1863. **Held:**

1. The debtor had a right to discharge it immediately with Confederate treasury notes.

Omohundro's ex'or v. Omohundro, 626

2. Where in a bond for the payment of money, the words "on demand" are used, it is payable at once, unless there be some other provision in the bond that it shall not be so paid. *Idem*, 626

3. The alternatives allowed the debtor were for his benefit and do not restrict his right to pay at once by Confederate treasury notes. *Idem*, 626

4. If it be a bond for a commodity, though a special demand may be necessary to entitle

R to sue, the debtor may pay without such demand. *Idem*, 626

5. The words "to be paid when called for," do not change the legal effect of the instrument. *Idem*, 626

6. The executor of S, who does not know of the existence of the bond, pays to R a debt which S owed him, and asks him if he has any other claims against S, and R says none but what the women can settle. He is told by the executor to produce them, that he is ready to pay them; but R does not, nor does he mention the bond; and after the close of the war, he demands payment of the bond. He is concluded by his failure to present the bond for payment when called upon to do so, and can only recover the value of the currency at the date of the bond, with interest from that date. *Idem*, 626

20. What not a Confederate contract.

See *Contracts* No. 8, and

Morgan's adm'r v. Oley & als., 619

21. In March 1863, the fact that Confederate States treasury notes were the only currency in circulation in this State is so notorious that it may be taken notice of judicially by the courts, as a matter of current public history. And all decrees made for the sale of property at as late a period of the war as 1863, and all judicial sales made under such decrees, must be taken as made for this currency, unless such decree in express terms directed otherwise.

Walker's ex'or & als. v. Page & als., 636

22. That the courts of this Commonwealth, during the war, had the authority to decree sales for Confederate money, and to make investments of funds under their control in Confederate securities, is no longer an open question. Transactions in Confederate currency during the war, and investments in Confederate securities (when properly made), must now be held to be as valid and binding as if made in time of peace in a sound currency.

Idem, 636

23. See *Presumptions*, No. 4, 5, and

Walker Per. Rep. v. Pierce, 722

24. See *Bonds*, No. 11, 13, and

Idem, 722

25. See *Principal and Agent*, No. 6, and *Myers' ex'or v. Zetelle*, 733

Pizzini's committee v. Zetelle, 733

26. A tract of land worth, before the war, not more than \$6,000, was, in June 1863, sold by F to S for \$30,000; of which \$5,000 was paid in cash in Confederate money, and for the remainder five bonds of \$5,000 each were given, to be paid in one, two, three, four and five years, "in current funds," with interest payable semiannually from their date; and a deed of trust on the land to secure them. The fourth bond was, in July 1863, sold by the agent of F to M, who purchased as commissioner of the court for an investment. In a controversy in equity between S and M as to the amount to be paid upon this fourth bond, HELD:

1. Though M is a *bona fide* holder of the bond, S may make any defence to it in equity that he could make in an action upon it by the obligee. M holds the bond subject to every infirmity of consideration—to all the equities attaching to it in the hands of the party to whom it was executed.

Meredith & als. v. Salmon, 762

2. Though the bond provides on its face that it is "to be paid in current funds," S may prove by parol evidence that, by the agreement with F at the time the bonds were executed, he had a right to pay them at any time before they were due, in Confederate currency, and that he had so paid the other four bonds to the holders thereof, and in January 1865 offered to pay this bond. *Idem*, 762

3. The words of the bond, that it is "to be paid in current funds," do not necessarily raise the presumption that it is to be paid in another and more valuable medium; but their proper interpretation depends upon the time when and the circumstances under which they are used.

Idem, 762

4. The most just and reasonable interpretation of the words "current funds," is, that they are intended to guard against any contingency of an obligation to pay in coin. *Idem*, 762

5. The bond, constituting one-sixth of the price contracted to be given for the land, it is to be discharged by the payment of one-sixth of the value of the land in United States currency, at the time of the sale. *Idem*, 762

CONFEDERATE CURRENCY.

1. When commissioner not liable for Confederate money which perishes on his hands. See *Trust and Trustees*, No. 4, and

Davis, comm'r v. Harman & als., 194

CONGRESS.

1. See *Acts of Congress*, No. 1, and

Bird's case, 800

CONSTITUTIONALITY OF STATUTES.

1. The act of March 3d, 1866, and that of February 28th, 1867, for adjusting Confederate contracts, is constitutional.

Pharis v. Dice, 303

2. The exemption from taxation of the real estate of the Richmond and Danville railroad company, in the city of Richmond, is not unconstitutional, as being in conflict with the charter of the city, previously granted, giving the city the power to tax real estate for the purposes stated in the city charter; the city having ample means of taxation left for the payment of her expenses and debts.

City of Richmond v. The Richmond and Danville Railroad Co., 604

3. The act of June 29, 1870, Sess. Acts 1869-70, ch. 174, § 6, p. 232, which requires a merchant paying a tax on his capital to take out license to deal in second hand articles at his store, is not in violation of § 4, article X, of the Constitution of the State.

Hirsh's case, 785

4. See *Corporation Courts*, No. 1, 3, and
Chahoon's case, 822

CONSTRUCTION OF STATUTES.

1. See *Statutes, passim*.
2. The act, Code (edi. of 1860), ch. 95, entitled "of harbor masters and dock masters," as amended by the act of February 16, 1867, Sess. Acts 1866-67, ch. 209, p. 648, is to be construed as one act; and § 17, of ch. 95, of the Code, applies to the whole act as amended.
Owners of Steamboat Wenonah v. Bragdon, 685
3. The established rule of construction of the Code of 1849 is, that an intention not to change the former law will be presumed, unless the contrary intention plainly appears.
Idem, 685

CONTEMPTS.

1. An appeal may be taken to the Court of Appeals from a judgment of a Circuit court imposing a fine upon a person for a contempt of the court in aiding to obstruct the execution of a decree of the court.
Wells v. The Commonwealth, 500

2. Where a rule is made upon a person to show cause why he shall not be punished for a contempt of the court, in aiding to obstruct the execution of a decree of the court, he purges himself of the contempt, by answering on oath that in what he had done he acted as counsel in good faith, without any design, wish or expectation of committing
927 *any contempt of, our offering disrespect to the court. *Idem*, 500

3. The duty of an attorney to his client cannot conflict with his obligation to demean himself honestly in the practice of the law, or to be faithful to the country. But if he acts in good faith and demeans himself honestly, he is not responsible for an error of judgment. *Idem*, 500

CONTINUANCE OF CAUSES.

1. See *Practice at Common Law*, No. 1, 2, and
Taylor v. Peck, 11

CONTRACTS.

1. See *Confederate Contracts, passim*.
2. See *Estoppel*, No. 1, and *Poague & al. v. Sprigg & als.*, 220
3. J lent to G \$5,000, and took his bond for the amount, dated April 17th, 1862, payable five years after date, with interest, and a deed of trust on land to secure the debt. The money loaned had been deposited in bank in January 1861, to J's credit, and she gave G a check upon the bank for the amount, in the usual form. This was not a Confederate contract, and is not liable to be scaled.
Michie v. Jeffries & al., 334
4. G afterwards sells the land covered by the deed of trust to M, and leaves in M's hands enough of the purchase money to pay the debt due to J; and M undertakes to pay it. On the 30th of November 1864, J enters into an agreement with M, by which J agrees to take \$2,000 in gold in full of the bond, provided it is paid in two months from the date of the agreement. M pays \$865 within the two months, and he pays \$413 in February,

after the two months is out; and he pays no more during the war. M not having fulfilled the agreement, it is not binding on J, and M must pay the balance due upon the bond; crediting the gold payments at 2½ for one; that being the ratio agreed upon by the parties in their agreement. *Idem*, 334

5. The bond and deed of trust are not tainted with usury; but if they were it could not be set up for the first time in argument in the appellate court; nor could M set it up at any time; it being G's debt, and M having received the money to pay it. *Idem*, 334

6. P executes his bond to H for \$5,000, dated June 9th, 1863, and payable two years after date, without interest, "in such funds as the banks receive and pay out." Parol evidence is not admissible, under § 2 of the adjustment act of March 1866, to prove the kind of currency in which the bond is to be paid, or with reference to which, as a standard of value, it was made and entered into.
Hilb for, &c. v. Peyton & als., 386

7. Such a bond is a contract of hazard.
Idem, 386

8. T, trustee of V, in August 1863, sells the estate to M, part for cash, and the balance on a credit of one and two years. The cash payment and the first note is paid in Confederate money; but the evidence is that the payments were to be made in the currency of the day when they respectively fell due; and the last note falling due in August 1865, is to be paid in the currency of that day.
Morgan's adm'x v. Oley & als., 619

CONVEYANCES.

1. M conveys land in trust to pay specified debts, and afterwards sells and conveys it to G. G has good title to the land, subject to the trust, and when the trust is discharged, he is by operation of the statute (Code, ch. 135, § 31, p. 612), entitled to the land at law and in equity, though the trustee has not conveyed it to him.
Hale v. Horne & als., 112

CONVEYANCES—Fraudulent.

1. An absolute deed of sale of personal effects held to be fraudulent upon the testimony of one of the grantors and corroborating circumstances.
Brown & al. v. Molineux, Duffield & Co. & als., 539

2. *Nemo allegans suam turpitudinem audiendus est*, if it be law, does not apply, where it is the creditors of the parties who assail the deed, and call on one of them to prove the fraud. *Idem*, 539

CONVICTS.

See *Penitentiary Convicts*.

928

*CORPORATIONS.

1. Under the power reserved in the charter of a private corporation, to repeal, alter or modify the charter, the legislature may repeal the charter, but cannot modify it without the consent of the corporation. But if the corporation refuses to consent to the modification, it must discontinue its business as a corporate body.
Yeaton v. Bank of the Old Dominion, 593

2. See *Banks*, No. 2, and *Idem*, 593
3. See *Railroad Companies*, No. 1, 2, 3, and *City of Richmond v. Richmond and Danville Railroad Co.*, 604
4. A city charter is not a contract between the State and the city, securing to the city the absolute right of taxation beyond the control or modifications of the legislature. *Idem*, 604
5. Municipal corporations are mere auxiliaries of the government; established for the more effective administration of justice; and the power of taxation confided to them is a delegated power. *Idem*, 604
6. See *Railroad Companies*, No. 4, and *Wilson v. Chesapeake & Ohio R. R. Co.*, 654

CORPORATION COURTS.

1. § 14, article 6 of the constitution, which provides that Corporation courts shall have similar jurisdiction which may be given by law to the Circuit courts of the State, was not intended to restrict, but to enlarge, the jurisdiction of these courts, and to elevate them to the grade and dignity of Circuit courts. And it was competent, therefore, for the Legislature to give to the Corporation courts jurisdiction to try cases of felony, though the jurisdiction in such cases was taken away from the Circuit courts.

Chahoon's case, 822
Sand's case, 871

2. Under the act of 1866-'67, passed April 27, 1867, to revise and amend the criminal procedure, the Corporation court of Richmond was authorized to empanel a grand jury on the 2d of May 1870.

Chahoon's case, 822

3. § 14, article 6 of the constitution, which directs a Corporation court to be held as often and as many days in each month as may be prescribed by law, does not require that the whole term shall be held in the same calendar month, and under the act of April 7, 1870, Acts of 1869-'70, p. 44, § 10, which fixes the terms of the Corporation court of Richmond to commence on the first Monday, and continue so long as the business before the court may require, the court may continue its session from the first Monday in one month until the first Monday in the next month. And a grand jury empanelled on the 2d day of May may find an indictment on the 4th of June; the term continuing until that day.

Idem, 822

COVENANTS.

A T executes his bond as follows: March 12th, 1863. I hereby bind myself, my heirs, &c., to pay—amount of principal and interest due from W A J on the tract of land purchased by him of G W J and wife. Witness my hand and seal the day and date above. And he delivers it to W A J. HELD:

1. W A J may maintain an action of covenant on the bond against A T. *Jones v. Thomas*, 96
2. W A J may recover upon the bond against A T, if A T has not paid the

debt, though it is not averred or proved that W A J has paid it, or has been otherwise injured by the failure of A T to pay it.

Idem, 96

3. The declaration does not, in its commencement, aver that A T covenanted with the plaintiff to pay the debt; but it does so in a subsequent part of it. This is substantially sufficient. *Idem*, 96

4. In a declaration on a covenant, it should be set out without any intermediate inducements of statements of the consideration; but if averments are made, which may be treated as mere surplusage, they they will not vitiate the declaration.

Idem, 96

5. QUÆRE: If G W J might not sue in his own name on this bond, to enforce the covenant of A T under the act, Code of 1860, ch. 116, § 2. *Idem*, 96

929 *CRIMINAL JURISDICTION AND PROCEEDINGS.

1. Upon an indictment in the County court against C, the jury render a verdict of guilty, and that he be imprisoned in the county jail for ten months, and paid a fine of ten dollars. No judgment on the verdict is entered at that time, nor is the case continued; but at the next term of the court the judgment is entered. Before the ten months have expired C escapes from jail and is afterwards retaken. HELD:

1. The cause was pending in court, and it was proper to render the judgment on the verdict at the next term of the court.

Cleek's case, 777

2. C is not entitled to be discharged at the end of the ten months; but is to be kept in prison beyond the period, for the length of time he was out when he escaped; and this though C has been indicted for the escape. *Idem*, 777

2. See *Murder*, No. 1, 2, 3, 4, and *Smith's case*, 809

3. See *Penitentiary Convicts*, No. 1, 4, and *Ruffin's case*, 790

4. A point in a cause in which the Court of Appeals are equally divided, stands affirmed by virtue of the act, Code, ch. 209, § 7, p. 841, Sess. Acts 1866-67, p. 937, as well where it is a ruling of the court below in the progress of the cause, as where it is the final judgment of the court in the case; and this decision is final and irreversible, and cannot be changed upon a second appeal in the cause.

Chahoon's case, 822

5. The court before which a prisoner is arraigned for trial, if qualified jurors not exempt from serving cannot be conveniently found in the county or corporation, may send to another county or corporation for such jurors. And in acting in such a case the court must have a large discretion.

Idem, 822

Sands' case, 871

6. P is indicted in the county court for receiving a stolen horse knowing it to have been stolen, and also for the larceny of the horse, and he elects to be tried in the Circuit

court. The record of the indictment against P, sent up to the Circuit court, shows that it was found at the February term of the court by a grand jury of eight members; but it does not show that the February term was not one of the four regular terms of the said court to which twenty-four citizens were required to be summoned to constitute a grand jury. In the absence of evidence to the contrary, it must be presumed that the indictment was found at a term when a grand jury might consist of only eight members.

Price's case, 846

7. The record in the case does not show that the indictment was endorsed "a true bill," by the grand jury, and signed by the foreman. Such endorsement, though usual, is not necessary, and the record of the finding of the jury, upon the order-book of the court, is the proper evidence of that fact.

Idem, 846

8. The *venire facias* in the case having been issued on the 18th of August 1871, properly conformed to the provisions of the act of March 29, 1871, Sess. Acts 1870-'71, ch. 262, p. 357, which went into operation on the 1st of July 1871; though the act was not in force at that time the prisoner was arrested, committed and indicted.

Idem, 846

9. If property be stolen, and recently thereafter be found in the exclusive possession of the prisoner, then such possession of itself affords sufficient grounds for a presumption of fact, that he was the thief; and in order to repeal the presumption, makes it incumbent on him, on being called on for the purpose, to account for such possession consistently with his innocence. If he gives a reasonable account of it, then it devolves on the Commonwealth to prove that such account is untrue. If he gives an unreasonable account of it, then it devolves on the prisoner to sustain such account by other evidence. What is such a recent possession as raises a presumption against a prisoner, in the meaning of the rule, is a question for the jury, and depends upon the nature of the property and other circumstances of the particular case.

Idem, 846

10. What will sustain an indictment for larceny. See *Larceny*, No. 1, and

Idem, 846

11. The list given by the judge to the officer, from which the officer is to summon jurors for the trial of a prisoner for felony, contains but twenty-four names, and the officer returns the names of nineteen of them whom he *summoned, and of five as not found. Though it would be better for the judge to put more than twenty-four names on the list, it is not error to give but twenty-four, and the return of the officer that he has summoned less than the twenty-four, and the others were not found, is a valid return.

Sands' case, 871

12. Upon an indictment against a person for a conspiracy to commit a felony, or for the felony so actually committed, the acts and declarations of another of the conspirators, though not in the presence of the prisoner or afterwards reported to him, are

evidence against him; and this though the acts and declarations were done or made before the prisoner became a party to the conspiracy, if done or said in furtherance of the common object.

Idem, 871

13. In order to the admissibility of such evidence, it must be shown, first, that the persons whose acts or declarations are sought to be made evidence, was, at the time of making or doing them, himself a conspirator; and, second, that they were done or said in furtherance of the object of the conspiracy.

Idem, 871

14. The guilty knowledge, by the conspirators, of the act done, is a necessary element of their guilt, without proof of which there can be no conviction. But it is not necessary to prove that this guilty knowledge was imparted to all of them at one and the same time, and by one and the same means. It is only necessary to show that each of the conspirators had this guilty knowledge, no matter how, when or where he acquired it.

Idem, 871

15. On a trial for murder, it is not competent for the Commonwealth to introduce evidence in chief as to the character of the person on whom the offence was committed.

Dock's case, 909

DEBT.

1. On the 14th September 1862, H binds himself by bond to pay to D, twelve months after date, \$800, for the purchase money of land, describing it "payable in the currency of Virginia and North Carolina money." This is a promise to pay in the currency named; and an action of debt cannot be maintained upon it.

Dungan v. Henderlite, 149

DECREES.

1. See *Judicial Sales*, No. 2, 3, 5, 6, and
Zollman v. Moore & als., 313
Dixon v. McCue's adm'x & als., 373
Walker's ex'or & als. v. Page & als., 636
2. See *Infants*, No. 2, 3, 4, and
Idem, 636

3. Where a doubt arises as to the meaning and effect of a decree, it may be ascertained by reference to the bill and other proceedings, especially where they are referred to in the decree.

Idem, 636

DEEDS.

1. A deed or other writing, though not stamped, is admissible in evidence; the act of Congress not applying to proceedings in State courts. And it seems it is admissible in evidence in the United States courts, unless the omission to stamp it was with fraudulent intent.

Hale v. Wilkinson, 75

DISCOVERY.

1. When bill of discovery should be filed. See *Practice in Chancery*, No. 16, and
Green & Suttle v. Massie, 356

DISTRICT OF COLUMBIA.

See *Acts of Congress*, No. 1, and
Bird's case, 800

DIVORCES.

1. Abandonment and desertion which entitles a husband or wife to a divorce *a mensa*

et thoro, consists in the actual breaking off of matrimonial cohabitation, with the intent to abandon and desert in the mind of the party so acting. And the intent to desert being once shown, the same intent will be presumed to continue until the contrary appears. *Bailey v. Bailey*, 43

2. The statute, Code, ch. 109, fixes no period for which the desertion must have continued to entitle a party to a divorce *a mensa et thoro*. Desertion for less than five years may be good cause; and the question 931 is to be determined by *the court exercising a sound discretion, according to the facts and circumstances of each case, and the principles of law applicable thereto. *Idem*, 43

3. The act, Code, ch. 109, § 9, is not intended to change the rules of evidence in divorce cases; and the letters of the parties are admissible in evidence for the plaintiff to show the intention of the defendant to abandon and desert her. *Idem*, 43

4. B leaves his home and family in November 1865, and returns in November 1866. He remains at home two weeks, and then leaves it, and had not returned in September, 1867, when Mrs. B files a bill for a divorce. B's intention to desert his wife being clearly proved, she is entitled to a divorce *a mensa et thoro*. *Idem*, 43

5. For the principles on which the amount of alimony will be fixed, see opinion of *Christian, J.* *Idem*, 43

6. Where a wife is compelled to seek a divorce from her husband on account of his misconduct, in fixing the amount of alimony the earnings of the husband may be taken into the account, if necessary, as well as his property. *Idem*, 43

7. In such a case, in fixing the amount of alimony, the court will not seek to find how light the burden may possibly be made, but what, under all the circumstances, will be a fair and just allotment. *Idem*, 43

DOWER.

When new assignment of dower may be made. See *Practice in Chancery*, No. 3 and *Raper v. Sanders*, 60

ELECTION.

1. C, by his will, gave a farm by name to M, and he gave another farm by name to G, the latter being the most valuable; and G accepted the devise. The farm given to M was, in fact, the property of G, and had been sold by his father to C, when G was but twelve years of age. G having elected to take the farm given to him, must relinquish to M his claim to the farm devised to her. *Glenn v. Clark & als.*, 35

2. M having filed a bill to enforce her claim to the land left to her by C, and made G and the executor of C defendants, and G, in his answer, having repudiated the sale of his land by his father, and insisted that the will of C did not raise a case of election; but that he was entitled to hold both farms; though it may be that a part of the purchase money for his land is still due from C's estate, the

question cannot be considered in this case, and there can be no decree between these co-defendants upon it. *Idem*, 35

EQUITABLE JURISDICTION AND RELIEF.

1. See *Specific Performance, passim*, and *McComas v. Easley*, 23
Hale v. Wilkinson, 75
Booten v. Scheffer, 474

2. See *Trust and Trustees*, No. 2, and *Hale v. Horne*, 112

3. B is a voluntary society, composed of between four and five hundred members. They employ C to collect numerous debts due them, and he fails to account, or to return the notes not collected. Some of the members may sue C in equity for the benefit of all, for an account and for payment of the money collected, and the return of the evidences of debt unpaid. And the court has jurisdiction on the ground of discovery, or from the difficulty of proceeding at law. *Coffman v. Sangston & als.*, 263

4. Courts of equity have jurisdiction in matters of account involving the transactions of trustees and agents, whenever it appears that a discovery is necessary, or there are mutual accounts between the parties, or the remedy at law is not plain, simple, and free from difficulty. *Idem*, 263

5. M and others file a bill for the sale of land in which infants are interested, and the interest of M is stated in the bill to be one-half the tract. The land is sold and the sale confirmed, money paid and conveyance. In fact, M is entitled to the whole tract, and files her bill of review to set aside the sale on the ground of mistake. The mistake of M as to her rights was a mistake of law, and a court of equity will afford no relief in such a case. *Zollman v. Moore & als.*, 313

6. The prayer of the bill being for a sale of the land, and the decree and sale 932 being of the land, and the deed *conveying it, the title of all the parties to the suit passed by the deed. *Idem*, 313

7. The purchaser was not bound, as against the parties to the suit, to enquire whether their title to the property was such as stated in the bill. *Idem*, 313

8. The purchaser is a *bona fide* purchaser for value without notice, and having the legal title, M is not entitled to recover against him. *Idem*, 313

9. If a discovery from the plaintiff is necessary to enable the defendant to make his defence at law, he must file his bill for the discovery before the judgment has been rendered against him. And he cannot go into equity for discovery and relief against the judgment after it has been rendered. *Green & Suttle v. Massie*, 356

10. That money is scarce, and that the large cash payment required at a sale under a deed of trust will be attended with great if not irreparable loss to the owner of the property, is no ground for an injunction to the sale. *Muller, &c. v. Bayly & al.*, 521

EQUITY OF REDEMPTION.

1. The equity of redemption in land conveyed in trust to secure debts, is subject to the lien of judgments subsequently obtained, in the order of their priority in date.

Hale v. Horne & als., 112

ESTOPPEL.

1. See *Practice in Chancery*, No. 7, and *Lee county justices v. Fulkerson*, 182

2. S has a judgment docketed for an ante-war debt against C, the principal, and E and P his sureties, well secured by the judgment lien upon the lands of the debtors. If S, to enable C to sell his land for Confederate money, and make a good title to the purchaser, agrees, in May 1863, to accept payment of the judgment in Confederate notes or bonds, and if, in pursuance of this agreement, C immediately advertises and sells his land, and receives payment of the purchaser, in such money or bonds, and conveys to him the land, S cannot afterwards revoke his agreement to accept such payment, but his promise is binding upon S, not only in behalf of C, but of his sureties also, and the purchaser.

Poague & al. v. Sprigg & als., 220

3. In such a case the agreement, of S must be proved beyond all reasonable doubt; and in this case it was not proved. *Idem*, 220

EVIDENCE.

1. Though a tenant holds under a written lease, he may, in an ejectment by his landlord against him, without producing the lease, or accounting for its nonproduction, introduce receipts of his landlord for rent, showing that at the time the action was instituted he held as tenant, and his year was not out.

Taylor v. Peck, 11

2. A parol admission of a party to a suit, is always admissible in evidence against him, although it relates to the contents of a deed or other unwritten instrument, and even though its contents be directly in issue in the cause. *Idem*, 11

3. The act, Code ch. 109, § 9, is not intended to change the rules of evidence in divorce cases; and the letters of the parties are admissible in evidence for the plaintiff, to show the intention of the defendant to abandon and desert her.

Bailey v. Bailey, 43

4. A deed or other writing, though not stamped, is admissible in evidence; the act of Congress not applying to State courts. And it seems it is admissible in evidence in the United States courts, unless the omission to stamp it was with fraudulent intent.

Hale v. Wilkinson, 75

5. When parol evidence is admissible to show the intention of parties to a written agreement for the sale of land. See *Vendor and Purchaser*, No. 1, and

Caldwell v. Craig, 132

6. Upon a motion by defendant to quash an attachment sued out against his property by the plaintiff, the admissions and declarations of defendant's wife are not admissible

as evidence for the plaintiff, to prove the defendant's intention to move from the State with his property, unless they were part of the *res gestæ* of an act which was evidence, and which they tended to explain.

Wright v. Rambo, 158

7. Upon such motion the defendant's intention and declarations as to leaving *the State after the date of the attachment, are not admissible as evidence.

Idem, 158

8. What facts may be considered by a jury on the question of negligence. See *Negligence*, No. 1, and

Blosser v. Harshbarger, 214

9. The uncertain and unreliable nature of parol evidence to prove the contents of a letter, commented on by *Moncure*, P.

Poague & al. v. Spriggs & als., 220

10. Though parol evidence of the contents of a book has been admitted, though objected to, without excuse for failing to produce the book, yet, if after exception has been taken, evidence is introduced showing good reason why the book cannot be produced, the error is thereby cured.

Pidgeon v. Williams' adm'rs, 251

11. Bought of Maj. J. W. twenty-seven head of cattle, weighing 38,152 pounds, at six and a half cents—\$2,478.88. Mr. W. M. T., you will please settle with Maj. W. the above account. J. C. In assumpsit by W against C to recover the amount; the paper being of doubtful meaning, C may introduce parol evidence to show that T was chief commissary for the district in the Confederate States service, and that C was his agent, and as such bought the cattle of W, who knew he was buying as such agent.

Walker v. Christian, 291

12. When parol evidence not admissible under § 2, of the adjustment act of March 1866, to prove the kind of currency in which a bond was to be paid, or with reference to which, as a standard of value, it was made and entered into. See *Bonds*, No. 3, and

Hilb for, &c. v. Peyton & als., 386

13. The acts, admissions and declarations of the principal obligor in a bond, done and made at the time of its delivery, are evidence against his sureties in the bond, though he is dead, and therefore not a party to the suit.

Walker, Per. Rep. v. Pierce, 722

14. See *Conveyances—Fraudulent*, No. 2, and *Brown & al. v. Molineux, Duffield & Co. & als.*, 539

15. What obligor in a bond may prove by parol, as against the *bona fide* assignee for value. See *Confederate Contracts*, No. 26, and *Meredith & als. v. Salmon*, 762

16. See *Bigamy*, No. 1, 2, 3, 4, and *Bird's case*, 800

17. Of evidence in the case of a conspiracy to commit a felony. See *Criminal Jurisdiction and Proceedings*, No. 12, 13, 14, and *Sands' case*, 871

EXECUTORS AND ADMINISTRATORS.

1. Debt barred by the statute at the death

of the debtor, cannot be revived by the promise to pay it, or the admission it was due, by his personal representative.

Seig, adm'r v. Acord's ex'or, 365

EXPERTS.

1. All persons who practice a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts, so far as expertness is required. 8 Man. Gran. & Scott 812. *Bird's case*, 800

FELONY.

1. When Corporation courts have jurisdiction to try felonies. See *Corporation Courts*, No. 1, 2, 3, and *Chahoon's case*, 822

2. Upon a prosecution for a conspiracy to commit a felony, or for the felony so committed, what evidence is admissible, and how the conspiracy may be proved. See *Criminal Jurisdiction and Proceedings*, No. 12, 13, 14, and *Sands' case*, 871

FORTHCOMING BONDS.

1. The act of May 28, 1870, to prevent the sacrifice of property at forced sales, Acts of 1869-'70, ch. 120, p. 162, does not require three months' notice of a motion on a forthcoming bond, where the bond was forfeited before the passage of the act.

Goolsby & als. v. Strother, comm'r, 107

FRAUDS AND PERJURIES.

1. The statute of frauds and perjuries applies to a contract between a purchaser of real estate and a third person, for an interest in the property.

Walker v. Herring, 678

934 *HARBORMASTERS.

1. The act, Code, edi. of 1860, ch. 95, entitled "of harbormasters and dockmasters," as amended by the act of February 16, 1867, Sess. Acts 1866-'67, ch. 209, p. 648, is to be construed as one act; and § 17 of ch. 95, of the Code, applies to the whole act so amended.

Owners of Steamboat Wenonah v. Bragdon, 685

2. The words "bay or river craft or other boat," in § 17, ch. 95, of the Code, edi. of 1860, embraces steamboats of 500 tons burthen.

Idem, 685

3. The word craft, as used in this § 17, includes all kinds of sailing vessels.

Idem, 685

HORSE STEALING.

1. See *Criminal Jurisdiction and Proceedings*, No. 6, and *Price's case*, 846

HUSBAND AND WIFE.

1. See *Divorces, passim*, and *Bailey v. Bailey*, 43

2. Real estate is conveyed to a trustee of a married woman, the whole equitable estate being vested in her, free from liability for her husband's debt; and with express power in her to mortgage, convey in trust or otherwise pledge the property, or any part of it, and the trustee is, on her request, to sell it, and pay the proceeds to her or re-invest. The

wife may subject the property to pay the debt of, or raise money for her husband.

Muller & c. v. Bayly & al., 521

INDICTMENTS.

1. In an indictment for murder, the death of the murdered person may be laid in several counts, as having been occasioned in different and inconsistent modes.

Smith's case, 809

2. P is indicted for receiving a horse which had been stolen, knowing that it had been stolen. The indictment may charge specially the fact of receiving the horse, with the knowledge that it has been stolen, or it may charge P with the larceny of the horse; and the latter would seem to be the better practice.

Price's case, 846

3. It is not essential that an indictment shall be endorsed "a true bill," and signed by the foreman. The record of the finding of the jury, upon the order book of the court, is the proper evidence of that fact.

Idem, 846

4. When it will be presumed that the indictment was found by a grand jury properly empanelled. See *Criminal Jurisdiction and Proceedings*, No. 6, and *Idem*, 846

INFANTS.

1. As to sale of infant's lands. See *Judicial sales*, No. 3, 5, 6, and

Dixon & als. v. McCue's adm'x & als., 373

Walker's ex'or & als. v. Page & als., 636

2. The right of an infant to show cause against a decree which affects his interests, after he arrives at age, must be limited to this extent, to show cause existing at the rendition of the decree; and not such as arose afterwards. The question must always be, can any cause be shown why the decree, at the time it was rendered, was not a legal and binding decree.

Walker's ex'or & als. v. Page & als., 636

3. C dies in 1855, leaving a widow and children, some of them infants. Dower is assigned to the widow; and the guardian of the infants files a bill for a sale of their interest in the dower property making the widow and adult children parties. In March 1863, there is a decree for a sale of the whole property, and the sale is made, and the proceeds invested in Confederate bonds, the widow to receive the interest during her life. After the infants come of age, they seek to set the sale aside on the ground that it was not for their interest. HELD: If the court that pronounced the decree had jurisdiction of the subject and the parties; if its proceedings were regular and in accordance with the requirements of the law; and the decree is sustained by the evidence then introduced, the infants will not be allowed, as against a *bona fide* purchaser, to go out of the record to show that, upon facts and events arising since the rendition of the decree, their interests were not promoted by a sale of their real estate.

Idem, 636

4. In this case all the papers in the cause were destroyed, except the decrees; but

935 the decrees showing by their *recitals that the proceedings had been regular, and that the court was satisfied the sale was for the interest of the infants, and the investments and conveyances having been made according to the decree, the sale and investment will be sustained. *Idem*, 636

INJUNCTIONS.

1. That money is scarce, and that the large cash payment required at a sale under a deed of trust will be attended with great if not irreparable loss to the owner of the property, is no ground for an injunction to the sale.

Muller, &c. v. Bavy & al., 521

2. § 4, ch. 179, Code, p. 736, applies only to a pure bill of injunction; not to a bill seeking other relief, to which the injunction sought is merely ancillary. *Idem*, 521

3. In a case of a pure bill of injunction to restrain a sale of real estate in one county, if the plaintiff institutes his suit in another county or corporation, where the defendants answer and do not object to the jurisdiction, the plaintiff cannot afterwards make the objection; and the court may under its general jurisdiction hear and determine the case.

Idem, 521

4. A cause having been removed from the Circuit court of one county to that of another, and received by the clerk of the latter court, the defendants may, upon notice, in vacation, before the next term of the court to which the cause is removed, move the judge to dissolve the injunction which had been granted.

Idem, 521

5. In such a case the judge may in vacation dissolve the injunction, but he cannot then dismiss the bill. *Idem*, 521

JUDGMENTS.

1. A judgment stating that the defendants were solemnly called and not appearing, on motion, &c., is a judgment by default; though it is stated at the foot of the judgment, that on motion of the defendants the execution on this judgment is suspended for sixty days, &c.; and a *supersedeas* to this judgment will be dismissed as improvidently awarded, if allowed before a motion is made in the court below, or to the judge, to correct it.

Goolsby & als. v. Strother, comm'r, 107

2. The equity of redemption in land conveyed in trust to pay debts, is subject to the lien of judgments subsequently obtained, in the order of their priority in date.

Hale v. Horne & als., 112

3. How lien of judgments will be enforced upon the equity of redemption on land against trustee and purchaser. See *Trustee and Trustees*, No. 2, and *Idem*, 112

4. On motion to reform a judgment by default by allowing credits for payments, plaintiff endorses the credits at the time of the motion. The court may refuse to reform the judgment.

Gunn & als. v. Turner's adm'r, 382

JUDICIAL SALES.

1. See *Equitable Jurisdiction and Relief*, No. 5, 6, 7, 8, and

Zollman v. Moore & als., 313

2. Decree for sale of lands made in April, 1863, it is to be presumed that the intention of the decree was that the sale should be made for Confederate money. *Idem*, 313

3. In November 1860, M was appointed a commissioner to sell infants' land, on a credit of six, twelve, eighteen and twenty-four months. M reports that after three trials he failed to sell, and suggests that it be rented out for the present; and in June 1861, M is authorized to rent out the land for such time and on such terms as he might think judicious; and he rents it out for that and the next year. In March 1863, M reports that he in that month sold the land on the terms of the decree to S and D; and the report is confirmed, and he is directed to collect the purchase money as it falls due, and pay it to the receiver of the court, if the parties decline to receive it. M, without giving bond as required by the statute, but which was not directed by the decree, collects the first three payments as they fall due, and pays the money into a bank, which had been appointed receiver of the court. The last payment was not made by S and D, one of them being in the army and the other a prisoner. After the war they proposed to pay the last

936 *payment: and the parties entitled object to the sale, and also to the payments made, which were in Confederate currency. HELD:

1. The decree of November 1860, for the sale of the land, continued in force, notwithstanding the order of June 1861, for renting it, and the commissioner had authority to sell in March 1863.

Dixon & als. v. McCue's adm'r & als., 373

2. The sale having been made more than six months after the decree for a sale, and having been confirmed, the sale cannot be set aside as to the purchaser. *Idem*, 373

3. When the sale was confirmed in March 1863, the court must have understood and intended that the sale was for Confederate currency, and the purchase money was to be paid in that currency. *Idem*, 373

4. The payments made to M, and his payments to the receiver of the court, were valid payments, though M had not given the bond required by the statute; and the purchaser and M are not liable for this part of the purchase money. *Idem*, 373

5. S and D were, under the circumstances, excused for the non-payment of their fourth bond as it fell due; and upon their paying these bonds are entitled to have the land conveyed to them. *Idem*, 373

4. R sold land to E, and retained the vendor's lien. E sold parts of the land to F and Q. E not paying R, R filed his bill against E, F and Q, to enforce his lien. The court decrees a sale of that in possession of E first, and, if that is not sufficient, then of that bought by F and Q. The sale is made, and F and Q buy the parts they had before bought of E, for less than they were to give E. The commissioner reports the sales good. E objects to the confirmation of the sale on the ground of the inadequacy of price; but he

does not move to open the biddings, or offer an advance. **HELD:**

1. There was no error as to R in directing the sale of the parts held by F and Q, instead of confirming the sale of E to them; especially as Q alleged that E had defrauded him, and he did not intend to pay him.

Effinger v. Ralston & als., 430

2. If E objected to the sale for inadequacy of price he should have moved the court to open the biddings, and have offered an advance on the price bid: his objection to the confirmation of the sale, without more, was no ground for refusing to confirm it.

Idem, 430

3. For the mode of proceeding on application to open biddings, and on what advance it will be done, see the opinion of *Moncure, P.*

Idem, 430

4. *Quære*: If E may not recover of F and Q the difference between the price they gave at the judicial sale and that they had contracted to pay to him?

Idem, 430

5. In March 1863, the fact that Confederate States treasury notes was the only currency in circulation in this State is so notorious that it may be taken notice of judicially by the courts as a matter of current public history; and all decrees made for the sale of property at as late a period of the war as 1863, and all judicial sales made under such decrees, must be taken as made for this currency, unless such decree in plain terms directed otherwise.

Walker's ex'or & als. v. Page & als., 636

6. That the courts of this Commonwealth, during the war, had the authority to decree sales for Confederate money, and to make investments in Confederate securities, is no longer an open question. Transactions in Confederate currency during the war, and investments in Confederate securities (when properly made), must now be held to be as valid and binding as if made in time of peace in a sound currency.

Idem, 636

JUNK DEALERS.

1. Under the act of June 29, 1870, Sess. Acts 1869-'70, ch. 174, § 6, p. 232, a regular merchant paying the tax assessed upon him as such, must take out the license required by the act, to authorize him to deal in second-hand articles at his store.

Hirsh's case, 785

2. The act is not in violation § 4, of article X of the constitution of the State.

Idem, 785

937

*JURORS.

1. As a general rule, with few exceptions, the evidence of jurors will not be heard to impeach their verdict.

Howard & al. v. McCall, adm'r, for &c., 205

2. When court may send to another county or corporation for jurors. See *Criminal Jurisdiction and Proceedings*, No. 5, and

Chahoon's case, 822

3. A person who is qualified to vote by the constitution of Virginia, is a competent juror, though he is disabled from holding office by

the fourteenth amendment of the constitution of the United States.

Sands' case, 871

4. As to the mode of obtaining a jury for the trial of a felony. See *Criminal Jurisdiction and Proceedings*, No. 11, and

Idem, 871

LANDLORD AND TENANT.

1. See *Evidence*, No. 1, and

Taylor v. Peck, 11

LARCENY.

1. If a person be indicted for the simple larceny of a thing, and the proof be, that it was stolen by some other person, and received by the accused knowing it to have been stolen, the proof will sustain the charge; the act making the receiving of a thing stolen, knowing it to be stolen, larceny.

Price's case, 846

2. P is indicated for receiving a horse which had been stolen, knowing that it had been stolen. The indictment may charge specially the fact of receiving the horse, with the knowledge that it had been stolen, or it may charge P with larceny of the horse: and the latter would seem to be the better way.

Idem, 846

LIENS.

1. The equity of redemption in land conveyed in trust to pay debts, is subject to the lien of judgments subsequently obtained, in the order of their priority in date.

Hale v. Horne & als., 112

2. How liens of judgments upon the equity of redemption in land will be enforced against trustee and purchaser.

See *Trusts and Trustees*, No. 2, and

Idem, 112

3. K recovers a judgment against F and H as partners, and sues out an execution of *fi. fa.* upon it, which is returned "no effects." Afterwards S recovers a judgment against H for an individual debt of H. There are no assets of the partnerships of F and H, but G is indebted to H. K summons G as garnishee, and obtains a judgment for the amount of his debt against G. S also summons G, and obtains a judgment, the summons of G being after that of K, but he obtains his judgment first. S then files his bill to enjoin K from receiving, and G from paying K the debt of G to H. **Held**: K having first recovered his judgment against F and H, and sued out execution thereon, has the prior lien upon the debt due from G to H; and a court of equity cannot deprive him of it.

Straus v. Kerngood & als., 584

LIMITATIONS—Statutes of.

1. When deputy sheriff barred by statute from suing county justices.

See *Sheriffs*, No. 4, and

Lee county justices v. Fulkerson, 182

2. A debt which is barred by the statute of limitations at the death of the debtor, cannot be revived by the promise of the personal representative to pay it.

Seig. adm'r, v. Acord's ex'or, 365

3. Where there are two joint administrators

or executors, to one of whom the deceased was indebted in his lifetime, for money loaned so long before the death of the debtor that at the time of his death it was barred by the statute, the debt cannot be revived by the admission of the other administrator or executor that the money had been loaned and was due. *Idem*, 365

LUNATICS.

1. When there is a committee of a lunatic, every suit respecting the person or estate of the lunatic must be in the name of the committee.

Bird's committee v. Bird, 712

2. But where no committee of a lunatic has been appointed, or where the committee appointed has been removed, *or a committee has interests adverse to the lunatic, a suit may be brought in the name of the lunatic by his next friend, approved by the court. *Idem*, 712

3. If a suit is brought in the name of a lunatic by her next friend, without the sanction of the court, against her former committee who has been removed, for an account, and he objects to the parties, the court may make an order for the cause to proceed in the name of the lunatic by some fit person as her next friend, if the one named in the bill is not such a one; or the court may direct the appointment of a committee, and the amendment of the bill, by making such committee a co-plaintiff or defendant in the suit. *Idem*, 712

4. In such a case, if the defendant does not make the objection in the court below, and there is an account and decree against him, the appellate court will consider that he has waived the objection; and will not reverse the decree on that account. *Idem*, 712

5. In 1836, the committee of a lunatic receives her estate, which consists principally of money, and he does not invest it, but retains it in his own hands. During the war he pays her expenses in Confederate money. These payments are to be scaled as of the date of payment. *Idem*, 712

6. Where a committee of a lunatic is charged in his account with the annual interest on money of the lunatic in his hands, he is entitled to his commissions upon such interest. *Idem*, 712

7. Whatever may be the correct general rule, under the circumstances of this case interest should not be charged upon interest. *Idem*, 712

MANSLAUGHTER.

1. When death ensues on a sudden provocation or sudden quarrel, without malice pre-pense, the killing is manslaughter; and in order to reduce the offence to killing in self-defence, the prisoner must prove two things: First, that before the mortal blow was given, he declined further combat, and retreated as far as he could with safety; and, secondly, he killed the deceased through the necessity of preserving his own life, or to save himself from great bodily harm.

Dock's case, 909

MURDER.

1. In an indictment for murder, the death of the murdered person may be laid in several counts, as having been occasioned in different and inconsistent modes.

Smith's case, 809

2. On a trial for murder, the death of the person charged to have been murdered must be proved by the most cogent and irresistible evidence; either by witnesses who were present when the murderous act was done, or by proof of the body having been seen dead, or by proof of criminal violence adequate to produce death, and which accounts for the disappearance of the body. *Idem*, 809

3. The proof must show that the body found is the body of the person for whose murder the prisoner has been indicted and is tried. *Idem*, 809

4. Until there is clear proof of the person for whose murder the prisoner has been indicted and is tried, the admissions of the prisoner as to his having committed the act must be clear and explicit. If there be any doubt as to his meaning, he ought not to be convicted. *Idem*, 809

5. On a trial for murder, it is not competent for the Commonwealth to introduce evidence in chief as to the character of the person on whom the offence was committed.

Dock's case, 909

6. If the prisoner, in the execution of a malicious purpose to do the deceased a serious personal injury or hurt by wounding and beating him, killed him, the offence is murder. *Idem*, 909

NEGLIGENCE.

1. A holds the bond of B, twelve years old, and she puts it into the hands of H for collection. They are all relations, and members of the Menonite church, the rules of which forbid members to sue each other. H does not collect the money; and after the death of A, her administrator sues H for negligence in failing to collect the money. These are facts which may be considered by the jury on the question of negligence.

Blosser v. Harshbarger, 214

2. See *Railroad Companies*, No. 4, 5, 6, 7, 8, 9, 10, and

Wilson v. Chesapeake and Ohio R. Co., 654

39

*NEW TRIALS.

1. Case in which an appellate court will not grant a new trial on the ground that the verdict is contrary to the evidence.

Bell v. Alexander, 1

2. For the grounds on which new trials will be granted, see opinion of *Christian, J.* *Blosser v. Harshbarger*, 214

3. A new trial asked on the ground that the verdict is contrary to the evidence, ought to be granted *only* in a case of a plain deviation from right and justice; not in a doubtful case, merely because the court, if on the jury, would have given a different verdict. *Idem*, 214

4. Where a case has been fairly submitted to a jury, and a verdict fairly rendered, it ought not to be interfered with by the court,

unless manifest wrong and injustice has been done, or unless the verdict is plainly not warranted by the facts proved.

Idem, 214

5. When some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances and presumptions, a new trial will not be granted merely because the court if upon the jury would have given a different verdict. To warrant a new trial in such cases, the evidence should be plainly insufficient to warrant the verdict. And this restriction applies *a fortiori* to an appellate court. *Idem*, 214

NOTICE.

1. When three months' notice on forfeited forthcoming bond not necessary. See *Forthcoming Bonds*, No. 1, and

Goolsby & als. v. Strother, comm'r, 107

2. What notice of a motion to reverse a decree by default insufficient. See *Practice in Chancery*, No. 8, and

Coffman v. Sangston & als., 263

3. When notice of taking depositions will be presumed in the appellate court. See *Appellate Court*, No. 7, and

Idem, 263

OFFICE JUDGMENTS.

1. In debt on bond, if the common order and the common order confirmed have been regularly entered at rules, the cause is properly on the office judgment docket at the next term of the court; though no endorsement of the proceedings may have been made upon the papers in the cause.

Wall v. Atwell, 401

2. If the proceedings in the office had been so irregular, that the cause is not properly on the office judgment docket, the court should remand it to the rules for proper proceedings. *Idem*, 401

3. An office judgment cannot be set aside when it stands as an office judgment on the docket of the court, by a plea in abatement. *Idem*, 401

PARTIES—To Actions at Law.

1. See *Covenant*, No. 1, 5, and

Jones v. Thomas, 96

PARTIES—In Equity.

1. When the plaintiff has an interest in the subject matter of the suit, the bill may be amended, and other persons having the same interest may be joined as co-plaintiffs.

Coffman v. Sangston & als., 263

2. If the plaintiff has no interest in the subject matter of the suit, how and when the objection may be taken. See *Practice in Chancery*, No. 9, and

Idem, 263

3. B society is a voluntary society composed of between four and five hundred members. Some of them may sue an agent in equity for the benefit of all for an account and payment of moneys collected by him, and the return of the evidences of debt unpaid. And the court has jurisdiction on the ground either of discovery, or from the difficulty of proceeding at law. *Idem*, 263

4. G, as adm'r *de bonis non* of F, files his bill against the executors of J, the first ex'or of F, the devisees of J, and purchasers from them, and also the legatees of F, to recover the amount due from J on his administration account of F, and the legatees of F answer and concur in the prayer of the bill. HELD: The legatees being parties, and concurring with the plaintiff, he may maintain the suit.

Burwell's adm'rs v. Fauber & als., 446

5. S makes an assignment of a policy of insurance on his life to R for the benefit of the wife of S *and her children.

A few days after, he conveys the same policy to R, in trust for his wife and her children by him; but, if she dies without children, the principal to be paid to S's children by his first wife. The widow of S and her infant son files a bill against R, claiming the insurance under the assignment. R answers, and says he has acted under the deed of trust, and insists that the children of S by his first wife are necessary parties. There is a decree on the merits against R, and he appeals. HELD: The children of S, by his first wife, are necessary parties; and the appellate court will reverse the decree for this error, without passing upon the merits.

Richardson v. Davis and wife, 706

6. Who should sue for a lunatic. See *Lunatics*, No. 1, 2, 3, and

Bird's committee v. Bird, 712

PARTNERS.

1. See *Liens*, No. 3, and

Straus v. Kerngood & als., 584

2. H and T, partners, failed, and obtained their discharge in bankruptcy. H had some separate property which he had not surrendered, and G, one of the creditors of the firm, having taken steps to subject it to the payment of his debt, H and G entered into a covenant under seal, by which H covenanted to pay G the sum of \$2,100, partly on time, in full of his claim. G having sued H on the covenant, and thus received payment, H sued T to recover one half of what he had paid G. To entitle H to recover, he must prove that T agreed with and promised H to pay him one moiety of the debt to G, if H paid the whole of it to G; and that such a promise was an express and unequivocal promise; and that H afterwards, in pursuance of such agreement, paid the debt to G.

Tyler v. Taylor, 700

PAYMENTS.

1. H executed to G four bonds for the price of land payable respectively September 1st, 1860, 1861, 1862 and 1863; the first for \$5,000, and the others each for \$2,833. In January 1866, G gives to H a receipt for \$1,000, and for the note of H for \$1,008, in part payment of interest on certain bonds executed by H to G. Suit is brought on the two last bonds, and there are judgments thereon for principal and interest from time of payment. G assigns the second bond to M, who sues H upon it, who pleads the payment of \$2,008 upon it. Nothing appears as to the first bond; but the interest upon it up to the time of

payment was more than sufficient to absorb the payment. The debtor not having directed the application of the payment, it was the right of the creditor to apply it to the first bond; and if neither had applied it, the law would apply it to the first bond due; and it is to be presumed it was so applied.

Howard & al. v. McCall, adm'r for, &c., 205

2. For the rules upon which partial payments will be applied, see Judge *Christian's* opinion. *Idem,* 205

3. See *Accord and Satisfaction* No. 2, and *Campbell v. Ranson & als.,* 405

4. Payments, how scaled. See *Lunatics*, No. 5, and *Bird's committee v. Bird,* 712

PENITENTIARY CONVICTS.

1. A penitentiary convict is hired to work on a railroad, and in Bath county, in attempting to escape, he kills the man put by the contractor to guard him. He may be tried for the offence before the Circuit court of the city of Richmond, and by a jury summoned from the city. *Ruffin's case,* 790

2. The bill of rights, though made a part of the present construction, has the same force and authority, and no more, that it has always had. And the principles which it declares have reference to freemen, and not to convicted felons. *Idem,* 790

3. A convicted felon has only such rights as the statutes may give him. *Idem,* 790

4. A person convicted of felony and sentenced to confinement in the penitentiary, is, until the time of his imprisonment has expired, or he has been pardoned, in contemplation of law, in the penitentiary, though he may have been hired out to work on a railroad, or the like, in a distant county; and the laws relating to convicts in the penitentiary apply to him. *Idem,* 790

PLEADINGS—At Common Law.

1. See *Covenant*, Nos. 3, 4, and *Jones v. Thomas,* 96

941 *2. See *Debt*, No. 1, and *Dungan v. Henderlite,* 149

PLEADINGS—In Equity.

1. A bill is fatally defective, as a bill of review, if it fails to show defect in the proceedings in the cause it seeks to review, or to allege that the plaintiff had discovered evidence since the decree, that she could not by reasonable diligence have ascertained before. *Carter v. Allan & als.,* 241

2. The bill seeks to set aside a decree for the sale and conveyance of the land of a lunatic, for fraud, and also a subsequent conveyance of the land to a purchaser for value. It is fatally defective as to this last purchaser if it fails to charge him with notice of the fraud. *Idem,* 241

3. When the plaintiff has an interest in the subject matter of a suit, the bill may be amended, and other persons having the same interest may be joined as co-plaintiffs. *Coffman v. Sangston & als.,* 263

4. If plaintiff has no interest in the subject matter of a suit, how and when the objection may be taken. See *Practice in Chancery*, No. 9, and *Idem,* 263

POWERS.

1. Testator directs, first, that so long as his wife L remains his widow, all his property, real and personal, shall be kept together, and subject to the executor, but the possession to remain with L during her widowhood. Second. If she marries she is to take one-third of his estate, and the remainder to go into possession of his executor; and if, in his opinion, it should at any time thereafter be for the interest of his children to sell the entire estate and loan the money for their benefit, the executor may sell the same at his discretion. The widow renounces the will, and dower is assigned her by an order of court, to which the children are not parties. The executor and widow, she selling her dower interest, join in selling and conveying the land, the executor acting under the power. **HELD:**

1. The executor had no authority to sell under the power during the widowhood of L.

Raper v. Sanders, 60

2. On a bill by the children to set aside the sale, the court may set aside the sale so far as made by the executor, and confirm it so far as made by the widow; and direct a new assignment of dower.

Idem, 60

PRACTICE—At Common Law.

1. T sues P in unlawful detainer. P has T summoned as a witness; but agrees with T that, if she will produce in evidence on the trial the deed of lease under which he claimed to hold, he would not require her to be present. When the case is called, T's counsel, she being absent, is asked whether the lease will be introduced in evidence; and they say it will be produced, but its admissibility will then have to be determined. P is entitled to a continuance of the cause.

Taylor v. Peck, 11

2. Even if T and P misunderstood each other as to whether the paper was to be introduced in evidence or produced on the trial, P is entitled to a continuance.

Idem, 11

3. Where a case is heard by the court without a jury, it is a matter of indifference in what order the evidence is heard.

Wright v. Rambo, 158

4. Upon a motion by the defendant to quash an attachment sued out against his property by the plaintiff, the *onus* is on the plaintiff to show that the attachment was issued on sufficient cause, and he may, therefore, be required to introduce his evidence first. *Idem,* 158

5. When the motion to quash the writ and inquest in case of a road should be made, and when defects will be held to be waived. See *Roads*, No. 4, 5, 6, and *Mitchell v. Thornton & al.,* 164

6. How, in such cases, objection to the inquest may be made, and what and when evidence may be introduced to show the damages assessed adequate or inadequate. See *Roads*, No. 8, 9, 10, and *Idem*, 164

7. Though parol evidence of the contents of a book has been admitted, though objected to, without excuse for failing to produce the book, yet, if after exception has been taken, evidence is introduced showing good reason why the book cannot be produced, the error is thereby cured.

Pidgeon v. Williams' adm'rs, 251

942 *8. In an action of debt by the holder of a negotiable note, against the maker and four endorsers, upon the plea of usury by the endorsers, the jury found that the note was endorsed by the first three endorsers for the accommodation of the maker, and was sold by him to the fourth endorser, at a usurious rate of interest; who afterwards and before it became due, endorsed it to the holder for value. Upon the verdict the court should render a judgment in favor of the maker and first three endorsers, and against the fourth endorser, under the act, Code, ch. 177, § 10, p. 733.

Moffett v. Bickle, 280

9. Upon the question of an alteration in the bond sued on, if the case agreed does not state the alteration was made after the execution of the bond, the court, in pronouncing the conclusion of law upon the facts, cannot assume that such was the fact.

Ramsey's adm'rs v. McCue & als., 349

10. The question as to the time when, and by whom and with what intent, an alteration, apparent upon the face of a bond, was made, is a question of fact to be ascertained by a jury, and cannot be inferred by the court.

Idem, 349

11. See *Judgments*, No. 4, and

Gunn & als. v. Turner's adm'r, 382

12. For proceedings at rules, see *Office Judgments*, No. 1, 2, 3, and

Wall v. Atwell, 401

13. It is error for the court to instruct the jury, when the scale of depreciation shall be applied to a Confederate debt; it is for the jury to fix the time.

Moses v. Trice, 556

PRACTICE IN CRIMINAL CASES.

See *Criminal Jurisdiction and Proceedings*.

PRACTICE—In Chancery.

1. See *Specific Performance*, No. 1, 2, 3, 4, and *McComas v. Easley*, 23

2. As to decrees between co-defendants. See *Co-defendants*, No. 1, and

Election, No. 2, and *Glenn v. Clark & als.*, 35

3. On a bill by infants to set aside a sale of land by the executor under the power which does not authorize it, the widow joining in the sale and selling her dower interest which had been assigned to her, the court may set aside the sale so far as made by the executor, and confirm it so far as made by the widow; and direct a new assignment of dower; the first assignment having been

made under an order to which the infants were not parties.

Raper v. Sanders, 60

4. In such case, though the bill does not pray that the sale may be set aside, yet if it makes a proper case for such relief, it may be given under the prayer for general relief.

Idem, 60

Hale v. Horne & als., 112

5. See *Trusts and Trustees*, No. 2, and *Idem*, 112

6. When the plaintiff offers no proof of the allegations of his bill, and they are not admitted by the answer, though if proved they would entitle him to an account, the bill should be dismissed at the hearing.

Lee county justices v. Fulkerson, 182

7. Judgment having been recovered by the high sheriff against his deputy, for his default in paying over money to county creditors, the deputy applies for and obtains an injunction, on the grounds that he had been induced to confess the judgment upon the agreement of the high sheriff, that the account should be settled by persons named, and the execution should only issue for the amount, if any, found due from the deputy; and that in fact nothing was due; and in breach of this agreement execution had been sued out on the judgment. At the hearing the injunction is dissolved and the bill dismissed; and this decree is affirmed on appeal. The deputy is estopped from proceeding by bill in equity against the justices of the county to recover the amount he has paid to the county creditors, above what he has collected from the county levies. *Idem*, 182

8. There is a decree by default against the defendant, and he gives notice to the counsel of the plaintiff, that he will move the judge in vacation to reverse the same, and to make such order in the cause as might be deemed just and proper. The notice is not served on the plaintiffs, but on their counsel in the cause. The judge may properly refuse to entertain the motion, on the ground that the notice was too vague and indefinite to warrant the court to amend or *reverse the decree, and also because it had not been served on the plaintiff. And for the same reasons the appellate court may dismiss the appeal as improvidently awarded.

Coffman v. Sangston & als., 263

9. If it appears from the bill that the plaintiff has no interest in the subject matter of the suit, the objection may be made by demurrer. If this does not appear on the bill the objection may be taken by plea, or at the hearing of the cause. But if the objection is not taken until the hearing, if it appears from any part of the record that the plaintiff has an interest in the subject matter of the suit, it will not avail; and the appellate court will not reverse the decree because such interest is not stated in the bill. *Idem*, 263

10. When the plaintiff has an interest in the subject matter of the suit, the bill may be amended, and other persons having the same interest may be joined as co-plaintiffs.

Idem, 263

11. S sues C in equity. In the bill he describes himself as secretary of the B society, and says he has placed in the hands of C certain debts for collection, some of which C had collected; and that C refused to pay over the money or account with S. It may be presumed from these averments that S had an interest in the subject matter of the suit; and the bill may be amended making other members of the society co-plaintiffs, and averring the interest of S and the other plaintiffs in the subject. *Idem*, 263

12. Injunction to sale of land under deed of trust to secure a debt due by bond, there being no doubt as to the balance due upon the bond, the injunction may be dissolved and the bill dismissed, or the court may retain the cause, and have the sale made by the trustee under its directions.

Michie v. Jeffries, 334

13. The deed being in the form given in the statute, the decree directing the trustee to proceed to sell under and by virtue of the deed, upon the notice and terms stated in the decree; the decree in effect embodies in it the provisions of the deed, except in so far as they are altered by the decree, and the trustee must sell accordingly. *Idem*, 334

14. It is the duty of a trustee not to sell more of the trust subject, than is necessary to satisfy the trust, unless the interest of the owners demanded it, or they requested it.

Idem, 334

15. It is not necessary for the court, before directing the trustee to proceed to sell, first to refer it to a commissioner to report how much and what part of the trust subject shall be sold. It is the duty of the trustee to determine that question, and if he finds difficulty in doing so, a reference to a commissioner may be made. *Idem*, 334

16. If a discovery from the plaintiff is necessary to enable the defendant to make his defence at law, he must file his bill for the discovery before the judgment has been rendered against him. And he cannot go into equity for discovery and relief against the judgment after it has been rendered.

Green & Suttle v. Massie, 356

17. If at the hearing of a cause, the case made upon the pleadings and proofs is one of which a court of equity has no jurisdiction, the bill should be dismissed; though the defendant has made no objection to the jurisdiction, either by demurrer, plea or answer, but has defended himself upon the merits.

Idem, 356

18. See *Judicial Sales*, No. 3 and 4 and *Dixon & als. v. McCue's adm'x & als.*, 373

Effinger v. Ralston & als., 430

19. Where B files bill against S for partition of land, and S, by his answer sets up a contract for the purchase of B's moiety, how the court will proceed and what relief it will give. See *Specific Performance*, No. 12, and

Booten v. Scheffer, 474

20. When plaintiff in a case of a pure bill

of injunction cannot object to the jurisdiction. See *Injunctions*, No. 3, and

Muller, &c. v. Bayly & al., 521

21. Both plaintiffs and defendants being present by their counsel, the court makes an order removing a cause to the court of another county, assigning as a reason for making it, that it appears that the cause had been improperly brought in the court. If this reason was unfounded in fact, it would not invalidate the order which the court had power under the statute, Code, ch. 174, § 3, p. 719, to make; and to which there was no exception.

Idem, 521

22. A Circuit court may make an order to remove a cause to another court, whilst the cause is at rules. *Idem*, 521

944 *23. A cause having been removed and received by the clerk, the defendants may, upon notice, before the next term of the court to which the cause is removed, move the judge to dissolve the injunction which had been granted. *Idem*, 521

24. In such case the judge may in vacation dissolve the injunction; but he cannot then dismiss the bill. *Idem*, 521

25. See *Infants*, No. 2, 3, 4, and

Walker's ex'or & als. v. Page & als., 636

26. See *Decrees*, No. 3, and

Idem, 636

27. How court may have proper person to sue for a lunatic. See *Lunatics*, No. 3, and

Bird's committee v. Bird, 712

PRESUMPTIONS.

1. From what statements in the bill it may be presumed plaintiff has an interest in the subject matter of the suit. See *Practice in Chancery*, No. 11, and

Coffman v. Sangston & als., 263

2. What presumptions an appellate court will make in favor of the decree of the court below. See *Appellate Courts*, No. 7 and 8, and

Idem, 263

3. Decree for sale of land in April 1863, is to be presumed to be intended by the decree to be made for Confederate money.

Zollman v. Moore & als., 313

Walker's ex'or & als. v. Page & als., 636

4. In contracts for the payment of money entered into between the 1st of January 1862, and the 10th of April 1865, there is, under the operation of the act of 1867, in relation to the scaling of debts, no presumption of law as to the kind of currency in which they were to be paid.

Walker, Per. Rep. v. Pierce, 722

5. In the absence of proof to the contrary, contracts made during the war subsequent to the date of the act of October 20th, 1863, would by the force of that act be presumed to be paid in currency such as designated in it.

Idem, 722

6. See *Bonds*, No. 11, and

Idem, 722

7. When it will be presumed that a grand jury which found an indictment for a felony was properly constituted. See *Criminal Jurisdiction and Proceedings*, No. 6, and

Price's case, 846

8. When it will be a presumption of fact that a party in possession of property is the thief. See *Idem*, No. 9, and *Idem*, 846

PRINCIPAL AND AGENT.

1. Bought of Maj. J. W. twenty-seven head of cattle, weighing 28,152 pounds, at six and a half cents—\$2,479.88. Mr. W. M. T., you will please settle with Maj. W. the above account. J. C. In assumpsit by W against C to recover the amount; the paper being of doubtful meaning, C may introduce parol evidence to show that T was chief commissary for the district in the Confederate States service, and that C was his agent, and as such bought the cattle of W, who knew he was buying as such agent.

Walker v. Christian, 291

2. The principles on which the liability of agents, both private and public, will be ascertained and fixed, considered by *Moncure*, P. *Idem*, 291

3. See *Accord and Satisfaction*, No. 2, and *Campbell v. Ranson & als.*, 406

4. C, president of a railroad company, and A, agent of the company, borrow money from H, and give their own bond for it. The money is borrowed for the use of the company, which is itself without credit, and it is immediately turned over to the company. A, as agent, receives money of the company, out of which he is expected to pay the debt; but the bond having been given for money in suit, he cannot pay it; and C and A become insolvent. HELD:

1. The money having been loaned to C and A individually, with the knowledge that it was for the use of the company, and H having chosen to take the responsibility of C and A, cannot afterwards make the company his debtor.

Strider & al. v. Winch. & Pot. R. R. Co., 440

2. The company having put money into the hands of A to pay the debt, they are not liable in equity as having received the benefit of the loan. *Idem*, 440

5. See *Auctioneers*, No. 1, 2, 3, and *Walker v. Herring*, 678

6. Z, a foreigner, who had lived some years in Richmond, was the owner of a house and lot in the city, and some furniture, and held debts due to him, and among them, the bond of P for \$5,000, bearing interest, and due in November 1865, secured upon a house and lot. Z having determined to leave the country with his family, for an indefinite time, on the 9th of September 1861, executed a power of attorney to M and C, by which he conferred on them the most ample powers and the largest discretion, for the management of his business and the disposition of his property. On the same day Z and his wife conveyed to M and C his house and lot, in trust to rent it out or sell it at their discretion, and pay him the proceeds. He then left the country, and M and C received no communication from him, and had no knowledge of his residence until 1865, when he returned to Richmond. In the

meantime they received payment of the debts due to Z, and also the debt of P before it fell due, and they sold the house and lot; and in 1863 invested all the funds in their hands in Confederate bonds for Z. There was no question of the *bona fides* of M and C in all that they did. HELD: They are not liable to Z for the loss which had occurred by the investments in Confederate bonds; nor is P liable to him for his debt.

Myers' ex'or v. Zetelle, 732

Pizzini's committee v. Zetelle, 733

7. An agent or trustee acting within his power, and acting in good faith, in the exercise of a fair discretion, and in the same manner he would probably have acted if the subject had been his own, he ought not to be held responsible for any loss accruing in the management of the trust fund.

Idem, 733

8. Pre-eminent knowledge, and uncommon foresight, are not required in a trustee. Ordinary men are to be compared and judged by the standard of ordinary men. Common skill, common prudence, and common caution are all that courts have required.

Idem, 733

9. It would be unreasonable to judge of the conduct of an agent or trustee from subsequent events. His conduct ought not to be condemned if it flowed from honest though uninformed and mistaken judgment.

Idem, 733

10. See *Railroad Companies*, No. 5, 6, 7, 8, 9, and

Wilson v. Chesapeake & Ohio R. R. Co., 654

11. See *Attorneys at Law*, No. 1, 2, 3, 4, and

Pidgeon v. Williams' adm'r, 251

PRIVILEGED COMMUNICATIONS.

1. J S, R S, and C, are under a joint indictment for a conspiracy to defraud the estate of H, and each of them is under a separate indictment for forging or uttering the same forged note of H. They meet together to consult about their defence: L, the counsel of R S, and G, the counsel of J S, being with them. On the trial of C, R S is called for the commonwealth as a witness, and testifies as to a question he put to C, and C's answer to it. C then calls L as a witness, states what R S had said, and asks L what answer C made to the question. L says he considers all that passed at that meeting as under the seal of professional confidence, and declines to answer unless released by R S. C moves the court to require L to answer, but the court refuses. HELD:

1. All that L heard at that meeting in relation to the subject of consultation was privileged.

Chahoon's case, 822

2. R S did not, by giving evidence of what passed at the meeting, release L from his obligation to be silent as to what passed there.

Idem, 822

3. The privilege extended to all three parties, and the consent of all was necessary to authorize L to give the evidence.

Idem, 822

PROCEEDINGS IN CLERK'S OFFICE.

1. In debt on bond, if the common order and common order confirmed have been regularly entered at rules, the cause is properly on the office judgment docket at the next term of the court, though no endorsement of the proceedings may have been made upon the papers in the cause.

Wall v. Atwell, 401

2. If the proceedings in the office had been so irregular that the cause is not properly on the office judgment docket, the court should remand it to the rules for proper proceedings.

Idem, 401

PROMISSORY NOTES.

1. D owes C a debt, and in January 1861 D gives his negotiable note at four 946 *months for the amount, with B as his endorser upon the note. C has the note discounted at bank, and it is protested for non-payment. In August 1862, C retires the note, paying the bank in Confederate money, and in 1863 sues D and C on the note. It is a specie debt, and is not to be scaled.

Barnett v. Cecil, &c., 93

2 An action at law cannot be maintained upon a lost negotiable note, whether not due or overdue at the time of the loss.

Moses v. Trice, 556

3. But if at the time of the trial a recovery upon the lost note would be barred by the statute of limitations, the action may be maintained.

Idem, 556

4. An action at law may be maintained upon a note that has been destroyed. The evidence should, however, satisfy the jury beyond any reasonable doubt that the note has been destroyed.

Idem, 556

5. Where a note has been given for a loan of money, and there have been renewals of it, the holder may sue on the first note, or for the money loaned.

Idem, 556

PURCHASER FOR VALUE.

1. A purchaser of land for value without notice, actual or constructive, having obtained a conveyance, will not be affected by a latent equity, whether by lien or incumbrance, or trust, or fraud, or any other claim.

Carter v. Allan & als., 241

2. See *Pleadings in Equity*, No. 2, and

Idem, 241

3. When purchaser for value will be affected by constructive notice. See *Vendor and Purchaser*, No. 6, 7, and

Burwell's adm'r v. Fauber & als., 446

RAILROAD COMPANIES.

The charter of the R. & D. Railroad company provides that "all machines, wagons, vehicles or carriages, belonging to the company, with all their works, and all profits which may accrue from the same, shall be vested in the respective shareholders forever, in proportion to their respective shares, shall be deemed personal estate, and exempt from any charge or tax whatever." HELD:

1. The real estate owned and used by the company for the purposes of their business

is embraced in the provision, and is personal estate.

City of Richmond v. Richmond & Danville R. R. Co., 604

2. All the said property, real and personal, is exempt from taxation, both State and municipal.

Idem, 604

3. The exemption from taxation of the real estate of the company in the city of Richmond, is not unconstitutional as being in conflict with the charter of the city, previously granted, giving the city the power to tax real estate for the purposes stated in the city charter; the city having ample means of taxation left for the payment of her expenses and debts.

Idem, 604

4. The Chesapeake & Ohio R. R. Co. is the Virginia Central R. R. Co. under another name; and is liable upon any contract, or for the negligence of the Virginia Central R. R. Co.

Wilson v. Chesapeake & Ohio R. R. Co., 654

5. A railroad company is liable as a common carrier, for the baggage of a passenger, to the same extent, if the passenger is travelling with his baggage, as if it was carried without him.

Idem, 654

6. Under the contract between the Virginia Central R. R. Co. and Trotter & Bro., stage proprietors, for the carriage, by the latter, of passengers from the terminus of the railroad to White Sulphur Springs, Trotter & Bro. are the agents of the railroad company, and the company is liable for the loss of the baggage of a passenger by Trotter & Bro.

Idem, 654

7. Though the contract stipulates that each party shall be responsible for losses occurring on their part of the line, the railroad company is responsible for the loss of a passenger's baggage by the stage line.

Idem, 654

8. Through passengers from Richmond to the White Sulphur Springs are allowed to stay all night at the terminus of the road, and go on in the stages the next morning. Though a passenger takes her baggage with her to a hotel, where she stays, yet, if she, the next morning,

947 brings it with her *to the stage, and commits it to the agent of the line, and it is lost, the railroad company is liable for the loss.

Idem, 654

9. Though the through ticket given to a passenger at Richmond, specifies on its face that each party to the contract is only liable for losses on their part of the line, the railroad company is liable for the loss on the stage line.

Idem, 654

10. To restrict the liability of a railroad company as a common carrier, for the loss of the baggage of a passenger, there must be proof of actual notice to the passenger of such restriction, before the cars are started; and an endorsement on the ticket given to the passenger, is not enough, unless it is shown that he knew its purport before the cars started.

Idem, 654

RECEIVING STOLEN GOODS.

1. How the offence may be charged in the indictment, and what proofs will sustain the charge. See *Larceny*, No. 1, 2, and *Price's case*, 846

2. If property be stolen, and recently thereafter it be found in the exclusive possession of the prisoner, then such possession of itself affords sufficient grounds for a presumption of fact, that he was the thief; and in order to repel the presumption, makes it incumbent on him, on being called on for the purpose, to account for such possession consistently with his innocence. If he gives a reasonable account of it, then it devolves on the Commonwealth to prove that such account is untrue. If he gives an unreasonable account of it, then it devolves on the prisoner to sustain such account by other evidence. What is such a recent possession as raises a presumption against a prisoner, in the meaning of the rule, is a question for the jury, and depends upon the nature of the property and other circumstances of the particular case. *Idem*, 846

REMOVAL OF CAUSES.

1. Both plaintiffs and defendants being present in court by their counsel, the court makes an order removing a cause to the court of another county, assigning as a reason for making it, that it appears that the cause had been improperly brought in the court. If this reason was unfounded in fact, it would not invalidate the order which the court had power to make under the statute, Code, ch. 174, § 3, p. 719; and to which there was no exception.

Muller, &c. v. Bayly & al., 521

2. A Circuit court may make an order to remove a cause to another court, whilst the cause is at rules. *Idem*, 521

RICHMOND.

1. See *Railroad Companies*, No. 1, 2, 3, and *City of Richmond v. Richmond and Danville R. R. Co.*, 604

2. See *Corporation Courts*, No. 3, and *Sands' case*, 871

ROADS.

1. Upon application for the change of a road, the order directs the viewers to view the proposed alteration of the road (describing it), and to return to the court a report of such view in the manner prescribed by law. It would have been more formal, and therefore better, to follow the terms of the law in the order; but the order is substantially and sufficiently conformed to it.

Mitchell v. Thornton & al., 164

2. Under the present law, Code, ch. 52, § 6, the viewers appointed to view the alteration proposed in the road, and report to the court, are not required to be sworn. And though the order appointing them directs them to be sworn, it need not be done. *Idem*, 164

3. What is a sufficient compliance by the viewers in their report, with the directions of the second and fourth sections of the act, Code, ch. 52. *Idem*, 164

4. The writ of *ad quod damnum*, issued in such a case, is defective for not directing an enquiry as to "damage to the residue of the tract, beyond the peculiar benefits which will be derived in respect to such residue from the road." And the inquest taken on such writ, not making this enquiry, is defective. And for this defect, both the writ and the inquest will be quashed, if the motion to quash is made at the proper time. *Idem*, 164

5. In such a case, the defendant not *having made any motion to quash the writ and inquest in the County court, but going to trial on the merits, he waived the objections to the writ and inquest; and it is too late to move to quash them, or any other of the proceedings, in the Circuit court. *Idem*, 164

6. Although in such cases there is an appeal as of right, and *viva voce* testimony is heard in the Circuit court on such appeal, yet, as a general rule, a party must make any objections he may have to the proceedings in the court of original jurisdiction; and if he permits such proceedings to progress to the final hearing of the case, without making the objections, he will be held to have waived them, and cannot make them for the first time in the appellate court. *Idem*, 164

7. In such a case on appeal by the defendant, it is his right and duty to begin; the judgment of the County court being *prima facie* right. *Idem*, 164

8. The regular mode of objecting to the inquest of the jury, on account of the small amount of the damages assessed, is, by motion, to quash the inquest; on which motion, evidence will be heard to prove the damage assessed is insufficient. Until this is done the inquest is conclusive on the question of damages. *Idem*, 164

9. The objection may, however, be made on the hearing; and evidence may be then introduced by either party, to show the damages assessed are either adequate or inadequate. *Idem*, 164

10. So in such case, upon appeal by the defendant, he is entitled to introduce evidence in the Circuit court to prove the inadequacy of the damages assessed by the inquest. *Idem*, 164

11. In assessing the damages in such a case, the defendant is entitled to have the value of the land taken for the road without deduction, and such further damage as the residue of his tract will sustain beyond the peculiar benefits which will be derived to said residue from the road. *Idem*, 164

SCALING CONFEDERATE DEBTS.

1. See *Confederate Contracts*, No. 3, 4, 8, 10, 11, 17, 18, 19, 26.

2. By the act of March 3d, 1866, and that of February 28th, 1867, two modes of adjusting Confederate contracts are provided: 1st. By reducing the nominal amount contracted to be paid to its gold value; 2d. In cases of sales of property, or renting or hiring, giving the value of the property sold, or the value of the rent or hire, at the time of such sale, renting or hiring.

Pharis v. Dice,

303

3. It is for the jury to fix the time when the sale of depreciation shall be applied to a Confederate debt; and it is error for the court to instruct the jury as to the time when the sale shall be applied.

Moses v. Trice, 556

4. How payments made in Confederate currency are to be scaled.

See *Lunatics*, No. 5, and
Bird's committee v. Bird, 712

SHERIFFS.

1. Upon a motion against a high sheriff, for the failure of his deputy to collect and account for the county levies which went into his hands, of which motion the deputy has notice, it is the duty of the deputy to defend the suit, and show, if he can, that he has accounted for them.

Lee county justices v. Fulkerson, 182

2. In such a case, judgment having been rendered against the high sheriff, he is entitled to recover a judgment for the same amount against his deputy; and the deputy cannot show upon such motion against him that he has paid the levies to the parties entitled.

Idem, 182

3. The judgment recovered against the high sheriff, is, by the creditor of the county, for money lent; the deputy sustains no such relation to the creditor as will entitle him to be substituted to the rights of the creditor against the justices of the county, to enforce the payment of so much of the debt as had not been levied for.

Idem, 182

4. The deputy pays the judgment recovered against him in 1847, and he does not institute his suit against the justices of the county until 1858. The statute of limitations is a bar to the claim.

Idem, 182

5. QUÆRE: Whether, under any circumstances, the deputy sheriff could maintain a suit against the justices of a county for their failure to lay the levy?

Idem, 182

6. When deputy estopped by proceeding in equity against the high sheriff, in which he failed, from proceeding against the justices.

See *Practice in Chancery*, No. 7, and
Idem, 182

7. There is a judgment against a high sheriff for a fine for the failure of one of his deputies to return an execution, which, the record showed, had come into the hands of the deputy; and the high sheriff satisfies the judgment. In fact, the execution had been delivered to another deputy who farmed the shrievalty, who collected the money and failed to pay it over and to return the execution. The high sheriff may sue the last mentioned deputy and his sureties on his bond, and recover the amount he has paid.

Ramsey's adm'rs v. McCue & als., 144

SPECIFIC PERFORMANCE.

1. In a bill by the purchaser for the specific performance of a parol contract for the sale of land, the contract as stated in the bill must be sustained by the evidence, or the bill will be dismissed.

McComas v. Easley, 23

2. In such a case, where a different contract is stated in the answer, and sustained by the evidence, the bill will be dismissed, or the court may, in a proper case, give to the plaintiff the election to have the contract as proved enforced, or to have it rescinded.

Idem, 23

3. Where one contract is made for the sale of both real and personal property, and a lumping price is to be paid for both, the whole sum is a charge upon the real estate, and a conveyance of the real estate will only be decreed upon the payment of the whole amount.

Idem, 23

4. If the purchaser elect to have the contract rescinded, he is to be charged with the value of the personal property which he has received, with interest, with the rents and profits of the real estate of which he has been in possession, and is to be credited with so much of the purchase money as he has paid, with interest, and with the value of permanent improvements upon the property.

Idem, 23

5. Specific performance of a contract for the sale of land will not be refused on the sole ground of inadequacy of price, unless it is itself evidence of fraud.

Hale v. Wilkinson, 75

6. The inadequacy of price which will operate to prevent the specific performance of a contract must be inadequacy at the time of the sale.

Idem, 75

7. In August 1863, H sold S certain real estate for \$10,000, payable in Confederate money, at three and six months. S did not pay the money when it fell due, but he paid it in November 1863, and during the year 1864 and January 1865, H accepting the money and giving receipts for it. The land was estimated to be worth at the time, and since the war, \$6,000 in gold; and the value of the Confederate money, when paid, was in gold \$385. Upon a bill by S for a specific performance of the contract, filed since the war, the only objection to it being that of inadequacy of price, S is entitled to the specific performance of the contract.

Idem, 75

8. On a contract for the purchase of land, where payment is to be made in Confederate currency, time is of the essence of the contract, though it is not generally, unless injustice is thereby done to the vendor.

Booten v. Scheffer, 474

9. In 1863, B sells S one moiety of real estate, and agrees that S may elect within the year to take the other half on the same terms. If S elects to take the other half, he does not pay the purchase money when it fell due. He is not entitled to have specific execution of the contract.

Idem, 474

10. Equity will not decree a specific execution of a contract where the applicant for relief has been in default, and by force of subsequent events, or a change of circumstances, the execution of the contract would entail great loss and hardship on the adverse party.

Idem, 474

11. Where a party who applies for a specific performance has omitted to execute his part of the contract by the time appointed

for that purpose without being able to assign any sufficient justification or excuse for his delay; and where there is nothing in the conduct of the other party that amounts to acquiescence in that delay, the court will not compel a specific performance.

Kent, Ch. in Benedict v. Lynch, 19 John Ch. 370. *Idem*, 474

950 *12. Though S sets up his demand for specific performance, by answer to a bill by B asking for partition, it is still an application for equitable aid, and is to be governed by settled rules appropriate to bills for specific performance; and the court will not leave S to bring his suit, but will terminate the controversy by adjudicating the rights of the parties, and administering such relief as may be appropriate to the equity forum.

Idem, 474

STATUTES.

1. The act, Sess. Acts 1866-67, ch. 270, § 2, p. 695, as to scaling Confederate debts, considered in *Bell v. Alexander*, 1

2. The act, Code, ch. 109, § 9, in relation to evidence in case of divorce, construed in *Bailey v. Bailey*, 43

3. The act, Code, ch. 116, § 2, referred to in *Jones v. Thomas*, 96

4. The act of May 28, 1870, Sess. Acts 1869-70, p. 162, to prevent the sacrifice of property at forced sales, construed in *Goolsby & als. v. Strother, comm'r*, 107

5. The act, Code, ch. 135, § 31, p. 612, construed in *Hale v. Horne & als.*, 112

6. The act, Code, ch. 52, §§ 2, 4, 6, construed in *Mitchell v. Thornton & al.*, 164

7. The act, Code, ch. 177, § 19, p. 733, in relations to judgments in actions against two or more defendants, construed in *Moffett v. Bickle*, 280

8. The act of March 3, 1866, and that of February 28, 1867, for adjusting Confederate debts considered and sustained in *Pharis v. Dice*, 303

9. The act, Code, ch. 179, § 4, p. 736, in relation to injunctions, construed in *Muller, &c. v. Bayly & al.*, 521

10. The act of June 29, 1870, Sess. Acts 1869-70, ch. 174, § 6, p. 232, in relation to junk dealers, construed in *Hirsh's case*, 785

11. The § 14, article 6, of the constitution, construed in *Chahoon's case*, 822

SUBROGATION.

1. When creditors or sureties of the debtor paying the debt entitled to be subrogated to the right of legatees whose legacies are charged upon land in the hands of a purchaser. See *Vendor and Purchaser*, No. 7, 8, and

Burwell's adm'rs v. Fauber & als., 446

SURETIES.

1. When sureties of an adm'r paying the debts, will be substituted to the rights of creditors against land in the hands of a purchaser. See *Vendor and Purchaser*, No. 7, 8, and

Burwell's adm'rs v. Fauber & als., 446

2. By what acts, admissions and declarations of principal sureties are bound, and to what extent. See *Bonds*, No. 12, 13, and *Walker, Per. Rep. v. Pierce*, 722

TAXES AND TAXATION.

1. The proceeding to be relieved of a double tax, is a civil proceeding.

Neal & others v. Commonwealth, 511

2. H has taken out a license as a storager, and also as a tobacco auctioneer. But if H receives tobacco from the grower on consignment, sells it at auction, makes advances to the owner, charges him storage, an auction fee, and a commission on the amount of sales, independent of his charge as auctioneer, and accounts with him for the balance, he is bound to obtain a license as a commission merchant, and pay the tax assessed thereon according to law. *Idem*, 511

3. The keepers of a billiard saloon may be required to take out a license, and pay a tax thereon.

Lewellen, Sergeant for, &c. v. Lockharts, 570

4. The fact that capital is invested in billiard tables and other necessary furniture of a billiard saloon, which capital may be taxed as property under § 32 of the act of June 1870, does not exempt the pursuit from a license tax. *Idem*, 570

5. The real and personal estate of the Richmond and Danville Railroad Co., used for the purposes of their business, is by the charter of the company exempt from taxation, both State and municipal.

City of Richmond v. Richmond and Danville R. R. Co., 604

6. A city charter is not a contract *between the State and the city, securing to the city the absolute power of taxation, beyond the control or modification of the Legislature. *Idem*, 604

7. The power of exemption, as well as the power of taxation, is an essential element of sovereignty; and can only be surrendered or diminished in plain and explicit terms. *Idem*, 604

8. Municipal corporations are mere auxiliaries of the government, established for the more effective administration of justice; and the power of taxation confided to them is a delegated trust. *Idem*, 604

9. Under the act of June 29, 1870, Sess. Acts 1869-70, ch. 174, § 6, p. 232, a regular merchant, paying the tax on him as such, must take out the license required by the act, to authorize him to deal in junk and second-hand articles at his store.

Hirsh's case, 785

10. The act is not in violation of § 4, Article X of the constitution of the State.

Idem, 785

TRUSTS AND TRUSTEES.

1. M conveys land in trust to pay specified debts, and afterwards sells and conveys it to G. G has good title to the land, subject to the trust; and when the trust is discharged he is by operation of the statute (Code, ch. 185, § 31, p. 612) entitled to hold the land, at

law and equity, though the trustee has not conveyed it to him.

Hale v. Horne & als., 112

2. M conveys land to H in trust to secure certain debts. After the deed is recorded, C and D recover judgments against M; and then M and H, and the principal creditor in the trust deed, unite to sell and convey the land to G; and G pays one-half cash, and gives his notes in one and two years for the balance of the purchase money; all of them having notice of the judgments. H proceeds at once to pay off the debts secured by the deed, and pays the whole balance of the purchase money to M before the notes of the purchaser are due. **Held:**

1. The payment by H to M was in his own wrong, and C and D are entitled to have their judgments satisfied out of the purchase money due from G. *Idem*, 112

2. C and D having filed their bill to have their judgments satisfied out of the land, to which the vendors and purchaser are parties, G may enjoin the collection of the money from him by H, and pay it into court. *Idem*, 112

3. Though the bill seeks to set aside the deed for fraud, yet as it makes a case entitling C and D to be paid out of the purchase money of the land, and asks for general relief, though the fraud is not proved, they may have the purchase money applied to the payment of their judgments. *Idem*, 112

3. For the principles upon which trustees and other fiduciaries will be held to account for the trust fund.

See opinion of *Christian, J.*

Davis, comm'r v. Harman & als., 194

Myers' ex'or v. Zetelle, 733

4. A commissioner who, under the direction of the court, collects and disburses Confederate money, and, by order of the court, retains the balance, which is in controversy between disputing lien holders, until the rights of the parties are litigated, cannot be held responsible personally for any loss that may be incurred in consequence of the fund perishing on his hands by the result of the late civil war. *Idem*, 194

5. It is the duty of a trustee in a deed to secure a debt, not to sell more of the trust subject than is necessary to satisfy the trust, unless the interest of the owners demand it, or they request it. *Michie v. Jeffries*, 334

6. Court dissolving an injunction to a sale by a trustee under a deed of trust, may retain the cause, and have the sale made under its directions. How it may proceed in such a case. See *Practice in Chancery*, No. 12, 13, 15, and *Idem*, 334

7. Real estate is conveyed to a trustee for a married woman, the whole equitable estate being vested in her, free from liability for her husband's debts, and with express power in her to mortgage, convey in trust or otherwise pledge the property, or any part of it, and the trustee is, on her request, to sell it and pay the proceeds to her or re-invest. The

wife may subject the property to pay the debts of, or raise money for her husband.

Muller, &c. v. Bayly & al., 521

8. That money is scarce, and that 952 *the large cash payment required at the sale under a deed of trust will be attended with great if not irreparable loss to the owner of the property, is no ground for an injunction to the sale. *Idem*, 521

9. See *Contracts*, No. 8, and

Morgan's adm'x v. Oley & als., 619

10. When trustee will not be liable for losses which have accrued in the management of the trust fund.

See *Principal and Agent*, No. 6, 7, 8, 9, and

Myer's ex'or v. Zetelle, 733

Pizzini's committee v. Zetelle, 733

USURY.

1. In an action against the maker and four endorsers of a negotiable note, upon the plea of usury, the usury being proved as to the maker and first three endorsers, but not as to the fourth, there may be a judgment in favor of the former, and against the last.

Moffett v. Bickle, 280

2. When bond and deed of trust not usurious, how usury cannot be set up in the appellate court; and who cannot set up usury on a bond. See *Contracts*, No. 5, and

Michie v. Jeffries, 334

3. What a contract of hazard, and not usury. See *Bonds*, No. 4, and

Hilb, for, &c. v. Peyton & als., 386

VENDOR AND PURCHASER.

By a contract in writing, R C sells to N C "his tract of land on Smith's creek and Gasper creek, in the county of W, except the church and one acre of ground, which R C reserves. After stating the consideration, being \$6,500, and N C's tract of land of one hundred and fifty acres, it says: "R C's tract supposed to contain one thousand acres more or less." **Held:**

1. The language of the contract in reference to the quantity of the land in the tract is mere matter of description; and parol evidence is admissible to show what was the intention of the parties—that they intended to be governed by the estimated quantity, and that it was a sale in gross.

Caldwell v. Craig, 132

2. The sale being a sale in gross, N C is not entitled to any abatement of the purchase money, though the tract contained, in fact, but eight hundred acres.

Idem, 132

3. R C having sued N C at law upon the bonds given for the purchase money, and N C having set up the defence of equitable set-off, for the value of the deficiency in the quantity of the land, the rules governing an equitable forum must apply, and the plaintiff be permitted to rebut the claim by any evidence which would be considered appropriate to his defence, had the defendant elected to proceed by bill in equity. *Idem*, 132

4. A purchaser of land for value without notice, actual or constructive, having ob-

tained a conveyance, will not be affected by any latent equity, whether by lien or incumbrance, of trust, or fraud, or any other claim.

Carter v. Allan & als., 241

5. See *Judicial Sales*, No. 3, 4, 6, and *Dixon & als. v. McCue's adm'r & als.*, 373

Effinger v. Ralston & als., 430

6. F devises his H land to be sold for the payment of his debts, and gives his P land to two sons, charged with legacies to his wife and other children. The two sons, who were the executors of F, sell the H land, and apply the proceeds to pay two of the charges on their land, and then sell their land to F, their deed referring to the will of F. B has constructive notice of the provisions of the will of F, and that the H land had been sold to pay charges upon the land he purchased, and was bound, therefore, to enquire whether the debts of F had been discharged:

Burwell's adm'r v. Fauber & als., 446

7. B being a purchaser with constructive notice, his land is liable to satisfy the charges upon it; and two of the charges having been satisfied out of the H tract, the creditors are entitled to be subrogated to the rights of these legatees, and to the extent of these charges, to have the land of B subjected to the satisfaction of their claims. *Idem*, 446

8. There having been a decree against the sureties of F as adm'r of, &c., in favor of creditors, and the sureties having paid the decree, have a right to be substituted to the creditors' right against the land of B. *Idem*, 446

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*9. The statute of frauds and perjuries applies to a contract between a purchaser of real estate and a third person for an interest in the property.

Walker v. Herring, 678

10. An auctioneer selling real estate at auction, is the agent of both vendor and

purchaser, and his writing at the time the name of the purchaser, to the written terms of sale, binds the purchaser.

Idem, 678

11. QUÆRE: If the auctioneer can bind the purchaser at auction of real estate, by subscribing the name to the terms of sale, after the sale is completed: and it seems he cannot. *Idem*, 678

12. An auctioneer conducting a sale of real estate, writes the name of W as a purchaser. His partner, who was not present at the sale, without any communication with or authority from H, on the day after the sale writes the name of H as a joint purchaser with W. The partner had no authority to write the name of H; and H is not bound by it. *Idem*, 678

13. When title vested in a purchaser without a conveyance by a trustee. See *Conveyances*, No. 1, and

Hale v. Horne & als., 112

VENIRE FACIAS.

See *Criminal Jurisdiction and Proceedings*, No. 5, and

Chahoon's case, 822

No. 8, *Price's case*, 846

No. 11, *Sands' case*, 871

WITNESSES.

1. An absolute deed of sale of personal effects held to be fraudulent upon the testimony of one of the grantors, and corroborating circumstances.

Brown & al. v. Molineux, Duffield & Co. & als., 539

2. *Nemo allegans suam turpitudinem audiendus est*, if it be law, does not apply, where it is the creditors of the parties who assails the deed, and call upon one of them to prove the fraud. *Idem*, 539

3. See *Jurors*, No. 1, and

Howard & al. v. McCall, adm'r for, &c., 205

payment was more than sufficient to absorb the payment. The debtor not having directed the application of the payment, it was the right of the creditor to apply it to the first bond; and if neither had applied it, the law would apply it to the first bond due; and it is to be presumed it was so applied.

Howard & al. v. McCall, adm'r for, &c., 205

2. For the rules upon which partial payments will be applied, see Judge *Christian's* opinion. *Idem,* 205

3. See *Accord and Satisfaction* No. 2, and *Campbell v. Ranson & als.,* 405

4. Payments, how scaled. See *Lunatics*, No. 5, and *Bird's committee v. Bird,* 712

PENITENTIARY CONVICTS.

1. A penitentiary convict is hired to work on a railroad, and in Bath county, in attempting to escape, he kills the man put by the contractor to guard him. He may be tried for the offence before the Circuit court of the city of Richmond, and by a jury summoned from the city. *Ruffin's case,* 790

2. The bill of rights, though made a part of the present construction, has the same force and authority, and no more, that it has always had. And the principles which it declares have reference to freemen, and not to convicted felons. *Idem,* 790

3. A convicted felon has only such rights as the statutes may give him. *Idem,* 790

4. A person convicted of felony and sentenced to confinement in the penitentiary, is, until the time of his imprisonment has expired, or he has been pardoned, in contemplation of law, in the penitentiary, though he may have been hired out to work on a railroad, or the like, in a distant county; and the laws relating to convicts in the penitentiary apply to him. *Idem,* 790

PLEADINGS—At Common Law.

1. See *Covenant*, Nos. 3, 4, and *Jones v. Thomas,* 96

941 *2. See *Debt*, No. 1, and *Dungan v. Henderlite,* 149

PLEADINGS—In Equity.

1. A bill is fatally defective, as a bill of review, if it fails to show defect in the proceedings in the cause it seeks to review, or to allege that the plaintiff had discovered evidence since the decree, that she could not by reasonable diligence have ascertained before. *Carter v. Allan & als.,* 241

2. The bill seeks to set aside a decree for the sale and conveyance of the land of a lunatic, for fraud, and also a subsequent conveyance of the land to a purchaser for value. It is fatally defective as to this last purchaser if it fails to charge him with notice of the fraud. *Idem,* 241

3. When the plaintiff has an interest in the subject matter of a suit, the bill may be amended, and other persons having the same interest may be joined as co-plaintiffs. *Coffman v. Sangston & als.,* 263

4. If plaintiff has no interest in the subject matter of a suit, how and when the objection may be taken. See *Practice in Chancery*, No. 9, and *Idem,* 263

POWERS.

1. Testator directs, first, that so long as his wife L remains his widow, all his property, real and personal, shall be kept together, and subject to the executor, but the possession to remain with L during her widowhood. Second. If she marries she is to take one-third of his estate, and the remainder to go into possession of his executor; and if, in his opinion, it should at any time thereafter be for the interest of his children to sell the entire estate and loan the money for their benefit, the executor may sell the same at his discretion. The widow renounces the will, and dower is assigned her by an order of court, to which the children are not parties. The executor and widow, she selling her dower interest, join in selling and conveying the land, the executor acting under the power. **HELD:**

1. The executor had no authority to sell under the power during the widowhood of L.

Raper v. Sanders, 60

2. On a bill by the children to set aside the sale, the court may set aside the sale so far as made by the executor, and confirm it so far as made by the widow; and direct a new assignment of dower.

Idem, 60

PRACTICE—At Common Law.

1. T sues P in unlawful detainer. P has T summoned as a witness; but agrees with T that, if she will produce in evidence on the trial the deed of lease under which he claimed to hold, he would not require her to be present. When the case is called, T's counsel, she being absent, is asked whether the lease will be introduced in evidence; and they say it will be produced, but its admissibility will then have to be determined. P is entitled to a continuance of the cause.

Taylor v. Peck, 11

2. Even if T and P misunderstood each other as to whether the paper was to be introduced in evidence or produced on the trial, P is entitled to a continuance.

Idem, 11

3. Where a case is heard by the court without a jury, it is a matter of indifference in what order the evidence is heard.

Wright v. Rambo, 158

4. Upon a motion by the defendant to quash an attachment sued out against his property by the plaintiff, the *onus* is on the plaintiff to show that the attachment was issued on sufficient cause, and he may, therefore, be required to introduce his evidence first. *Idem,* 158

5. When the motion to quash the writ and inquest in case of a road should be made, and when defects will be held to be waived. See *Roads*, No. 4, 5, 6, and

Mitchell v. Thornton & al., 164

6. How, in such cases, objection to the inquest may be made, and what and when evidence may be introduced to show the damages assessed adequate or inadequate. See *Roads*, No. 8, 9, 10, and *Idem*, 164

7. Though parol evidence of the contents of a book has been admitted, though objected to, without excuse for failing to produce the book, yet, if after exception has been taken, evidence is introduced showing good reason why the book cannot be produced, the error is thereby cured.

Pidgeon v. Williams' adm'rs, 251
942

*8. In an action of debt by the holder of a negotiable note, against the maker and four endorsers, upon the plea of usury by the endorsers, the jury found that the note was endorsed by the first three endorsers for the accommodation of the maker, and was sold by him to the fourth endorser, at a usurious rate of interest; who afterwards and before it became due, endorsed it to the holder for value. Upon the verdict the court should render a judgment in favor of the maker and first three endorsers, and against the fourth endorser, under the act, Code, ch. 177, § 10, p. 733.

Moffett v. Bickle, 280

9. Upon the question of an alteration in the bond sued on, if the case agreed does not state the alteration was made after the execution of the bond, the court, in pronouncing the conclusion of law upon the facts, cannot assume that such was the fact.

Ramsey's adm'rs v. McCue & als., 349

10. The question as to the time when, and by whom and with what intent, an alteration, apparent upon the face of a bond, was made, is a question of fact to be ascertained by a jury, and cannot be inferred by the court.

Idem, 349

11. See *Judgments*, No. 4, and *Gunn & als. v. Turner's adm'r*, 382

12. For proceedings at rules, see *Office Judgments*, No. 1, 2, 3, and *Wall v. Atwell*, 401

13. It is error for the court to instruct the jury, when the scale of depreciation shall be applied to a Confederate debt; it is for the jury to fix the time.

Moses v. Trice, 556

PRACTICE IN CRIMINAL CASES.

See *Criminal Jurisdiction and Proceedings*.

PRACTICE—In Chancery.

1. See *Specific Performance*, No. 1, 2, 3, 4, and *McComas v. Easley*, 23

2. As to decrees between co-defendants. See *Co-defendants*, No. 1, and *Election*, No. 2, and *Glenn v. Clark & als.*, 35

3. On a bill by infants to set aside a sale of land by the executor under the power which does not authorize it, the widow joining in the sale and selling her dower interest which had been assigned to her, the court may set aside the sale so far as made by the executor, and confirm it so far as made by the widow; and direct a new assignment of dower; the first assignment having been

made under an order to which the infants were not parties.

Raper v. Sanders, 60

4. In such case, though the bill does not pray that the sale may be set aside, yet if it makes a proper case for such relief, it may be given under the prayer for general relief.

Idem, 60

Hale v. Horne & als., 112

5. See *Trusts and Trustees*, No. 2, and *Idem*, 112

6. When the plaintiff offers no proof of the allegations of his bill, and they are not admitted by the answer, though if proved they would entitle him to an account, the bill should be dismissed at the hearing.

Lee county justices v. Fulkerson, 182

7. Judgment having been recovered by the high sheriff against his deputy, for his default in paying over money to county creditors, the deputy applies for and obtains an injunction, on the grounds that he had been induced to confess the judgment upon the agreement of the high sheriff, that the account should be settled by persons named, and the execution should only issue for the amount, if any, found due from the deputy; and that in fact nothing was due; and in breach of this agreement execution had been sued out on the judgment. At the hearing the injunction is dissolved and the bill dismissed; and this decree is affirmed on appeal. The deputy is estopped from proceeding by bill in equity against the justices of the county to recover the amount he has paid to the county creditors, above what he has collected from the county levies. *Idem*, 182

8. There is a decree by default against the defendant, and he gives notice to the counsel of the plaintiff, that he will move the judge in vacation to reverse the same, and to make such order in the cause as might be deemed just and proper. The notice is not served on the plaintiffs, but on their counsel in the cause. The judge may properly refuse to entertain the motion, on the ground that the notice was too vague and indefinite to warrant the court to amend or *reverse the decree, and also because it had not been served on the plaintiff. And for the same reasons the appellate court may dismiss the appeal as improvidently awarded.

Coffman v. Sangston & als., 263

9. If it appears from the bill that the plaintiff has no interest in the subject matter of the suit, the objection may be made by demurrer. If this does not appear on the bill the objection may be taken by plea, or at the hearing of the cause. But if the objection is not taken until the hearing, if it appears from any part of the record that the plaintiff has an interest in the subject matter of the suit, it will not avail; and the appellate court will not reverse the decree because such interest is not stated in the bill. *Idem*, 263

10. When the plaintiff has an interest in the subject matter of the suit, the bill may be amended, and other persons having the same interest may be joined as co-plaintiffs.

Idem, 263



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